FOURTH CIVIL JUSTICE REFORM SUMMIT



CREATING THE JUST, SPEEDY, AND INEXPENSIVE COURTS OF TOMORROW

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MATERIALS

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The Simpler Cases: 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)
- California Assembly Bill No. 555 (approved Sept. 28, 2015)
- California Judicial Council, Trial Courts: Report on Expedited Jury Trials (for meeting July 19, 2015)
- Paula Hannaford-Agor & Cynthia G. Lee, Nat'l Ctr. For State Courts ForFor for State Cts., Utah: Impact of the Revisions to Rule 26 on Discovery Practice in the Utah District Courts, Final Report (2015)
- Texas Rules of Civil Procedure—Expedited Actions
- Corina D. Gerety & Logan Cornett, Inst. for the Advancement of the Am. Legal Sys., Measuring Rule 16.1: Colorado's Simplified Civil Procedure Experiment (2012)
- Brittany K.T. Kauffman, Inst. for the Advancement of the Am. Legal Sys., Chart of Short, Summary, and Expedited Trial Programs Around the Country (rev. 2016)
- IAALS, ABOTA & NCSC, A Return to Trials: Implementing Effective Short, Summary, and Expedited Civil Action Programs (2012)
- Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 Mich. L. Rev. 1794 (2002)

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.

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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.

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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]

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[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-

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[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-

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[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]

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[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/.

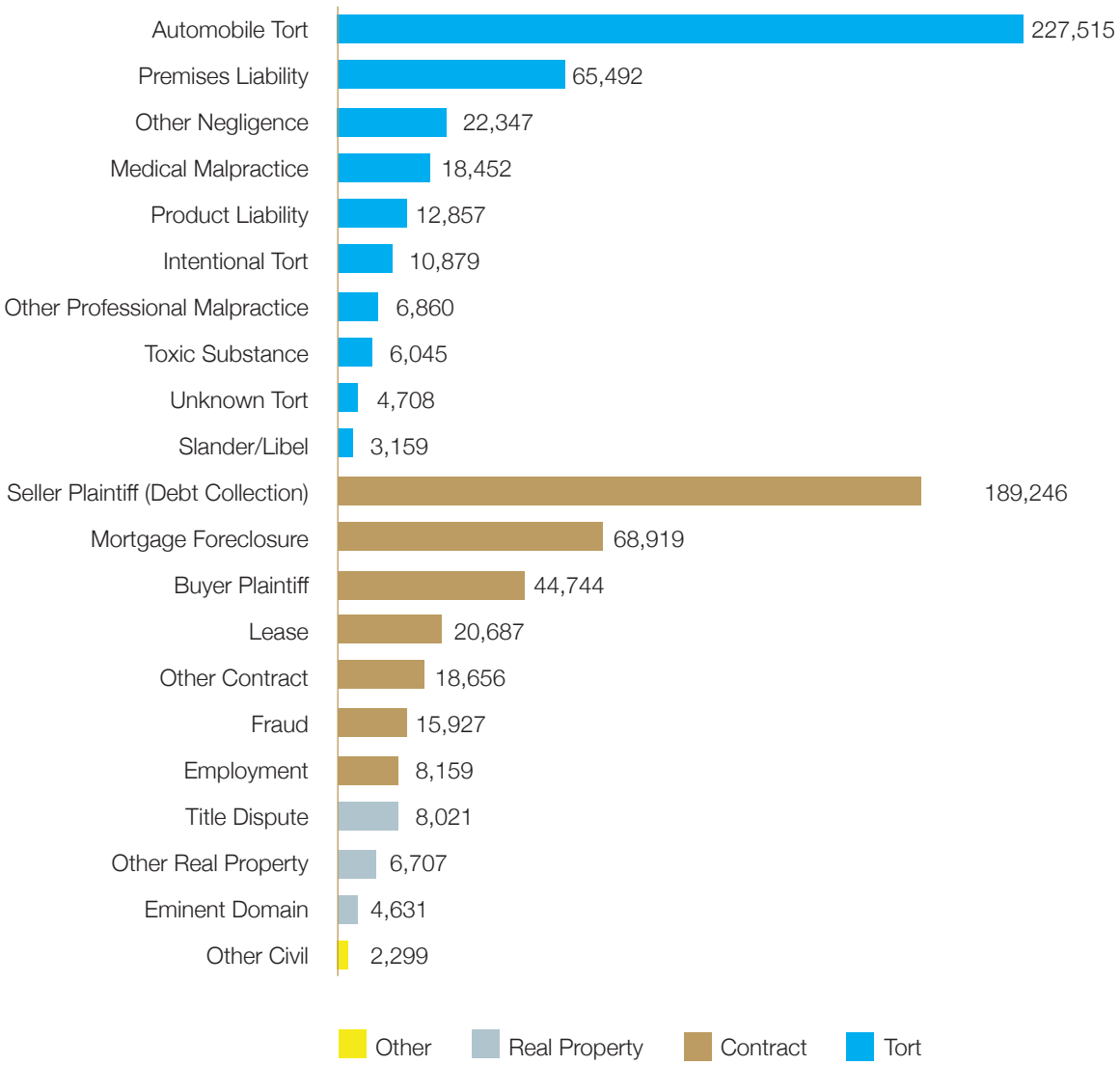
[34] Advance Notice of Proposed Rulemaking from Consumer Financial Protection Bureau, 78 Fed. Reg. 218 (proposed Nov. 12, 2013) (to be codified at 12 CFR Part 1006).

[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.

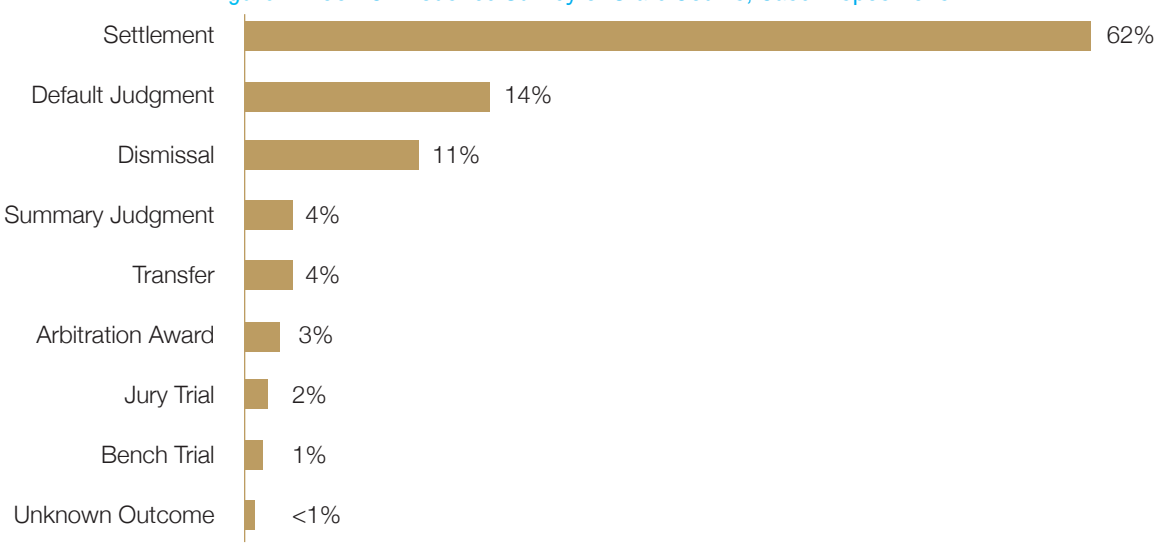
and used that information to estimate civil caseloads and case outcomes for the 75 most populous counties in the country.[38] Of more than 750,000 civil cases disposed in the 75 most populous counties, it estimated that approximately half (49%) alleged tort claims, 48 percent alleged contract claims, 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.

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[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

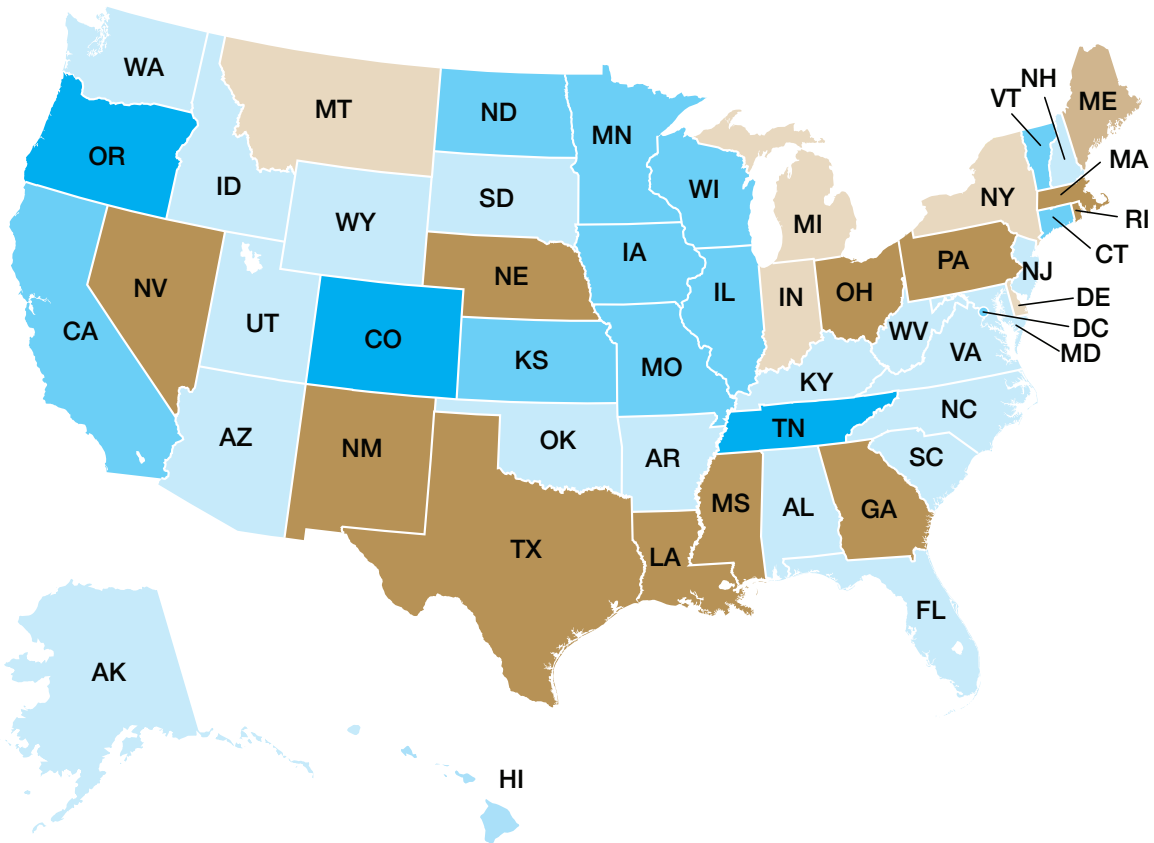
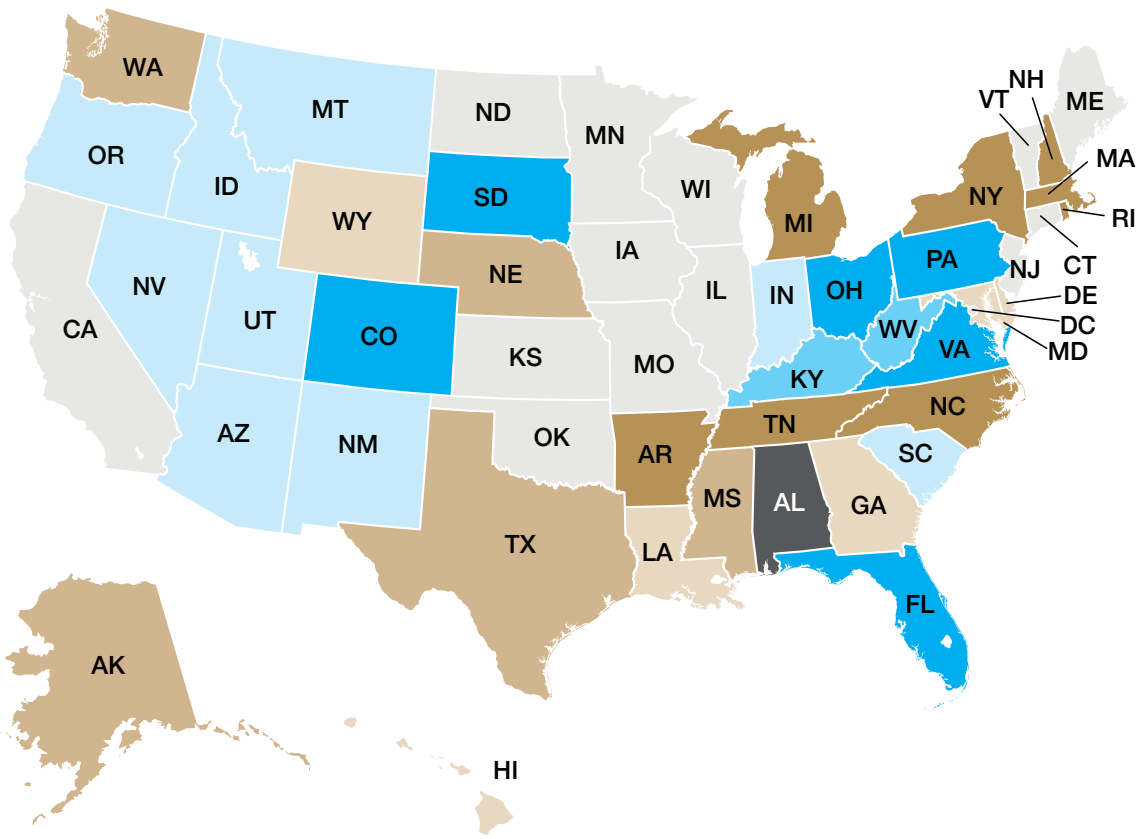


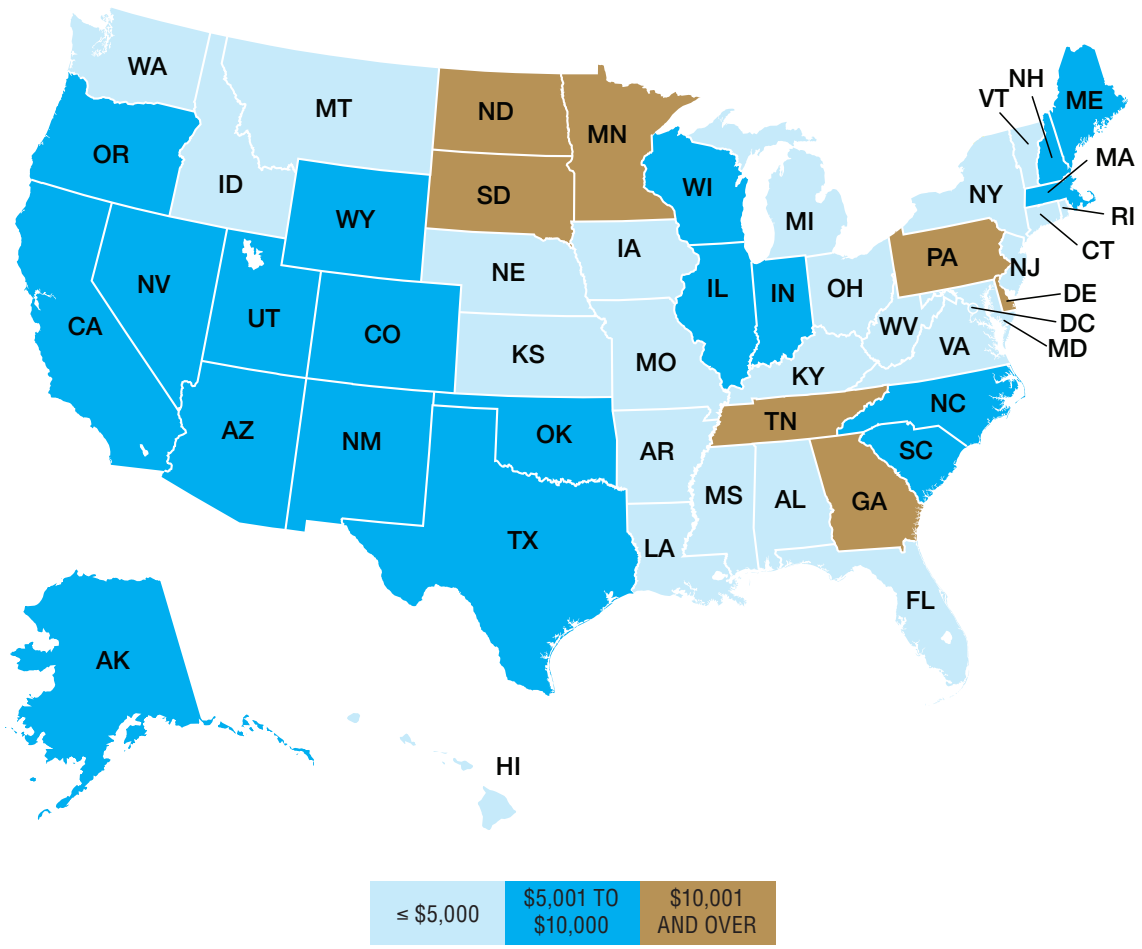
Figure 5: Maximum Amount-In-Controversy to File in Limited Jurisdiction Courts



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).

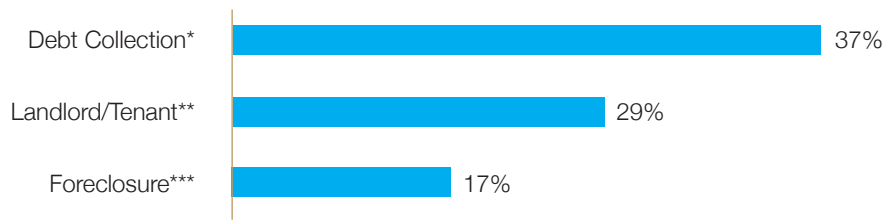
[58] It is likely that a large proportion of the unknown casetypes in the six municipal courts from Cuyahoga County that did not provide case-level data are actually contract cases.

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

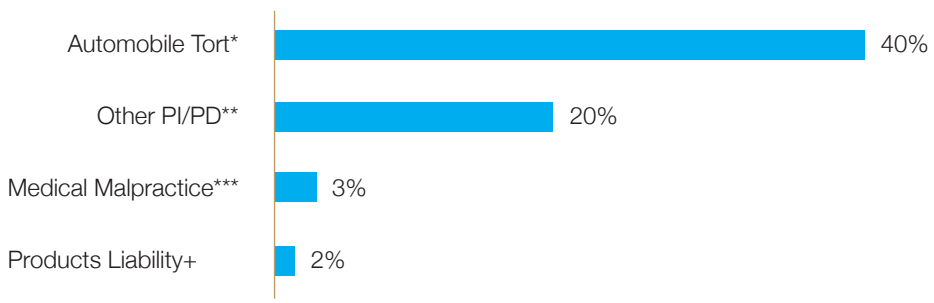
Documenting how civil cases are actually resolved is somewhat challenging due to varying disposition descriptions among case management systems. As discussed previously, courts traditionally record the procedural significance of the disposition in the case management system rather than the actual manner 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.

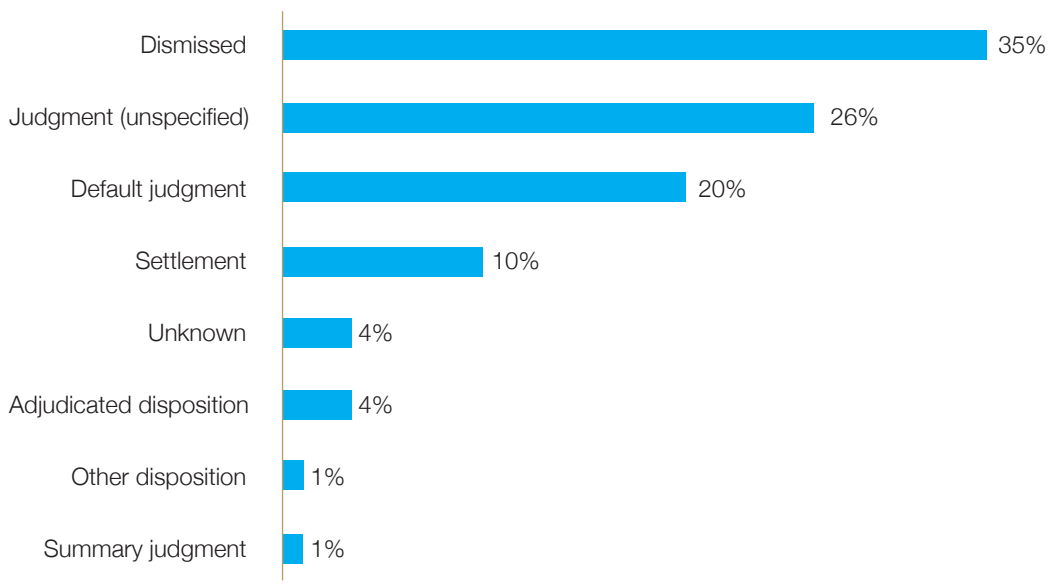
[60] "Personal injury/property damage" reflects a characteristic of the type of damages rather than the legal claim upon which relief is requested. Consequently, that term is not recognized as a unique case type by the NCSC *State Court Guide*. Nevertheless, that term is used by many courts, including 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.

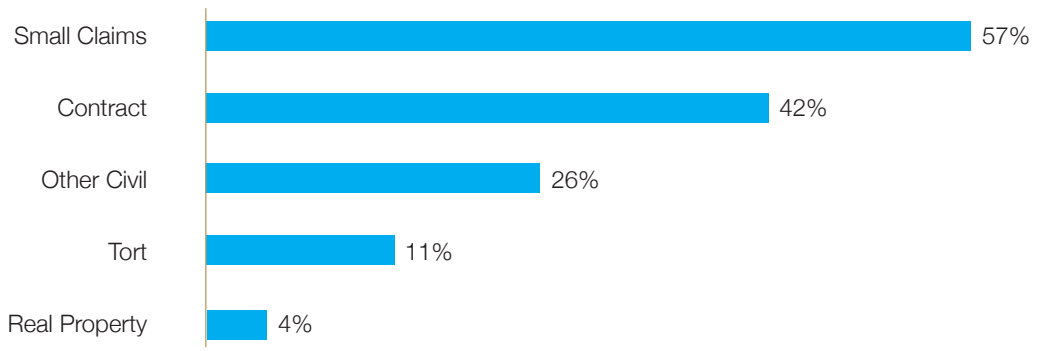
CASE OUTCOMES AND JUDGMENT AMOUNTS

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

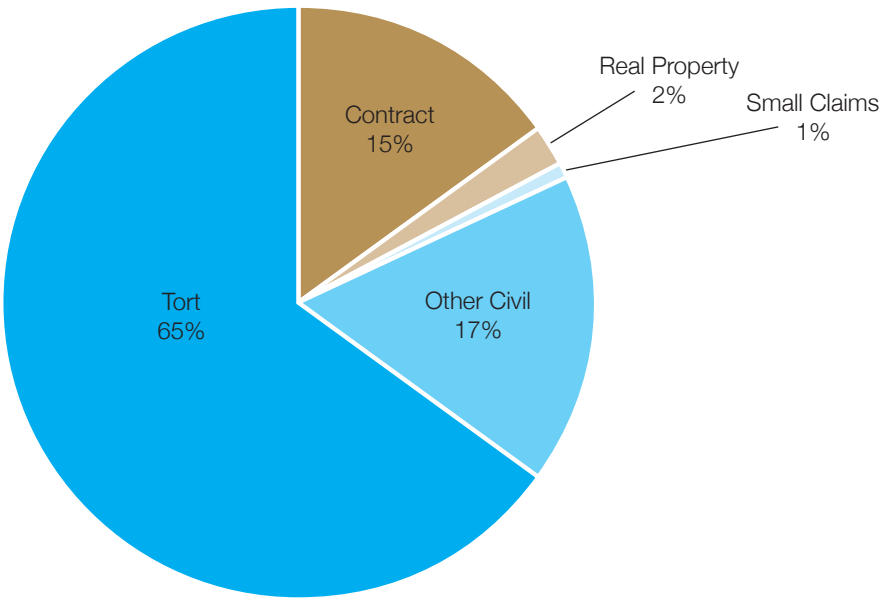
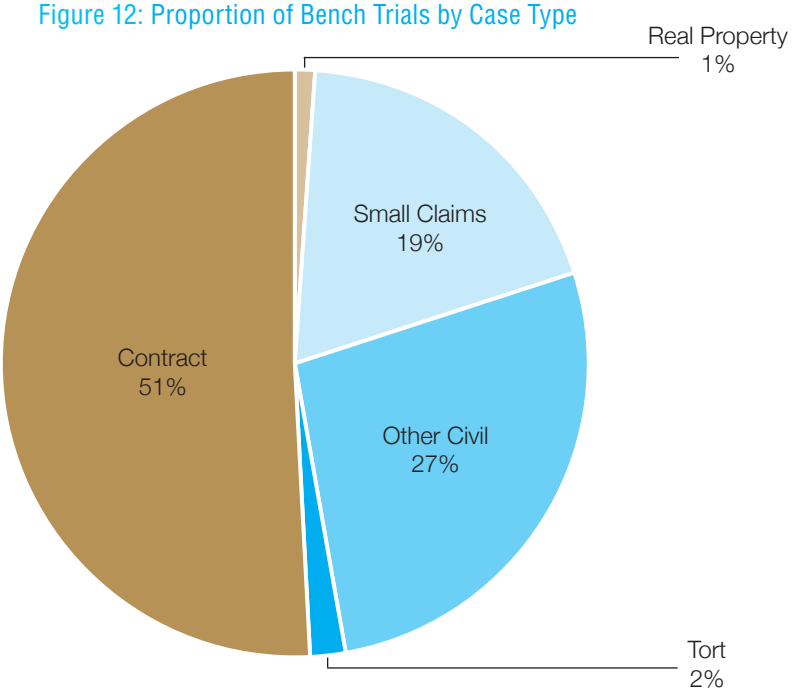


Figure 12: Proportion of Bench Trials by Case Type



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]

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[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.

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[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).



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STATE OF CALIFORNIA
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Assembly Bill No. 555

CHAPTER 330

An act to amend Sections 630.03 and 630.11 of, to amend the heading of Chapter 4.5 (commencing with Section 630.01) of Title 8 of Part 2 of, to add and repeal Chapter 4.6 (commencing with Section 630.20) of Title 8 of Part 2 of, and to repeal Section 630.12 of the Code of Civil Procedure, relating to civil actions.

[Approved by Governor September 28, 2015. Filed with Secretary of State September 28, 2015.]

LEGISLATIVE COUNSEL'S DIGEST

AB 555, Alejo. Civil actions.

Existing law establishes procedures for conducting expedited jury trials in civil cases where the parties sign a consent order to stipulate that those procedures apply. Pursuant to these procedures, all parties agree that each side has up to 3 hours to present its case and agree to waive all rights to appeal and to move for a directed verdict or to make any posttrial motions, except as provided. Existing law repeals these provisions on January 1, 2016.

This bill would modify procedures to provide that each party would have up to 5 hours to complete voir dire and present its case. The bill would require the Judicial Council to update rules and forms relating to these procedures by July 1, 2016. The bill would also delete the January 1, 2016, repeal date, thereby extending the operation of these provisions indefinitely.

Existing law requires that a designated action or special proceeding meeting certain conditions be treated as a limited civil case. Existing law authorizes a limited civil case to be brought in the small claims division if the case is within the jurisdiction of the small claims division as otherwise provided by statute.

The bill would establish procedures for conducting mandatory expedited jury trials in limited civil cases, including provisions for a jury of 8 or few members, with one alternate, and a limit of 5 hours for each side to complete voir dire and to present its case. The bill would authorize either party to opt out of the expedited jury trial procedures if certain requirements are met. The bill would provide that the verdict in an expedited jury trial case may be appealed and is subject to any written high/low agreement, as defined. The bill would require the Judicial Council to adopt additional rules and uniform procedures, as provided, by July 1, 2016.

The bill would delay the operative date of specified provisions relating to mandatory expedited jury trials until July 1, 2016. The bill would also repeal the provisions relating to mandatory expedited jury trials on July 1, 2019.

The people of the State of California do enact as follows:

SECTION 1. The heading of Chapter 4.5 (commencing with Section 630.01) of Title 8 of Part 2 of the Code of Civil Procedure is amended to read:

CHAPTER 4.5. VOLUNTARY EXPEDITED JURY TRIALS

SEC. 2. Section 630.03 of the Code of Civil Procedure is amended to read:

630.03. (a) All parties agreeing to participate in an expedited jury trial and, if represented, their counsel, shall sign a proposed consent order granting an expedited jury trial.

(b) Except as provided in subdivision (d), the agreement to participate in the expedited jury trial process is binding upon the parties, unless either of the following occurs:

(1) All parties stipulate to end the agreement to participate.

(2) The court, on its own motion or at the request of a party by noticed motion, finds that good cause exists for the action not to proceed under the rules of this chapter.

(c) Any agreement to participate in an expedited jury trial under this chapter may be entered into only after a dispute has arisen and an action has been filed.

(d) The court shall approve the use of an expedited jury trial and any high/low agreements or other stipulations for an expedited jury trial involving either of the following:

(1) A self-represented litigant.

(2) A minor, an incompetent person, or a person for whom a conservator has been appointed.

(e) The proposed consent order submitted to the court shall include all of the following:

(1) A preliminary statement that each named party and any insurance carrier responsible for providing coverage or defense on behalf of that party, individually identified in the proposed consent order, have been informed of the rules and procedures for an expedited jury trial and provided with a Judicial Council information sheet regarding expedited jury trials, have agreed to take part in or, in the case of a responsible insurance carrier, not object to, the expedited jury trial process, and have agreed to all the specific provisions set forth in the consent order.

(2) The parties' agreement to all of the following:

(A) That all parties waive all rights to appeal and to move for directed verdict or make any post-trial motions, except as provided in Sections 630.08 and 630.09.

(B) That each side shall have up to five hours in which to complete voir dire and to present its case.

(C) That the jury shall be composed of eight or fewer jurors with no alternates.

(D) That each side shall be limited to three peremptory challenges, unless the court permits an additional challenge in cases with more than two sides as provided in Section 630.04.

(E) That the trial and pretrial matters will proceed under subparagraphs (A) to (D), inclusive, and, unless the parties expressly agree otherwise in the proposed consent order, under all other provisions in this chapter and in the implementing rules of court.

(f) The court shall issue the consent order as proposed by the parties, unless the court finds good cause why the action should not proceed through the expedited jury trial process, in which case the court shall deny the proposed consent order in its entirety.

SEC. 3. Section 630.11 of the Code of Civil Procedure is amended to read:

630.11. The Judicial Council shall, on or before July 1, 2016, update rules and forms to establish uniform procedures implementing the provisions of this chapter, including, but not limited to, rules for all of the following:

(a) Additional content of proposed consent orders.

(b) Pretrial exchanges and submissions.

(c) Pretrial conferences.

(d) Presentation of evidence and testimony.

(e) Any other procedures necessary to implement the provisions of this chapter.

SEC. 4. Section 630.12 of the Code of Civil Procedure is repealed.

SEC. 5. Chapter 4.6 (commencing with Section 630.20) is added to Title 8 of Part 2 of the Code of Civil Procedure, to read:

Chapter 4.6. Mandatory Expedited Jury Trials in Limited Civil Cases

630.20. (a) Except as provided in subdivisions (b) and (c), an action or special proceeding treated as a limited civil case pursuant to Article 1 (commencing with Section 85) of Chapter 5.1 of Title 1 of Part 1, including an action or special proceeding initially filed as a limited civil case or remanded as one thereafter, shall be conducted as a mandatory expedited jury trial pursuant to this chapter.

(b) Either party may opt out of the mandatory expedited jury trial procedures if any of the following criteria is met:

(1) Punitive damages are sought.

(2) Damages in excess of insurance policy limits are sought.

(3) A party's insurer is providing a legal defense subject to a reservation of rights.

(4) The case involves a claim reportable to a governmental entity.

(5) The case involves a claim of moral turpitude that may affect an individual's professional licensing.

(6) The case involves claims of intentional conduct.

(7) The case has been reclassified as unlimited pursuant to Section 403.020.

(8) The complaint contains a demand for attorney's fees, unless those fees are sought pursuant to Section 1717 of the Civil Code.

(9) The judge finds good cause exists for the action not to proceed under the rules of this chapter. Good cause includes, but is not limited to, a showing that a party needs more than five hours to present or defend the action and that the parties have been unable to stipulate to additional time.

(c) This chapter does not apply to a proceeding in forcible entry or forcible or unlawful detainer.

(d) A judgment in a limited civil case conducted as a mandatory expedited jury trial may be appealed to the appellate division of the superior court in which the case was tried.

630.21. For purposes of this chapter:

(a) "Mandatory expedited jury trial" means a jury trial before a reduced jury panel and a judge, conducted pursuant to this chapter.

(b) "High/low agreement" means a written agreement entered into by the parties that specifies a minimum amount of damages that a plaintiff is guaranteed to receive from the defendant, and a maximum amount of damages that the defendant will be liable for, regardless of the ultimate verdict returned by the jury. Neither the existence of, nor the amounts contained in, any high/low agreements may be disclosed to the jury.

630.22. (a) The procedures in this chapter and in the implementing rules of court shall apply to mandatory expedited jury trials conducted in limited civil cases, unless the parties agree otherwise, as permitted under subdivision (d) of Section 630.23, and the court so orders.

(b) Any matters not expressly addressed in this chapter, in the implementing rules of court, or in an agreement authorized by this chapter and the implementing rules, are governed by applicable statutes and rules governing civil actions.

630.23. The following rules and procedures apply to mandatory expedited jury trials conducted pursuant to this chapter:

(a) Each side shall have up to five hours in which to complete voir dire and to present its case.

(b) The jury shall be composed of eight jurors and one alternate, unless the parties have agreed to fewer jurors.

(c) Each side shall be limited to four peremptory challenges, unless the court permits an additional challenge in cases with more than two sides. If there are more than two parties in a case and more than two sides, as determined by the court under subdivision (c) of Section 231, the parties may request one additional peremptory challenge each, which is to be granted by the court as the interests of justice may require.

(d) The parties may agree to modify the rules and procedures specified in this chapter and the implementing rules of court, subject to the court's approval.

630.24. Nothing in this chapter is intended to preclude a jury from deliberating as long as needed.

630.25. (a) The rules of evidence apply to mandatory expedited jury trials conducted in limited civil cases, unless the parties stipulate otherwise.

(b) Any stipulation by the parties to use relaxed rules of evidence shall not be construed to eliminate, or in any way affect, the right of a witness or party to invoke any applicable privilege or other law protecting confidentiality.

(c) The right to issue subpoenas and notices to appear to secure the attendance of witnesses or the production of documents at trial shall be in accordance with this code.

630.26. (a) A vote of six of the eight jurors is required for a verdict, unless the parties stipulate otherwise.

(b) The verdict in a limited civil case following a mandatory expedited jury trial case shall be appealable under subdivision (d) of Section 630.20 and subject to any written high/low agreement or other stipulations concerning the amount of the award agreed upon by the parties.

630.27. All statutes and rules governing costs and attorney's fees shall apply in limited civil cases that are conducted as mandatory expedited jury trials, unless the parties stipulate otherwise.

630.28. The Judicial Council shall, on or before July 1, 2016, adopt rules and forms to establish uniform procedures implementing the provisions of this chapter, including, rules for the following:

(a) Pretrial exchanges and submissions.

(b) Pretrial conferences.

(c) Opt-out procedures pursuant to subdivision (b) of Section 630.20.

(d) Presentation of evidence and testimony.

(e) Any other procedures necessary to implement the provisions of this chapter.

630.29. Sections 630.20 to 630.27, inclusive, shall become operative on July 1, 2016.

630.30. This chapter shall remain in effect only until July 1, 2019, and as of that date is repealed, unless a later enacted statute, that is enacted before July 1, 2019, deletes or extends that date.

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JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: February 19, 2015

Title
Trial Courts: Report on Expedited Jury Trials

Agenda Item Type
Information Only

Submitted by
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Date of Report
January 30, 2015

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Executive Summary

This report provides data regarding the number of expedited jury trials that have been conducted in the California trial courts since the enactment of the Expedited Jury Trial Act and the dispositions achieved in those cases.

Previous Council Action

The Expedited Jury Trial Act (Assem. Bill 2284 [Evans]; Stats. 2010, ch. 674), which went into effect on January 1, 2011, established a new expedited jury trial process. This alternative, streamlined method for handling civil actions was designed to promote the speedy and economic resolution of cases and to conserve judicial resources.

Although not directly sponsored by the Judicial Council, Assembly Bill 2284 was the result of efforts encouraged and coordinated by the council. For several years before the bill's enactment, groups in the legal community had been discussing ways to make the litigation of civil cases

with smaller amounts in controversy more efficient. In light of those discussions and given the state's economic circumstances, a Small Civil Cases Working Group was formed at the request of the Chief Justice and the Administrative Director of the Courts. It was comprised of members of the council's Civil and Small Claims Advisory Committee and members of the plaintiff and defense bars, as well as liaisons from the insurance industry, business groups, and a consumer organization. The group's charge included consideration of innovative program models, including, but not limited to, summary jury trial programs, which could be implemented in California to enhance settlements and promote more effective and efficient administration of civil cases. The working group developed a proposal for new rules of court establishing expedited jury trial procedures and presented the proposal to the Civil and Small Claims Advisory Committee. At that committee's recommendation, the Rules and Projects Committee of the Judicial Council approved the circulation of the proposed rules for public comment in spring 2010.

While the proposal was out for comment, AB 2284—originally introduced to provide a general legislative authorization for developing rules governing an expedited jury trial program—was amended at the urging of several stakeholder groups that had taken part in the Small Civil Cases Working Group. The amended bill included the key elements from the rules proposal, codifying them in statute to establish the Expedited Jury Trials Act. The Judicial Council supported the legislation and, upon its enactment, adopted rules from the original proposal that were not included in the legislation. The Expedited Jury Trial Act contains a five-year sunset provision under which the act will automatically be repealed effective January 1, 2016, if it is not extended by statute.

Expedited Jury Trials in California Courts

In light of the approaching sunset of the Expedited Jury Trial Act, Judicial Council staff has gathered information as to how the act has been used in the trial courts.

Overview of Expedited Jury Trial Process

An expedited jury trial (EJT) is a streamlined jury trial—generally lasting only one day. It is intended to be quicker and less expensive than a traditional jury trial, saving time and money for all involved: litigants, lawyers, courts, and jurors. An EJT differs from a regular jury trial in the following key ways:

- *Shorter trial length*. Each side has 3 hours to put on all its witnesses, show the jury its evidence, and argue its case;
- *Smaller jury*. The jury consists of 8 jurors instead of 12, with no alternates;
- *Faster jury selection process*. The parties exercise fewer peremptory challenges (3 per side); and
- *Swifter finality*. All parties must waive their rights to appeal. In order to help keep down the costs of litigation, there are no appeals following an expedited jury trial except in very limited circumstances.

Data Requested

To assist in determining how the EJT program has been used, some basic data about EJTs was requested of the California superior courts statewide. Data was requested for the period beginning January 1, 2011, and ending August 31, 2014. Courts were asked whether EJTs had been used in any cases during the reporting period and, if so, requested some basic information about those cases.

1. Date of the filing;
2. Date that the parties requested an EJT;
3. Date the court granted/denied the consent order allowing parties to use an EJT;
4. Case numbers for these cases; and
5. Type of dispositions in cases where parties agreed to use EJT (including settlement prior to jury verdict).

Summary of Data Received

Response Rate. Thirty-nine of the 58 superior courts (67%) reported data on the use of EJTs. Of those 39 courts, 25 (64%) reported that EJTs had not been used in any cases during the reporting period. Fourteen courts (36%) reported that EJTs had been used in one or more cases during the reporting period.

- The 25 courts that reported no EJTs were: the Superior Courts of Butte, Calaveras, Colusa, Contra Costa, Del Norte, Humboldt, Imperial, Inyo, Kings, Lake, Lassen, Madera, Mariposa, Mendocino, Modoc, Plumas, San Benito, Santa Cruz, Shasta, Sierra, Sutter, Tehama, Trinity, Yolo, and Yuba counties.

- The 14 courts that reported one or more EJTs were: the Superior Courts of Alameda, Los Angeles, Monterey, Orange, Riverside, San Bernardino, San Francisco, San Joaquin, San Mateo, Santa Barbara, Santa Clara, Solano, Tulare, and Ventura counties.

Percentage of EJTs. Table 1 shows the total number of jury trials and EJTs that took place during the reporting period in each of the 14 courts that reported one or more EJTs. As this table shows, these courts reported a total of 156 EJTs over the entire reporting period. This represents 4.3% of the total civil jury trials that took place in these courts during the reporting period.[1] For individual courts, the percentage of EJTs ranged from 2% to 9% of the jury trials during the reporting period.

[1] The 156 EJTs represent 4.0% of the all the jury trials in all 39 reporting courts.

Table 1. Percentage of Expedited Jury Trials Compared to Standard Jury Trials

Court	Civil Jury Trials[1] FY 2010-11	FY 2011-12	FY 2012-13	Total	EJTs (Jan. 1, 2011–Aug. 31, 2014)[2]	% of EJTs
Alameda	64	56	45	165	9	5%
Los Angeles	479	623	542	1,644	62	4%
Monterey	9	11	11	31	1	3%
Orange[2]	246	253	187	686	32	5%
Riverside	54	49	50	153	6	4%
San Bernardino	66	95	92	253	7	3%
San Francisco	83	43	92	218	18	8%
San Joaquin	26	33	29	88	6	7%
San Mateo	21	11	31	63	1	2%
Santa Barbara	14	16	18	48	1	2%
Santa Clara	19	23	47	89	2	2%
Solano	3	12	8	23	2	9%
Tulare	10	10	10	30	1	3%
Ventura	68	36	38	142	8	6%
Total	**1,162**	**1,271**	**1,200**	**3,633**	**156**	**4.3%**

[1] The *Court Statistics Report (CSR)* was used to report the number of Civil Jury Trials for most courts.

[2] For Orange, the *Jury Data Report* was used to report Civil Jury Trials in FY 2010–2011 and FY 2011–2012; CSR data was not available.

Dispositions in EJTs. Based on a 2005 *Civil Justice Survey of State Courts*, plaintiffs won in 53% of jury trials overall.[3] Although our data reflects a similar pattern, it is difficult to say with certainty whether EJT dispositions match dispositions in overall jury trials due to the small reporting numbers and because many courts had two or fewer EJTs in the reporting period. However, if we look only at those courts with greater than 10 EJTs, the percentage breakdown reflects 55% judgment for plaintiff and 45% judgment for defendant. Additionally, if we look at the court with the highest reported number of EJTs (*n=62*), the breakdown shifts slightly but still reflects an almost 50/50 breakdown at 52% judgment for defendant and 48% judgment for plaintiff.

[2] The Expedited Jury Trials Act took effect January 1, 2011, so to best capture the data, this report looks at each calendar year. Other civil jury data is reported by fiscal year.

[3] Langton & Cohen, *Civil Bench and Jury Trials in State Courts, 2005*, (2008, rev. 2009) Bureau of Justice Statistics Special Report, NCJ 223851, Washington, DC: United States Department of Justice, Office of Justice Programs.

Table 2. Disposition Data on Judgment for Plaintiff/Defendant Only (Courts with > 10 EJTs)

Court	EJTs	Judgment for Plaintiff		Judgment for Defendant		Judgment	
		Total	%	Total	%	Total	%
Courts w/ > 10 EJT[1]	112	52	55%	43	45%	95	85%
1 Court (= 62 EJT)[2]	62	29	48%	31	52%	60	97%

[1] This includes those courts that reported more than 10 EJTs (72% of all reported EJTs).

[2] This includes a single court that reported 62 EJTs (40% of all reported EJTs).

Next Steps

The stakeholders who urged the enactment of the Expedited Jury Trial Act in 2010 are expected to return to the Legislature in the near future to request that the sunset provision be extended or removed. This report provides information regarding the experience of the trial courts under the act, and may be useful in the Legislature's evaluation of the act.

Attachments

1. Attachment A: Expedited Jury Trial & Jury Trial Data Reporting Summary
2. Attachment B: Expedited Jury Trial—Disposition Summary

Expedited Jury Trial & Jury Trial Data Reporting Summary[1]

	Civil Jury Trials				Expedited Jury Trials[2]					
Court	**FY2010-11**	**FY2011-12**	**FY2012-13**	**Total**	**CY2011**	**CY2012**	**CY2013**	**CY2014**	**Total**	**%**
Alameda	**64**	**56**	**45**	**165**	**1**	**2**	**2**	**4**	**9**	**5%**
Alpine										
Amador										
Butte	2	6	10	18	0	0	0	0	0	0%
Calaveras	6	2	2	10	0	0	0	0	0	0%
Colusa	0	0	0	0	0	0	0	0	0	0%
Contra Costa	15	11	20	46	0	0	0	0	0	0%
Del Norte	1	5	1	7	0	0	0	0	0	0%
El Dorado										
Fresno										
Glenn										
Humboldt	6	3	2	11	0	0	0	0	0	0%
Imperial	6	7	7	20	0	0	0	0	0	0%
Inyo	0	0	1	1	0	0	0	0	0	0%
Kern										
Kings	0	0	0	0	0	0	0	0	0	0%
Lake	3	4	2	9	0	0	0	0	0	0%
Lassen	2	2	0	4	0	0	0	0	0	0%
Los Angeles	**479**	**623**	**542**	**1644**	**21**	**21**	**15**	**5**	**62**	**4%**
Madera	9	2	7	18					0	
Marin										
Mariposa	0	0	0	0	0	0	0	0	0	0%
Mendocino	1	3	3	7	0	0	0	0	0	0%
Merced										
Modoc	1	0	0	1	0	0	0	0	0	0%
Mono										
Monterey	**9**	**11**	**11**	**31**	**0**	**1**	**0**	**0**	**1**	**3%**
Napa										
Nevada										
Orange[3]	**246**	**253**	**187**	**686**	**13**	**4**	**9**	**6**	**32**	**5%**
Placer										
Plumas	0	1	1	2	0	0	0	0	0	0%
Riverside	**54**	**49**	**50**	**153**	**2**	**0**	**4**	**0**	**6**	**4%**
Sacramento										
San Benito	4	2	4	10	0	0	0	0	0	0%
San Bernardino	**66**	**95**	**92**	**253**	**1**	**5**	**1**	**0**	**7**	**3%**
San Diego										
San Francisco	**83**	**43**	**92**	**218**	**7**	**6**	**3**	**2**	**18**	**8%**
San Joaquin	**26**	**33**	**29**	**88**	**2**	**1**	**1**	**2**	**6**	**7%**
San Luis Obispo										
San Mateo	**21**	**11**	**31**	**63**	**0**	**0**	**0**	**1**	**1**	**2%**
Santa Barbara	**14**	**16**	**18**	**48**	**1**	**0**	**0**	**0**	**1**	**2%**
Santa Clara	**19**	**23**	**47**	**89**	**1**	**1**	**0**		**2**	**2%**
Santa Cruz	8	8	9	25	0	0	0	0	0	0%
Shasta	9	7	6	22	0	0	0	0	0	0%
Sierra	0	ND	ND	0	0	0	0	0	0	0%
Siskiyou										
Solano	**3**	**12**	**8**	**23**	**0**	**1**	**1**	**0**	**2**	**9%**
Sonoma										
Stanislaus										
Sutter	8	5	3	16	0	0	0	0	0	0%
Tehama	0	0	0	0	0	0	0	0	0	0%
Trinity	0	0	0	0	0	0	0	0	0	0%
Tulare	**10**	**10**	**10**	**30**	**0**	**1**	**0**	**0**	**1**	**3%**
Tuolumne										
Ventura	**68**	**36**	**38**	**142**	**0**	**0**	**2**	**6**	**8**	**6%**
Yolo	2	4	8	14	0	0	0	0	0	0%
Yuba	3	5	2	10	0	0	0	0	0	0%
Total of 1+EJTs	**1162**	**1271**	**1200**	**3633**	**49**	**43**	**38**	**26**	**156**	**4.3%**
									AVG of AVG	*4.5%*
Total of Reporting	**1248**	**1348**	**1288**	**3884**					156	4.0%

[1]Courts with values left blank did not report EJT data.

[2]The Expedited Jury Trials Act took effect January 1, 2011, so to best capture the data, this report looks at each calendar year. Other civil jury data is reported by fiscal year.

[3]For Orange FY2010-11 and FY2011-12, Jury Data Report was used to determine number of Civil Jury Trials (all other courts, years, CSR was used).

Expedited Jury Trials -Summary of Reported Disposition Data[1]

January 1, 2011 through August 31, 2014

Court	EJTs	Withdrawn	Settlement, before trial	Settlement, during trial	Dismissal	Judgment for Plaintiff, punitive damages awarded	Judgment for Plaintiff, no punitive damages awarded	Judgment for Plaintiff, unknown	Judgment for Defendant	Mistrial	Other	Don't know
Alameda	9	0	0	0	0	0	6	0	3	0	0	0
Alpine	0	0	0	0	0	0	0	0	0	0	0	0
Amador												
Butte	0	0	0	0	0	0	0	0	0	0	0	0
Calaveras	0	0	0	0	0	0	0	0	0	0	0	0
Colusa	0	0	0	0	0	0	0	0	0	0		0
Contra Costa	0	0	0	0	0	0	0	0	0	0	0	0
Del Norte	0	0	0	0	0	0	0	0	0	0	0	0
El Dorado												
Fresno												
Glenn												
Humboldt	0	0	0	0	0	0	0	0	0	0	0	0
Imperial	0	0	0	0	0	0	0	0	0	0	0	0
Inyo	0	0	0	0	0	0	0	0	0	0	0	0
Kern												
Kings	0	0	0	0	0	0	0	0	0	0	0	0
Lake	0	0	0	0	0	0	0	0	0	0	0	0
Lassen	0	0	0	0	0	0	0	0	0	0	0	0
Los Angeles	62	0	0	0	0	0	0	29	31	0	2	0
Madera	0	0	0	0	0	0	0	0	0	0	0	0
Marin												
Mariposa	0	0	0	0	0	0	0	0	0	0	0	0
Mendocino	0	0	0	0	0	0	0	0	0	0	0	0
Merced												
Modoc	0	0	0	0	0	0	0	0	0	0	0	0
Mono												
Monterey	1	0	1	0	0	0	0	0	0	0	0	0
Napa												
Nevada												
Orange	32	0	0	0	9	0	14	0	8	0	1	0
Placer												
Plumas	0	0	0	0	0	0	0	0	0	0	0	0
Riverside	6	0	0	0	1	1	4	0	0	0	0	0
Sacramento												
San Benito	0	0	0	0	0	0	0	0	0	0	0	0
San Bernardino	7	0	0	0	0	0	0	0	0	0	0	7
San Diego												
San Francisco	18	0	2	2	0	0	9	0	4	0	1	0
San Joaquin	6	0	0	0	3	0	2	0	0	0	1	0
San Luis Obispo												
San Mateo	1	0	0	0	0	1	0	0	0	0	0	0
Santa Barbara	1	0	0	0	0	0	1	0	0	0	0	0
Santa Clara	2	0	0	0	0	0	0	2	0	0	0	0
Santa Cruz	0	0	0	0	0	0	0	0	0	0	0	0
Shasta	0	0	0	0	0	0	0	0	0	0	0	0
Sierra	0	0	0	0	0	0	0	0	0	0	0	0
Siskiyou												
Solano	2	0	0	1	0	1	0	0	0	0	0	0
Sonoma												
Stanislaus												
Sutter	0	0	0	0	0	0	0	0	0	0	0	0
Tehama	0	0	0	0	0	0	0	0	0	0	0	0
Trinity	0	0	0	0	0	0	0	0	0	0	0	0
Tulare	1	0	0	0	0	0	1	0	0	0	0	0
Tuolumne												
Ventura	8	0	0	0	0	0	0	4	3	0	0	1
Yolo	0	0	0	0	0	0	0	0	0	0	0	0
Yuba	0	0	0	0	0	0	0	0	0	0	0	0
Total	156	0	3	3	13	3	37	35	49	0	5	8

[1] Courts with values left blank did not report EJT data.

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.

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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.

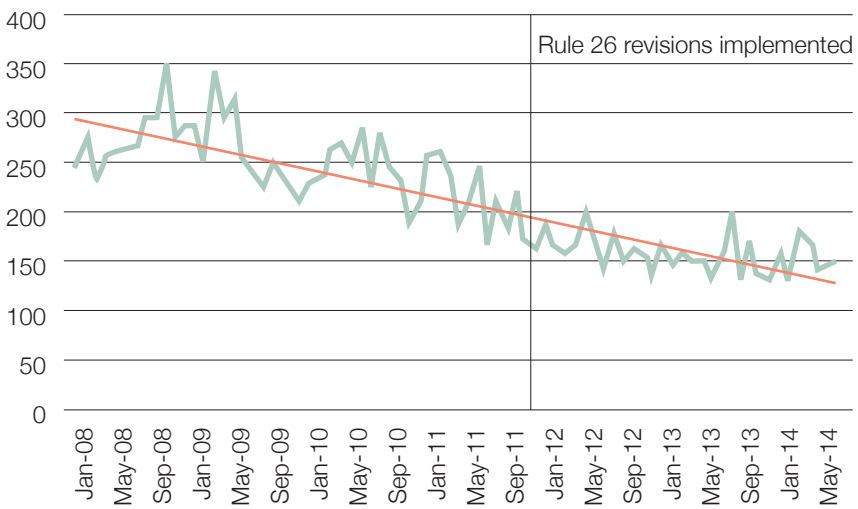
[17] The focus groups were conducted in conjunction with the Utah District Court Judges Spring Education Conference on April 23-25, 2014 in Bryce Canyon, Utah.

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.

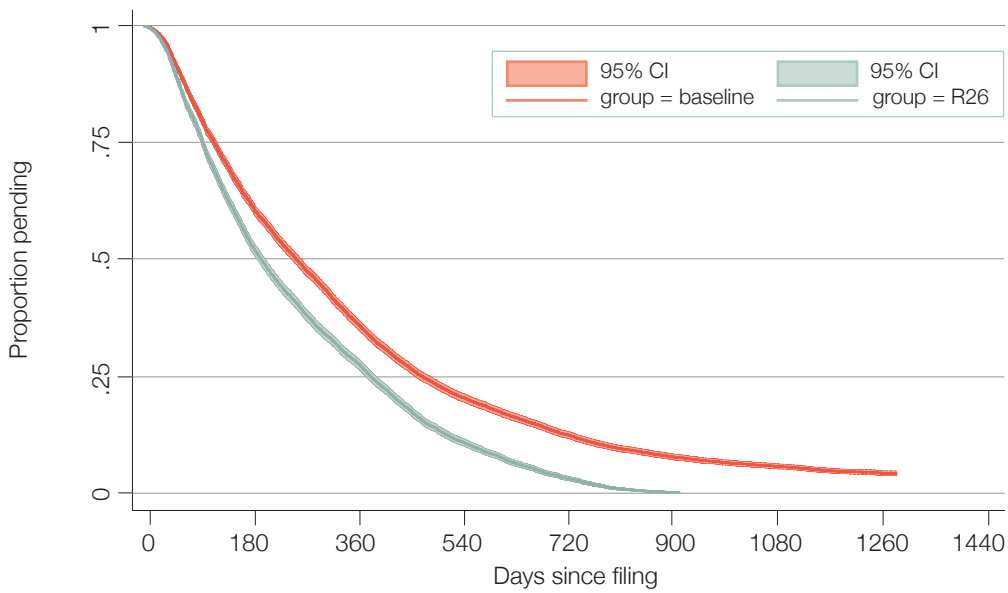
[29] N=210, χ^2=11.223, df=2, p=.004. The NCSC also examined the FY 2008 data and found that the distribution of outcomes for cases in which an answer was filed is very similar to the distribution in the pre-implementation sample for Tier 1 non-debt collection and Tier 3 cases, but Tier 2 non-domestic 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

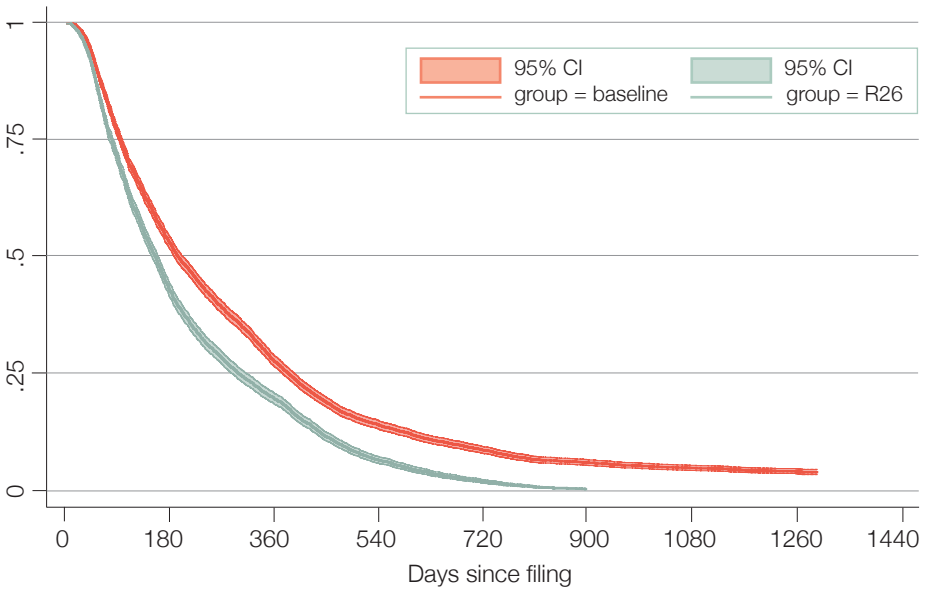
n = 17,029; 16,541 failures.
Log-rank test for equality of survivor functions: $\chi^2 = 525.21$, 1 degree of freedom, $p(\chi^2) < .001$.
Note: Includes only cases in which an answer was filed.

[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

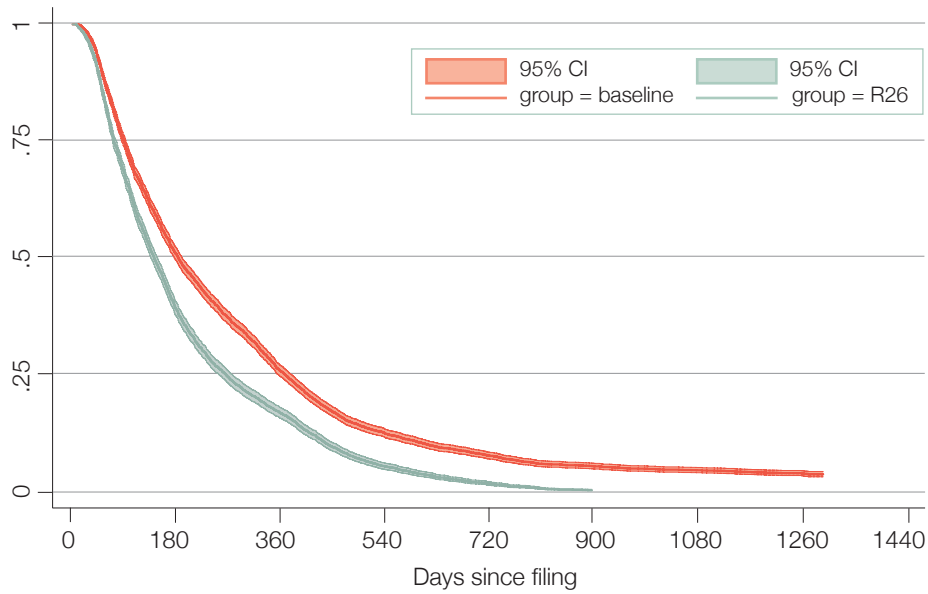


Number at risk									
Group = baseline	5505	2896	1506	755	463	316	253	54	0
Group = R26	4466	1889	864	276	75	0	0	0	0

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.

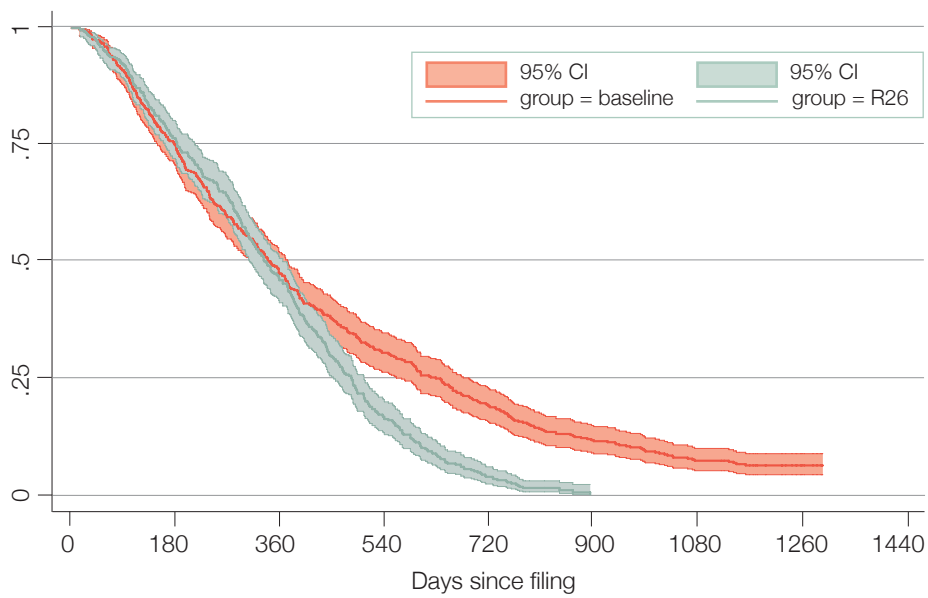
Figure 4. Tier 1 Debt Collection Cases — Cumulative Probability of Survival Without Disposition, Cases Filed Before and After Rule 26 Revisions



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

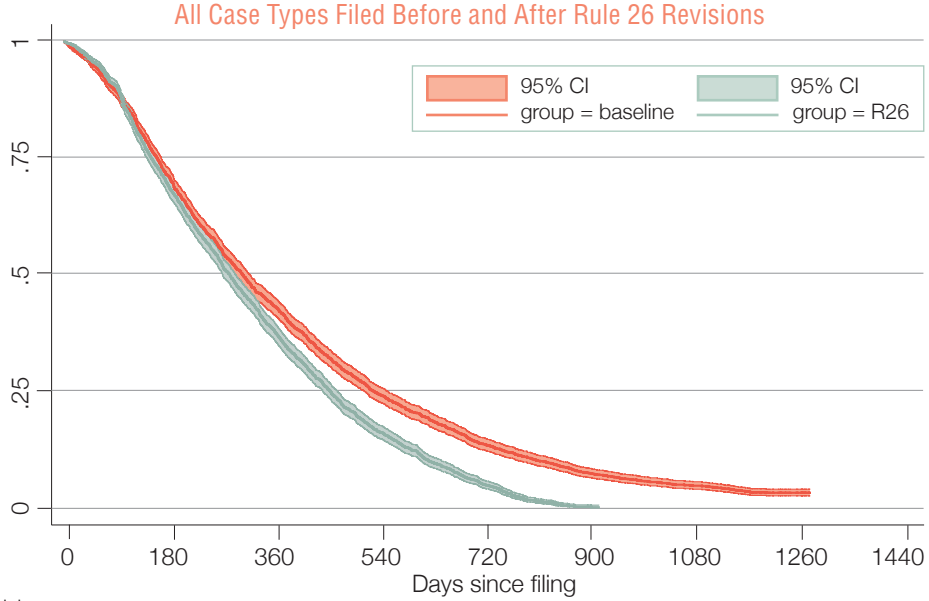


Number at risk									
Group = baseline	454	340	215	138	86	53	33	7	0
Group = R26	420	320	193	68	16	0	0	0	0

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

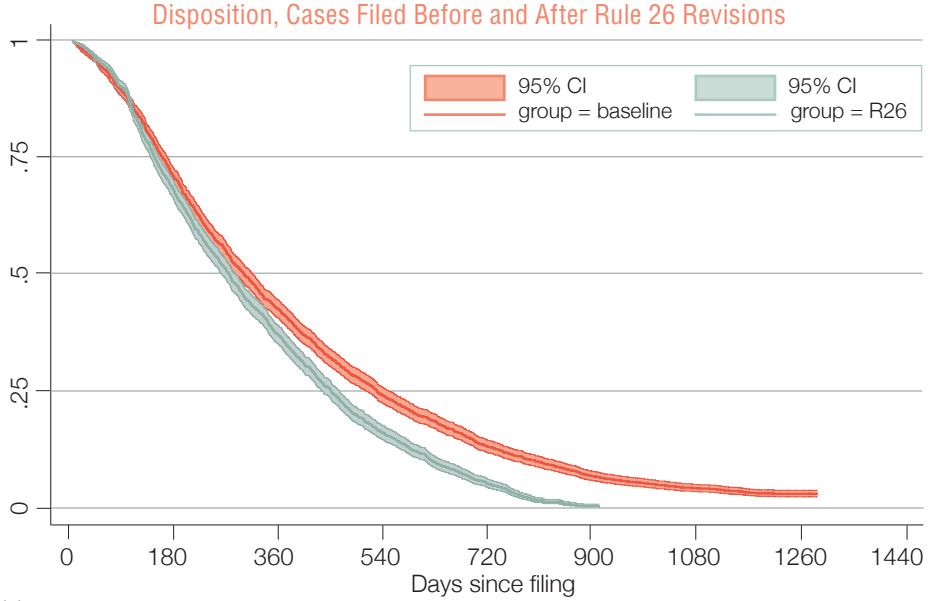


Number at risk

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



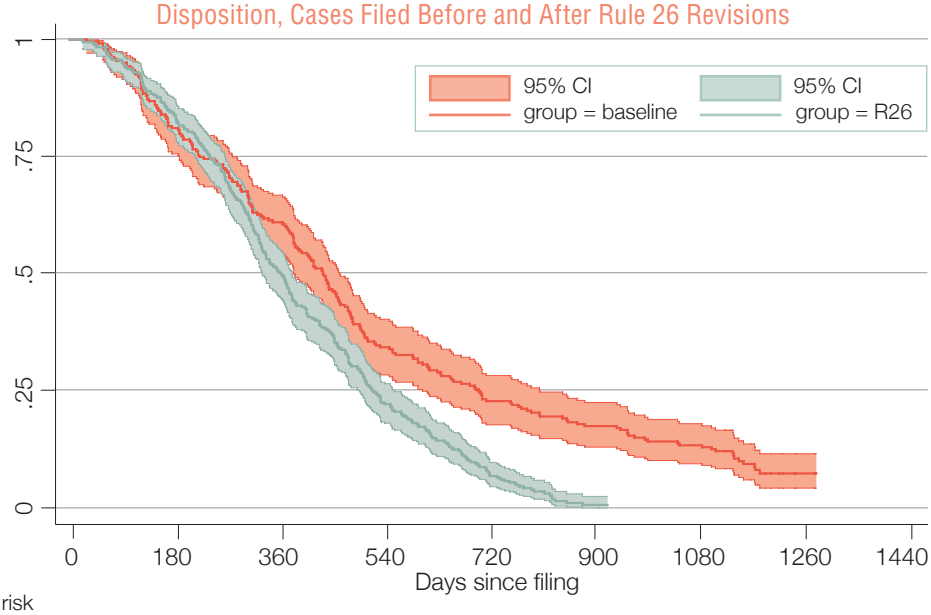
Number at risk

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).

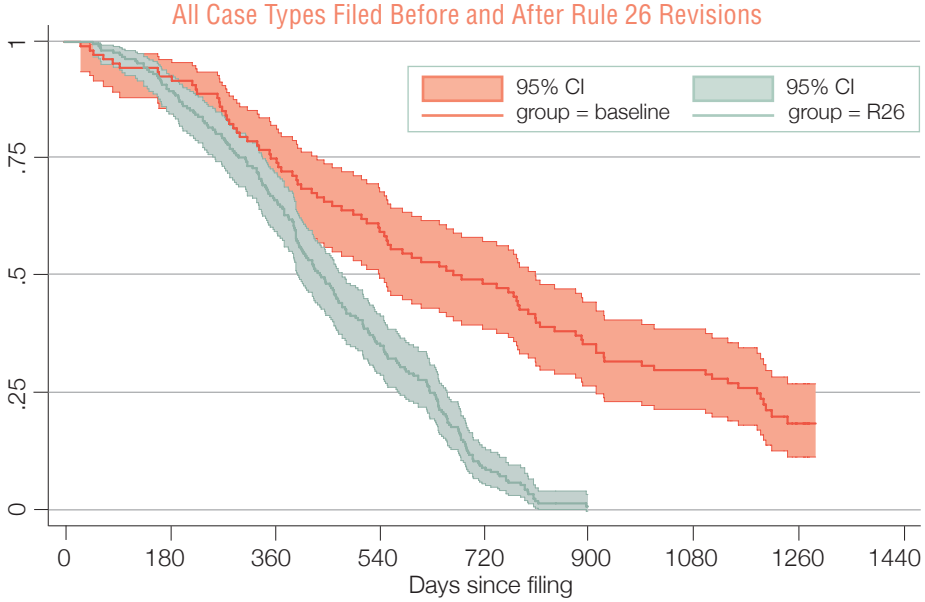
Figure 8. Tier 2 Non-Domestic Relations — Cumulative Probability of Survival Without Disposition, Cases Filed Before and After Rule 26 Revisions



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

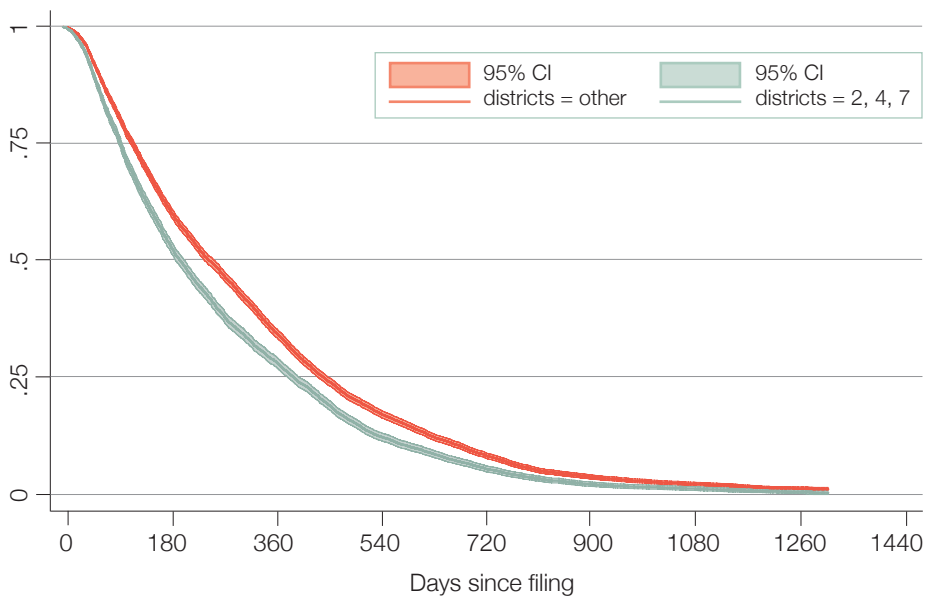


Number at risk									
Group = baseline	109	101	82	65	53	39	33	9	0
Group = R26	220	197	146	79	21	0	0	0	0

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.

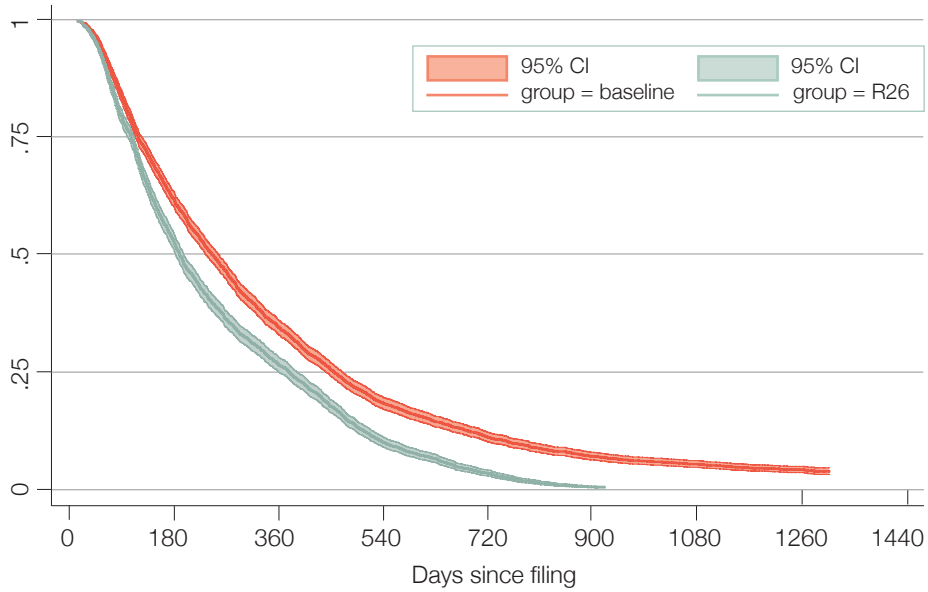
Figure 10. Districts 2, 4 and 7 versus All Other Districts — Cumulative Probability of Survival Without Disposition, All Civil Case Types



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.

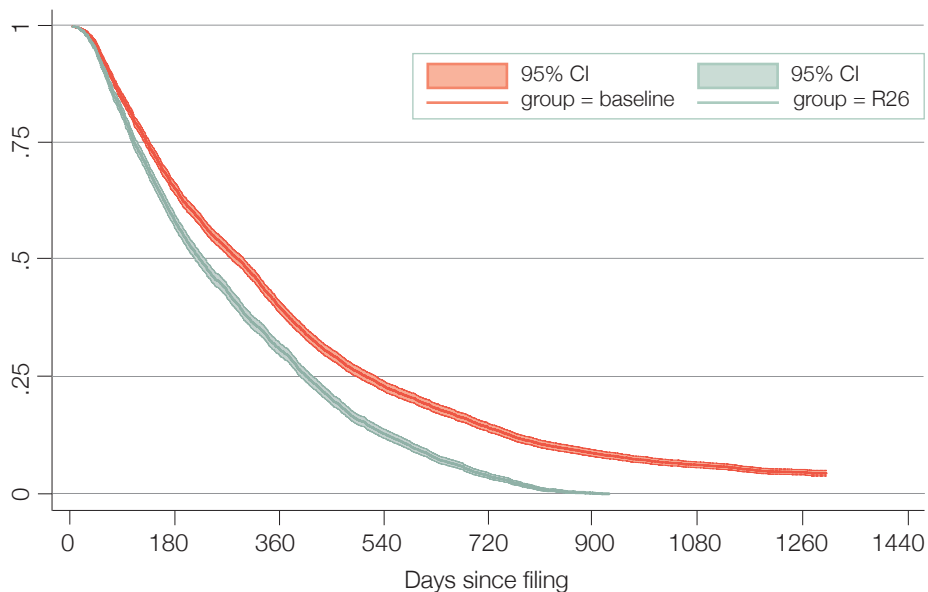
Figure 11. Districts 2, 4 and 7 — Cumulative Probability of Survival Without Disposition, All Civil Case Types Filed Before and After Rule 26 Revisions



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.

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[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.

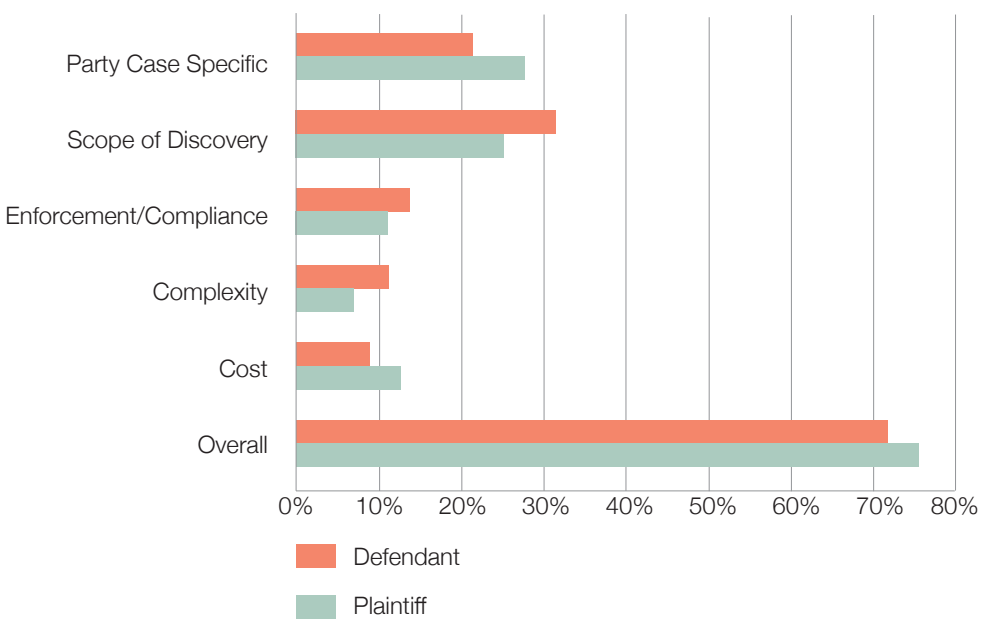
OPEN-ENDED ATTORNEY COMMENTS

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



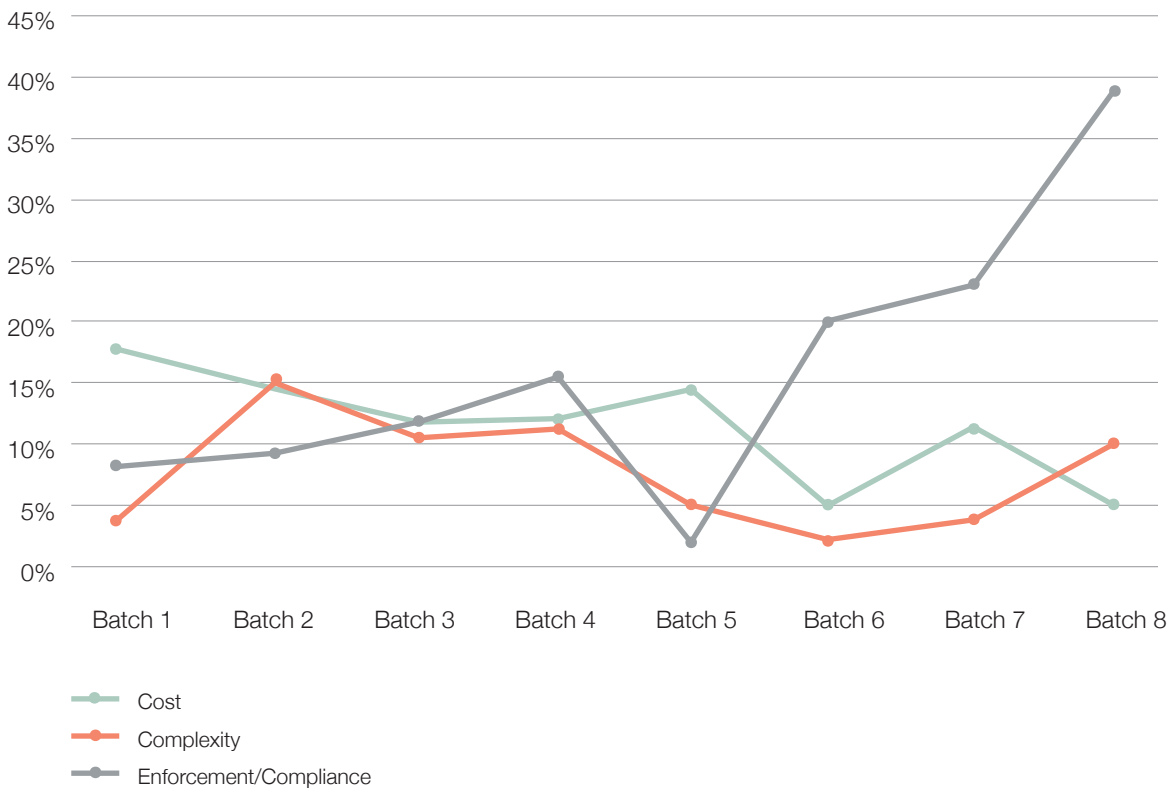
There were also subtle differences in the comments based on the Utah case type reporting categories. Overall, attorneys in property rights and domestic cases were the least negative in their criticism of the Rule 26 revisions (70% of comments) compared to attorneys in tort cases (75%) and contract cases (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%

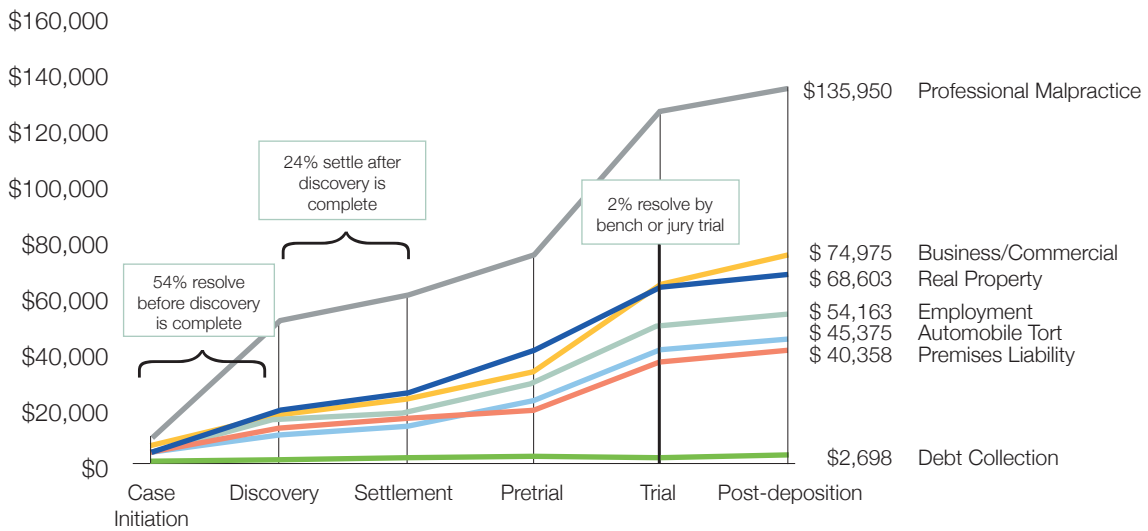
of the anticipated time expended in a "typical" case of each type, which is a challenging task for many attorneys as evidenced by the number of emailed comments that no cases are ever "typical" and all are completely unique. It is clear from both the emailed comments and the survey responses that most 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.

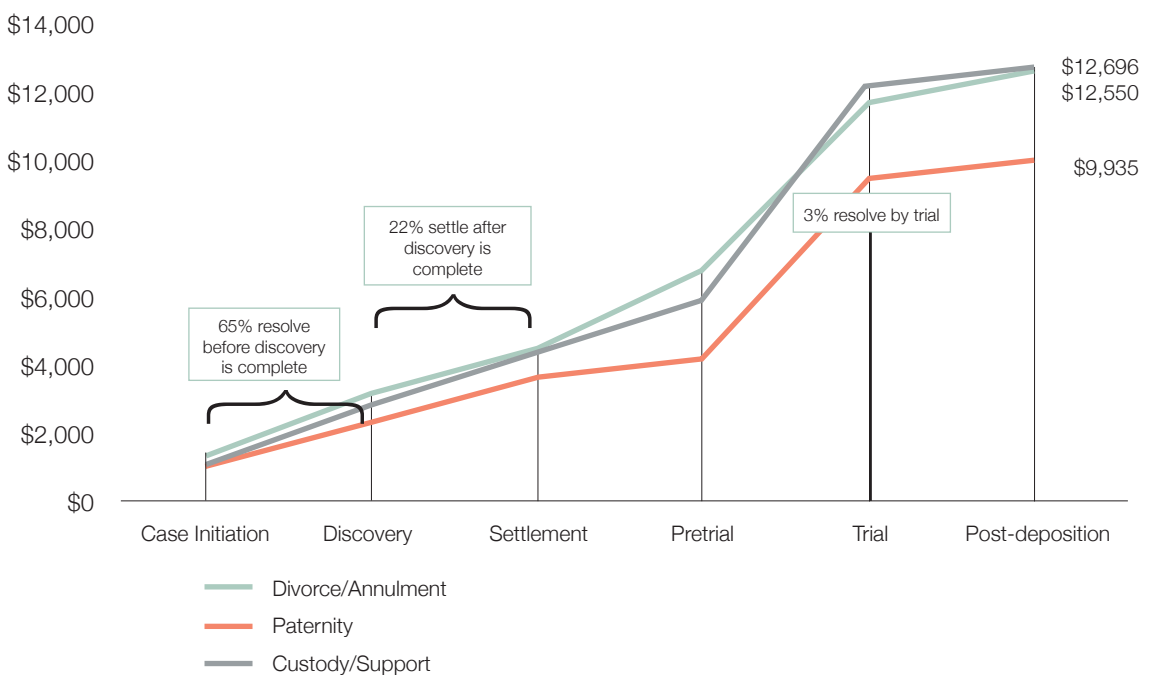
Figures 15a and 15b display the median estimated cumulative costs of litigation per side by litigation stage for the non-domestic and domestic case types

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

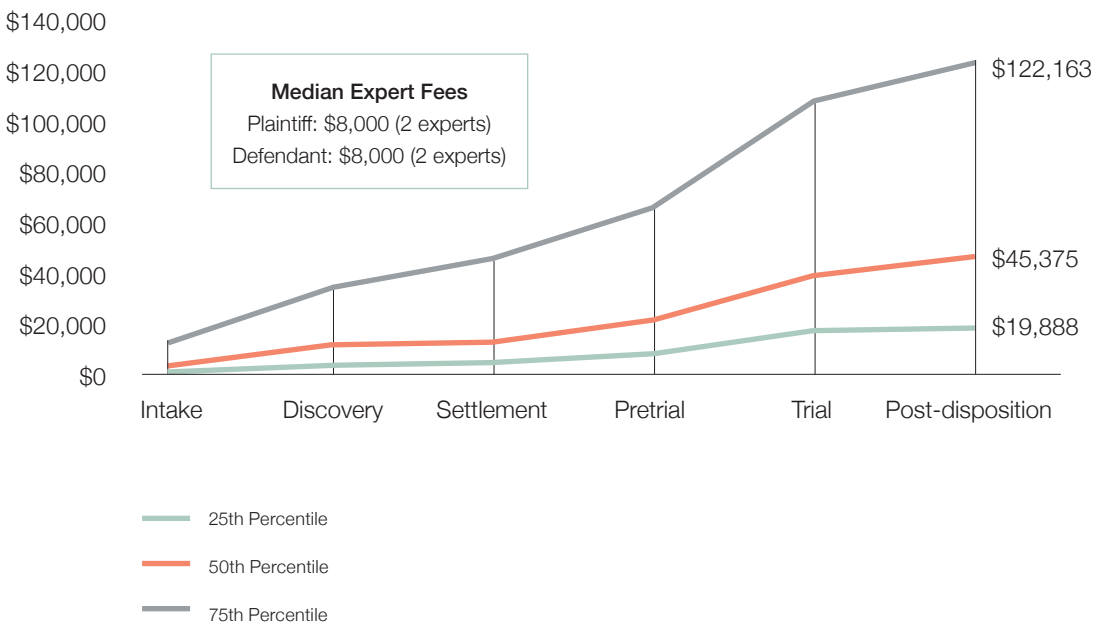
PERCENTILE	25TH	50TH	75TH
Number of plaintiff experts	1	2	2
Plaintiff Expert Fees	$1,500	$4,000	$5,000
Number of defendant experts	2	2	3
Defendant expert fees	$1,500	$4,000	$6,000
Total Expert Costs	$4,500	$16,000	$28,000

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

Cumulative Legal Fees for Automobile Torts



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

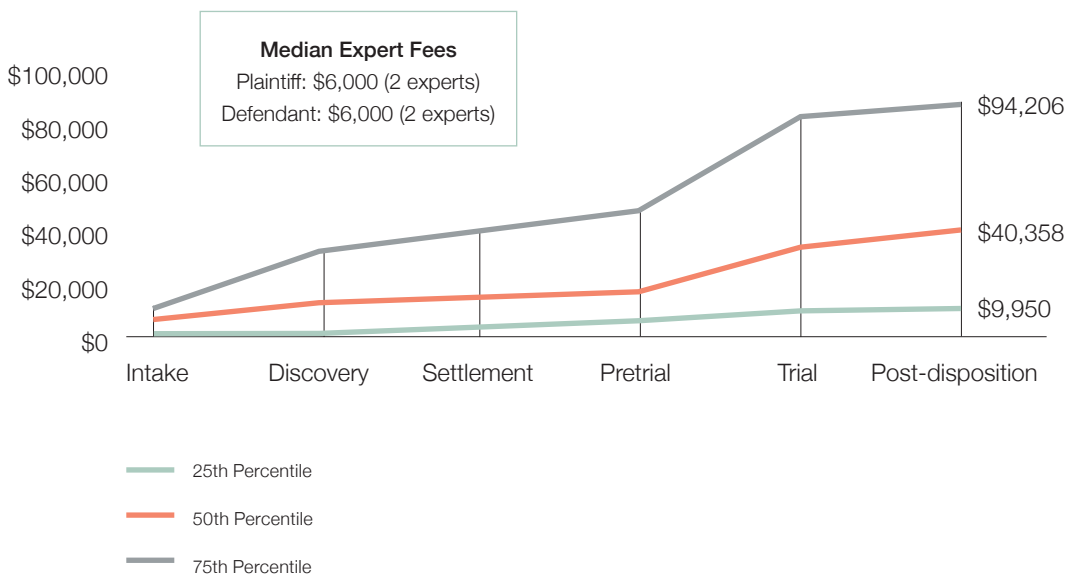
PERCENTILE	25TH	50TH	75TH
Number of plaintiff experts	1	2	2
Plaintiff Expert Fees	$1,500	$3,000	$5,000
Number of defendant experts	1	2	3
Defendant expert fees	$2,500	$3,000	$5,000
Total Expert Costs	$3,500	$12,000	$25,000

Proportion of Time Expended per Litigation Stage

PERCENTILE	TOTAL TIME 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

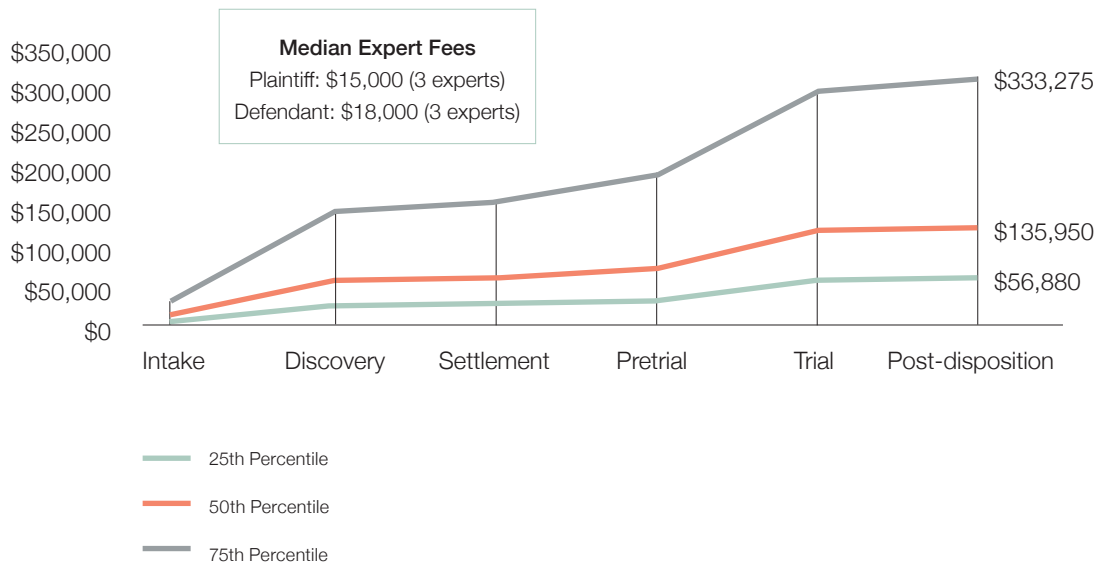
PERCENTILE	25TH	50TH	75TH
Number of plaintiff experts	2	3	4
Plaintiff Expert Fees	$4,625	$5,000	$10,000
Number of defendant experts	3	3	4
Defendant expert fees	$5,000	$6,000	$12,500
Total Expert Costs	$23,000	$33,000	$90,000

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

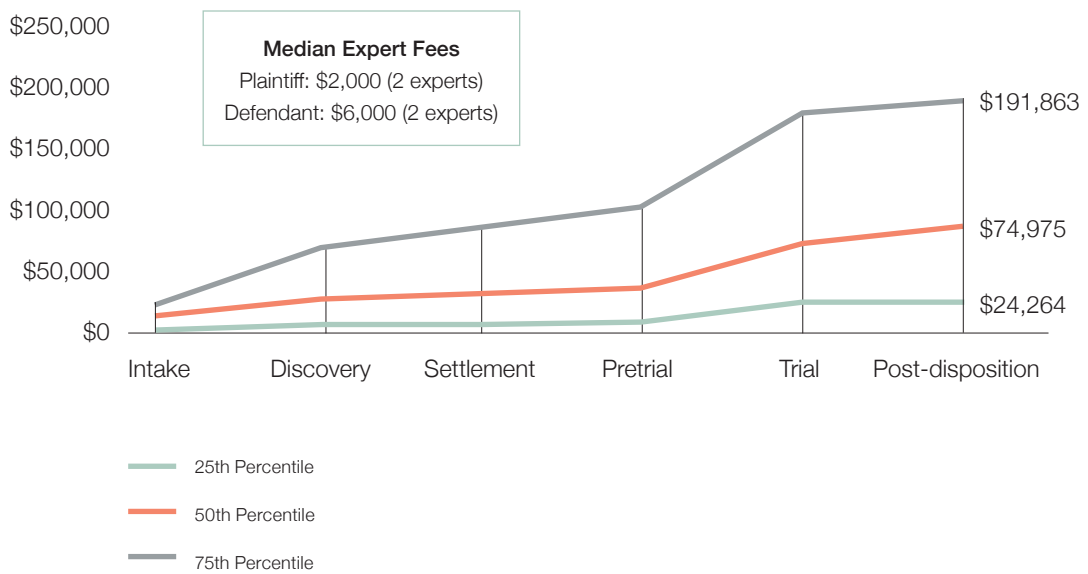
PERCENTILE	25TH	50TH	75TH
Number of plaintiff experts	1	2	2
Plaintiff Expert Fees	$300	$1,000	$10,000
Number of defendant experts	1	2	2
Defendant expert fees	$300	$3,000	$10,000
Total Expert Costs	$600	$8,000	$40,000

Proportion of Time Expended per Litigation Stage

PERCENTILE	TOTAL TIME 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

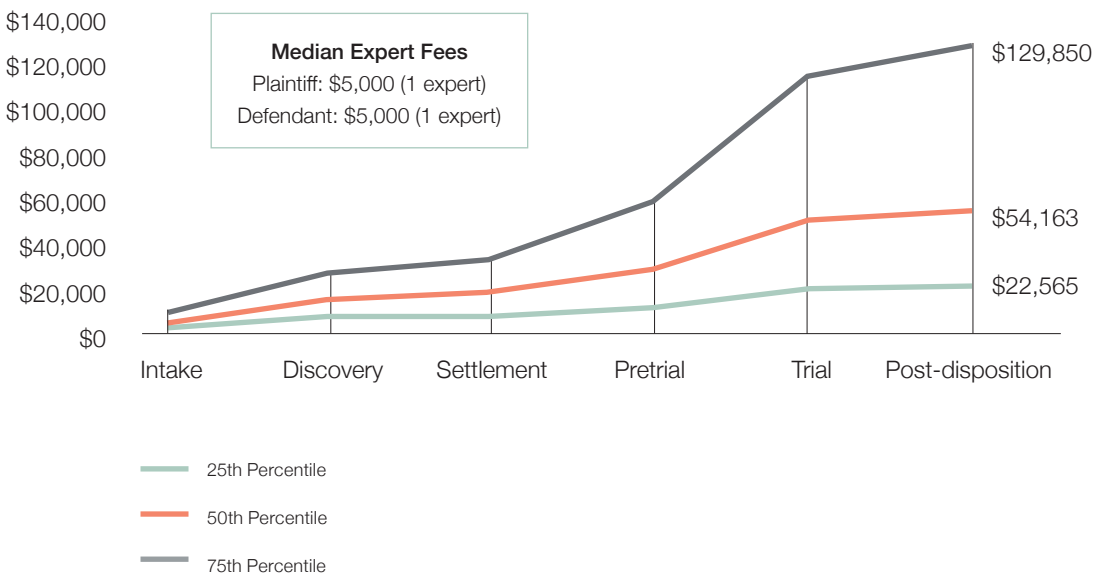
PERCENTILE	25TH	50TH	75TH
Number of plaintiff experts	1	1	2
Plaintiff Expert Fees	$1,075	$5,000	$7,375
Number of defendant experts	1	1	2
Defendant expert fees	$1,125	$5,000	$8,500
Total Expert Costs	$2,200	$10,000	$33,875

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

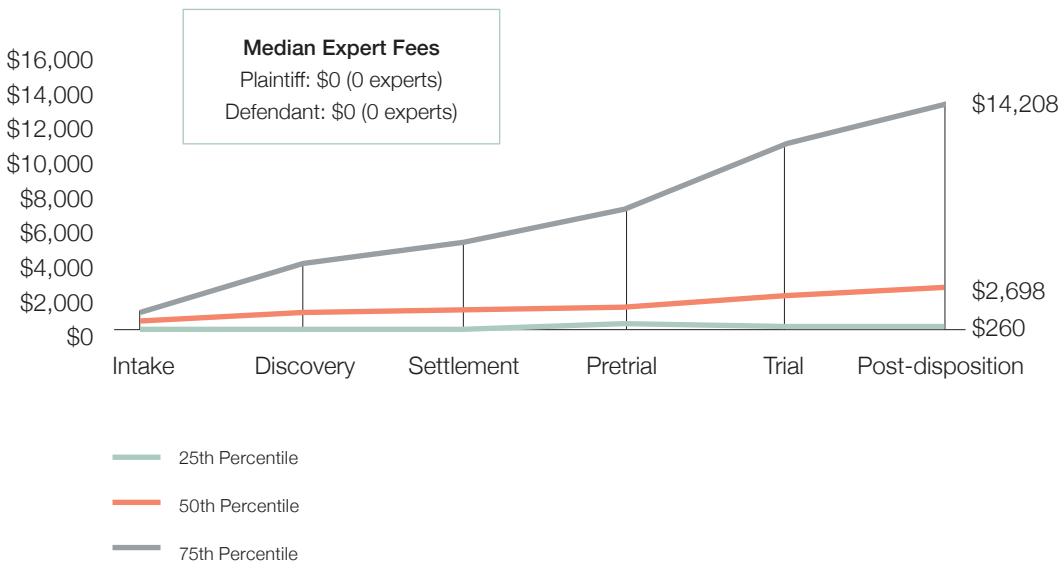
PERCENTILE	25TH	50TH	75TH
Number of plaintiff experts	0	0	0
Plaintiff Expert Fees	$0	$0	$550
Number of defendant experts	0	0	0
Defendant expert fees	$0	$0	$251
Total Expert Costs	$0	$0	$0

Proportion of Time Expended per Litigation Stage

PERCENTILE	TOTAL TIME					
	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

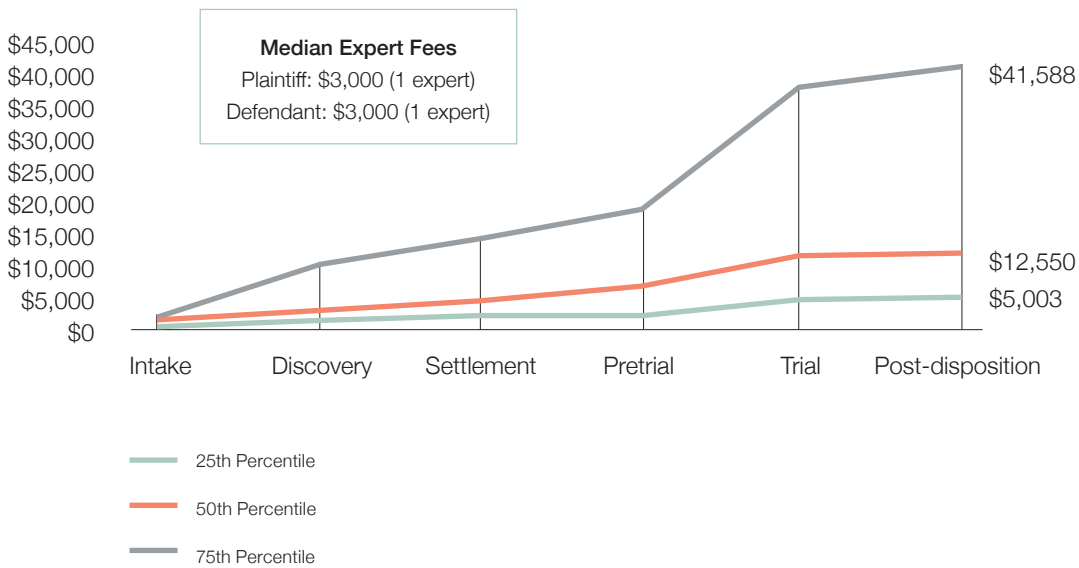
PERCENTILE	25TH	50TH	75TH
Number of plaintiff experts	1	1	2
Plaintiff Expert Fees	$400	$3,000	$5,000
Number of defendant experts	1	1	2
Defendant expert fees	$400	$3,000	$5,000
Total Expert Costs	$800	$6,000	$15,000

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

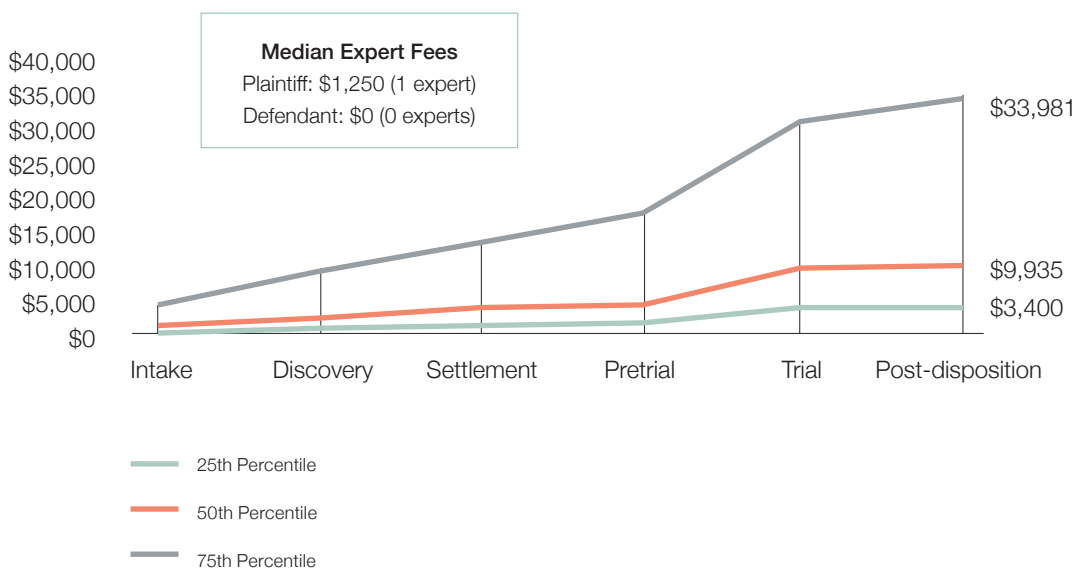
PERCENTILE	25TH	50TH	75TH
Number of plaintiff experts	0	1	1
Plaintiff Expert Fees	$0	$1,250	$5,000
Number of defendant experts	0	1	1
Defendant expert fees	$0	$0	$5,000
Total Expert Costs	$0	$1,250	$10,000

Proportion of Time Expended per Litigation Stage

PERCENTILE	TOTAL TIME 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

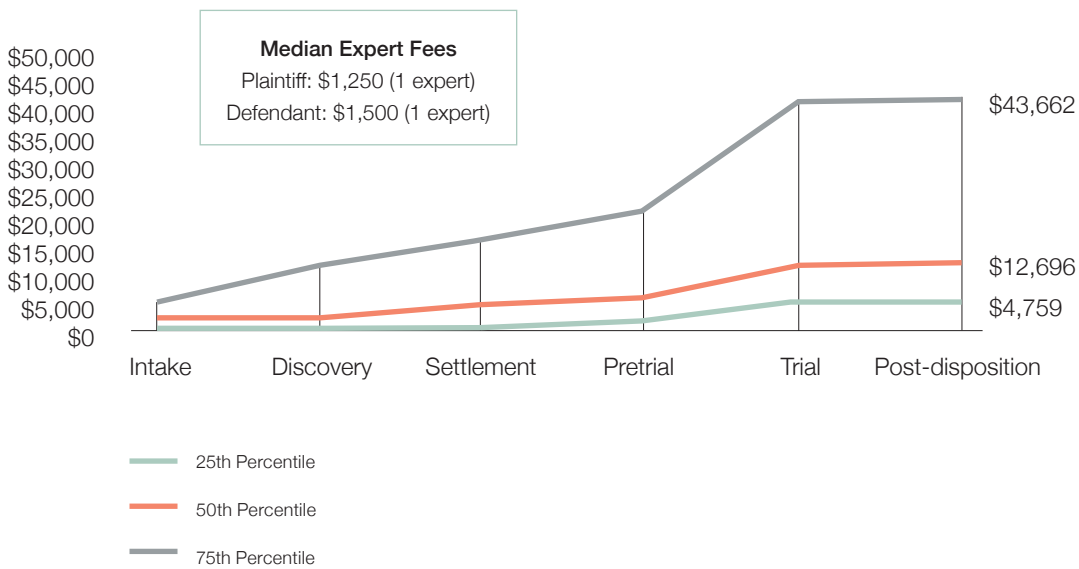
PERCENTILE	25TH	50TH	75TH
Number of plaintiff experts	0	1	1
Plaintiff Expert Fees	$0	$2,500	$5,000
Number of defendant experts	0	1	1
Defendant expert fees	$0	$1,500	$3,500
Total Expert Costs	$0	$3,250	$8,500

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

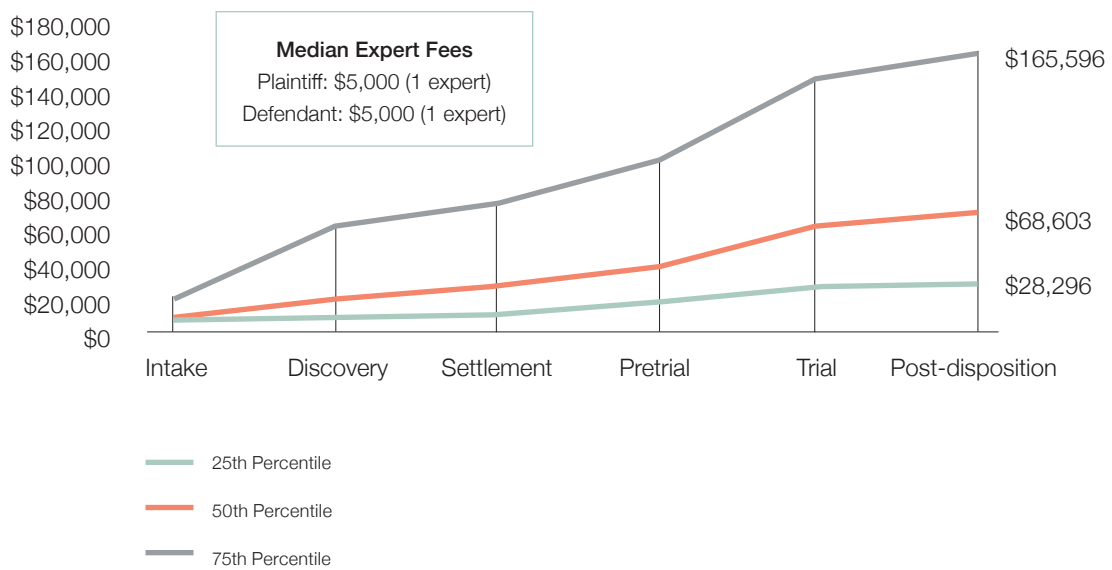
PERCENTILE	25TH	50TH	75TH
Number of plaintiff experts	1	1	2
Plaintiff Expert Fees	$2,000	$5,000	$10,000
Number of defendant experts	1	1	2
Defendant expert fees	$2,000	$5,000	$10,000
Total Expert Costs	$4,000	$10,000	$40,000

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
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Williamsburg, VA 23185

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Texas Rules of Civil Procedure

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PART II - RULES OF PRACTICE IN DISTRICT AND COUNTY COURTS

Pleadings in the district and county courts shall

(a) be by petition and answer;

(b) consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's grounds of defense. That an allegation be evidentiary or be of legal conclusion shall not be grounds for objection when fair notice to the opponent is given by the allegations as a whole; and

(c) contain any other matter which may be required by any law or rule authorizing or regulating any particular action or defense.

Pleadings that are not filed electronically must be in writing, on paper measuring approximately 8 ½ inches by 11 inches, and signed by the party or his attorney. The use of recycled paper is strongly encouraged.

All pleadings shall be construed so as to do substantial justice.

RULE 46. PETITION AND ANSWER; EACH ONE INSTRUMENT OF WRITING

The original petition, first supplemental petition, second supplemental petition, and every other, shall each be contained in one instrument of writing, and so with the original answer and each of the supplemental answers.

RULE 47. CLAIMS FOR RELIEF

An original pleading which sets forth a claim for relief, whether an original petition, counterclaim, cross-claim, or third party claim, shall contain

(a) a short statement of the cause of action sufficient to give fair notice of the claim involved;

(b) a statement that the damages sought are within the jurisdictional limits of the court;

(c) except in suits governed by the Family Code, a statement that the party seeks:

(1) only monetary relief of $100,000 or less, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees; or

(2) monetary relief of $100,000 or less and non-monetary relief; or

(3) monetary relief over $100,000 but not more than $200,000; or

(4) monetary relief over $200,000 but not more than $1,000,000; or

(5) monetary relief over $1,000,000; and

(d) a demand for judgment for all the other relief to which the party deems himself entitled.

Relief in the alternative or of several different types may be demanded; provided, further, that upon special exception the court shall require the pleader to amend so as to specify the maximum amount claimed. A party that fails to comply with (c) may not conduct discovery until the party's pleading is amended to comply.

Comment to 2013 change: Rule 47 is amended to require a more specific statement of the relief sought by a party. The amendment requires parties to plead into or out of the expedited actions process governed by Rule 169, added to implement section 22.004(h) of the Texas Government Code. Except in a suit governed by the Family Code, the Property Code, the Tax Code, or Chapter 74 of the Civil Practice & Remedies Code, a suit in which the original petition contains the statement in paragraph (c)(1) is governed by the expedited actions process. The further specificity in paragraphs (c)(2)-(5) is to provide information regarding the nature of cases filed and does not affect a party's substantive rights.

RULE 48. ALTERNATIVE CLAIMS FOR RELIEF

A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based upon legal or equitable grounds or both.

RULE 49. WHERE SEVERAL COUNTS

Where there are several counts in the petition, and entire damages are given, the verdict or judgment, as the case may be, shall be good, notwithstanding one or more of such counts may be defective.

RULE 50. PARAGRAPHS, SEPARATE STATEMENTS

All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings, so long as the pleading containing such paragraph has not been superseded by an amendment as provided by Rule 65. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of

On a party's motion or on its own initiative, a trial court may permit an appeal from an interlocutory order that is not otherwise appealable, as provided by statute. Permission must be stated in the order to be appealed. An order previously issued may be amended to include such permission. The permission must identify the controlling question of law as to which there is a substantial ground for difference of opinion, and must state why an immediate appeal may materially advance the ultimate termination of the litigation.

Comment to 2011 change: Rule 168 is a new rule, added to implement amendments to section 51.014(d)-(f) of the Texas Civil Practice and Remedies Code. Rule 168 applies only to cases filed on or after September 1, 2011. Rule 168 clarifies that the trial court's permission to appeal should be included in the order to be appealed rather than in a separate order. Rule of Appellate Procedure 28.3 sets out the corollary requirements for permissive appeals in the courts of appeals.

RULE 169. EXPEDITED ACTIONS

(a) *Application.*

(1) The expedited actions process in this rule applies to a suit in which all claimants, other than counter-claimants, affirmatively plead that they seek only monetary relief aggregating $100,000 or less, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees.

(2) The expedited actions process does not apply to a suit in which a party has filed a claim governed by the Family Code, the Property Code, the Tax Code, or Chapter 74 of the Civil Practice & Remedies Code.

(b) *Recovery.* In no event may a party who prosecutes a suit under this rule recover a judgment in excess of $100,000, excluding post-judgment interest.

(c) *Removal from Process.*

(1) A court must remove a suit from the expedited actions process:

(A) on motion and a showing of good cause by any party; or

(B) if any claimant, other than a counter-claimant, files a pleading or an amended or supplemental pleading that seeks any relief other than the monetary relief allowed by (a)(1).

(2) A pleading, amended pleading, or supplemental pleading that removes a suit from the expedited actions process may not be filed without leave of court unless it is filed before the earlier of 30 days after the discovery period is closed or 30 days before the date set for trial. Leave to amend may be granted only if good cause for filing the pleading outweighs any prejudice to an opposing party.

(3) If a suit is removed from the expedited actions process, the court must reopen discovery under Rule 190.2(c).

(d) *Expedited Actions Process.*

(1) Discovery. Discovery is governed by Rule 190.2.

(2) Trial Setting; Continuances. On any party's request, the court must set the case for a trial date that is within 90 days after the discovery period in Rule 190.2(b)(1) ends. The court may continue the case twice, not to exceed a total of 60 days.

(3) Time Limits for Trial. Each side is allowed no more than eight hours to complete jury selection, opening statements, presentation of evidence, examination and cross-examination of witnesses, and closing arguments. On motion and a showing of good cause by any party, the court may extend the time limit to no more than twelve hours per side.

(A) The term "side" has the same definition set out in Rule 233.

(B) Time spent on objections, bench conferences, bills of exception, and challenges for cause to a juror under Rule 228 are not included in the time limit.

(4) Alternative Dispute Resolution.

(A) Unless the parties have agreed not to engage in alternative dispute resolution, the court may refer the case to an alternative dispute resolution procedure once, and the procedure must:

(i) not exceed a half-day in duration, excluding scheduling time;

(ii) not exceed a total cost of twice the amount of applicable civil filing fees; and

(iii) be completed no later than 60 days before the initial trial setting.

(B) The court must consider objections to the referral unless prohibited by statute.

(C) The parties may agree to engage in alternative dispute resolution other than that provided for in (A).

(5) Expert Testimony. Unless requested by the party sponsoring the expert, a party may only challenge the admissibility of expert testimony as an objection to summary judgment evidence under Rule 166a or during the trial on the merits. This paragraph does not apply to a motion to strike for late designation.

Comments to 2013 change:

1. Rule 169 is a new rule implementing section 22.004(h) of the Texas Government Code, which was added in 2011 and calls for rules to promote the prompt, efficient, and cost-effective resolution of civil actions when the amount in controversy does not exceed $100,000.

2. The expedited actions process created by Rule 169 is mandatory; any suit that falls within the definition of 169(a)(1) is subject to the provisions of the rule.

3. In determining whether there is good cause to remove the case from the process or extend the time limit for trial, the court should consider factors such as whether the damages sought by multiple claimants against the same defendant exceed in the aggregate the relief allowed under 169(a)(1), whether a defendant has filed a compulsory counterclaim in good faith that seeks relief other than that allowed under 169(a)(1), the number of parties and witnesses, the complexity of the legal and factual issues, and whether an interpreter is necessary.

4. Rule 169(b) specifies that a party who prosecutes a suit under this rule cannot recover a judgment in excess of $100,000. Thus, the rule in *Greenhalgh v. Service Lloyds Ins. Co.*, 787 S.W.2d 938 (Tex. 1990), does not apply if a jury awards damages in excess of $100,000 to the party. The limitation of 169(b) does not apply to a counter-claimant that seeks relief other than that allowed under 169(a)(1).

5. The discovery limitations for expedited actions are set out in Rule 190.2, which is also amended to implement section 22.004(h) of the Texas Government Code.

[RULE 170. Repealed effective April 1, 1984]

RULE 171. MASTER IN CHANCERY

The court may, in exceptional cases, for good cause appoint a master in chancery, who shall be a citizen of this State, and not an attorney for either party to the action, nor related to either party, who shall perform all of the duties required of him by the court, and shall be under orders of the court, and have such power as the master of chancery has in a court of equity.

The order of references to the master may specify or limit his powers, and may direct him to report only upon particular issues, or to do or perform particular acts, or to receive and report evidence only and may fix the time and place for beginning and closing the hearings, and for the filing of the master's report. Subject to the limitations and specifications stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of books, papers, vouchers, documents and other writings applicable thereto. He may rule upon the admissibility of evidence, unless otherwise directed by the order of reference and has the authority to put witnesses on oath, and may, himself, examine them, and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner as provided for a court sitting in the trial of a case.

The clerk of the court shall forthwith furnish the master with a copy of the order of reference.

The parties may procure the attendance of witnesses before the master by the issuance and service of process as provided by law and these rules.

The court may confirm, modify, correct, reject, reverse or recommit the report, after it is filed, as

[RULE 187. Repealed effective January 1, 1999]

[RULE 188. Repealed effective January 1, 1999]

[RULE 189. Repealed effective April 1, 1984]

RULE 190. DISCOVERY LIMITATIONS

190.1 Discovery Control Plan Required.

Every case must be governed by a discovery control plan as provided in this Rule. A plaintiff must allege in the first numbered paragraph of the original petition whether discovery is intended to be conducted under Level 1, 2, or 3 of this Rule.

190.2 Discovery Control Plan - Expedited Actions and Divorces Involving $50,000 or Less (Level 1)

(a) **Application.** This subdivision applies to:

(1) any suit that is governed by the expedited actions process in Rule 169; and

(2) unless the parties agree that rule 190.3 should apply or the court orders a discovery control plan under Rule 190.4, any suit for divorce not involving children in which a party pleads that the value of the marital estate is more than zero but not more than $ 50,000.

(b) **Limitations.** Discovery is subject to the limitations provided elsewhere in these rules and to the following additional limitations:

(1) **Discovery period.** All discovery must be conducted during the discovery period, which begins when the suit is filed and continues until 180 days after the date the first request for discovery of any kind is served on a party.

(2) **Total time for oral depositions.** Each party may have no more than six hours in total to examine and cross-examine all witnesses in oral depositions. The parties may agree to expand this limit up to ten hours in total, but not more except by court order. The court may modify the deposition hours so that no party is given unfair advantage.

(3) **Interrogatories.** Any party may serve on any other party no more than 15 written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate interrogatory.

(4) **Requests for Production.** Any party may serve on any other party no more than 15 written requests for production. Each discrete subpart of a request for production is considered a separate request for production.

(5) **Requests for Admissions.** Any party may serve on any other party no more than 15 written requests for admissions. Each discrete subpart of a request for admission is considered a separate request for admission.

(6) **Requests for Disclosure.** In addition to the content subject to disclosure under Rule 194.2, a party may request disclosure of all documents, electronic information, and tangible items that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses. A request for disclosure made pursuant to this paragraph is not considered a request for production.

(c) **Reopening Discovery.** If a suit is removed from the expedited actions process in Rule 169 or, in a divorce, the filing of a pleading renders this subdivision no longer applicable, the discovery period reopens, and discovery must be completed within the limitations provided in Rules 190.3 or 190.4, whichever is applicable. Any person previously deposed may be redeposed. On motion of any party, the court should continue the trial date if necessary to permit completion of discovery.

190.3 Discovery Control Plan - By Rule (Level 2)

(a) **Application.** Unless a suit is governed by a discovery control plan under Rules 190.2 or 190.4, discovery must be conducted in accordance with this subdivision.

(b) **Limitations.** Discovery is subject to the limitations provided elsewhere in these rules and to the following additional limitations:

(1) **Discovery period.** All discovery must be conducted during the discovery period, which begins when suit is filed and continues until:

(A) 30 days before the date set for trial, in cases under the Family Code; or

(B) in other cases, the earlier of

(i) 30 days before the date set for trial, or

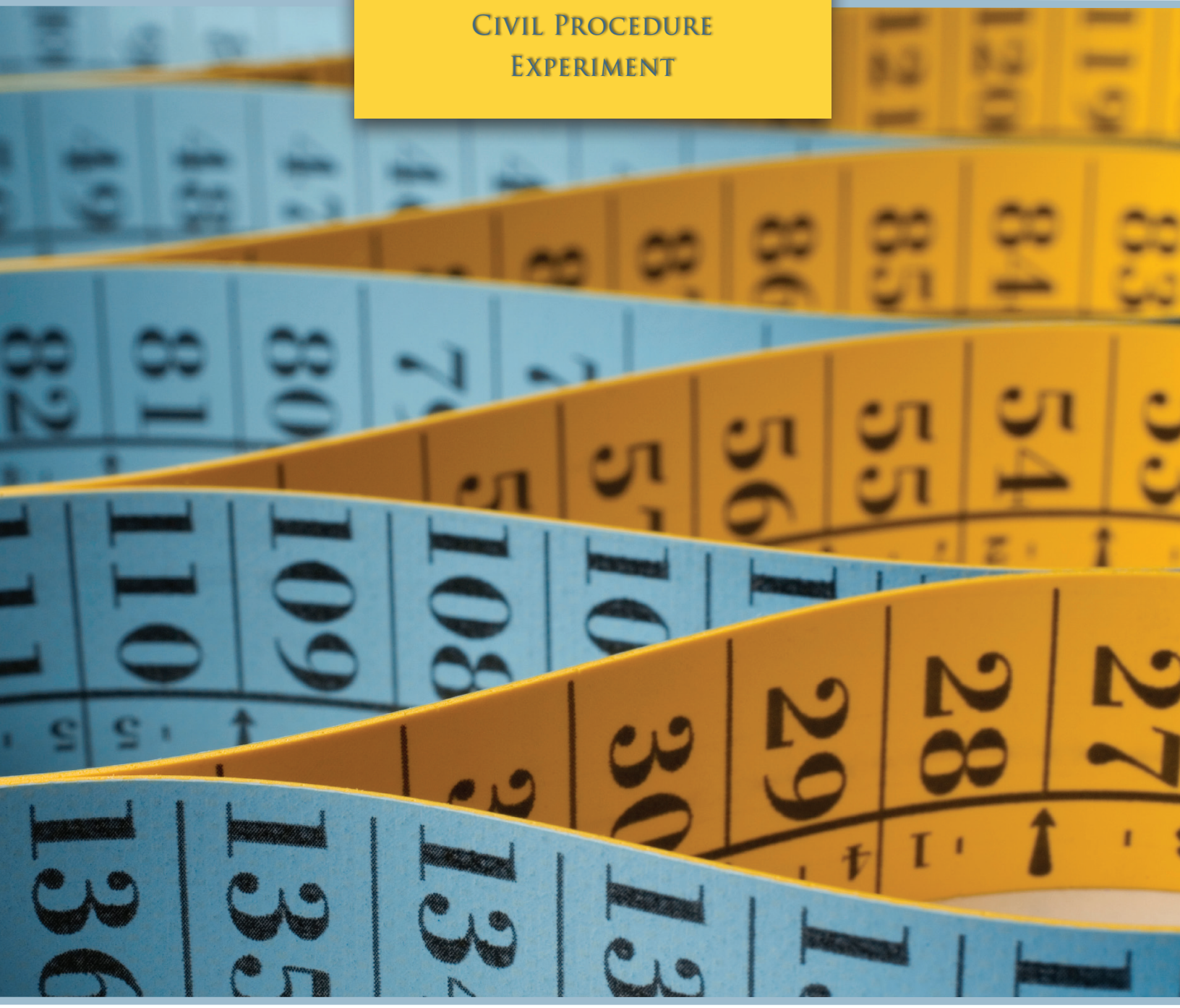
(ii) nine months after the earlier of the date of the first oral deposition or the due date of the first response to written discovery.

(2) **Total time for oral depositions.** Each side may have no more than 50 hours in oral depositions to examine and cross-examine parties on the opposing side, experts designated by those parties, and persons who are subject to those parties' control. "Side" refers to all the litigants with generally common interests in the litigation. If one side designates more than two experts, the opposing side may have an additional six hours of total deposition time for each additional expert designated. The court may modify the deposition hours and must do so when a side or party would be given unfair advantage.

(3) **Interrogatories.** Any party may serve on any other party no more than 25 written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate interrogatory.

Measuring Rule 16.1:

Colorado's Simplified Civil Procedure Experiment



Rule One Initiative

IAALS
Empowering Improvement. Advancing Excellence.
Institute for the Advancement of the American Legal System
University of Denver

SJI
State Justice Institute

MEASURING RULE 16.1: COLORADO'S SIMPLIFIED CIVIL PROCEDURE EXPERIMENT

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IAALS, the Institute for the Advancement of the American Legal System, is a national independent research center at the University of Denver dedicated to continuous improvement of the process and culture of the civil justice system. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications, and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models, and will to advance a more accessible, efficient, and accountable civil justice system.

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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, *Rule One Initiative* empowers, encourages, and enables continuous improvement in the civil justice process.

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I. EXECUTIVE SUMMARY

Over eight years ago, the Colorado Supreme Court put in place a new pretrial procedure for district court actions involving claims of $100,000 or less between any two parties. The idea behind Colorado Rule of Civil Procedure 16.1 ("Rule 16.1") was to provide a simpler process for relatively small cases, with more extensive disclosures and essentially no discovery followed by a more expedited trial. It is an optional procedure, with a corresponding cap on recovery. As interest in streamlined pretrial procedures, case differentiation, and voluntary processes grows, it is important to examine one such rule that has been in place for some time. Through this evaluation, IAALS, the Institute for the Advancement of the American Legal System at the University of Denver, attempts to answer the question: What has happened with Rule 16.1 in Colorado?

Rule 16.1 is intended to be the default procedure, but any party may opt out and the case will proceed under the standard pretrial process. How often, and in what circumstances, is Rule 16.1 used?

IAALS compiled and analyzed docket data from a sample of cases closed in 2010, and conducted in-depth interviews with attorneys and judges in July 2012.

- It is the general impression of the bench and bar that the procedure is not regularly used. In fact, the parties did not opt out in 62% of studied cases, and Rule 16.1 thus applied to the majority of potentially eligible cases.

- However, 70% of the Rule 16.1 cases were resolved—dropped, settled, closed by the court, or default judgment entered—without any appearance by the defendant(s) in the case. Thus, it would be an overstatement to say that the rule actually impacted a majority of cases. Where the plaintiff did not opt out of Rule 16.1 but there was no appearance by the defendant(s), the provisions of the simplified procedure were not invoked. In fact, fewer than 20% of all studied cases used Rule 16.1 *and* had any level of defendant participation.

- Rule 16.1 cases were overwhelmingly consumer credit cases (i.e., debt collection on credit card or revolving credit account) or other straightforward contract cases (e.g., breach of promissory note on a vehicle or house) with fixed or liquidated damages.

- Rule 16.1 cases tended to have relatively few parties, and as the number of parties increased, so did the likelihood that a party opted out of the procedure.

- Attorneys regularly opt out of Rule 16.1. Rule 16.1 was used in only 30% of studied cases in which all parties had representation, while the rate of use increased substantially in cases with at least one pro se party and cases in which the defendant(s) never appeared. Only about 15% of Rule 16.1 cases had all parties represented by counsel. Attorneys interviewed reported that they opt out because of the extent to which the rule ties their hands, both with respect to discovery and with respect to the ultimate damage recovery.

- Judges interviewed reported having very little contact with Rule 16.1 cases. In any event, they say that they do not manage these cases differently from other cases on the docket. Courts do not appear to give priority to Rule 16.1 cases in setting hearings and trials. In addition, judges generally do not affirmatively suggest that parties should consider Rule 16.1 when they hold pretrial conferences or otherwise.

- Rule 16.1 cases do not appear to have a higher bench trial rate, and none of the Rule 16.1 cases were resolved by a jury trial.

Rule 16.1 was implemented to reduce the time and cost burden of civil litigation in smaller cases. What has been the impact of Rule 16.1 in cases in which it is used?

Using statistical modeling techniques, IAALS compared cases in which Rule 16.1 was used and cases in which the litigants opted out. The analysis was conducted within two groups of cases: 1) actions designated in an initial pilot of Rule 16.1 (before the rule had permanent and statewide application), and 2) cases closed in 2010 in which the defendant(s) appeared.

- There is mixed evidence on whether Rule 16.1 influences the time it takes to resolve a case. While there is some indication of reduced time to resolution, other factors such as the court and the case type appear to play an important role and may thus mask the impact of the procedure.

- There is also mixed evidence on whether Rule 16.1 influences the number of court appearances.

- However, there is strong evidence that Rule 16.1 cases have significantly lower levels of motions filed (66% fewer within the initial pilot project and 37% fewer within the set of cases closed in 2010). This can be used as an indicator of decreased costs both to the litigants and to the court.

- Attorneys and judges were spilt between those who find the Rule 16.1 process to be beneficial and those who find it to be detrimental.

The challenge for those committed to making the civil justice process more accessible and less expensive is to be able to learn from the successes and failures of innovations. What lessons can be learned from the Rule 16.1 experience?

- While there are indications that Rule 16.1 may have some of its intended benefits when used, the optional rule is not frequently used in cases truly invoking the pretrial process.

- Structuring a rule in terms of amount in controversy and capping damages recovery may cause parties to opt out unless the damages are liquidated or certain and considerably less than the cap.

- Attorneys and judges alike expressed that differentiated rules schemes in the same court are difficult to manage. Cases tend to be treated the same irrespective of the applicable rules, or the differentiation becomes a source of annoyance rather than a benefit. There appears to be a preference for a rules scheme that is all-inclusive, with sufficient flexibility to accommodate a process appropriate to each case.

II. INTRODUCTION

In 2004, Colorado implemented the voluntary Rule 16.1 on a statewide basis, with the hope of providing a more efficient route to trial for civil cases involving less than $100,000 in monetary damages. The procedure drew inspiration from criminal procedure, and the idea that disputes can be justly resolved simply by filing the pleadings, disclosing the evidence, and proceeding to disposition.[1] The aim was to increase access to courts by addressing the slow, expensive, and often contentious nature of civil discovery.[2]

This report is the culmination of a comprehensive empirical study of the operation and effects of Rule 16.1. Has the procedure fulfilled its promise? If not, why not? And what lessons can be learned as rulemakers grapple with how best to "secure the just, speedy, and inexpensive determination of every action"?[3] This information will be useful not only for Colorado, but for jurisdictions around the country seeking to improve the civil justice process. It will be particularly valuable for those interested in streamlined pretrial procedures, case differentiation, and voluntary processes.

III. THE SPECIFICS OF RULE 16.1

To make effective use of the data contained in this report, it is important to understand the specifics of Rule 16.1. As this research demonstrates, the intricacies of a procedure can bear on its reception among the bench and bar as much as the overall approach or intent. In common parlance, "the devil is in the details." For ease of reference, the rule is set forth in its entirety in Appendix A.

A. APPLICABILITY

Rule 16.1 applies to civil actions in Colorado district court, the general jurisdiction state trial court.[4] The rule constitutes a separate pretrial "track," which is intended to be the default procedure for civil cases unless: 1) the case has been specifically exempted, or 2) a party timely opts out of the rule. The chart in Figure 1 shows which cases are exempted from Rule 16.1.

In calculating the amount in controversy, the $100,000 ceiling includes attorney fees, penalties, and punitive damages (if any), but excludes interest and costs.[5] In addition, the amount to be considered is between any two parties, rather than the amount sought by or against multiple

Figure 1: Cases Specifically Exempted from Rule 16.1

Amount in Controversy
Any party seeks a monetary judgment from any other party in excess of $100,000
Case Type
Class actions
Domestic relations
Juvenile
Mental health
Probate
Water law
Forcible entry and detainer
Rule 106[1]
Rule 120[1]
"Other similar expedited proceedings"

[1] Richard P. Holme, *Back to the Future--New Rule 16.1: Simplified Procedure for Civil Cases Up to $100,000*, 33 COLO. LAW. 11, 12 (May 2004).
[2] *Id.*; COLO. R. CIV. P. 16.1 (a)(2) (2011).
[3] COLO. R. CIV. P. 1(a).
[4] COLO. CONST. art. VI, §9; COLO. R. CIV. P. 16(a)(1).
[5] COLO. R. CIV. P. 16.1(b)(2), (c). Within the context of Rule 16.1, the term "interest" is intended to encompass pre-judgment and post-judgment interest *on* damages, but not interest sought *as* damages. Holme, *supra* note 1, at 16. Attorney fees count toward the limitation, even when a statute or contract designates recoverable attorney fees as "costs." *Id.* Paralegal charges are properly characterized as attorney fees. *Morris v. Belfor USA Group, Inc.*, 201 P.3d 1253, 1261-63 (Colo. App. 2008).

parties combined.[6] Rule 16.1 also applies to actions seeking purely equitable relief, such as injunctions and declaratory judgments.[7]

Classification of a case is initially the responsibility of the filing party, who submits a civil case cover sheet indicating whether Rule 16.1 applies, and if it does not apply, whether the determination is based on the amount in controversy or type of case.[8] A separate cover sheet must also accompany any subsequent pleading that contains a claim (i.e., amended complaint, counterclaim, cross-claim, or third party complaint). Once any cover sheet indicates that Rule 16.1 does not apply, the case will not proceed under the procedure.

Even if Rule 16.1 applies as indicated on the cover sheet(s), any party may remove the case from the procedure by filing a "notice to elect exclusion" no later than 35 days[9] after the case is "at issue."[10] No explanation is required, although both the litigant and the attorney (if any) must sign the notice.[11]

There is no mechanism or standard for review of the parties' designation of the case, with respect to either the cover sheet(s) or a notice to elect exclusion. As a result, the Rule 16.1 classification, based on an assessment of the case type or the level of damages, is completely within the control of the parties in the first instance.

If the window for electing exclusion closes without any party having done so, the case is generally required to proceed under Rule 16.1. However, at any point prior to trial, a party may file a motion to terminate application of the rule. If the court finds "substantially changed circumstances sufficient to render [application] unfair," as well as good cause for the timing of the motion, the court must grant the motion and Rule 16.1 will no longer apply.

It should also be noted that in actions seeking more than $100,000 against any one party, the parties may file a stipulation to be governed by Rule 16.1. This must be done within 45 days of the at-issue date.[12]

Hence, for all practical purposes, parties may opt in or opt out of Rule 16.1's purview.

B. THE PROCESS

Rule 16.1 essentially replaces discovery mechanisms with extensive disclosures, signed by the disclosing party under oath.[13] The text of the rule summarizes the procedure as follows:

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[6] COLO. R. CIV. P. 16.1(a)(2), (b)(2).
[7] Holme, *supra* note 1, at 16.
[8] COLO. R. CIV. P., Form 1.2 (JDF 601), *available at* http://www.courts.state.co.us/Forms/Forms_List.cfm?Form_Type_ID=153.
[9] It should be noted that the deadlines in Rule 16.1 were amended effective January 1, 2012, to reflect the new "rule of 7s" for time computation. While the differences are minimal, we describe the 2011 version of the rule, as it was the version applicable to the cases in this evaluation.
[10] A case is deemed to be "at issue" when all parties have been served and all pleadings have been filed, or all defaults or dismissals have been entered against all non-appearing parties. COLO. R. CIV. P. 16(b)(1).
[11] COLO. R. CIV. P., Form 1.3 (JDF 602), *available at* http://www.courts.state.co.us/Forms/Forms_List.cfm?Form_Type_ID=153.
[12] COLO. R. CIV. P. 16.1(e).
[13] Holme, *supra* note 1, at 21; COLO. R. CIV. P. 16.1(k)(1)(A). Disclosures are required to be signed under oath because they "serve as the principle means of identifying and producing evidence in the case in light of the absence of discovery." Sheila K. Hyatt & Stephen A. Hess, *Rule 16.1 Simplified Procedure for Civil Actions*, West's Colorado Practice Series, 16.1.1 (4th ed., current through the 2010 update).

> This Rule requires early, full disclosure of persons, documents, damages, insurance and experts, and early, detailed disclosure of witnesses' testimony, whose direct trial testimony is then generally limited to that which has been disclosed. Normally, no depositions, interrogatories, document requests or requests for admission are allowed, although examination under C.R.C.P. 34(a)(2) [inspection of real or personal property] and 35 [physical and mental examination of persons] is permitted.[14]

Any party may designate specific information and documentation that the party believes ought to be disclosed.[15] In addition, the rule sets forth case type-specific initial disclosures of routinely expected documents for personal injury and employment actions.[16]

Depositions may be taken only in lieu of trial testimony[17] or for the purpose of obtaining and authenticating documents from a non-party.[18] However, voluntary additional discovery may be conducted if all parties agree, on condition that such discovery cannot be the subject of motions, form the basis for a trial continuance, or constitute recoverable costs.[19]

The trial date is set within 40 days of the at-issue date. The rule specifies that cases proceeding under Rule 16.1 are to be given "early trial settings, hearings on motions, and trials."[20] However, the rule does not mandate assigning priority to Rule 16.1 cases over other cases.

C. Cap On Damages

Under Rule 16.1, recovery from any one party is limited to $100,000, and any verdict in excess will be reduced to that amount.[21] As with the criteria for inclusion in the rule, the $100,000 cap includes attorney fees, penalties, and punitive damages (if any), but excludes interest and costs.[22] There are no restrictions on non-monetary relief.[23] Moreover, the cap does not apply if the parties stipulate to be governed by the rule in an otherwise inapplicable case.[24]

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[14] COLO. R. CIV. P. 16.1(a)(2) (emphasis added); *see, e.g.*, *Berry & Murphy, PC v. Carolina Cas. Ins. Co.*, 586 F.3d 803, 805-806 (10th Cir. 2009) (describing, in a diversity claim for insurance coverage of legal malpractice lawsuit, the state court's preclusion of witnesses and ultimate dismissal of the underlying action for failure to provide disclosures in accordance with CRCP 16.1).
[15] COLO. R. CIV. P. 16.1(k)(1)(B)(iii).
[16] COLO. R. CIV. P. 16.1(k)(1)(B)(i).
[17] COLO. R. CIV. P. 16.1(k)(4). This provision was expected to, *inter alia*, allay the significant costs often incurred in connection with scheduling experts to testify at trial. Holme, *supra* note 1, at 23. The court has the discretion to disallow such depositions. *Thompson v. Thornton*, 198 P.3d 1281, 1284 (Colo. App. 2008).
[18] COLO. R. CIV. P. 16.1(k)(3); *see also Thompson*, *supra* note 18, at 1284 ("depositions generally are not available under the simplified procedure for civil actions").
[19] COLO. R. CIV. P. 16.1(k)(9). Essentially, voluntary discovery "must not involve or require any participation by the court." Holme, *supra* note 1, at 23.
[20] COLO. R. CIV. P. 16.1(i).
[21] COLO. R. CIV. P. 16.1(a)(2), (c).
[22] COLO. R. CIV. P. 16.1(b)(2), (c). Within the context of Rule 16.1, the term "interest" is intended to encompass pre-judgment and post-judgment interest *on* damages, but not interest sought *as* damages. Holme, *supra* note 2, at 16. Attorney fees count toward the limitation, even when a statute or contract designates recoverable attorney fees as "costs." *Id.* Paralegal charges are properly characterized as attorney fees. *Morris v. Belfor USA Group, Inc.*, 201 P.3d 1253, 1261-63 (Colo. App. 2008).
[23] COLO. R. CIV. P. 16.1(k)(4), (5).
[24] COLO. R. CIV. P. 16.1(e).

IV. EVALUATION STRUCTURE

A. APPROACH

In 2010, IAALS conducted a survey of Colorado district court judges and attorneys belonging to the Colorado Bar Association Litigation Section to get a preliminary sense of Rule 16.1's effects. In total, 272 attorneys and 50 district court judges provided feedback on many aspects of Rule 16.1. Importantly, a majority of survey respondents associated the rule with reduced litigation time and cost—in comparison to the standard pre-trial procedure—without a perceived decrease in procedural fairness. There was also some indication that the Rule 16.1 trial rate may be higher than the statewide rate for civil cases, a potential indicator of increased access to trial. However, most respondents believed that the rule is used, at most, only occasionally.

The survey provided the basis for designing a more objective study to verify and quantify the role of Rule 16.1 in practice. Therefore, IAALS sought to build on the survey data through triangulation: the technique of combining three or more research methodologies to study the same phenomenon. By viewing Rule 16.1 from multiple perspectives—both quantitative and qualitative—we can provide a more complete picture of its dimensions, while overcoming some of the weaknesses, intrinsic biases, and methodological issues associated with reliance on a single method. Accordingly, this report concludes three phases of study: 1) the initial survey of attorneys and judges, 2) an examination of court docket data, and 3) in-depth interviews with legal practitioners.[25]

As the initial survey methodology and results are set forth in a separate IAALS report,[26] they will not be repeated here. Rather, the methodology and results of the docket study and in-depth interviews are set forth in detail.

B. GOALS

Overall, this study had two main goals. The first goal was to describe the role that Rule 16.1 has come to play in civil litigation in district court throughout the state of Colorado. How often and under what circumstances is the rule employed? What are the general characteristics of Rule 16.1 cases as compared to cases proceeding under the standard procedure? The second goal was to examine the impact of Rule 16.1 in the cases in which it is used. Has the procedure realized its objective of increasing access to trial by reducing the burden of civil litigation? The answers to these questions provide insight into the most appropriate course of action going forward.

V. DOCKET STUDY

For the docket study, available data were limited to that captured by existing electronic systems for the purpose of daily court operations.[27] Because these archival data were designed to serve a function other than research, they did not provide optimal information. However, content analysis of records kept for another purpose does increase accuracy and reduce built-in bias.

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[25] IAALS received approval from the University of Denver's Institutional Review Board for all aspects of this research.

[26] CORINA GERETY, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SURVEYS OF THE COLORADO BENCH AND BAR ON COLORADO'S SIMPLIFIED PROCEDURE FOR CIVIL ACTIONS (2010), *available at* http://iaals.du.edu/library/publications/surveys-of-the-colorado-bench-bar.

[27] Specifically, there are two systems: the Eclipse system for case management and the LexisNexis system for filing documents.

To obtain the information necessary to complete this study, IAALS requested database queries from the Colorado State Court Administrator's Office, which yielded lists of cases meeting certain criteria (e.g., case type and date closed). IAALS researchers then reviewed the electronic court records of those cases selected for study.[28] This allowed us to build databases of case-level information for analysis.[29]

A. The Current Role of Rule 16.1: Cases Closed in 2010

With respect to the goal of describing Rule 16.1's role in civil litigation, it was important to examine recent cases, so as not to base findings on outdated information. Conversely, it was important to capture cases that had reached a conclusion, so as not to base findings on incomplete information. Accordingly, IAALS decided to study cases that the court administratively "closed" during the 2010 calendar year.[30]

1. Methodology

a. Sampling: Counties

The target population consisted of all relevant district court civil cases in every Colorado county. There are a total of 64 counties in the state: too many to keep the size of the study manageable. Accordingly, a sampling frame of geographically and demographically dispersed counties was selected for study as shown in Figure 2.

Figure 2: Counties Included in Sample

County (14)	Region (6)	Judicial District (12)
Arapahoe	Denver Metro	18th
Denver	Denver Metro	2nd
Jefferson	Denver Metro	1st
Gilpin	Front Range	1st
Larimer	Front Range	8th
Weld	Front Range	19th
Logan	Eastern Plains	13th
Yuma	Eastern Plains	13th
Otero	Eastern Plains	16th
Clear Creek	South Central	5th
El Paso	South Central	4th
Huerfano	South Central	3rd
Rio Grande	Southwest	12th
Mesa	Northwest	21st

These counties comprise 21% of Colorado's counties. They were selected using a Multistage Proportionate Cluster sampling approach. With available county attributes from 2010 census data, the CHAID segmentation tool[31] was used to understand key drivers of the 2010 civil caseload (number of relevant civil cases filed) in a particular county. The following factors were found to be statistically significant in explaining case numbers: 1) population density (this was the most important factor); 2) household income (in particular, in the $100,000-$149,000 per year range); and 3) occupation type (in particular, "management, business and arts" and "natural resources, construction and maintenance"). By incorporating these factors into the model, we were able to explain 85% of the variation in the number of case filings. This is the amount of insight the model provides over random chance, and this figure is considered strong.[32] Accordingly, by examining the 14 selected counties, the study presents a fairly broad picture of district court civil litigation in Colorado.

[28] IAALS did not have access to information classified as "sealed" or "suppressed."
[29] IAALS thanks the Colorado Judicial Department for its cooperation in allowing access to public court records for the purpose of this study.
[30] Because cases can be closed and reopened multiple times, the cases were selected for study if the *initial* closing event occurred in 2010.
[31] CHAID stands for *Chi*-squared Automatic Interaction Detector. It is one of the oldest decision tree classification methods.
[32] This number is the "gain" or "lift" above the baseline. For example, a 100% gain means that all factors affecting case filings are explained by the model. Here, only 15% of that which explains case filings is not explained.

B. Sampling: Cases

Even after limiting the number of counties, there were more than 14,000 cases in the sampling caseload—the caseload after irrelevant case categories were removed—again, too many for a manageable study.[33] Accordingly, a stratified proportionate sampling approach was used to determine an appropriate sample size to represent each studied county. The sample size estimation was based on "a priori" Power Analysis for a statistical Analysis of Variance test (ANOVA). For a 99% power level and 0.25 effect size,[34] the total number of cases in the sample would need to be 529.

The sample was stratified by the total sampling caseload in each county for the distribution shown in the chart below. The "sample size" column shows the minimum number of cases from each county required for the sample as a whole. However, in counties with fewer than 50 total cases, drawing a census rather than a very small sample reduced sampling error and the effects of potential outliers. In addition, in counties with a higher caseload but with fewer than 50 cases in the sample, the number of studied cases was increased to 50. Accordingly, the "actual review" column shows the actual number of cases studied. For counties with an applicable caseload of less than 50, the number of cases reviewed may not match the sampling caseload because some cases were removed. Please refer to the section that follows for a full description of included and excluded cases.

Figure 3: Cases Included in Sample

County	Region	Sampling Caseload	Sample Size	Actual Review
Arapahoe	Denver Metro	2,596	95	95
Denver	Denver Metro	4,035	148	148
Jefferson	Denver Metro	2,176	80	80
Gilpin	Front Range	31	1	27
Larimer	Front Range	1,068	39	50
Weld	Front Range	981	36	50
Logan	Eastern Plains	47	2	37
Yuma	Eastern Plains	20	1	20
Otero	Eastern Plains	54	2	42
Clear Creek	South Central	36	1	28
El Paso	South Central	2,666	98	98
Huerfano	South Central	43	2	33
Rio Grande	Southwest	41	1	30
Mesa	Northwest	589	22	50
14 Counties	**7 Regions**	**14,383 Cases**	**529 Sample**	**785 Studied**

[33] The exact number calculated was 14,383. While this number excludes irrelevant cases that could be categorically removed prior to review, it includes those cases and case type categories requiring individual review to determine inclusion or exclusion. Please refer to the section below, entitled "Scope: Included and Excluded Cases."

[34] The power level refers to the probability of making a Type I error with the sample (concluding that there is a difference between two populations when in fact there is no difference). Here, the probability of making such an error is $\alpha = 0.01$, and the probability of drawing a correct conclusion from the data in the sample is 0.99 or 99%. The effect size is the amount of change that can be detected. An effect size of 0.25 can detect a change of 25% or more. Because larger samples are required to detect smaller changes, a medium effect size of 0.25 is often recommended.

In total, 785 cases were included in the study. In addition, the actual sampling caseload was smaller than the number indicated above, due to the removal of some cases as explained below. Together, the larger sample and the smaller sampling caseload increase the power/effect size calculation and provide additional strength to the study.[35]

C. Scope: Included and Excluded Cases

As discussed above, case types categorically deemed irrelevant to Rule 16.1 were removed prior to sampling, and thus are not included in the caseload numbers for sampling purposes. Other types of cases were removed after sampling, when individual review made clear that they should not be included in the study. For those counties from which a sample was taken, the removed cases were replaced through random selection of another case. For those counties from which a census was drawn, the removed cases were not replaced. Essentially, there are five categories of cases excluded from the dataset:

1) Cases expressly excluded by the language of Rule 16.1.[36]

2) Cases suggested for exclusion by the author of a Colorado Judicial Branch Planning and Analysis study, completed in 2005, on how parties in civil cases were using Rule 16.1. These cases fall into the following general categories, which do not implicate the provisions of Rule 16.1: 1) non-adversarial proceedings, (e.g., registration of foreign judgments); 2) cases originating within a government entity or an administrative agency (e.g., workers' compensation); 3) cases in the nature of appellate review (e.g., county court appeals); and 4) cases designated as "expedited" proceedings (e.g., public nuisance). All of the case types falling into this category are listed below with "earlier study" provided as the reason for exclusion.[37]

3) Cases similar to those listed in the second category above, which do not implicate the provisions of Rule 16.1, but that were not specifically mentioned in the earlier study. Examples include: contempt citations not brought within the context of a larger case, ex parte motions for the appointment of a receiver, and motions to approve the formation of a special district. All of the case types falling into this category are listed below with "different process" provided as the reason for exclusion.[38]

4) Cases that were transferred between courts or consolidated with other cases. This was done to prevent double counting, as well as to help ensure accurate case analysis and time to disposition calculations.[39]

5) Those cases that exist in the case management systems only as a blank administrative record, the result of a test or conversion from one software program to another.

The following table provides a comprehensive list of excluded case types, as well as the rationale for not including them and the point at which removal occurred.

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[35] The study is stronger than a 99% power level and 0.25 effect size, and also stronger than a 95% power level and 0.20 effect size.

[36] It should be noted that this precludes a determination of the extent to which parties elect to use the rule in otherwise excluded case types. Based on the initial survey results, the number of such cases is believed to be quite small or non-existent.

[37] Leah Rose-Goodwin, *A Preliminary Analysis of How Parties in Civil Cases are Using C.R.C.P. 16.1*, Colorado Judicial Branch Planning and Analysis Division, 15-17 (June 21, 2005).

[38] Such cases were removed only if it was absolutely clear that the case was not subject to the typical pretrial process. Doubts were resolved in favor of inclusion because it would be important to know whether Rule 16.1 was being used under differing interpretations of the rule.

[39] This assumes that there are not certain case types that are transferred or consolidated at higher rates than others.

Figure 4: Cases Excluded from Study

Case Type	Reason for Exclusion	When Removed	In Sampling Caseload?
Administrative test or record conversion	Blank record (5)	If coded as such – prior to sampling; If not coded – after sampling	If coded – No If not coded – Yes
Class action	Expressly excluded (1)	After sampling	Yes
Consolidated with at least one other case	No single court record (4)	If coded as such – prior to sampling; If not coded – after sampling	If coded – No If not coded – Yes
Contempt citation (if sole purpose of the case)	Different process (3)	After sampling	Yes
County court counterclaim	No single court record (4)	If coded as such – prior to sampling; If not coded – after sampling	If coded – No If not coded – Yes
County or municipal appeal	Earlier study (2)	Prior to sampling	No
Distraint warrant	Earlier study (2)	Prior to sampling	No
Domestic relations	Expressly excluded (1)	Prior to sampling	No
Ex parte appointment of receiver (if sole purpose of the case)	Different process (3)	After sampling	Yes
Forcible entry & detainer	Expressly excluded (1)	If coded as such – prior to sampling; If not coded – after sampling	If coded – No If not coded – Yes
Foreign judgment	Earlier study (2)	Prior to sampling	No
Juvenile cases	Expressly excluded (1)	Prior to sampling	No
Mental health cases	Expressly excluded (1)	Prior to sampling	No
Name change	Earlier study (2)	Prior to sampling	No
Other cases not initiated by complaint or petition	Different process (3)	After sampling	Yes
Out of state subpoena	Different process (3)	After sampling	Yes
Perpetuation of testimony	Different process (3)	After sampling	Yes
Probate cases	Expressly excluded (1)	Prior to sampling	No
Public nuisance	Earlier study (2)	Prior to sampling	No
Removed to federal court	No single court record (4)	If coded as such – prior to sampling; If not coded – after sampling	If coded – No If not coded – Yes
Restraining order	Earlier study (2)	Prior to sampling	No
Review of local government	Earlier study (2)	Prior to sampling	No
Rule 106[40]	Expressly excluded (1)	If coded as such – prior to sampling; If not coded – after sampling	If coded – No If not coded – Yes
Rule 120 only[41]	Expressly excluded (1)	If coded as such – prior to sampling; If not coded – after sampling	If coded – No If not coded – Yes
Seal criminal conviction	Earlier study (2)	Prior to sampling	No
Seal criminal record	Earlier study (2)	Prior to sampling	No
Special district	Different process (3)	After sampling	Yes
Substitution of bond	Different process (3)	After sampling	Yes

[40] Rule 106 replaced common law remedial writs in Colorado. COLO. R. CIV. PRO. 106.
[41] Rule 120 sets forth the procedure for authorizing a foreclosure sale under a power of sale contained in an instrument. COLO. R. CIV. PRO. 106.

Case Type	Reason for Exclusion	When Removed	In Sampling Caseload?
Transfer of structured settlement	Different process (3)	After sampling	Yes
Transferred between different courts	No single court record (4)	If coded as such – prior to sampling; If not coded – after sampling	If coded – No If not coded – Yes
Venue changed	No single court record (4)	If coded as such – prior to sampling; If not coded – after sampling	If coded – No If not coded – Yes
Water law	Expressly excluded (1)	Prior to sampling	No
Workman's compensation	Earlier study (2)	Prior to sampling	No
Writ of habeas corpus	Earlier study (2)	Prior to sampling	No

After removal of the categorically excluded cases but before sampling, we removed the lengthiest 10% of cases, based on time to the first closing event, to moderate the effects of outliers. Once sampling was complete, 31 standard court case type categories remained in the study. The following table provides a list of included case types, as well as the portion of each type that appeared in the random sample of studied cases.

Figure 5: Existing Court Case Type Categories Included in Study

Case Type	Number in Sample	Percentage of Studied Cases	Percentage of Sampling Caseload
Breach of contract	145	18.5%	18.1%
Breach of warranty	2	0.3%	0.2%
Condemnation	1	0.1%	0.3%
Confirm arbitration award	3	0.4%	0.3%
Declaratory judgment	13	1.7%	1.9%
Determination of interests	1	0.1%	0.3%
Foreclosure other than Rule 120	22	2.8%	3.1%
Fraud	6	0.8%	0.9%
Goods sold and delivered	15	1.9%	1.8%
Injunctive relief	18	2.3%	2.5%
Landlord-tenant	2	0.3%	0.5%
Lien	1	0.1%	0.1%
Malpractice	8	1.0%	1.3%
Mechanics lien	15	1.9%	1.4%
Money	265	33.8%	30.6%
Negligence	14	1.8%	2.4%
Note	32	4.1%	4.3%
Other	27	3.4%	5.6%
Property damage	2	0.3%	0.3%
Personal injury	28	3.6%	4.5%
Personal injury – motor vehicle	91	11.6%	13.2%
Public utilities commission	0	0.0%	0.0%
Possession	0	0.0%	0.0%
Quiet title – Rule 105	35	4.5%	1.5%
Replevin	33	4.2%	2.8%

Case Type	Number in Sample	Percentage of Studied Cases	Percentage of Sampling Caseload
Sexual harassment	0	0.0%	0.0%
Specific performance	2	0.3%	0.1%
Services rendered	2	0.3%	1.5%
Wrongful death	0	0.0%	0.2%
Wages	2	0.3%	0.3%
Wrongful death – motor vehicle	0	0.0%	0.1%
Total	**785**	**100.0%**	**100.0%**

For purposes of understanding the role of Rule 16.1 in civil litigation, it is important not to put too much emphasis on these standard categories, as the case file reviews revealed a high level of inconsistency in case type coding. This may be attributable, at least in part, to the fact that the categories are not mutually exclusive. In addition, each case is classified by the filing party or attorney, and hence, the classifications may vary considerably across the caseload. For example, cases involving the breach of a promissory note secured by real property were found across the following categories: Contract, Declaratory Judgment, Foreclosure, Injunctive Relief, Money, Note, Other, Rule 105 Quiet Title, and Specific Performance. Likewise, the Money category contains a diversity of cases, ranging from credit card debt collection to construction defect actions.

Due to this variability, meaningful distinctions based on case type required reclassification. IAALS researchers examined the initial complaint in each case in the sample and gave the case a designation based on the contents of the complaint. The following table shows the new case types and the distribution within the sample. There are six broad categories—contract, tort, property, professional relationship, enforcement, and clerical—with the specific breakdown of the actions falling within them listed beneath. This is not an exhaustive list of all potential case types, only those appearing in the sample. The complaint was not available for viewing in a small portion of cases; those cases are listed in a separate row.

Figure 6: IAALS Case Type Categories Included in Sample

Case Type	Number in Sample	Percentage of Sample
TOTAL CONTRACT	**511**	**65.1%**
Breach of lease on personal property (e.g., vehicle, commercial equipment)	12	1.6%
Breach of lease on real property	11	1.4%
Breach of promissory note – secured by personal property (e.g., mobile home, vehicle, business inventory)	61	7.8%
Breach of promissory note – secured by real property (includes monetary judgment, foreclosure, declaratory judgment, deficiency judgment, appointment of receiver, and rescission of foreclosure)	62	7.9%
Breach of promissory note – unsecured (includes breach of settlement agreement)	37	4.7%
Breach of oral contract	2	0.3%
Collections – consumer credit card or revolving credit	204	26.0%
Collections – medical debt	10	1.3%
Declare contract invalid	1	0.1%
Failure to deliver – goods and services	1	0.1%
Failure to pay – goods and services (including professional services)	47	6.0%
Failure to pay – construction work (includes mechanics lien)	33	5.2%
Homeowners association – owner failure to pay assessments	16	2.0%

Case Type	Number in Sample	Percentage of Sample
Homeowners association – association failure to meet obligations	2	0.3%
Insurance coverage dispute (includes declaratory judgment)	12	1.5%
TOTAL TORT	**166**	**21.2%**
Assault	4	0.5%
Construction defect	6	0.8%
Fraud/misappropriation/civil theft	8	1.0%
Medical negligence (includes nursing home care)	8	1.0%
Motor vehicle accident	100	12.7%
Personal injury – dog bite	3	0.4%
Personal injury – premises liability (includes wrongful death)	22	2.8%
Property damage – personal property	2	0.3%
Property damage – real property	8	1.0%
Wrongful action by government employee working in official capacity	5	0.6%
TOTAL PROPERTY	**47**	**6.0%**
Condemnation	1	0.1%
Property dispute	4	0.5%
Real estate transaction dispute	3	0.4%
Spurious lien	4	0.5%
Title to real property (e.g., quiet title, partition)	35	4.5%
TOTAL PROFESSIONAL RELATIONSHIP	**19**	**2.4%**
Employment relationship (includes breach of employment contract, wrongful termination, and wage violations)	11	1.4%
Business relationship (includes dissolution and merger)	8	1.0%
TOTAL ENFORCEMENT	**17**	**2.2%**
Civil forfeiture for criminal activity	1	0.1%
Enforcement action by government agency (zoning, licensing, public consumer protection enforcement)	10	1.3%
Private right of action (communications act violation, consumer protection act violation, election law violation)	5	0.6%
Securities violation	1	0.1%
TOTAL CLERICAL	**9**	**1.1%**
Accounting (includes adjustment after audit)	5	0.6%
Confirm arbitration award	4	0.5%
TOTAL CASES CATEGORIZED	**769**	**98.0%**
Complaint unavailable	16	2.0%
TOTAL SAMPLE	**785**	**100.0%**

Because the sheer number of case types listed above would prove unwieldy for analysis purposes, we generally use the six condensed case types, with the largest categories within those types (consumer credit collection, motor vehicle accident, and title to real property) sometimes separated out for additional insight.

2. Rule 16.1 and the Civil Docket

One of the main goals of the docket study was to determine the extent of Rule 16.1's actual use. Contrary to the general impression of the bench and bar, as evidenced in the survey and interview data, Rule 16.1 was used in a

majority of studied cases (490 of 785, or 62.4%). It is important to note that because we do not have reliable amount-in-controversy data, studied cases include those involving more than $100,000. However, the defendant(s) did not appear in more than two-thirds of Rule 16.1 cases (341 of 489, or 69.7%), and thus the provisions of the simplified pretrial process had the opportunity to actually take effect in less than one-third of those cases.

A. Case Types

The highest rate of use is within all contract actions, where the rule technically applied to nearly 80% of cases. The lowest rate of use is within professional relationship disputes, with only about 15% of such cases proceeding under the simplified procedure. The table below displays the frequencies and proportions for the broad IAALS case types.

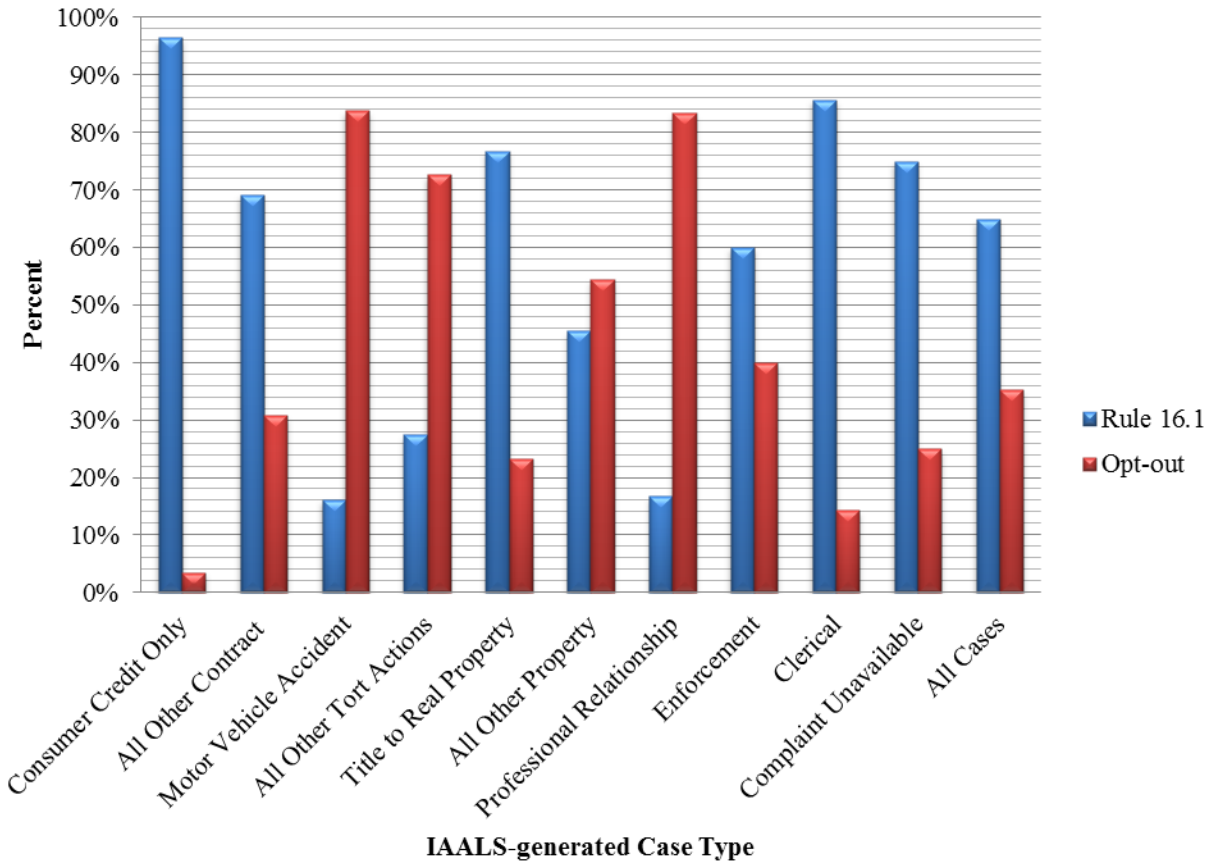
Figure 7: Procedure Used by Case Type

Case Type	Rule 16.1		Opt-out		Unable to Determine		TOTAL	
	n	Percent	n	Percent	n	Percent	n	Percent
CONTRACT	402	78.7%	100	19.6%	9	1.7%	511	100.0%
Consumer Credit Collection Only	*193*	*94.6%*	*7*	*3.4%*	*4*	*2.0%*	*204*	100.0%
All Other Contract Actions	*209*	*68.1%*	*93*	*30.3%*	*5*	*1.6%*	*307*	100.0%
TORT	33	19.9%	128	77.1%	5	3.0%	166	100.0%
Motor Vehicle Accident	*16*	*16.0%*	*83*	*83.0%*	*1*	*1.0%*	*100*	100.0%
All Other Tort Actions	*17*	*25.8%*	*45*	*68.2%*	*4*	*6.1%*	*66*	100.0%
PROPERTY	28	59.6%	13	27.6%	6	12.8%	47	100.0%
Title to Real Property	*23*	*65.7%*	*7*	*20.0%*	*5*	*14.3%*	*35*	100.0%
All Other Property	*5*	*41.7%*	*6*	*50.0%*	*1*	*8.3%*	*12*	100.0%
PROFESSIONAL RELATIONSHIP	3	15.8%	15	78.9%	1	5.3%	19	100.0%
ENFORCEMENT	9	52.9%	6	35.3%	2	11.8%	17	100.0%
CLERICAL	6	66.7%	1	11.1%	2	22.2%	9	100.0%
COMPLAINT UNAVAILABLE	9	56.3%	3	18.8%	4	25.0%	16	100.0%
All Cases	**490**	**62.4%**	**266**	**33.9%**	**29**	**3.7%**	**785**	**100.0%**

Whether Rule 16.1 was applied was not apparent from the court record in 3.7% of cases. For the calculations and descriptions that follow, those 29 cases will be excluded, as they provide little information on the use and efficacy of Rule 16.1.

The following two figures provide a visual depiction of the variability in use of Rule 16.1 when seen through the lens of case type. It is clear from Figure 8 that there are certain case types in which Rule 16.1 is frequently used and others in which there is a strong tendency for parties to opt out.

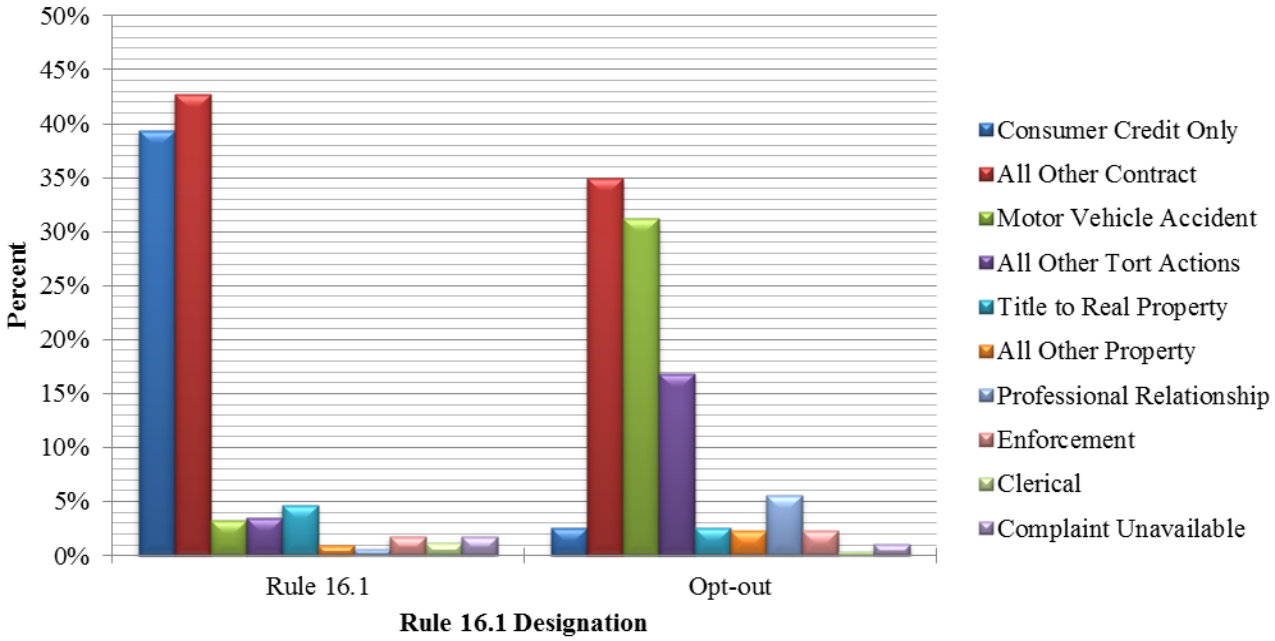
Figure 8: Comparison by Case Type for Rule 16.1 and Opt-Out Rates



Clearly, use of Rule 16.1 is very high in consumer credit collection cases (along with contract cases generally) and quite low in motor vehicle accident cases (along with tort cases generally).

Figure 9 provides information about the case type make-up of each Rule 16.1 designation. Interestingly, the "all other contract" category constituted the largest single case type within both the Rule 16.1 and opt-out categories, while the "consumer credit only" category represented the second largest case type within Rule 16.1 cases but made up one of the smallest proportions of opt-out cases. Both of these categories had the largest number of cases of the sample, but clearly use of Rule 16.1 was much stronger in consumer credit collection cases than in other contract cases.

Figure 9: Case Types Within Each Rule 16.1 Designation



For the 35% of cases that *did not* proceed under Rule 16.1 (266 of 756), more than three-quarters were excluded by the plaintiff through an indication on the cover sheet of the intent to seek more than $100,000. See Figure 10 for the frequencies and proportions of the various ways in which exclusion from Rule 16.1 can occur, considering only non-Rule 16.1 cases.

Figure 10: How Exclusion Occurs In Non-Rule 16.1 Cases

Case Type	Plaintiff Initially Excluded On Cover Sheet–Case Type		Plaintiff Initially Excluded On Cover Sheet–Amount In Controversy		Plaintiff Opted Out After Indicating Rule 16.1 On Cover Sheet		Defendant Opted Out After Plaintiff Indicated Rule 16.1 On Cover Sheet		Total	
	n	Percent	n	Percent	n	Percent	n	Percent	n	Percent
CONTRACT	24	24.0%	64	64.0%	9	9.0%	3	3.0%	100	100%
Consumer Credit Only	*0*	*0.0%*	*3*	*42.9%*	*4*	*57.1%*	*0*	*0.0%*	*7*	100%
All Other Contract	*24*	*25.8%*	*61*	*65.6%*	*5*	*5.4%*	*3*	*3.2%*	*93*	100%
TORT	0	0.0%	121	94.5%	3	2.3%	4	3.1%	128	100%
Motor Vehicle Accident	*0*	*0.0%*	*77*	*92.8%*	*3*	*3.6%*	*3*	*3.6%*	*83*	100%
All Other Tort Actions	*0*	*0.0%*	*44*	*97.8%*	*0*	*0.0%*	*1*	*2.2%*	*45*	100%
PROPERTY	7	53.8%	5	38.5%	1	7.7%	0	0.0%	13	100%
Title to Real Property	*4*	*57.1%*	*2*	*28.6%*	*1*	*14.3%*	*0*	*0.0%*	*7*	100%
All Other Property	*3*	*50.0%*	*3*	*50.0%*	*0*	*0.0%*	*0*	*.0.0%*	*6*	100%
PROF. RELATIONSHIP	1	6.7%	12	80.0%	1	6.7%	1	6.7%	15	100%
ENFORCEMENT	4	66.7%	2	33.3%	0	0.0%	0	0.0%	6	100%
CLERICAL	1	100.0%	0	0.0%	0	0.0%	0	0.0%	1	100%
COMPLAINT UNAVAILABLE	0	0.0%	1	33.3%	0	0.0%	2	66.7%	3	100%
All Cases	**37**	**13.9%**	**205**	**77.1%**	**14**	**5.3%**	**10**	**3.8%**	**266**	**100%**

With respect to exclusion based on case type, there appears to be lingering uncertainty about whether Rule 16.1 applies to certain kinds of actions. The following are very discrete case types in which a portion of the cases proceeded under Rule 16.1, while a portion elected exclusion based on case type.

Figure 11: Case Types Receiving Inconsistent Treatment

Case Type	Proceeded Under Rule 16.1		Excluded Based On Case Type	
	n	Percent	n	Percent
Failure to pay for construction work	18	56.3%	6	18.8%
Title to real property	23	76.7%	4	13.3%
Breach of promissory note secured by real property	41	67.2%	6	9.8%
Breach of promissory note secured by personal property	43	71.7%	9	15.0%
Enforcement action	5	55.6%	3	33.3%

One explanation for the inconsistent treatment may be the interplay with statutory time frames. For example, construction work cases often contain mechanic's lien claims, note cases involving real property often contain foreclosure claims, and note cases secured by personal property often contain replevin claims. Such claims, as well as many enforcement actions, have separate statutory processes but may be combined with claims that proceed under standard civil rules. Rule 16.1 does not provide guidance on these case types or how to handle combined claims. As there were no cases in the sample in which the court changed the designation, similar cases may proceed under a different pretrial process depending upon the plaintiff's interpretation of the rule's applicability.

B. Geography

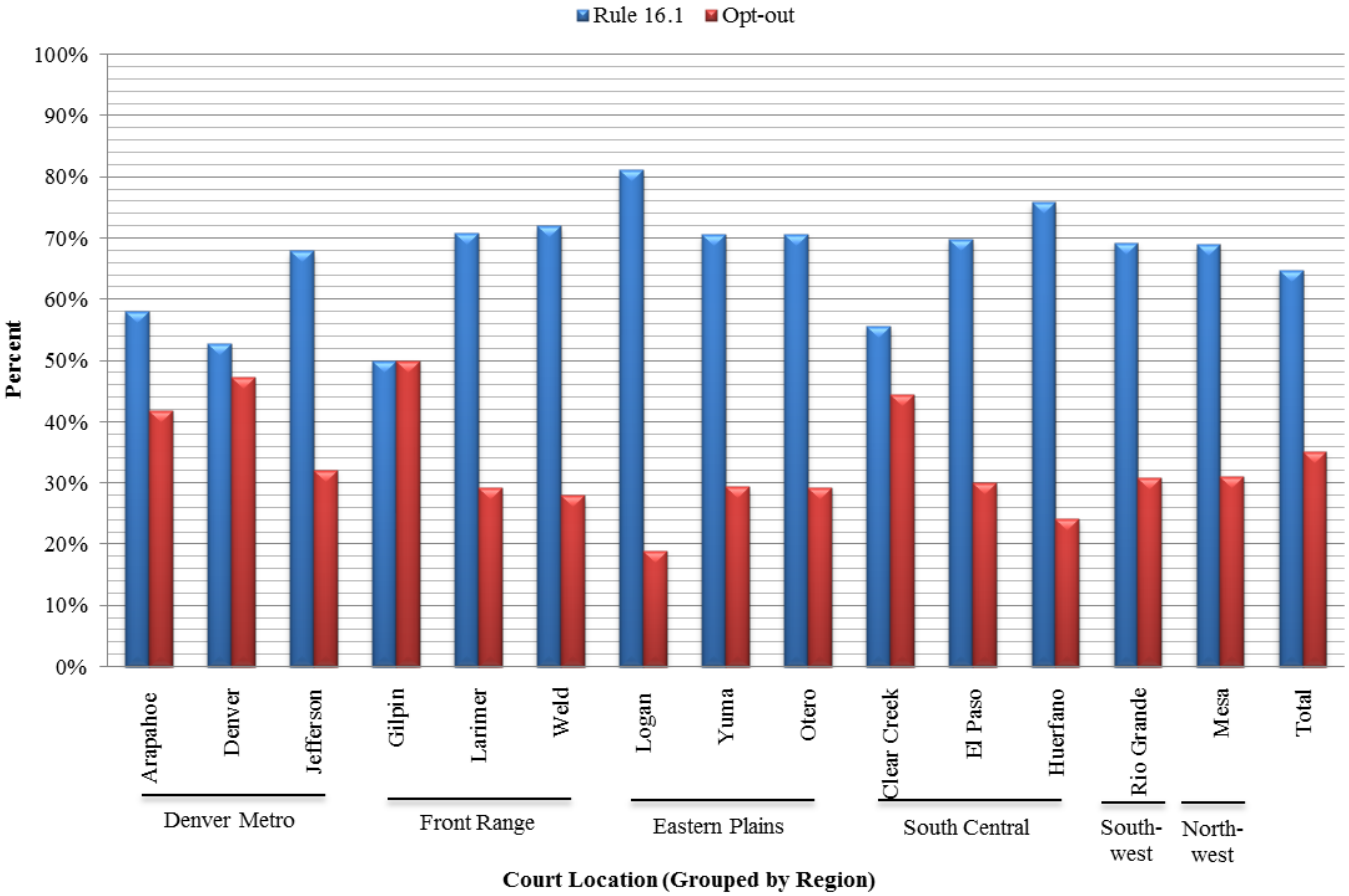
It is also important to consider whether there are any geographical differences in rates of use of Rule 16.1. In fact, Rule 16.1 was used in at least half of studied cases in all counties. The lowest rate was in Gilpin County (50.0%), while the highest rate was in Logan County (81.1%). Because these specific counties are simply a representative sample of all Colorado counties, it is important to consider them by region.

Figures 12 and 13 illustrate the varying degrees of use of Rule 16.1 within each county in the study, grouped by region. There appears to be no clear pattern linking Rule 16.1 designation to region, or to urban and rural areas. It is apparent that cases used Rule 16.1 at a consistently higher rate than they opted out throughout the state, with the sole exception of Gilpin County, where cases proceeded under Rule 16.1 and opted out at equal rates.

Figure 12: Use of Rule 16.1 by Court Location

County	Region	Rule 16.1 Cases		Opt-out Cases		TOTAL	
		n	Percent	n	Percent	n	Percent
Arapahoe	Denver Metro	54	58.1%	39	41.9%	93	100.0%
Denver	Denver Metro	76	52.8%	68	47.2%	144	100.0%
Jefferson	Denver Metro	53	67.9%	25	32.1%	78	100.0%
Gilpin	Front Range	12	50.0%	12	50.0%	24	100.0%
Larimer	Front Range	34	70.8%	14	29.2%	48	100.0%
Weld	Front Range	36	72.0%	14	28.0%	50	100.0%
Logan	Eastern Plains	30	81.1%	7	18.9%	37	100.0%
Yuma	Eastern Plains	12	70.6.%	5	29.4%	17	100.0%
Otero	Eastern Plains	29	70.7%	12	29.3%	41	100.0%
Clear Creek	South Central	15	55.6%	12	44.4%	27	100.0%
El Paso	South Central	65	69.9%	28	30.1%	93	100.0%
Huerfano	South Central	25	75.8%	8	24.2%	33	100.0%
Rio Grande	Southwest	18	69.2%	8	30.8%	26	100.0%
Mesa	Northwest	31	68.9%	14	31.1%	45	100.0%
14 Counties	**7 Regions**	**490**	**64.8%**	**266**	**35.2%**	**756**	**100.0%**

Figure 13: Rule 16.1 Designation Within Each Court Location



3. Characteristics of Rule 16.1 Cases: Parties

A. Parties

1. Number of Parties

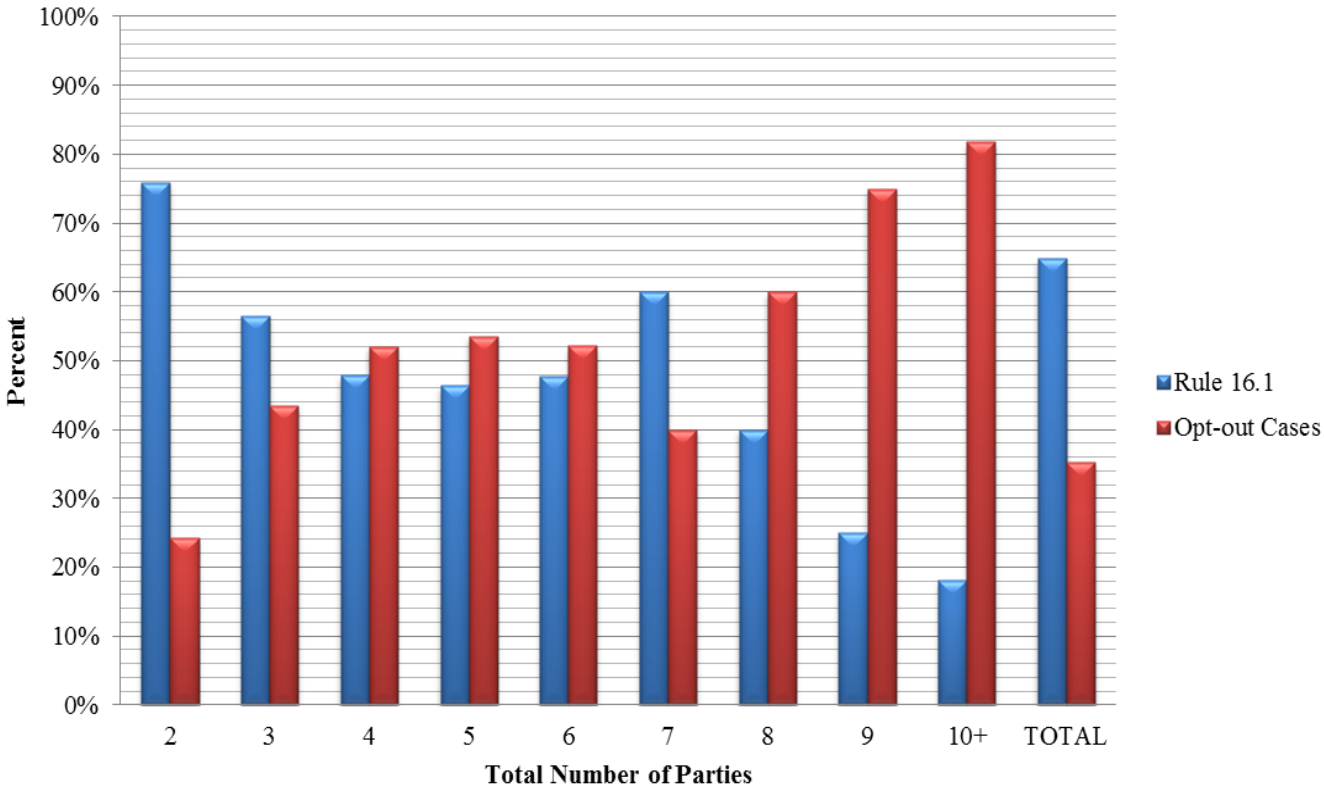
One factor to consider is whether use of Rule 16.1 is associated with the number of parties in a case. As shown in the figure below, the apparent trend is that the fewer the total number of parties in a given case, the more likely the case will proceed under Rule 16.1. Conversely, as the number of parties increases, the likelihood of using Rule 16.1 tends to decrease. This could be due to the increasing complexity of the cases as more parties are added. Alternatively, the heightened tendency to exclude as the number of parties increases may be a function of the concomitant increased number of opportunities to opt out. It should be noted that Rule 16.1 was not used at all in cases with 15 or more parties.

Figure 14: Use of Rule 16.1 by Number of Parties

Total Number of Parties	Rule 16.1		Opt-out Cases		TOTAL	
	n	Percent	n	Percent	n	Percent
2	314	75.8%	100	24.2%	414	100.0%
3	104	56.5%	80	43.5%	184	100.0%
4	34	47.9%	37	52.1%	71	100.0%
5	13	46.4%	15	53.6%	28	100.0%
6	11	47.8%	12	52.2%	23	100.0%
7	9	60.0%	6	40.0%	15	100.0%
8	2	40.0%	3	60.0%	5	100.0%
9	1	25.0%	3	75.0%	4	100.0%
10+	2	18.2%	9	81.8%	11	100.0%
TOTAL	**490**	**64.8**	**266**	**35.2%**	**756**	**100.0%**

Figure 15 provides a visual display of the rate of use and non-use of Rule 16.1 by total number of parties. There is a distinct general pattern. Interestingly, no similar patterns were found upon considering the number of plaintiffs and the number of defendants separately. This may be due to the low proportion of cases with more than two plaintiffs (2.5%) or more than five defendants (3.8%).

Figure 15: Rule 16.1 Designation for Total Number of Parties



II. Representation of Parties

Another consideration with respect to the parties is whether having attorney representation is associated with any difference in the rate of use of Rule 16.1. Because each case in the sample had a different combination of plaintiffs and defendants with varying levels of representation on each side, we created three categories of cases for ease of analysis: 1) all parties represented; 2) at least one pro se party on either side; and 3) none of the defendants appeared in the action. Figure 16 provides the Rule 16.1 designation for these categories. Notably, the defendant(s) did not appear in the majority of all cases (401 of 753, or 53.3%). In addition, this is the category with the highest rate of Rule 16.1 designated cases, followed by cases with a pro se party. Less than one-third of cases with attorney representation for all parties used Rule 16.1.

Figure 16: Use of Rule 16.1 by Representation Categories

Representation Type	Rule 16.1		Opt-out		TOTAL	
	n	Percent	n	Percent	n	Percent
All parties represented	76	30.2%	176	69.8%	252	100.0%
At least one pro se party on either side	72	72.0%	28	28.0%	100	100.0%
Defendant(s) never entered into case	341	85.0%	60	15.0%	401	100.0%
TOTAL	**489**	**64.9%**	**264**	**35.1%**	**753**[42]	**100.0%**

[42] Three cases in the sample had parties that were listed without representation, but were not designated as pro se. These cases were removed for the purpose of examining party representation.

Stated differently, only about 15% of Rule 16.1 cases (76 of 489) had all parties represented by counsel. The remaining 85% of Rule 16.1 cases had at least one pro se party (72 of 489, or 14.7%) or non-appearing defendant(s) (341 of 489, or 69.7%). Due to the high portion of Rule 16.1 cases with non-appearing defendant(s), and thus a resolution before the provisions of the rule could take effect, the simplified procedure had the opportunity to impact only about one in five cases studied (148 of 753, or 19.7%).

B. Resolution

We define resolution as the event that provided a court decision on the status of every substantive claim at the trial level (e.g., dismissal or judgment). Here, we look at the associations between use of Rule 16.1 and case resolution. It is important to remember that the data described below are merely descriptive of the cases and do not speak to whether Rule 16.1 has an effect on how and when cases are resolved.

1. Method of Resolution

For each method of resolution, the figure below shows the portion of cases that proceeded under Rule 16.1, from largest to smallest. Within the sample, 37% of cases were resolved by default judgment and 33% were resolved by settlement, for a total of 70% of cases (532 of 756). Of the cases resolved by default judgment, 90% were Rule 16.1 cases, while only 37% of cases that ultimately settled used Rule 16.1. It is also notable that no Rule 16.1 cases were tried by a jury.

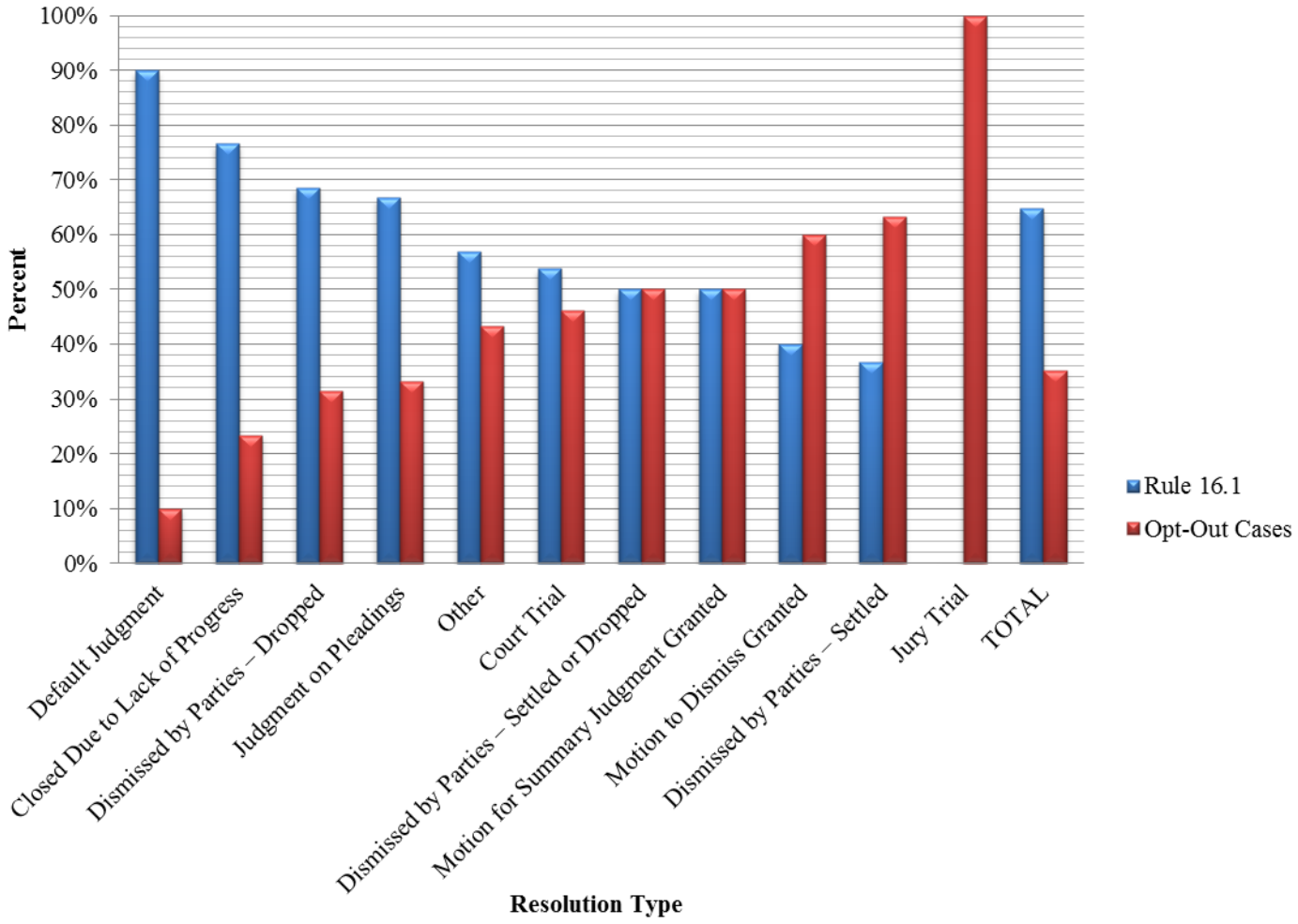
Figure 17: Use of Rule 16.1 by Resolution Method

Resolution Type	Rule 16.1		Opt-Out Cases		TOTAL	
	n	Percent	n	Percent	n	Percent
Default Judgment	254	90.0%	28	10.0%	282	100.0%
Closed Due to Lack of Progress	36	76.6%	11	23.4%	47	100.0%
Dismissed by Parties – Dropped	59	68.6%	27	31.4%	86	100.0%
Judgment on Pleadings	8	66.7%	4	33.3%	12	100.0%
Other[43]	21	56.8%	16	43.2%	37	100.0%
Court Trial	7	53.8%	6	46.2%	13	100.0%
Dismissed by Parties – Settled or Dropped[44]	2	50.0%	2	50.0%	4	100.0%
Motion for Summary Judgment Granted	9	50.0%	9	50.0%	18	100.0%
Motion to Dismiss Granted	2	40.0%	3	60.0%	5	100.0%
Dismissed by Parties – Settled	92	36.7%	159	63.3%	251	100.0%
Jury Trial	0	0.0%	1	100.0%	1	100.0%
TOTAL	**490**	**64.8%**	**266**	**35.2%**	**756**	**100.0%**

Figure 18 provides a visual representation of how the Rule 16.1 designation varies according to the type of resolution. Because the designation is made early in the case and the resolution is generally the concluding substantive event, this data may relate to the types of cases using Rule 16.1.

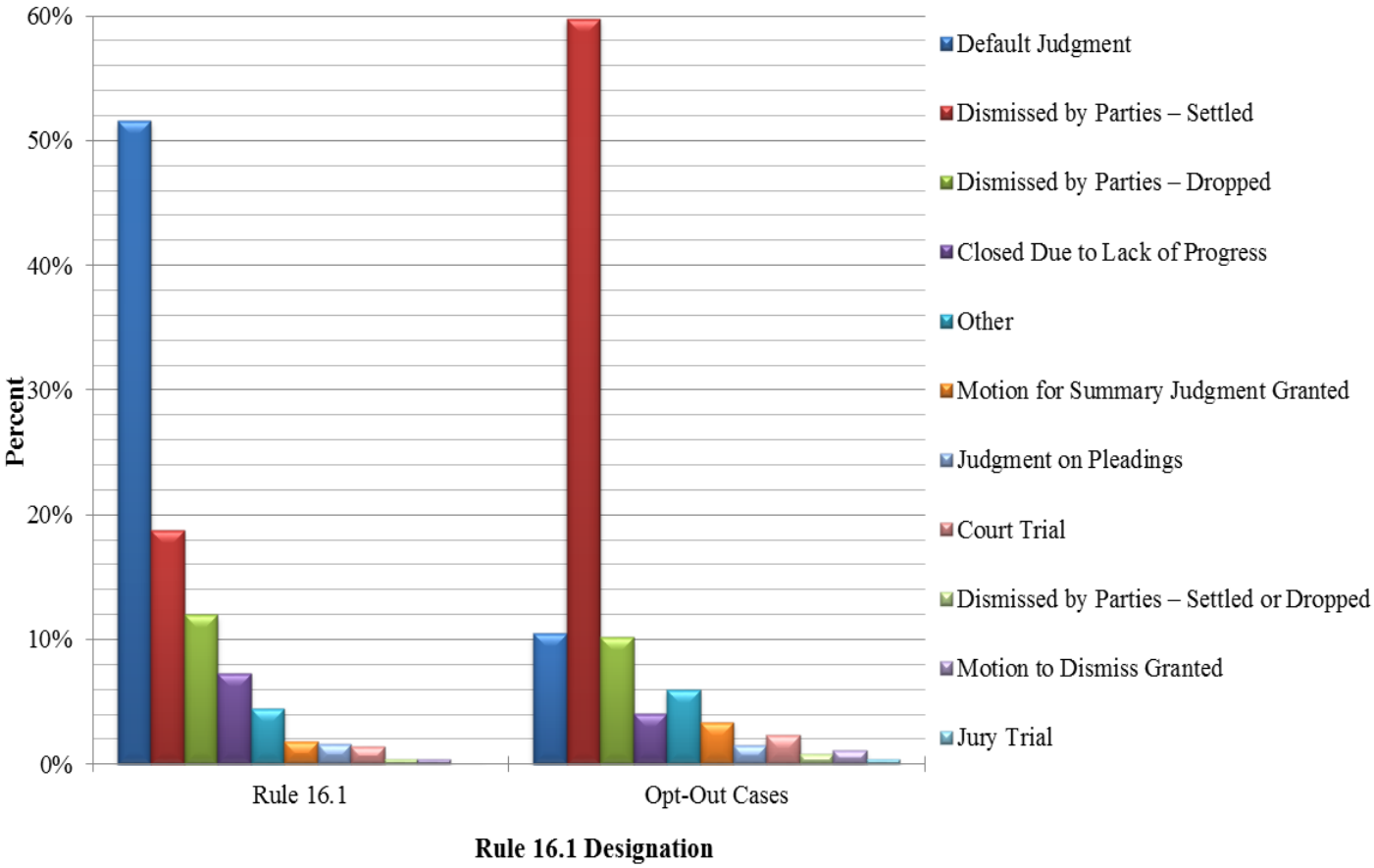
[43] The "Other" resolution type includes cases which were stayed due to a bankruptcy filing, cases in which the matter was resolved at a hearing or court appearance (not trial), cases which were dismissed for a party's failure to comply with a court order, cases in which arbitration was compelled, cases in which a stipulation for confession of judgment was filed, and cases which had not reached resolution by the time of data collection.
[44] This category is used if the researcher was unable to determine whether the case was settled or dropped.

Figure 18: Rule 16.1 Designation for Resolution Type



Shown differently, Figure 19 provides the percentage that each resolution method constituted for all Rule 16.1 cases and all opt-out cases. While default judgment and settlement made up the largest two resolution methods for both designations, Rule 16.1 cases had a vastly higher rate of default judgment, and opt-out cases had a vastly higher rate of settlement.

Figure 19: Method of Resolution Compared with Rule 16.1 Designation



Considering only Rule 16.1 default judgments (the far left bar on the graph above), 51% of those cases (130 of 254) were consumer credit collection only, 37% (94 of 254) were all other contract actions, and 6% (16 of 254) were real property title actions.

II. Time to Resolution

Considering the Rule 16.1 and opt-out designations separately, Figure 20 shows the proportion of cases within each time to resolution category. It is important to remember that these categories were chosen for consistency with model time standards, and they are not evenly spaced (e.g., the category for 1-30 days is one month long, while the category for 181-365 days is six months long). Notably, less than 9% (8.8%) of all cases lasted less than one month, and approximately the same portion of cases (8.4%) lasted more than one year. For Rule 16.1 cases, a plurality (43.1%) resolved within 31-90 days. For opt-out cases, a plurality (49.8%) resolved within 181-365 days.

Figure 20: Time to Resolution by Rule 16.1 Designation

Resolution Time (in Days)	Rule 16.1		Opt-Out Cases		TOTAL	
	n	Percent	n	Percent	n	Percent
1-30 days (within one month)	53	10.8%	13	4.9%	66	8.8%
31-90 days (between one and three months)	211	43.1%	33	12.5%	244	32.4%
91-180 days (between three and six months)	122	24.9%	41	15.6%	163	21.6%
181-365 days (between six months and one year)	86	17.6%	161	49.8%	217	28.8%
365+ (more than one year)	18	3.7%	45	17.1%	63	8.4%
TOTAL	**490**	**100.0%**	**263**	**100.0%**	**753**[45]	**100.0%**

For each resolution time category, Figure 21 shows the portion of Rule 16.1 cases and the portion of opt-out cases. About 80% of cases that resolved within one month were Rule 16.1 cases, while 20% were opt-out cases. It is the opposite pattern for cases that lasted more than one year.

Figure 21: Use of Rule 16.1 by Time to Resolution

Resolution Time	Rule 16.1		Opt-Out Cases		TOTAL	
	n	Percent	n	Percent	n	Percent
1-30 days (within one month)	53	80.3%	13	19.7%	66	100.0%
31-90 days (between one and three months)	211	86.5%	33	13.5%	244	100.0%
91-180 days (between three and six months)	122	74.8%	41	25.2%	163	100.0%
181-365 days (between six months and one year)	86	39.6%	161	60.4%	217	100.0%
365+ (more than one year)	18	28.6%	45	71.4%	63	100.0%
TOTAL	**490**	**65.1%**	**263**	**34.9%**	**753**	**100.0%**

[45] Three cases are excluded from resolution time calculations due to the fact that no resolution has yet been reached in those cases.

Figure 22 provides a visual depiction of time to resolution within the discrete time categories. The Rule 16.1 and opt-out designations create an interesting mirror image.

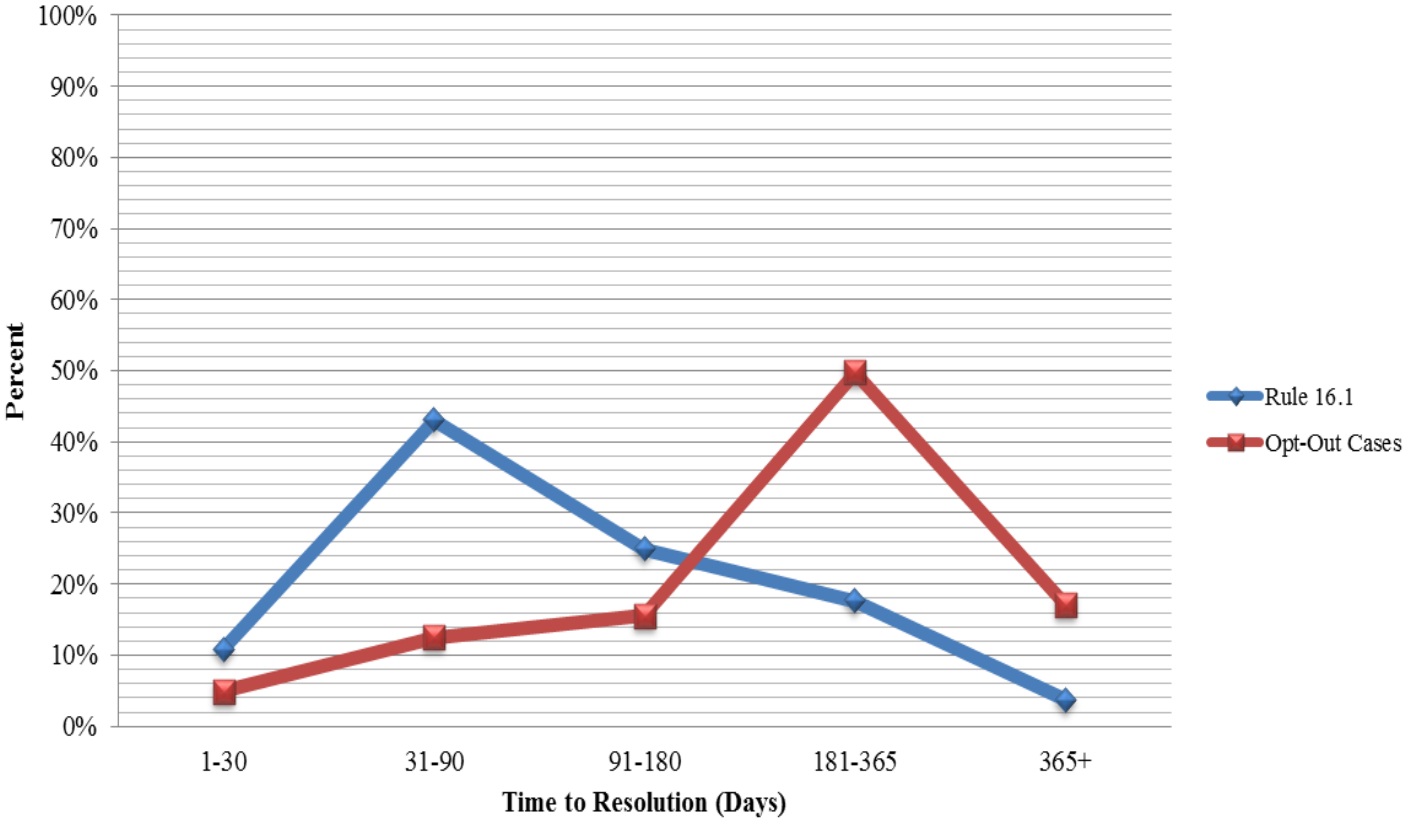


Figure 22: Time to Resolution Compared with Rule 16.1 Designation

Considering only Rule 16.1 cases, a majority (264 of 490, or 53.8%) resolved within 90 days. Of those that resolved early, 53% (140 of 264) were consumer credit collection cases. In addition, 65% of those that resolved early (170 of 264) ended in default judgment.

C. Motions and Court Appearances

We also examined Rule 16.1 and opt-out cases with respect to their relative number of motions and court appearances (i.e., the amount of activity in the case). Again, it is important to remember that these measures are merely descriptive and do not speak to the question of whether Rule 16.1 caused any differences between the two sets of cases.

Figure 23 shows that, in our sample, Rule 16.1 cases had fewer motions filed than opt-out cases. This may be due to the type and complexity of the cases within each designation.

Figure 23: Motions Count by Rule 16.1 Designation

Motions Count			
	Rule 16.1 n=490	**Opt-out n=266**	**TOTAL n=756**
Mean	1.66	3.23	2.24
Median	1	2	1
Mode	1	0	1
Standard Deviation	1.81	4.43	3.11
Minimum	0	0	0
Maximum	20	33	33

Figure 24 shows that Rule 16.1 cases also had fewer court appearances as measured by number of days in which an appearance occurred.[46] Again, this may be due to the type and complexity of the cases within each designation. It is notable that court appearances were relatively infrequent overall, with the median number resting at zero.

Figure 24: Court Appearances by Rule 16.1 Designation

Court Appearances			
	Rule 16.1 n=490	**Opt-out n=266**	**TOTAL n=756**
Mean	0.16	0.46	0.26
Median	0	0	0
Mode	0	0	0
Standard Deviation	0.60	1.03	3.11
Minimum	0	0	0
Maximum	5	7	7

[46] Because the count refers to the number of days during which an appearance occurred, a hearing spanning more than one day may be counted as multiple appearances. Nevertheless, it is still an appropriate measure of court involvement and resources expended.

B. THE IMPACT OF RULE 16.1: THE INITIAL PILOT PROJECT AND CASES CLOSED IN 2010

With respect to the goal of examining Rule 16.1's impact on civil litigation, IAALS decided to analyze two sets of data: 1) cases designated as part of an initial pilot of the simplified procedure and 2) a subset of the cases closed in 2010. Using statistical modeling of the docket data, we examined the impact across four measures: time to resolution, time to the final event, number of motions, and number of court appearances. Within the initial pilot project and within the subset of cases closed in 2010, Rule 16.1 cases were tested against opt-out cases for each measure. Examining the separate but parallel results from these two different time periods provides a better sense of the impact than could be obtained from examining one time period alone.

1. METHODOLOGY

The main challenge for this impact analysis was the identification of comparable cases that did and did not use the procedure. Specifically, because Rule 16.1 has an amount in controversy criteria for eligibility but is also completely voluntary, it can be difficult to discern whether the rule was not used in a particular action because it was an ineligible case (claim over $100,000) or because it was an eligible opt-out case (claim under $100,000). Although the cover sheet may give some indication, the initial designation can be subject to manipulation.[47] In addition, neither the pleadings nor any other filings are required to specify the damages amount sought, although this does occur in some cases.

A. SCOPE

In an effort to minimize the problem of identifying comparable cases, IAALS decided to reexamine cases in an initial pilot project, conducted before the rule was adopted on a permanent basis. According to Richard Holme, one of the drafters of the rule and an early champion of the effort, the pilot project began in March 2000 and included eligible cases assigned to Chief Judge Harlan Bockman in Adams County and Judge Christopher Munch in Jefferson County.[48]

Examination of the State Court Administrator's Office coding schedule revealed that codes were established for cases in the pilot project. There is a code for those cases that proceeded under the simplified procedure as part of the project, as well as a code for those cases in which the parties opted to use the standard procedure instead.[49] Presumably, a party could only opt out if the case was eligible to participate in the first instance, and therefore the codes provide a comparable set of Rule 16.1[50] and opt-out cases for analysis.

A query of district court civil cases for the years 2000 (when the pilot project began) through 2004 (when the rule became permanent) generated a list of cases containing a pilot project code ("Initial Pilot Project").[51] Because the initial code assigned to the case might not reflect subsequent events (e.g., the parties may have opted out at a later date), IAALS researchers examined the events in each case to ensure that the classification was correct. In addition, those cases that were consolidated with another case or moved to another court were removed from the data.

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[47] Please refer to the in-depth interview discussion below.
[48] Holme, *supra* note 1, at 12-14.
[49] A third code was also established, as it was anticipated that a control group of cases from a separate courtroom in both counties would be selected. *Id.* However, no cases contain the control code.
[50] The rule was designated as "Rule 1.1" during the initial pilot project phase.
[51] Although the query identified a handful of cases in three additional counties, the review was limited to the "official" pilot project courts.

After the review was complete, the Initial Pilot Project dataset contained 536 cases from Adams County and 155 cases from Jefferson County. Of 691 total cases, 311 used Rule 16.1 and 380 opted out. These cases fell across 24 standard court case type categories. The following table provides a list of included case types, as well as the portion of each type within the studied cases.

Figure 25: Initial Pilot Project Impact Analysis Standard Case Types

Case Type	Number	Percentage of Studied Cases
Breach of contract	155	22.4%
Breach of warranty	7	1.0%
Declaratory judgment	8	1.2%
Foreclosure other than Rule 120	11	1.6%
Forcible entry and detainer	3	0.4%
Goods sold and delivered	18	2.6%
Injunctive relief	2	0.3%
Lien	1	0.1%
Landlord-tenant	2	0.3%
Malpractice	9	1.3%
Mechanics lien	11	1.6%
Money	59	8.5%
Negligence	67	9.7%
Note	26	3.8%
Other	37	5.6%
Property damage	6	0.9%
Personal injury	19	2.8%
Personal injury – motor vehicle	231	33.4%
Quiet title – Rule 105	6	0.9%
Replevin	1	0.1%
Specific performance	4	0.6%
Services rendered	1	0.1%
Wrongful death	4	0.6%
Wrongful death – motor vehicle	3	0.4%
Total	**691**	**100%**[52]

Although the Initial Pilot Project can provide more assurance of comparability between Rule 16.1 and non-Rule 16.1 cases, there are a number of challenges with this dataset with respect to examining the impact of Rule 16.1. First, Rule 16.1 was amended somewhat after the initial pilot project. For ease of reference, the earlier version is contained in Appendix B. Second, the specifics of pilot project coding and implementation, as applied each of these cases, are unknown. Finally, the same caveat with respect to the inconsistency of standard case types applies to the Initial Pilot Project. However, IAALS researchers were unable to reclassify those cases, as we did with the more current dataset, because fewer than half of the complaints were available in electronic format for viewing.

Therefore, IAALS expanded the study of the impact of Rule 16.1 to include examination of *both* the Initial Pilot Project *and* cases closed in 2010 ("Cases Closed 2010"). Conducting parallel but separate analyses comparing Rule

[52] The percentages contained in the table do not total 100% exactly due to rounding.

16.1 cases with opt-out cases within each group helps to serve as a check on the inherent deficiencies present with respect to either group.

Within Cases Closed 2010, cases unresolved or without an indication of the applied process were removed from the analysis, leaving 754 cases. Of those, 460 were resolved—dropped, settled, closed by the court, or default judgment entered—without any appearance by the defendant(s) in the case. Such cases would provide little additional insight on impact, as the defendant(s) must engage in a case before any differences between Rule 16.1 and the standard pretrial process emerge. Accordingly, those cases were also removed. The impact analysis was conducted on the remaining 37.5% of cases, or 294 cases in total. Those cases fell into the following IAALS case type categories.

Figure 26: 2010 Impact Analysis IAALS Case Types

Case Type	Number	Percentage of Studied Cases
Consumer Credit Collection Only	41	13.9%
All Other Contract Actions	86	29.3%
Motor Vehicle Accident Only	77	26.2%
All Other Tort Actions	44	15.0%
Title to Real Property	7	2.4%
All Other Property Actions	8	2.7%
Professional Relationship	14	4.8%
Enforcement	5	1.7%
Clerical	4	1.4%
Unable to Determine	8	2.7%
Total	**294**	**100%**

It should be emphasized that examining both the Initial Pilot Project and the more limited Cases Closed 2010 separately does not eliminate two major challenges for an impact evaluation. First, as the rule was voluntary during the pilot project period and is voluntary today, there is a self-selection bias within both groups. In other words, notwithstanding the amount in controversy, cases in which the parties decided to opt out of the rule could be intrinsically different from those that proceeded under Rule 16.1. While we tracked and controlled for some extraneous variables, reliable data were not available with respect to all factors that might affect the results. This includes many important factors, such as case complexity. Second, we cannot know the extent to which the parties and court actually adhered to Rule 16.1 in cases to which it was officially applied, particularly because much of the pretrial process occurs outside the purview of the case record. If the parties and the court tend to litigate Rule 16.1 cases similarly to non-Rule 16.1 cases, this convergence will not be apparent in the analysis. It is important to view the impact analysis with these challenges in mind.

B. MEASURES

Based upon the available data, we evaluated the impact across four measures:

- **Time to resolution.** This is defined as the time from the event that originated the case (e.g., complaint) to the event that provided a decision on the status of every substantive claim at the trial level (e.g., dismissal or judgment).

- **Time to the final event.** This is defined as the time from the originating event to the last recorded event in the case. This would include events such as requests to modify the resolution, appeal-related activity,

collections activity, and notification of satisfaction of judgment. It reflects how long the parties are involved with the case even after resolution.

- **Number of motions.** This is a gauge of the number of times the parties needed to involve the court to resolve an issue. It can be used as an indicator of cost.

- **Number of court appearances.** This is the number of times that any party appeared before the court, either in person or by telephone. It relates to the level of judicial management, but can also be used as an indicator of cost.

Although it would have been ideal to examine the impact on trial rate and trial time, the number of occurrences within each dataset was too small to accurately model those measures.

C. Modeling Approach

To test the impact of Rule 16.1 on the duration measures (time to resolution and time to final event), the Cox Proportional Hazard model was employed. This model allows for the establishment of a baseline expectation of how likely a case is to resolve or conclude at any given point in time. The impact of Rule 16.1 on the baseline expectation is then tested to determine whether it significantly increases or decreases the likelihood that the event will occur sooner or later. This process is also known as a risk analysis, and describes the relative risk of an event ("risk" is used here in a pure probability sense without the normally pejorative implications). A finding that Rule 16.1 significantly increases the risk of a case resolving earlier is also a finding that Rule 16.1 significantly decreases the time from filing to resolution.

The number of motions and court appearances are event counts, which have a non-normal distribution. Therefore, to avoid making false inferences, a negative binomial regression model was employed. This model uses an alternative distribution more appropriate for court data, and can reveal the impact of Rule 16.1 on the expected count of motions and court appearances.

A more complete explanation of the modeling approach is contained in Appendix C.

D. Control Variables

It was important to control for other factors that might theoretically impact the time to resolution, time to final event, number of motions, and number of court appearances. However, we could only control for factors on which we had reliable available data.[53] These factors were slightly different for the Initial Pilot Project and the Cases Closed 2010.

The following were the control variables for the Initial Pilot Project:

- **Court (county).** Because cases from district courts in two counties (Adams and Jefferson) are included in the dataset, this is a dichotomous variable.

[53] We collected data on certain additional variables, but excluded them from the analysis due to either sufficient evidence of inconsistency in the systems to render the data unreliable (presiding judge, number of claims, and use of an alternative dispute resolution process) or insufficient occurrences in the dataset to incorporate them effectively into the model (indigence of any party in the Initial Pilot Project).

- **Year filed.** Cases in the dataset were initiated in 2002,[54] 2003, and 2004. With three values, each was coded as a dichotomous dummy variable. To avoid co-linearity, one variable needed to be left out of the model, or rather, used as the reference point. Here, 2003 was used as the reference point.

- **Number of plaintiffs.** The values for this variable ranged from one to nine.

- **Number of defendants.** The values for this variable ranged from one to 37.

- **Method of resolution.** From the 12 methods of resolution tracked, three dichotomous dummy variables were created to ensure sufficient occurrences within each to draw reliable conclusions: default judgment; case dismissed by parties (i.e., dropped or settled); and all other types of resolution (i.e., court involvement).[55] "Other types" was omitted to serve as the reference category.

An important factor to consider in modeling time to resolution, number of motions, and number of court appearances is the case type. However, for the Initial Pilot Project, the only information available was the standard case type code. Because there are a large number of these codes and because their use proved to be inconsistent, a clustering procedure was used. This procedure helps to account for any correlation in errors associated with case type by recognizing unique patterns and estimating standard errors, improving the ability to make accurate inferences. The analysis of the Initial Pilot Project focuses on the models clustered on case type.

The following were the control variables for Cases Closed 2010:

- **Number of plaintiffs.** The values for this variable ranged from one to nine.

- **Number of defendants.** The values for this variable ranged from one to seven.

- **Indigence.** A dichotomous variable was used to reflect if any party in the case had an indicator of indigence.

- **Insurance company as party.** A dichotomous variable was used to reflect if any plaintiff in the case was an insurance company; a separate variable was used to reflect if any defendant in the case was an insurance company.

- **Court (county).** Dummy variables were created for each of the 14 included counties. Arapahoe County was omitted as the reference category.

- **Case type.** For this dataset, the cases were coded by IAALS researchers, and thus are reliable. Case type dummy variables were created for each of the following categories: consumer credit debt collection; other contract; motor vehicle accident; other tort; title to real property; other property; professional relationship (business/employment); enforcement; clerical; and undeterminable. "Other contract" was omitted as the reference category.

- **Method of resolution.** From the 14 methods of resolution tracked, three dichotomous dummy variables were created to ensure sufficient occurrences within each to draw reliable conclusions: default judgment;

[54] Because fewer than five cases were initiated in 2001, those were included in the 2002 group.
[55] The cases that were consolidated with another case (1) and moved to another court (5) were removed.

case dismissed by parties (i.e., dropped or settled); and all other types of resolution (i.e., court involvement).[56] "Other types" was omitted as the reference category.

2. Impact Analysis

For interpretation of the impact analysis, we again emphasize the limitations of the data, specifically: 1) the self-selected nature of Rule 16.1 cases; 2) the inability to control for all variables that might affect the four measures, including case complexity; and 3) the incapacity to discern the level of adherence to the applicable set of rules. Nevertheless, considering these limitations, it is still valuable to examine the impact of Rule 16.1 to the extent possible and within the context of the other data collected in this study.

A. Time to Resolution and Time to Final Event

The time to resolution is the most important measure with respect to Rule 16.1 and case duration, as this is the pretrial period during which the provisions of the rule take effect. However, we also examine the time to the final event in order to get a full picture of the life of a case. The following table shows the summary time statistics for all cases in the two datasets.

Figure 27: Summary Statistics for Case Duration

Initial Pilot Project: All Cases (Rule 16.1 and Opt-Out)				
Variable	**Minimum**	**Maximum**	**Mean**	**Standard Deviation**
Time to Resolution	0.143 weeks (1 day)	364.857 weeks (2554 days)	45.049 weeks (315.343 days)	42.655
Time to Final Event	3.000 weeks (21 days)	467.286 weeks (3271 days)	72.191 weeks (505.337 days)	73.651
Cases Closed 2010: All Cases (Rule 16.1 and Opt-Out)				
Variable	**Minimum**	**Maximum**	**Mean**	**Standard Deviation**
Time to Resolution	0.286 weeks (2 days)	98.571 (690 days)	33.778 weeks (236.446 days)	19.518
Time to Final Event	0.429 weeks (3 days)	170.571 weeks (1194 days)	47.304 weeks (331.128 days)	27.691

Within the Initial Pilot Project, the Cox Proportional Hazard Model reveals that Rule 16.1 cases were more than twice as likely (109%) to have a shorter time to resolution than those that opted out of the rule. Rule 16.1 cases were also 70% more likely to have a shorter time to the final event. These results were statistically significant ($p<0.01$), and held true when controlling for the number of parties, type of resolution, county, and year, while also adjusting the estimates based on the type of case. See Charts D1 and D2 in Appendix D.

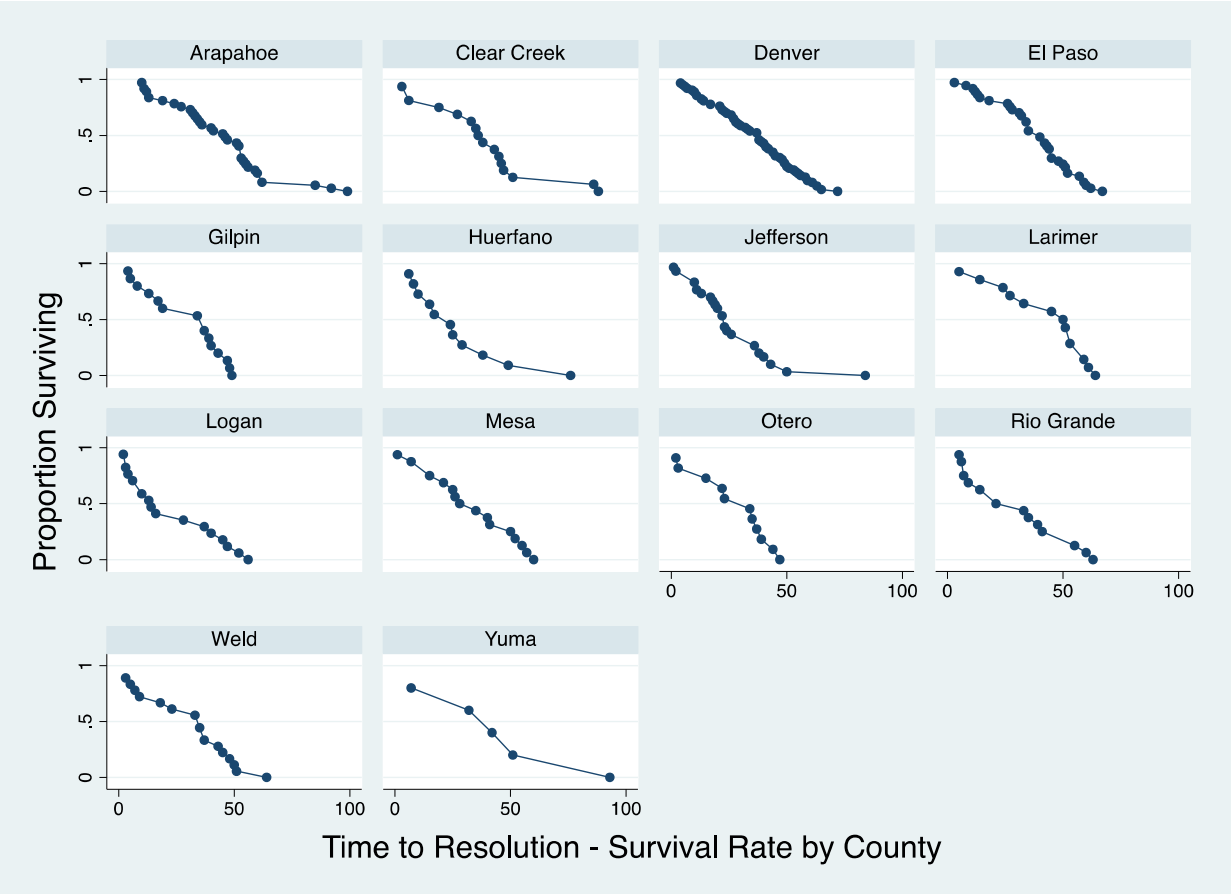
Within Cases Closed 2010, Rule 16.1 was *not* found to be associated with a statistically significant difference in time to resolution. This result held true when controlling for number and type of party, type of resolution, type of case, and indigence, while also adjusting the estimates based on the county. However, when controlling for the case type but not for the county, the application of Rule 16.1 significantly increases the likelihood of an earlier case resolution by 34%. This reveals that differences in time to resolution among counties explain the bulk of the variation in resolution time observed in general. Differences across case types also explain some of the variation.

[56] Cases that consolidated with another case or moved to another court were not included in the dataset.

As the model cannot parse out the relative variance attributable to each factor, the county and case type differences may mask the impact, if any, of Rule 16.1. Accordingly, this dataset does not support a finding that Rule 16.1 significantly impacts time to resolution. See Charts D3 and D4 in Appendix D.

Figure 28 is a visual representation of the variation in time to resolution among studied counties for Cases Closed 2010. The "survival rate" refers to the percentage of unresolved cases over time; the steeper the slope, the faster cases are resolved. It should be noted that Yuma County has only five cases in the dataset, and constitutes an outlier. During the in-depth interviews, one judge raised Yuma County as an example of a rural court that does not have a full-time judge. Rather, all cases must wait for the judge to arrive and then other cases may take priority over Rule 16.1 cases.

Figure 28: Time to Resolution by County in Cases Closed 2010



In contrast to time to resolution, with respect to time to the final event, Rule 16.1 is the most salient factor predicting shorter times in Cases Closed 2010. Rule 16.1 cases are 43% more likely to take less time between filing and the final event than non-Rule 16.1 cases. This result was statistically significant ($p<0.01$) and held true when controlling for number and type of party, type of resolution, type of case, and indigence, while also adjusting the estimates based on the county. See Charts D5 and D6 in Appendix D.

This analysis provides some indication that Rule 16.1 may have a beneficial impact on case duration. However, the evidence is mixed, as it does not provide a clear answer across all variables in both sets of data. For the more recent data, it appears that other factors exert more influence than the use of Rule 16.1.

B. Number of Motions

The number of motions filed in a case represents the number of times the parties requested court resolution of an issue. While this can indicate the level of contentiousness between the parties or the complexity of the issues in the case, for the purpose of analyzing the impact of Rule 16.1, we use it as an indicator of cost. Every motion requires an investment in the case. The following table shows the summary motions statistics for all cases in the two sets of data.

Figure 29: Summary Statistics for Number of Motions

Initial Pilot Project: All Cases (Rule 16.1 and Opt-Out)				
Variable	**Minimum**	**Maximum**	**Mean**	**Standard Deviation**
Number of Motions	0	135	3.321	7.047
Cases Closed 2010: All Cases (Rule 16.1 and Opt-Out)				
Variable	**Minimum**	**Maximum**	**Mean**	**Standard Deviation**
Number of Motions	0	24	2.884	3.555

Within the Initial Pilot Project, estimates of a negative binomial regression with clustered standard errors reveals that Rule 16.1 cases had 66% fewer motions than cases that opted out of the rule. This result was statistically significant ($p<0.01$) and held true when controlling for the number of parties, type of resolution, county, and year, while also adjusting the estimates based on the type of case. See Chart E1 in Appendix E.

Within Cases Closed 2010, the same model reveals that Rule 16.1 cases had 37% fewer motions than non-Rule 16.1 cases. This result was statistically significant ($p<0.01$) and held true when controlling for number and type of party, type of resolution, type of case, and indigence, while also adjusting the estimates based on the county.

This analysis provides strong preliminary evidence that Rule 16.1 has a beneficial impact on the number of motions. To the extent that motions serve as a proxy for cost, it also indicates decreased litigation expenses in Rule 16.1 cases. See Chart E2 in Appendix E.

C. Number of Court Appearances

The number of court appearances represents the number of times the parties discussed the case with the court, at any level of depth. While this was originally included in the study as an indication of the level of judicial management, it can also be used as an indicator of cost because, as with motions, every appearance requires an investment in the case. Accordingly, there may be differing opinions with respect to the benefits and drawbacks of any increase or decrease in this number. The following table shows the summary court appearance statistics for all cases in the two sets of data.

Figure 30: Summary Statistics for Number of Court Appearances

Initial Pilot Project: All Cases (Rule 16.1 and Opt-Out)				
Variable	**Minimum**	**Maximum**	**Mean**	**Standard Deviation**
Number of Appearances	0	8	0.320	0.723
Cases Closed 2010: All Cases (Rule 16.1 and Opt-Out)				
Variable	**Minimum**	**Maximum**	**Mean**	**Standard Deviation**
Number of Appearances	0	7	0.520	1.073

Within the Initial Pilot Project, estimates of a negative binomial regression with clustered standard errors reveals that Rule 16.1 cases had 55% fewer court appearances than cases that opted out of the rule. This result was statistically significant ($p<0.01$) and held true when controlling for the number of parties, type of resolution, county, and year, while also adjusting the estimates based on the type of case. It should be noted that, as a general matter, cases in Adams County had 52% more court appearances than cases in Jefferson County. See Chart F1 in Appendix F.

Within Cases Closed 2010, Rule 16.1 was not found to be associated with a statistically significant difference in the number of court appearances. This result held true when controlling for number and type of party, type of resolution, type of case, and indigence, while also adjusting the estimates based on the county. See Chart F2 in Appendix F.

Given the differences between the two sets of data, there is mixed evidence as to Rule 16.1's measureable impact on court appearances. Again, it is not clear whether a reduction in court appearances would be considered an indication of a beneficial decrease in litigation costs and/or a detrimental decrease in judicial management.

VI. IN-DEPTH INTERVIEWS

While the docket study provides important quantitative information on the role and impact of Rule 16.1, it cannot provide a complete picture. As many of the decision points occur outside the court record and involve strategy considerations, the experiences of attorneys and judges provide essential insight, necessary for a thorough understanding of Rule 16.1. Therefore, IAALS researchers collected such qualitative data by conducting in-depth interviews.

A. METHODOLOGY

At the end of the initial Rule 16.1 survey conducted in 2010, IAALS asked respondents whether they would be willing to participate in further studies on the simplified procedure. That question yielded a list of volunteers, consisting of 120 attorneys and 28 judges statewide. Each of these volunteers were contacted via their preferred method (email or telephone) and invited to be interviewed by IAALS researchers for the purpose of this study. In total, 31 individuals agreed to participate. Ultimately, IAALS conducted 29 interviews with 22 attorneys and seven judges.

The interviews took place during the month of July 2012. Due to constraints on researcher travel, only interviews of those in the Denver-metro area could be conducted in person; interviews of participants located elsewhere in the state were conducted via telephone. Because not all of the interviews would be face-to-face, participants in the

Denver area were allowed to choose the interview method at the time of scheduling. Seven participants chose an in-person interview, and the remaining 22 interviews were conducted by telephone. Generally, the interviews lasted 30 minutes.

To facilitate open communication and protect the identities of participants, the interviews were not recorded. Rather, an IAALS researcher took comprehensive notes during each interview to capture the conversation. A basic list of questions provided the starting point. Examples of the attorney questions include:

- What role does Rule 16.1 play in your practice?
- What is the conversation you have (if any) with clients about Rule 16.1?
- How do you decide whether Rule 16.1 will be used?
- What are the benefits and drawbacks of the process?
- How do Rule 16.1 disclosures operate in practice?
- Do judges handle Rule 16.1 cases differently than other cases?
- Have the stated goals of Rule 16.1 been met?
- What would you like the Colorado Supreme Court to know about Rule 16.1?

Examples of the judge questions include:

- What role does Rule 16.1 play in your courtroom?
- What has been the reaction to Rule 16.1?
- What is the level of cooperation you see in Rule 16.1 cases as compared to other cases?
- What are the benefits and drawbacks of the process?
- How do Rule 16.1 disclosures operate in practice?
- Do you manage Rule 16.1 cases differently than other cases?
- Have the stated goals of Rule 16.1 been met?
- What would you like the Colorado Supreme Court to know about Rule 16.1?

However, IAALS researchers had the flexibility to adapt the interview to the specifics of the participant's practice, ask follow-up questions based on previous answers provided, and delve into unanticipated areas of discussion. As a result, each interview was different, and insights gained during the earlier interviews changed the dimensions of subsequent interviews. The point was to gain a deeper understanding of Rule 16.1 rather than adhere to a prescribed set of questions.

B. FINDINGS

The interview process was an important effort, as it captured aspects of Rule 16.1 that could not be gleaned from the numbers alone. However, because we spoke with a limited group of self-selected individuals, the data are not readily generalizable to a broader population. In addition, reporting the responses in numerical terms would be problematic, given the number of interviews and the complexity of the issues discussed. In the following narrative, we have tried simply to identify themes while preserving minority viewpoints.

The participants were ultimately quite diverse, in both experience and perspective. While most of the attorneys have offices in the Denver-metro area, we spoke to a number in Northern Colorado and to one in Aspen. Length of practice ranged from four to 53 years, and firm size ranged from solo practice to 70 attorneys. Areas of practice ranged from commercial business litigation, to personal injury and medical malpractice, to employment law, to eminent domain.

Each of the seven judges hailed from a different judicial district, and the group included judges from the western half of the state. One of the judges has a dedicated civil docket, while the others handle some mix of civil, criminal, and domestic cases. Time on the bench ranged from four to 25 years; three of the judges were appointed after Rule 16.1 was enacted in 2004. When asked to describe their overall approach to civil cases, answers ranged from "active and early management" to "somewhere in the middle…involved, but not as involved as some other judges" to "letting the attorneys do their own thing as long as they are managing [the case] appropriately."

1. The General Role of Rule 16.1

Some of the attorney interviewees use Rule 16.1 regularly and find it to be of benefit to clients, citing streamlined litigation, faster results, and monetary savings. One firm has a policy to use Rule 16.1 in "appropriate" cases, based on an overall philosophy not to overcharge the client.

Nevertheless, there is a common perception that opting out of the procedure is the norm. The rule was described as "a noble thought," but an effort with ultimately little impact. The procedure is viewed as "just another set of rules" that practitioners do not normally think about. One attorney stated: "I think it was an abortive idea because if no one uses it, it's just a useless tool. It's not even an infrequently used tool, it's totally useless."

Likewise, the judges reported that Rule 16.1 plays a de minimus role in their courtrooms, describing the procedure as "below the radar" or "largely ignored." The perception is that the vast majority of cases circumvent the rule by opting out, and thus it has not become the default rule as intended. One judge estimated a 5% rate of use, while another stated that only about five cases in the last four years have proceeded under the rule. A third described Rule 16.1 cases as "rare." In fact, one judge admitted: "Until you called me, I had not given much thought to 16.1 . . . maybe it's because [those cases] never go to trial."

These responses make sense, even in light of the docket data showing that a majority of cases in eligible categories actually elect to use the rule. First, with respect to attorneys, use of the rule is high in certain practice areas, so it may appear low to those who practice in areas where use of Rule 16.1 is less common. In addition, rates of use are lower in cases involving an attorney on both sides, so those typically involved in contested actions will see Rule 16.1 cases less often. Second, with respect to judges, many Rule 16.1 cases resolve by default judgment. The judges interviewed reported becoming personally aware of the applicable pretrial procedure only when there is a need to rule on a motion or prepare for an upcoming conference.

2. Characteristics of Rule 16.1 Cases

Generally, the attorneys interviewed reported electing to use the rule in very straightforward ("cut and dried") cases that require little discovery in any event and involve less than $50,000 in damages. For those cases, Rule 16.1 makes the process "very circumscribed and tight."

The judges interviewed reported that Rule 16.1 is used most often in money collection cases, and this is supported by the docket data. The judges noted that in these kinds of cases, usually one side has an attorney and finds it advantageous to limit the process, while the other side does not know how the rule works or what it means. In fact, some of the judges pointed to a pattern of use in cases with pro se parties.

At the other end of the spectrum, judges noted a pattern of use in cases with "reasonable" or "experienced" attorneys with a strong working relationship, as they understand the necessary level of process and are willing to "stipulate to a minimal amount of discovery to the extent that the rule is too constraining."

One attorney with a general civil practice does not recall opting out in an eligible case: "People in a case of that size are not interested in spending a bunch of money if they don't have to." One attorney stated that the decision is about "the economics of the case, client resources, and the prejudice that may result from the lack of discovery."

3. Reasons for Opting Out

Given the general impression that electing exclusion is the most common course of action with respect to Rule 16.1, it is important to explore rationales for doing so. While a few attorneys stated that they only exclude a case when the damages are beyond $100,000, the other reasons provided were varied.

A. Cap on Damages

There is a real sense among attorneys we interviewed that the cap on damages diminishes the use of Rule 16.1. Some have a moral objection to invading the province of the jury by limiting recovery for their own client. One attorney commented: "I don't think I'm either qualified or justified in depriving my client of all the damages seen by a jury." Another stated that it would be malpractice to "hamstring your client in this way." A third commented that the rule limits the client's leverage for settlement purposes, as well. It was also pointed out that the cap on damages "might give unsophisticated lawyers an unclear view of the purpose of the rule."

Beyond philosophical reasons, it can sometimes be difficult to establish the level of damages at the outset of a case—an ultimate issue of fact. This can be true of disputes that are not otherwise particularly complicated and could benefit from a streamlined procedure. An interviewee provided the following example: a claim for breach of a contract that entitled the plaintiff to a royalty per product sold by the defendant; the case was straightforward, but sales levels were unknown. According to one attorney with a focus on business relationship disputes: "No earlier than expert reports on damages do you have an adequate understanding of the value of the case."

Even in those cases with readily ascertainable damages, the inclusion of attorney fees in the cap can add an additional layer of uncertainty. Where fees are recoverable by contract or statute, the amounts are difficult to predict because they can vary significantly depending upon how the case progresses. The case may be resolved by default judgment, it may settle halfway through, or it could go all the way to an appellate court and back. Much depends upon the opposing party and counsel, who could be cooperative or who might be "bulldoggish," and the judge, who could be attentive or who might let gamesmanship to go unchecked.

For many of those interviewed, the limit becomes "too close for comfort" in cases over $50,000. One attorney noted that "unless you think you can do a case really cheaply, the rule really clamps down on damages." Another wondered how a lawyer could face a client who recovered less than they otherwise would have due to the procedure elected: "How do you explain that you were trying to be a good citizen, *but*…" A third declared: "It is the cap on recovery that keeps me and the people at my firm out."

B. Lack of Discovery

One judge commented that in a practice like debt collection, Rule 16.1 is "probably a good deal." But in other types of cases, even if smaller and eligible for the procedure, lawyers opt out because they almost always want to depose the opposing party. The lack of discovery is both the rule's biggest benefit (it is streamlined) and its biggest drawback (it is confining).

Some attorney interviewees believe that their clients are best served when they have the freedom to make individualized decisions within the context of the particular case. One commented: "I don't think Rule 16.1 is a bad

rule, but we want to be careful about how we restrict parties' abilities to maneuver within the system." They described Rule 16.1 as too "rigid," with the limitations on discovery as much a risk as a benefit. Many of these attorneys maintained that they incorporate the provisions of Rule 16.1 into their practice anyway, but preserving the possibility of discovery provides a measure of insurance in case the need arises. One attorney remarked: "In most cases, I don't conduct any discovery, but I need that flexibility when I need it." This attorney gave an example of a $500,000 real estate commission case requiring only one deposition. "There is a general sense that if the rules allow for ten depositions, ten will be taken, but clients don't want to pay for unnecessary activity." A defense attorney noted that he recommends the rule when representing a single client, but because the limit is defendant-specific, when the number rises to three defendants, the "risk of a $300,000 client hit is too great" to proceed without discovery.

Even those attorneys who are not categorically opposed to eliminating the possibility of discovery in an appropriate case will opt out of Rule 16.1 when they see a specific need to conduct discovery, or when they believe that the streamlined process will disadvantage their client. Reasons cited for wanting discovery, particularly depositions, include: to develop the most appropriate theory of liability; to parse a more complex case even if monetary damages are relatively low or non-existent; to test the credibility of witnesses; to ensure the complete exchange of information when the other side is not expected to be forthcoming in disclosures; and to "pin the other side down" and ensure against perjury. One attorney stated that even in non-monetary title actions, depositions are beneficial if simply for preservation purposes.

In addition, for some cases, the exchange of disclosures followed by trial is not the most efficient route to resolution. Rather, there are cases that are particularly suited for a limited amount of discovery followed by a dispositive motion. One attorney admitted that dispositive motions are routinely filed in every case in his practice, but he maintained that, even when denied, dispositive motions provide information about how the judge interprets the case, thus framing the issues for trial.

Some attorneys stated that they have stipulated to conduct limited discovery in Rule 16.1 cases, such as one day of depositions or a limited number of requests for admissions, when they discovered that the rule was too constraining for a particular case. According to these attorneys, one deposition per side, particularly depositions of parties, can be very helpful. However, if the opposing party resists allowing the discovery, it can put the party who needs it at a disadvantage. One judge stated that if attorneys ask for limited discovery under Rule 16.1, the request will most likely be granted.

C. Timing of the Decision

The decision regarding whether to use Rule 16.1 must be made early in a case. According to the judge interviewees, attorneys often opt out because they do not have enough information at the outset to feel comfortable committing themselves to a process that limits both discovery and recovery for their client. There is apprehension that the case may not turn out as expected, exposing the attorney to malpractice liability. One judge commented: "It takes a confident lawyer to be willing to proceed under Rule 16.1." Another noted: "It's the rare attorney who gives it serious consideration."

The attorney interviewees confirmed this sentiment: "Some lawyers are risk averse." It was suggested that the rule would be used more often if the determination could be delayed until after the selection of opposing counsel and the completion of disclosures. Having a better idea of what the other side's case "looks like" would lead to a better decision and fewer exclusions to protect against uncertainty.

D. Other Reasons

There are also less principled reasons for opting out. Some attorneys we interviewed get the sense that exclusion can happen "to raise the price of litigation and jerk [the other side] around a little," on both sides. There are plaintiffs' attorneys who believe that the defense bar has a financial incentive to "rack up attorney fees," particularly when litigating an insured claim. There are defense attorneys who believe that the high rate of statutory pre-judgment interest provides plaintiffs with an incentive to delay the process, as it is more than is available on any investment and quickly increases the level of damages. One attorney admitted that sometimes the client benefits from the case being more difficult to litigate, such as when the other lawyer is inexperienced or inept, or when the opposing side cannot keep their lawyer paid. Another attorney gave an example of a clear-cut wages case in which an employee was owed less than $50,000, and the employer acknowledged the state of affairs. Yet the defense strategy was to run up the bill, and ultimately, the fees, costs, and interest reached six figures. The individual who recounted this example believes that the case could have benefitted from a curtailed process.

Some attorneys we interviewed leave the decision to their client, after explaining what is given up and what is gained. Some clients want to reduce costs and get to trial more quickly. Other clients—particularly in the tort arena—are not willing to consider Rule 16.1, as they are more inclined to want to conduct lengthy discovery and less inclined to limit potential recovery.

A few attorneys stated that they have a general policy against Rule 16.1 and will inform the client that it will not be an option unless they decide to hire a different lawyer. It is also a perception that the insurance industry opts out as a matter of course.

4. Handling of Rule 16.1 Cases

A. Judicial Management

All of the judges declared that they do not handle Rule 16.1 cases differently from other civil cases as a general matter. One sends out a different standard case management order, and another allows Rule 16.1 cases to set the date of trial before completion of mandatory alternative dispute resolution, but otherwise there was no difference in management reported by the judges.

Most of the attorneys likewise reported no perceived difference in judicial treatment of Rule 16.1 cases. One attorney even observed that some judges "don't actually pay attention to what rule is applicable" and send out their own case management orders that contradict Rule 16.1, leaving the attorney in a quandary about what to do. A few noted that judges do not become involved unless a party needs help with compliance, but there was a difference of opinion with respect to whether this is a good thing or a bad thing. Only one attorney stated that judges "favor" Rule 16.1 cases.

B. Attorney Cooperation

Interviewees generally do not see a difference in the level of attorney cooperation in Rule 16.1 cases, as this is thought to depend more on the lawyers than the procedure. A few attorneys observed less cooperation in Rule 16.1 cases, giving the following reasons: counsel do not have to interact to conduct discovery; defense counsel, particularly insurance defense, has a worse-case scenario number—the reservation value of the other side—which provides less incentive to act cooperatively; and some who find themselves in the rule do not really understand it.

C. Disclosures

There is a level of dissatisfaction with disclosures among attorney interviewees in general, whether under Rule 16.1 or the standard pretrial process. Overall, disclosures are thought to be used as a trial tactic, with parties reluctant to disclose harmful information.

A number of interviewees stated that, when taken seriously and done properly, Rule 16.1 disclosures provide adequate information to try the case. However, the rule requires the parties to rely on the candor and goodwill of the other side: "The rule works when both parties lay out what they've got. No surprises or sneak attacks . . . If it's played fair, it's much more effective." As a result, interviewees believe that Rule 16.1 provides an advantage to the party that is least inclined to be honest in disclosures. If there is any effort to be vague or disguise the information, then the process becomes really difficult and consumes a lot of time. One attorney commented that "it can be like pulling teeth." In this regard, the defendant has a slight advantage because the plaintiff has the burden of proof.

With respect to their own witness disclosures, the attorneys expressed apprehension about ensuring adequate disclosures. The level of detail required by the procedure is not clear and receives inconsistent application by judges. As one attorney explained: "Some judges require the testimony to be identical to the disclosures—verbatim; others allow for disclosure of just the subject matter—more vague." One attorney noted that the lack of appellate law on the issue means there is essentially no guidance for practitioners. Accordingly, there is a fear that choosing Rule 16.1 entails a lot of detailed work, as well as a greater risk of sanctions in the event that the attorney's own interpretation does not match the judge's expectations. In addition, because more detailed disclosures require a significant investment, cases with more than a few witnesses are less likely to elect to use the rule. The docket data confirm this sentiment.

However, there is frustration with the lack of enforcement of the disclosure requirement with respect to the opposing party. Generally, in response to a request to compel or for sanctions, the court will simply order the other party to comply. While acknowledging the need to resolve cases on their merits, the attorneys we interviewed also believe that judges underestimate the harm caused by unchecked gamesmanship and the presentation of evidence not disclosed, particularly when discovery is not available to ensure an appropriate exchange of information prior to trial. In one attorney's experience, failure to disclose a witness completely will result in preclusion of the witness, but failure to adequately disclose a witness' testimony will never result in preclusion. The aggrieved party is generally left with a choice between proceeding to trial blind or tolerating a continuance. Such lenience has an effect on the overall culture of disclosures.

The attorney interviewees do not perceive the judges to be receptive to hearing disclosures issues. When asked, none of the judge interviewees could specifically recall having encountered any disputes or problems related to disclosures in Rule 16.1 cases, with the caveat that they see relatively few such cases and that disclosure issues usually arise at trial. Drawing from his days in practice, one newer judge commented: "[There] needs to be a whole ethical change where people stop gamesmanship and stop hiding the ball. . . [with] default sanctions for failure to comply."

The attorneys and judges we interviewed agree that, at least in principle, Rule 16.1 disclosures should not operate any differently than criminal disclosures: "Lawyers are under a particular obligation, whether it stems from the Constitution or not." In addition, for some attorneys, the issue of surprise at trial does not constitute a reason not to use the rule, as criminal cases are tried based on disclosures.

5. Intended Effects

Interviewees were asked to evaluate whether Rule 16.1 had met its stated goals of: "limit[ing] discovery and its attendant expense"; "provid[ing] the earliest practicable trials"; and "maximiz[ing] access to the district courts in civil actions."

A. Limiting Discovery Expenses

Overall, interviewees believe that Rule 16.1 does limit discovery costs, and cases with "full blown discovery" are more expensive. One attorney described the fact that "no one can run up the discovery bill" as a "selling point" to clients. Another stated that "if used properly, it's a reasonably effective way of having a case prepared within a reasonably small budget." There were a number of caveats expressed by both attorneys and judges, however. First, to the extent that parties opt out of the rule in eligible cases, potential cost savings are not realized. Second, for certain kinds of cases, a limited amount of targeted discovery (such as an expert deposition) can lead to a very efficient resolution through settlement or a dispositive motion. Third, certain aspects of Rule 16.1 are more expensive, such as the preparation of detailed witness disclosure statements.

A minority of attorney interviewees do not believe that Rule 16.1 lowers costs. One explained that removing the lawyer's ability to make individual determinations about the needs of a case makes litigation needlessly complicated and thus more expensive. He described clients and lawyers as cost-conscious (with the exception of those clients who are litigating an insured claim). Another described "concomitant expenses" associated with Rule 16.1, such as hiring a third party investigator in lieu of taking depositions. It was also noted that Rule 16.1 cases consume more courtroom time at trial, particularly on cross-examination.

B. Providing Early Trials

Only one judge reported giving priority to Rule 16.1 cases ("there is that incentive in my court"). The other judges affirmed that trial dates are driven more by court calendars and attorney schedules than the applicable rule. One judge stated that Rule 16.1 cases are "still competing with everything else going on in the trial court. We give everyone the earliest possible date regardless of the rule." Generally, the attorneys expressed agreement with this assessment, although some mentioned that certain courts (e.g., Denver and Jefferson County) are really good about providing early trial dates regardless of the case.

A handful of attorneys stated that Rule 16.1 cases do have faster trial settings, either because of their priority status or because the cases are ready to go to trial sooner. A couple of attorneys resisted the idea that a faster trial is a laudable goal for all cases, as some need time to develop, for the benefit of both the plaintiff and the defendant.

C. Maximizing Court Access

Attorney interviewees generally do not believe that Rule 16.1 has "maximized access" or increased the number of people who can file a case in court. The main reason provided: it is an optional rule with low rates of use. While acknowledging that Rule 16.1 does balance the playing field, which is tilted in favor of moneyed interest in the standard process, one attorney pointed to the fact that the disclosure process can be expensive due to the lack of judicial enforcement of the requirements. This attorney explained that the judges simply allow continuances when faced with a disclosure issue, which "isn't more speedy or just, it's expensive and unfair."

Judge interviewees expressed concerns about the fairness of the process. One judge stated: "There is a casino attitude here that requires the parties to put larger and larger blinders on for relatively little savings. It takes away fairness and only saves a few dollars…the trend in civil is the opposite of criminal." Another urged better efforts to help pro se litigants understand the procedure and its implications.

D. Nature or Nurture?

Interviewees were asked whether any time and cost benefits were more attributable to the nature of the cases that proceed under the rule or to the effects of the rule itself. Generally, there is the impression that cases under $100,000 are less complex, and thus predisposed to shorter and easier resolutions. According to the judges, these cases "are able to be ready on a faster timeline" and "seem to always settle, probably not viable to try." One attorney noted: "By definition, smaller cases don't generate as much litigation heat." However, credit was also given to the rule. Rule 16.1 can have an effect through its structure (limiting discovery and its attendant games) or through its message (parties try to comply with the spirit of the rule). An attorney stated that "it's better than nothing," but a judge commented that the nature of the attorneys trying the case is the most important factor.

6. Evaluation of Applicability Criteria

A. Amount in Controversy

Most of the attorney interviewees believe that the $100,000 criteria for inclusion in the rule is appropriate, while the remainder are split between raising and lowering the amount. Several described any amount as "arbitrary," but consider $100,000 to be a "legitimate" or "realistic" place to draw the line. While one might question the link between monetary damages and complexity, "generally if you are under $100,000, you don't need discovery and the client doesn't have enough money." One attorney provided a formula to support the limit, figuring that attorney fees in a district court case on either side are likely to be $25,000 to $30,000, and the standard contingent fee is 30%.

The attorneys who expressed that the limit is too high stated that, for some clients, it is too great a risk to "roll the dice" without the protections that discovery provides. For example, some small businesses can be made or broken by $100,000. The attorneys who expressed that the limit is too low cited the need to account for inflation, the fact that attorney fees are not included, and the desire to have more cases use the rule to benefit from the expedited treatment. One attorney noted: "$100,000 is a lot of money, but the limit isn't likely to encourage people to jump in unless liquidated."

A portion of attorneys expressed indifference to the monetary threshold. According to some, the current level does not make a lot of difference because the decision is really made in those cases between $15,000 (county court jurisdiction) and $50,000. One attorney stated, "I would leave it alone, if for no other reason than the Supreme Court changes the rules too often."

Generally, the judges also believe the $100,000 level is a "reasonable" place to demarcate less serious from more serious cases. One judge acknowledged that the threshold limits the number of cases subject to the rule, but considers that to be appropriate "given the other components of the rule." According to another judge's assessment, discovery can be worth the investment once there is more than $100,000 in controversy. One judge deems the limit too high.

B. Voluntary Process

Attorney and judge interviewees were split between those in favor of making Rule 16.1 mandatory, those against it, and those who would be fine with a mandatory rule if it were modified in certain ways. Those in favor stated that a mandatory Rule 16.1 would prevent the procedure from becoming irrelevant by increasing its use and counteracting the status quo bias. Said one attorney: "People find any reason to opt out." The idea is that the public would ultimately benefit, as it would make the court system more accessible.

A distinct group of attorneys would be in favor of a mandatory Rule 16.1 if certain improvements were made. They offered the following suggestions for modification:

- Allow depositions of parties.
- Treat attorney fees similarly to costs.
- Provide a mechanism for discovery or exclusion from the rule for good cause shown.
- Clarify the witness disclosure requirement.

Those against a mandatory rule do not believe it would solve any problems and, in fact, believe that it would further prevent people from using the courts. These individuals place a high value on flexibility and the exercise of judgment by legal professionals, describing the rule as too rigid: "You can always think of a case in which the dollar amount isn't that high…but there is more at stake for the client." An attorney characterized Rule 16.1 as "a different form of justice," which should not be mandated. A judge, who does believe that drastic changes need to be made to the system, stated that "going back to trial by ambush and taking informational tools away" is not the solution.

One attorney emphasized that, because it is not just about which procedure is used but also about a restriction on recovery, a mandatory rule would "violate the constitutional right to have damages determined by a jury." This attorney believes that caps on losses are fundamentally wrong, and cannot be mandated by the court.

Attorneys and judges alike discussed the practical difficulties associated with making Rule 16.1 mandatory, as it is based upon the plaintiff's representation. One attorney stated: "With a verbal threshold, [a mandatory rule] would be next to impossible." Interviewees have both witnessed and engaged in "puffing" claims. Even if parties were required to justify the amount to the court, one judge stated: "Someone can pretty much always present an argument—either legitimate or concocted—that the damages are higher." One suggestion offered would be to allow opting out only by stipulation rather than unilaterally because even if both parties frequently stipulate not to be governed by the rule, "at least they would be required to communicate and reach a consensus early in the case."

7. Colorado's Civil Procedure

A. A Complicated "Simplified" Process

Some attorneys we interviewed observed that the ostensibly simplified procedure is too long and complicated. For example, one commercial business litigator noted with surprise how few attorneys actually read, understand, and follow the rule. A plaintiff will elect to use the rule and then seek discovery by sending out interrogatories and deposition notices. Another attorney admitted that he did not appreciate the burden to disclose more than generalized information in his first Rule 16.1 case. A third stated during the interview that there is no difference between the disclosure requirements of Rule 16.1 and the standard procedure.

Confusion is also evident from the differing interpretations of the cases to which the rule applies. For example, one attorney urged rewriting the rule to clearly reflect that all cases for injunctive relief are included. Another stated that

most construction lawyers have interpreted the rule to exclude mechanic's lien cases as an "expedited proceeding." He considers this a failing of the rule because very often those cases are within the monetary limit and are very simple. Some interviewees, even those who employ the rule often, expressed surprise that the parties could stipulate to use the rule in higher value cases.

B. Interplay with County Court

One attorney stated that he will not advise a client to litigate a case in district court for less than $100,000 because it is a "high stakes game." Indeed, for many lower value cases, attorneys elect to use county court instead, even if the claim exceeds the $15,000 jurisdictional limit. With an estimated $10,000 cost difference between litigating in county court and district court, one attorney stated that "even if it's a $20,000 case, the client may benefit from being in county court." While it may be more "fly by the seat of your pants," the simplicity of bringing cases in the lower court appears to be working well. Litigants have a trial within 30 to 60 days, without incurring deposition costs.

In fact, there is some sentiment among those interviewed that increasing county court jurisdiction is a better solution than implanting a separate simplified procedure into district court. One attorney cited "unused capacity" in Colorado's county courts, while another acknowledged that more county court judges would need to be appointed.

C. The State's Rules Regime

Regarding the rules in general, interviewees expressed significant dissatisfaction with the following: 1) different sets of rule for different cases and 2) constant rules changes.

With respect to the former issue, there is a concern about the burden of having too many complicated rules schemes ("the rules book is two inches thick"). In addition to the energy consumed by tracking differing obligations and deadlines, it is sometimes difficult to know how the different schemes interact within a particular case. This issue has only been exacerbated with the introduction of the "Colorado Civil Access Pilot Project Applicable to Business Actions in District Court."[57] Practitioners would like to see one simple and complete set of rules, flexible enough to provide an appropriate level of process in every case. One interviewee professed to opting out of Rule 16.1 for the purpose of achieving a comfortable "rhythm" in his practice. Judges agree that "having two tracks is difficult."

With respect to the latter issue, there is concern that frequent rules changes make litigation more uncertain and complex, which ultimately makes it more expensive and decreases access. If lawyers and judges understand and are comfortable with a system, they can appropriately advise and navigate litigants through that system.

D. Suggested Changes

While the interviews were focused on Rule 16.1, some individuals were eager to discuss the Colorado Civil Access Pilot Project ("CAPP"). There were differing opinions on the merits and drawbacks of that set of rules, and all judgment ought to be reserved pending completion of the project at the end of 2013 and a comprehensive evaluation of the results. Nevertheless, for the purpose of the Rule 16.1 study, it is important to note that there is significant support among those interviewed for the idea of taking the best from Rule 16.1 and the best from CAPP, and consolidating those provisions into one set of flexible civil rules applicable to all actions in district court. This is seen as preferable to maintaining (and constantly changing) separate rules for different kinds of cases.

[57] Supreme Court of Colorado, Chief Justice Directive 11-02 (amended Oct. 2011). Information on the pilot project is currently located on the Colorado Judicial Branch website: http://www.courts.state.co.us/Courts/Civil_Rules.cfm.

With respect to Rule 16.1, interviewees provided the following feedback for improvement:

- Treat attorney fees similarly to costs for the purpose of calculating the limit. One attorney stated that excluding attorney fees would, paradoxically, have the effect of lowering them.

- Clarify the witness testimony disclosure requirements, and limit those requirements to expected direct testimony and exclude rebuttal testimony, so parties can adequately address issues on cross-examination.

- Allow a very limited amount of standard default discovery in Rule 16.1 cases.

Acknowledging that the cost of litigation is "outrageous," some interviewees believe that the best way to improve outcomes for individuals would be to focus on increasing judicial resources. Having more judges will allow for better case management and better enforcement of appropriate conduct. "Any time the judge takes an immediate interest and control in the case, it is better for the case. But the court taking control of the case is what will help, not a bunch of rules." These attorneys believe that if rules replace the exercise of an attorney's professional judgment and customized case management, the system becomes a "cookie cutter" processor of claims rather than people. "One of the benefits of our justice system is that it is a human system addressing human needs. If the restrictions are too great, that will be lost."

VII. CONCLUSION

It is hoped that this study will provide a rich source of data to inform the rulemaking process, both in Colorado and in jurisdictions around the country that seek to formulate a set of rules that will better ensure the "just, speedy, and inexpensive" determination of all civil actions. We encourage you to contact IAALS for additional information, studies, and models aimed at the continuous improvement of the civil justice system.

APPENDIX A

Source: COLO. R. CIV. P 16.1 (2011). The time limits in the rule were amended effective January 1, 2012 to reflect a new "rule of 7s" time standard. The former version is reflected here, as that is the version that pertains to the evaluation.

RULE 16.1. SIMPLIFIED PROCEDURE FOR CIVIL ACTIONS

(a) Purpose and Summary of Simplified Procedure.

(1) Purpose of Simplified Procedure. The purpose of this rule is to provide maximum access to the district courts in civil actions; to enhance the provision of just, speedy, and inexpensive determination of civil actions; to provide the earliest practical trials; and to limit discovery and its attendant expense.

(2) Summary of Simplified Procedure. Under this Rule, Simplified Procedure generally applies to all civil actions, whether for monetary damages or any other form of relief unless expressly excluded by this Rule or the pleadings, or unless a party timely and properly elects to be excluded from its provisions. This Rule normally limits the maximum allowable monetary judgment to $100,000 against any one party. This Rule requires early, full disclosure of persons, documents, damages, insurance and experts, and early, detailed disclosure of witnesses' testimony, whose direct trial testimony is then generally limited to that which has been disclosed. Normally, no depositions, interrogatories, document requests or requests for admission are allowed, although examination under C.R.C.P. 34(a)(2) and 35 is permitted.

(b) Actions Subject to Simplified Procedure. This Rule applies to all civil actions other than:

(1) civil actions that are class actions, domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, C.R.C.P. 106 and 120, or other similar expedited proceedings, unless otherwise stipulated by the parties; or

(2) civil actions in which any party seeks a monetary judgment from any other party of more than $100,000, exclusive of interest and costs.

(3) Each pleading containing an initial claim for relief in a civil action, other than a domestic relations, probate, water, juvenile, or mental health action, shall be accompanied by a completed Civil Cover Sheet in the form and content of Appendix to Chapters 1 to 17, Form 1.2 (JDF 601), at the time of filing. Failure to file the cover sheet shall not be considered a jurisdictional defect in the pleading but may result in a clerk's show cause order requiring its filing.

(c) Limitations on Damages. In cases subject to this Rule, a claimant's right to a monetary judgment against any one party shall be limited to a maximum of $100,000, including any attorney fees, penalties or punitive damages, but excluding interest and costs. The $100,000 limitation shall not restrict an award of non-monetary relief. The jury shall not be informed of the $100,000 limitation. If the jury returns a verdict for damages in excess of $100,000, the trial court shall reduce the verdict to $100,000.

(d) Election for Exclusion from This Rule. This Rule shall apply unless, no later than 45 days after the case is at issue as defined in C.R.C. P. 16(b)(1), any party files a written notice, signed by the party and its counsel, if any, stating that the party elects to be excluded from the application of Simplified Procedure, set forth in this rule 16.1. The use of a "Notice to Elect Exclusion From C.R.C.P. 16.1 Simplified Procedure" in the form and

content of Appendix to Chapters 1 to 17, Form 1.3 (JDF 602), shall comply with this section. In the event a notice is filed, C.R.C.P. 16 shall govern the action.

(e) Election for Inclusion Under This Rule. In actions excluded by subsection (b)(2) of this Rule, within 49 days after the case is at issue, as defined in C.R.C.P. 16(b)(1), the parties may file a stipulation to be governed by this Rule. In such event, they will not be bound by the $100,000 limitation on judgments contained in section (c) of this Rule.

(f) Case Management Orders. In actions subject to Simplified Procedure pursuant to this Rule, the presumptive case management order requirements of C.R.C.P. 16(b)(1), (2), (3), (5) and (6) shall apply.

(g) Trial Setting. No later than 40 days after the case is at issue, the responsible attorney shall set the case for trial pursuant to C.R.C.P. 121, section 1-6, unless otherwise ordered by the court.

(h) Certificate of Compliance. No later than 45 days after the case is at issue, the responsible attorney shall also file a Certificate of Compliance stating that the parties have complied with all the requirements of sections (f) and (g) of this Rule or, if they have not complied with each requirement, shall identify the requirements which have not been fulfilled and set forth any reasons for the failure to comply.

(i) Expedited Trials. Trial settings, motions and trials in actions subject to Simplified Procedure under this Rule should be given early trial settings, hearings on motions and trials.

(j) Case Management Conference. If any party believes that it would be helpful to conduct a case management conference, a notice to set case management conference shall be filed stating the reasons why such a conference is requested. If any party is unrepresented or if the court determines that such a conference should be held, the court shall set a case management conference. The conference may be conducted by telephone.

(k) Simplified Procedure. Simplified Procedure means that the action shall not be subject to C.R.C.P. 16, 26-33, 34(a)(1), 34(c) and 36, unless otherwise specifically provided in this Rule, and shall be subject to the following requirements:

(1) Required Disclosures.

(A) Disclosures in All Cases. Each party shall make disclosures pursuant to C.R.C.P. 26(a)(1), 26(a)(4), 26(b)(5), 26(c), 26(e) and 26(g), no later than 30 days after the case is at issue as defined in C.R.C.P. 16(b)(1). In addition to the requirements of C.R.C.P. 26(g), the disclosing party shall sign all disclosures under oath.

(B) Additional Disclosures in Certain Actions. Even if not otherwise required under subsection (A), matters to be disclosed pursuant to this Rule shall also include, but are not limited to, the following:

(i) ***Personal Injury Actions*****.** In actions claiming damages for personal or emotional injuries, the claimant shall disclose the names and addresses of all doctors, hospitals, clinics, pharmacies and other health care providers utilized by the claimant within five years prior to the date of injury, and shall produce all records from those providers or written waivers allowing the opposing party to obtain those records subject to appropriate protective provisions authorized by C.R.C.P. 26(c). The claimant shall also produce transcripts or tapes of recorded statements, documents, photographs, and video and other recorded images that address the facts of the case or the injuries sustained. The defending party shall disclose transcripts or tapes of recorded statements, any insurance company claims memos or documents, photographs, and video and other recorded images that address the facts of the case, the injuries sustained, or affirmative defenses. A party need not produce those

specific records for which the party, after consultation pursuant to C.R.C.P. 26(c), timely moves for a protective order from the court;

(ii) ***Employment Actions*****.** In actions seeking damages for loss of employment, the claimant shall disclose the names and addresses of all persons by whom the claimant has been employed for the ten years prior to the date of disclosure and shall produce all documents which reflect or reference claimant's efforts to find employment since the claimant's departure from the defending party, and written waivers allowing the opposing party to obtain the claimant's personnel files and payment histories from each employer, except with respect to those records for which the claimant, after consultation pursuant to C.R.C.P. 26(c), timely moves for a protective order from the court. The defending party shall produce the claimant's personnel file and applicable personnel policies and employee handbooks;

(iii) ***Requested Disclosures.*** Before or after the initial disclosures, any party may make a written designation of specific information and documentation that party believes should be disclosed pursuant to C.R.C.P. 26(a)(1). The other party shall provide a response and any agreed upon disclosures within 20 days of the request or at the time of initial disclosures, whichever is later. If any party believes the responses or disclosures are inadequate, it may seek relief pursuant to C.R.C.P. 37.

(C) Document Disclosure. Documents and other evidentiary materials disclosed pursuant to C.R.C.P. 26(a)(1) and 16.1(k)(1)(B) shall be made immediately available for inspection and copying to the extent not privileged or protected from disclosure.

(2) Disclosure of Expert Witnesses. The provisions of C.R.C.P. 26(a)(2)(A) and (B), 26(a)(4), 26(a)(6), 26(c), 26(e) and 26(g) shall apply to disclosure for expert witnesses. Written disclosures of experts shall be served by parties asserting claims 90 days before trial; by parties defending against claims 60 days before trial; and parties asserting claims shall serve written disclosures for any rebuttal experts 35 days before trial.

(3) Disclosure of Non-expert Trial Testimony. Each party shall serve written disclosure statements identifying the name, address, telephone number, and a detailed statement of the expected testimony for each witness the party intends to call at trial whose deposition has not been taken, and for whom expert reports pursuant to subparagraph (k)(2) of this Rule have not been provided. For adverse party or hostile witnesses, written disclosure of the expected subject matters of the witness's testimony, rather than a detailed statement of the expected testimony, shall be sufficient. Written disclosure shall be served by parties asserting claims 90 days before trial; by parties defending against claims 60 days before trial; and parties asserting claims shall serve written disclosures for any rebuttal witnesses 35 days before trial.

(4) Depositions of Witnesses in Lieu of Trial Testimony. A party who intends to offer the testimony of an expert or other witness may, pursuant to C.R.C.P. 30(b)(1)-(4), take the deposition of that witness for the purpose of preserving the witness' testimony for use at trial. Such a deposition shall be taken at least 5 days before trial. In that event, any party may offer admissible portions of the witness' deposition, including any cross-examination during the deposition, without a showing of the witness' unavailability. Any witness who has been so deposed may not be offered as a witness to present live testimony at trial by the party taking the deposition.

(5) Depositions for Obtaining Documents. Depositions also may be taken for the sole purpose of obtaining and authenticating documents from a non-party.

(6) Trial Exhibits. All exhibits to be used at trial which are in the possession, custody or control of the parties shall be identified and exchanged by the parties at least 30 days before trial. Authenticity of all identified and exchanged exhibits shall be deemed admitted unless objected to in writing within 10 days after receipt of the

exhibits. Documents in the possession, custody and control of third persons that have not been obtained by the identifying party pursuant to document deposition or otherwise, to the extent possible shall be identified 30 days before trial and objections to the authenticity of those documents may be made at any time prior to their admission into evidence.

(7) Limitations on Witnesses and Exhibits at Trial. In addition to the sanctions under C.R.C.P. 37(c), witnesses and expert witnesses whose depositions have not been taken shall be limited to testifying on direct examination about matters disclosed in reasonable detail in the written disclosures, provided, however, that adverse parties and hostile witnesses shall be limited to testifying on direct examination to the subject matters disclosed pursuant to subparagraph (k)(3) of this Rule. However, a party may call witnesses for whom written disclosures were not previously made for the purpose of authenticating exhibits if the opposing party made a timely objection to the authenticity of such exhibits.

(8) Juror Notebooks and Jury Instructions. Counsel for each party shall confer about items to be included in juror notebooks as set forth in C.R.C.P. 47(t). At the beginning of trial or at such other date set by the court, the parties shall make a joint submission to the court of items to be included in the juror notebook. Jury instructions and verdict forms shall be prepared pursuant to C.R.C.P. 16(g).

(9) Voluntary Discovery. In addition to the disclosures required by this Rule, voluntary discovery may be conducted as agreed to by all the parties. However, the scheduling of such voluntary discovery may not serve as the basis for a continuance of the trial, and the costs of such discovery shall not be deemed to be actual costs recoverable at the conclusion of the action. Disputes relating to such agreed discovery may not be the subject of motions to the court. If a voluntary deposition is taken, such deposition shall not preclude the calling of the deponent as a witness at trial.

(l) Changed Circumstances. In a case governed by this Rule, any time prior to trial, upon a specific showing of substantially changed circumstances sufficient to render the application of Simplified Procedure under this Rule unfair and a showing of good cause for the timing of the motion to terminate, the court shall terminate application of this Rule and enter such orders as are appropriate under the circumstances.

APPENDIX B

Source: Richard P. Holme, *Just, Speedy, and Inexpensive: Possible Simplified Procedure for Cases Under $100,000*, 29 Colo. Law. 5, Appendix (March 2000).

RULE 1.1 SIMPLIFIED PROCEDURE FOR CERTAIN ACTIONS

(a) Actions Subject to Simplified Procedure.

(1) In order to provide maximum access to the district courts in civil actions; to enhance the provision of just, speedy, and inexpensive determination of civil actions; to provide the earliest practical trials; and to limit discovery and its attendant expense, simplified procedure as defined in this Rule 1.1 shall govern civil actions in the district court in which no plaintiff, counterclaim plaintiff, cross-claim plaintiff or third-party plaintiff seeks money damages from any one party of more than $100,000.00 inclusive of any statutory or contractual attorney fees, penalties or punitive damages, but exclusive of interest and costs. Operation under this Rule shall limit the claimant's right to recover money damages from any one party to a maximum of $100,000.00 inclusive of any statutory or contractual attorney fees, penalties or punitive damages, but exclusive of interest and costs.

(2) This Rule shall not apply if, no later than 15 days after the case is at issue as defined in the first paragraph of C.R.C.P. 16(b):

(A) A claimant files a certification with the court that it has filed a claim against at least one other party in the case which exceeds $100,000.00 inclusive of any statutory or contractual attorney fees, penalties or punitive damages, but exclusive of interest and costs; or

(B) A party files a written statement signed by both the party and its counsel reflecting that the option and potential benefit of this Rule have been discussed and that the party believes that application of simplified procedure would not further the interests of a just, speedy and inexpensive determination of the action and further reflecting that this belief has been discussed with the other parties or their counsel.

(3) This Rule shall not apply to actions brought pursuant to C.R.C.P. 23, 23.1 and 23.2, domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, C.R.C.P. 120, or other expedited proceedings, unless otherwise stipulated by the parties.

(4) Parties with claims over $100,000.00 may mutually stipulate to be governed by this Rule, but they will not be bound by the $100,000.00 limitation on damages.

(b) Expedited Trials. Trial settings, motions and trials in actions subject to simplified procedure under this Rule should be given early trial settings, motions and trials.

(c) Simplified Procedure. Simplified procedure means that the action shall not be subject to C.R.C.P. 16, 26-34 and 36, unless otherwise specifically provided in this Rule, and shall be subject to the following requirements:

(1) ***Required Disclosures.***

(A) Each party shall make disclosures pursuant to C.R.C.P. 26(a)(1), 26(a)(4), 26(a)(6), 26(c), 26(e) and 26(g), no later than 30 days after the case is at issue as defined in the first paragraph of C.R.C.P. 16(b). In addition to the requirements of C.R.C.P. 26(g), all disclosures shall be signed under oath by the disclosing party.

(B) Even if not otherwise required under subsection (A), matters to be disclosed pursuant to this Rule shall also include, but are not limited to, the following:

(i) In actions claiming damages for personal or emotional injuries, the claimant shall disclose the names and addresses of all doctors, hospitals, clinics, pharmacies and other health care providers utilized by the claimant within ten years prior to the date of disclosure, and shall produce all records from those providers or written waivers allowing the opposing party to obtain those records. The claimant shall also produce documents, photographs, and transcripts or tapes of recorded statements that address the facts of the case or the injuries sustained. The defending party shall disclose any insurance company claims memos or documents, photographs, and transcripts or tapes of recorded statements that address the facts of the case, the injuries sustained, or affirmative defenses. A party need not produce those specific records for which the party, after consultation pursuant to C.R.C.P. 121, section 1-15(8), seeks and obtains a protective order from the court;

(ii) In actions seeking damages for loss of employment, the claimant shall disclose the names and addresses of all persons by whom the claimant has been employed for the ten years prior to the date of disclosure and shall produce all documents which reflect or reference claimant's efforts to find employment since the claimant's departure from the defending party, and written waivers allowing the opposing party to obtain the claimant's personnel files and payment histories from each employer, except with respect to those records for which the claimant, after consultation pursuant to C.R.C.P. 121, section 1-15(8), seeks and obtains a protective order from the court. The defending party shall produce the claimant's personnel file;

(iii) Before or after the initial disclosures, any party may make a written designation of specific information and documentation which that party believes should be disclosed pursuant to C.R.C.P. 26(a)(1). The other party shall provide a response and any agreed upon disclosures within 20 days of the request or at the time of initial disclosures, whichever is later. If any party believes the responses are inadequate, it may seek relief pursuant to C.R.C.P. 37.

(C) Documents and other evidentiary materials disclosed pursuant to C.R.C.P. 26(a)(1)(B) and 1.1(c)(1)(B) shall be made available for inspection and copying pursuant to C.R.C.P. 34 to the extent not privileged or protected from disclosure.

(2) ***Disclosure of Expert Witnesses.*** The provisions of C.R.C.P. 26(a)(2)(A) and (B), 26(a)(4), 26(a)(6), 26(c), 26(e) and 26(g) shall apply to disclosure for expert witnesses. Written disclosures of experts shall be served by parties asserting claims 90 days before trial; by parties defending against claims 60 days before trial; and parties asserting claims shall serve written disclosures for any rebuttal experts 45 days before trial.

(3) ***Disclosure of Trial Testimony.*** Each party shall serve written disclosure statements identifying the name, address, telephone number, and a detailed statement of the expected testimony for each witness the party intends to call at trial whose deposition has not been taken. For adverse party or hostile witnesses, written disclosure of the expected subject matters of the witness's testimony, rather than a detailed statement of the expected testimony, shall be sufficient. Written disclosure shall be served by parties asserting claims 90 days before trial; by parties defending against claims 60 days before trial; and parties asserting claims shall serve written disclosures for any rebuttal witnesses 45 days before trial.

(4) ***Depositions of witnesses in lieu of trial testimony.*** A party who intends to offer the testimony of an expert or other witness may, pursuant to C.R.C.P. 30(b)(1)-(4), take the deposition of that witness for the purpose of preserving the witness' testimony for use at trial. Such a deposition shall be taken at least 5 days before trial. In that event, admissible portions of the witness' deposition, including any cross-examination during the deposition, may be

offered at trial by any party without a showing of the witness' unavailability. Any witness who has been so deposed may not be offered as a witness to present live testimony at trial.

(5) ***Depositions for obtaining documents.*** Depositions upon oral or written examination also may be taken for the sole purpose of obtaining documents not accessible to a party.

(6) ***Trial Exhibits.*** All exhibits to be used at trial which are in the possession, custody or control of the parties shall be identified and exchanged by the parties 30 days before trial. Authenticity of all identified and exchanged exhibits shall be deemed admitted unless objected to in writing 20 days before trial. Documents in the possession, custody and control of third persons which have not been obtained by the identifying party pursuant to document deposition or otherwise shall be identified to the extent possible 30 days before trial and objections to the authenticity of those documents may be made at any time prior to their admission into evidence.

(7) ***Limitations on witnesses and exhibits at trial.*** In addition to the sanctions under C.R.C.P. 37(c), all witnesses and expert witnesses whose depositions have not been taken, except adverse party and hostile witnesses, shall be limited to testifying on direct examination about matters disclosed in reasonable detail in the written disclosures. Adverse party and hostile witnesses shall be limited to testifying on direct examination to the subject matters disclosed pursuant to subparagraph (c)(3) of this Rule. However, a party may call witnesses for whom written disclosures were not previously made for the purpose of authenticating exhibits if a timely objection to the authenticity of such exhibits was made by the opposing party.

(8) ***Juror Notebooks and Jury Instructions.*** Counsel for each party shall confer about items to be included in juror notebooks as set forth in C.R.C.P. 47(t). At the beginning of trial or at such other date set by the court, the parties shall make a joint submission to the court of items to be included in the juror notebook. Jury instructions and verdict forms shall be prepared pursuant to C.R.C.P. 16(d).

(9) ***Voluntary Discovery.*** In addition to the disclosures required by this Rule, voluntary discovery may be conducted as agreed to by all the parties. However, the scheduling of such voluntary discovery may not serve as the basis for a continuance of the trial, and the costs of such discovery shall not be deemed to be actual costs recoverable at the conclusion of the action. Disputes relating to such agreed discovery may not be the subject of motions to the court. If a voluntary deposition is taken, such deposition shall not preclude the calling of the deponent as a witness at trial.

APPENDIX C

A. IMPACT ANALYSIS MODELING APPROACH

1. Case Duration

To test the impact of Rule 16.1 on the duration measures (time to resolution and time to final event), the Cox Proportional Hazard model was employed. While a parametric model would assume that the case duration data have an approximately normal distribution,[58] the Cox model makes no assumption about the distribution of the baseline timing data. As a result, the model examines the data only in relative terms, as ordered events of interest, rather than in terms of a count of days, weeks, or months for case length. While this avoids errors created by false assumptions, the lack of a standardized period of time prevents length of case prediction estimates for the Rule 16.1 and non-Rule 16.1 groups. The data charts in Appendix D show both the coefficient estimates and the hazard ratios. The hazard rate is the probability that an event will occur at a particular time to a particular subject, given that the event has not yet occurred. As employed in this study, it provides the probability that a case will end at a particular time, and estimates the rate of case closure in Rule 16.1 cases as compared to opt-out cases. In order to convert the raw coefficients from the hazard model into hazard ratios, the following equation was used: $h(t) = \exp(\beta X)$, where $h(t)$ is the hazard ratio, β is a coefficient associated with a variable in the model, and X denotes the value of interest associated with that variable. Please note that for each control variable, the numbers are relative to the omitted reference category rather than absolute.

2. Number of Motions and Court Appearances

To test the impact of Rule 16.1 on the count measures (number of motions and number of court appearances), a negative binomial regression model was employed. The data charts in Appendices E and F show the coefficients obtained in the model. It should be noted that the coefficients do not directly reflect the percentage differences in number of motions reported, as those differences were estimated from the negative binomial regression after running the models. To estimate the percent change in the expected count from the coefficients, the following equation was used: $100 * [\exp(\beta_k * \delta) - 1]$[9], where β is the coefficient associated with a variable in the model and δ represents the specified change in the value of the variable. For example, when we look at the percent change in the expected motion count for cases that proceeded under Rule 16.1, the value of δ is equal to 1, given that the Rule 16.1 variable was coded as 1, denoting that the case proceeded under the rule. Please note that for each control variable, the numbers are relative to the omitted reference category rather than absolute.

[58] When data points are displayed visually in a graph, a "normal" distribution creates a symmetrical bell-shaped curve with most cases forming a central peak at the mean and fewer cases at either extreme.

APPENDIX D

*Standard errors in parentheses, *** p<0.01, ** p<0.05, * p<0.10*

CHART D1

INITIAL PILOT PROJECT: IMPACT ON TIME TO RESOLUTION

	Baseline Model	Cluster on Case Type	*Baseline Model Hazard Ratios*	*Cluster on Case Type Hazard Ratios*
Rule 16.1	0.737***	0.737***	2.089***	2.089***
	(0.093)	(0.106)	(0.195)	(0.221)
Number of Plaintiffs	-0.142**	-0.142***	0.868**	0.868***
	(0.059)	(0.031)	(0.051)	(0.027)
Number of Defendants	-0.056**	-0.056***	0.946**	0.946***
	(0.022)	(0.015)	(0.021)	(0.014)
Default Judgment	1.105***	1.105***	3.020***	3.020***
	(0.153)	(0.288)	(0.461)	(0.870)
Case Dismissed	0.213*	0.213	1.237*	1.237
	(0.115)	(0.146)	(0.142)	(0.181)
Adams County	-0.621***	-0.621***	0.537***	0.537***
	(0.100)	(0.101)	(0.054)	(0.054)
2002	-0.274***	-0.274**	0.761***	0.761**
	(0.090)	(0.129)	(0.069)	(0.098)
2004	-0.096	-0.096	0.908	0.908
	(0.120)	(0.077)	(0.109)	(0.070)
Observations	690	690	690	690

CHART D2

INITIAL PILOT PROJECT: IMPACT ON TIME TO FINAL EVENT

	Baseline Model	Cluster on Case Type	*Baseline Model Hazard Ratios*	*Cluster on Case Type Hazard Ratios*
Rule 16.1	0.530***	0.530***	1.699***	1.699***
	(0.094)	(0.123)	(0.160)	(0.209)
Number of Plaintiffs	-0.103*	-0.103***	0.902*	0.902***
	(0.057)	(0.039)	(0.052)	(0.035)
Number of Defendants	-0.028	-0.028**	0.972	0.972**
	(0.018)	(0.012)	(0.018)	(0.012)
Default Judgment	-0.012	-0.012	0.988	0.988
	(0.148)	(0.166)	(0.146)	(0.164)
Case Dismissed	0.514***	0.514***	1.671***	1.671***
	(0.116)	(0.146)	(0.194)	(0.245)
Adams County	-0.135	-0.135	0.874	0.874
	(0.102)	(0.198)	(0.089)	(0.173)
2002	0.011	0.011	1.011	1.011
	(0.089)	(0.118)	(0.090)	(0.120)
2004	-0.061	-0.061	0.941	0.941
	(0.120)	(0.066)	(0.113)	(0.062)
Observations	691	691	691	691

CHART D3

CASES CLOSED 2010: IMPACT ON TIME TO RESOLUTION

	Baseline Model	Cluster on Case Type	Case Type Dummies	Controlling for County
Rule 16.1	0.574***	0.574***	0.295*	0.266
	(0.133)	(0.200)	(0.156)	(0.163)
Number of Plaintiffs	-0.134*	-0.134	-0.120	-0.112
	(0.078)	(0.095)	(0.078)	(0.075)
Number of Defendants	-0.025	-0.025	0.013	-0.005
	(0.057)	(0.074)	(0.061)	(0.064)
Indigence	-0.256	-0.256*	-0.134	-0.070
	(0.268)	(0.138)	(0.273)	(0.296)
Case Type				
Tort			-0.339*	-0.546***
			(0.195)	(0.206)
Property disputes			0.170	0.307
			(0.376)	(0.393)
Employment/business disputes			0.211	0.274
			(0.298)	(0.305)
Enforcement			0.119	0.463
			(0.475)	(0.531)
Clerical			0.892*	1.062*
			(0.525)	(0.561)
Credit card/revolving credit debt collection			0.652***	0.599**
			(0.209)	(0.235)
Motor vehicle accident			-0.320*	-0.436**
			(0.183)	(0.192)
Title actions			-0.254	-0.493
			(0.401)	(0.419)
Undetermined case type			0.199	0.205
			(0.377)	(0.472)
Method of Resolution				
Default Judgment	0.608*	0.608*	0.572*	0.399
	(0.332)	(0.320)	(0.335)	(0.372)
Case Dismissed	-0.150	-0.150*	-0.076	-0.090
	(0.145)	(0.087)	(0.151)	(0.160)
Party Type				
Plaintiff - Insurance	0.034	0.034	0.284	0.255
	(0.343)	(0.315)	(0.351)	(0.378)
Defense - Insurance	0.126	0.126	0.150	-0.085
	(0.277)	(0.226)	(0.284)	(0.290)
Observations	294	294	294	294

CHART D4

CASES CLOSED 2010: IMPACT ON TIME TO RESOLUTION—HAZARD RATIOS

	Baseline Model	Cluster on Case Type	Case Type Dummies	Controlling for County
Rule 16.1	1.775***	1.775***	1.343*	1.304
	(0.235)	(0.356)	(0.209)	(0.212)
Number of Plaintiffs	0.874*	0.874	0.887	0.894
	(0.068)	(0.083)	(0.069)	(0.067)
Number of Defendants	0.976	0.976	1.013	0.995
	(0.056)	(0.072)	(0.061)	(0.064)
Indigence	0.774	0.774*	0.875	0.932
	(0.208)	(0.107)	(0.239)	(0.275)
Case Type				
Tort			0.712*	0.579***
			(0.139)	(0.119)
Property disputes			1.185	1.360
			(0.446)	(0.535)
Employment/business disputes			1.234	1.315
			(0.368)	(0.401)
Enforcement			1.126	1.589
			(0.535)	(0.843)
Clerical			2.441*	2.891*
			(1.282)	(1.621)
Credit card/revolving credit debt collection			1.919***	1.820**
			(0.402)	(0.428)
Motor vehicle accident			0.726*	0.647**
			(0.133)	(0.124)
Title actions			0.775	0.611
			(0.311)	(0.256)
Undetermined case type			1.220	1.228
			(0.460)	(0.579)
Method of Resolution				
Default Judgment	1.837*	1.837*	1.771*	1.491
	(0.610)	(0.588)	(0.592)	(0.555)
Case Dismissed	0.861	0.861*	0.927	0.914
	(0.125)	(0.075)	(0.140)	(0.147)
Party Type				
Plaintiff - Insurance	1.034	1.034	1.329	1.291
	(0.354)	(0.325)	(0.466)	(0.488)
Defense - Insurance	1.134	1.134	1.162	0.918
	(0.315)	(0.256)	(0.331)	(0.266)
Observations	294	294	294	294

CHART D5

CASES CLOSED 2010: IMPACT ON TIME TO FINAL EVENT

	Baseline Model	Cluster on Case Type	Case Type Dummies	Controlling for County
Rule 16.1	0.396***	0.396***	0.266*	0.354**
	(0.131)	(0.141)	(0.160)	(0.168)
Number of Plaintiffs	-0.117	-0.117**	-0.128*	-0.123
	(0.074)	(0.060)	(0.076)	(0.076)
Number of Defendants	-0.083	-0.083	-0.073	-0.097
	(0.059)	(0.067)	(0.063)	(0.067)
Indigence	-0.415	-0.415	-0.312	-0.312
	(0.269)	(0.260)	(0.281)	(0.286)
Case Type				
Tort			-0.164	-0.348
			(0.198)	(0.214)
Property disputes			-0.095	0.235
			(0.379)	(0.398)
Employment/business disputes			-0.114	-0.317
			(0.307)	(0.322)
Enforcement			0.412	0.819
			(0.491)	(0.526)
Clerical			1.145**	1.351**
			(0.527)	(0.549)
Credit card/revolving credit debt collection			0.141	0.234
			(0.212)	(0.222)
Motor vehicle accident			-0.108	-0.275
			(0.188)	(0.196)
Title actions			-0.447	-0.656
			(0.435)	(0.475)
Undetermined case type			-0.213	-0.147
			(0.380)	(0.492)
Method of Resolution				
Default Judgment	0.151	0.151	0.153	0.269
	(0.332)	(0.537)	(0.342)	(0.457)
Case Dismissed	0.203	0.203	0.205	0.244
	(0.144)	(0.158)	(0.154)	(0.164)
Party Type				
Plaintiff - Insurance	-0.078	-0.078	0.004	-0.091
	(0.342)	(0.386)	(0.360)	(0.386)
Defense - Insurance	0.020	0.020	0.017	-0.260
	(0.277)	(0.152)	(0.285)	(0.291)
Observations	294	294	294	294

CHART D6

CASES CLOSED 2010: IMPACT ON TIME TO FINAL EVENT—HAZARD RATIOS

	Baseline Model	Cluster on Case Type	Case Type Dummies	Controlling for County
Rule 16.1	1.487***	1.487***	1.304*	1.425**
	(0.194)	(0.210)	(0.209)	(0.239)
Number of Plaintiffs	0.890	0.890**	0.880*	0.885
	(0.066)	(0.053)	(0.067)	(0.067)
Number of Defendants	0.921	0.921	0.930	0.907
	(0.055)	(0.061)	(0.058)	(0.061)
Indigence	0.661	0.661	0.732	0.732
	(0.178)	(0.172)	(0.206)	(0.209)
Case Type				
Tort			0.849	0.706
			(0.168)	(0.151)
Property disputes			0.909	1.265
			(0.344)	(0.504)
Employment/business disputes			0.893	0.729
			(0.274)	(0.235)
Enforcement			1.510	2.268
			(0.742)	(1.193)
Clerical			3.143**	3.863**
			(1.657)	(2.122)
Credit card/revolving credit debt collection			1.151	1.263
			(0.244)	(0.281)
Motor vehicle accident			0.897	0.760
			(0.169)	(0.149)
Title actions			0.639	0.519
			(0.278)	(0.246)
Undetermined case type			0.808	0.863
			(0.307)	(0.425)
Method of Resolution				
Default Judgment	1.163	1.163	1.165	1.309
	(0.386)	(0.625)	(0.398)	(0.598)
Case Dismissed	1.225	1.225	1.227	1.277
	(0.176)	(0.193)	(0.189)	(0.209)
Party Type				
Plaintiff - Insurance	0.925	0.925	1.004	0.913
	(0.317)	(0.357)	(0.361)	(0.352)
Defense - Insurance	1.021	1.021	1.018	0.771
	(0.283)	(0.155)	(0.290)	(0.225)
Observations	294	294	294	294

APPENDIX E

*Standard errors in parentheses, *** p<0.01, ** p<0.05, * p<0.10*

CHART E1

INITIAL PILOT PROJECT: IMPACT ON NUMBER OF MOTIONS

	Baseline Model	Cluster on Case Type
Rule 16.1	-1.085***	-1.085***
	(0.097)	(0.083)
Number of Plaintiffs	0.217***	0.217***
	(0.054)	(0.065)
Number of Defendants	0.163***	0.163***
	(0.022)	(0.033)
Default Judgment	-0.012	-0.012
	(0.150)	(0.126)
Case Dismissed	-0.207**	-0.207
	(0.098)	(0.156)
Adams County	0.038	0.038
	(0.105)	(0.087)
2002	-0.002	-0.002
	(0.093)	(0.074)
2004	-0.060	-0.060
	(0.119)	(0.096)
Constant	0.872***	0.872***
	(0.161)	(0.150)
Observations	691	691

CHART E2

CASES CLOSED 2010: IMPACT ON NUMBER OF MOTIONS

	Baseline Model	Cluster on Case Type	Case Type Dummies	County Dummies
Rule 16.1	-0.606***	-0.606***	-0.518***	-0.465***
	(0.139)	(0.153)	(0.153)	(0.151)
Number of Plaintiffs	0.106	0.106***	0.086	0.081
	(0.068)	(0.039)	(0.066)	(0.065)
Number of Defendants	0.284***	0.284***	0.215***	0.213***
	(0.055)	(0.094)	(0.055)	(0.053)
Indigence	0.776***	0.776***	0.686***	0.661***
	(0.257)	(0.101)	(0.250)	(0.246)
Case Type				
Tort			0.300	0.373**
			(0.186)	(0.189)
Property disputes			0.003	-0.038
			(0.360)	(0.359)
Employment/business disputes			0.536**	0.568**
			(0.272)	(0.267)
Enforcement			-0.294	-0.494
			(0.466)	(0.477)
Clerical			0.105	0.159
			(0.541)	(0.532)
Credit card/revolving credit debt collection			-0.363*	-0.412*
			(0.221)	(0.220)
Motor vehicle accident			-0.379**	-0.334*
			(0.183)	(0.179)
Title actions			0.588*	0.622*
			(0.352)	(0.360)
Undetermined case type			-0.162	-0.295
			(0.404)	(0.445)
Method of Resolution				
Default Judgment	-0.083	-0.083	-0.079	-0.116
	(0.344)	(0.263)	(0.334)	(0.343)
Case Dismissed	-0.484***	-0.484**	-0.436***	-0.521***
	(0.142)	(0.191)	(0.144)	(0.143)
Party Type				
Plaintiff - Insurance	0.445	0.445*	0.621*	0.557*
	(0.337)	(0.269)	(0.341)	(0.339)
Defense - Insurance	-0.011	-0.011	0.130	0.296
	(0.283)	(0.127)	(0.276)	(0.277)
Constant	0.850***	0.850***	0.947***	0.557*
	(0.188)	(0.255)	(0.204)	(0.339)
Observations	294	294	294	294

APPENDIX F

*Standard errors in parentheses, *** p<0.01, ** p<0.05, * p<0.10*

CHART F1

INITIAL PILOT PROJECT: IMPACT ON NUMBER OF COURT APPEARANCES

	Baseline Model	Cluster on Case Type
Rule 16.1	-0.802***	-0.802***
	(0.185)	(0.130)
Number of Plaintiffs	0.241***	0.241**
	(0.079)	(0.096)
Number of Defendants	0.034	0.034
	(0.024)	(0.025)
Default Judgment	-2.002***	-2.002***
	(0.530)	(0.449)
Case Dismissed	-0.400**	-0.400***
	(0.166)	(0.115)
Adams County	0.420*	0.420*
	(0.226)	(0.224)
2002	0.280	0.280**
	(0.174)	(0.109)
2004	0.009	0.009
	(0.214)	(0.217)
Constant	-1.404***	-1.404***
	(0.277)	(0.258)
Observations	691	691

CHART F2

CASES CLOSED 2010: IMPACT ON NUMBER OF COURT APPEARANCES

	Baseline Model	Cluster on Case Type	Case Type Dummies	County Dummies
Rule 16.1	-0.338	-0.338	-0.370	-0.276
	(0.266)	(0.386)	(0.307)	(0.290)
Number of Plaintiffs	0.256**	0.256*	0.173	0.235**
	(0.120)	(0.136)	(0.126)	(0.101)
Number of Defendants	0.233**	0.233**	0.170	0.065
	(0.104)	(0.091)	(0.105)	(0.090)
Indigence	1.255***	1.255***	1.233***	1.156***
	(0.457)	(0.279)	(0.453)	(0.390)
Case Type				
Tort			-0.073	-0.360
			(0.377)	(0.369)
Property disputes			0.052	0.326
			(0.705)	(0.654)
Employment/business disputes			0.174	0.546
			(0.517)	(0.471)
Enforcement			0.746	1.243**
			(0.757)	(0.626)
Clerical			1.256	0.705
			(0.804)	(0.728)
Credit card/revolving credit debt collection			-1.588***	-2.250***
			(0.592)	(0.605)
Motor vehicle accident			-0.554	-0.634*
			(0.390)	(0.363)
Title actions			0.555	0.079
			(0.645)	(0.565)
Undetermined case type			0.690	-0.462
			(0.641)	(0.696)
Method of Resolution				
Default Judgment	0.218	0.218	0.361	0.518
	(0.646)	(0.440)	(0.627)	(0.596)
Case Dismissed	-0.233	-0.233	-0.164	-0.495*
	(0.273)	(0.328)	(0.291)	(0.268)
Party Type				
Plaintiff - Insurance	-0.028	-0.028	0.225	0.023
	(0.696)	(0.390)	(0.688)	(0.619)
Defense - Insurance	-0.711	-0.711*	-0.732	-0.127
	(0.702)	(0.399)	(0.702)	(0.674)
Constant	-1.248***	-1.248***	-0.943**	-1.043**
	(0.368)	(0.373)	(0.408)	(0.464)
Observations	294	294	294	294

A SUMMARY OF THE SHORT, SUMMARY, AND EXPEDITED CIVIL ACTION PROGRAMS AROUND THE COUNTRY

RULE ONE INITIATIVE

IAALS

Short, Summary, and Expedited Civil Action Programs Around the Country

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
N.D. Cal.	Expedited Trial Procedure	General Order No. 64	2011	Voluntary	Absent agreement, limited to 10 interrogatories, 10 requests for production, 10 requests for admission, and 15 hours of deposition time, per side; experts limited to one per side absent agreement or leave		Initial expedited trial conference within 30 days after agreement filed; pretrial motions require leave of court and may not exceed 3 pages; pretrial conference shall be held no later than 150 days after agreement approved	Unless otherwise ordered, trial is to be held no later than 6 months after the agreement is approved by the court	The judge sets limits for opening and closing with 3 hours per side for introduction of evidence		May be tried to a judge or a jury; the judge conducts voir dire	6 jurors and may proceed with 5				Binding with limited grounds for appeal
D. Minn.	Expedited Trials Program	U.S. District Court for the District of Minnesota Rules of Procedure for Expedited Trials	2001	Voluntary	Expectation that Rule 26(a)(1) will be more vigorously followed and enforced; documents under Rule 26(a)(3) to be exchanged within 30 days of pretrial conference and all disovery within 120 days of the pretrial conference; discovery limited to 10 interrogatories, 5 requests for production, 5 requests for admission, and 2 depositions per party		Pretrial conference to be scheduled with magistrate within 30 days of the date the Complaint was served; pretrial order to be issued at pretrial conference	Trial to be held no later than 6 months after the pretrial conference; if the parties consent to trial before a magistrate judge, trial shall be held within 120 days of the date of the pretrial conference	8 hours per side				Only one expert witness may testify per party; written witness statements may be offered in lieu of direct testimony			

Short, Summary, and Expedited Civil Action Programs Around the Country

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
D. Nev.	Short Trial Program	General Order 2013-01 and Short Trial Rules 1-26	2013	Voluntary	Exchange initial disclosures within 7 days after Stipulation approved; parties must submit a Stipulated Scheduling Order and Discovery Plan within 30 days after appointment of judge and meet with judge to confer, exchange documents not previously produced; extent to which discovery is allowed is at discretion of judge	Subject to timely objections, documents admitted without necessity for authentication; joint evidentiary booklets created, to be submitted with joint pretrial memorandum	Joint pretrial memorandum due to judge 7 days prior before pretrial conference; pretrial conference held no later than 10 days before trial	Trial to commence no later than 150 days from the date presiding judge is assigned	Allowed up to 9 hours each to present the case unless a different time frame is stipulated to and approved, including voir dire, opening and closing			4, or 6 if good cause shown	Parties can quote directly from relevant depositions, interrogatories, requests for admissions, or any other evidence as stipulations by the parties; parties not required to present oral testimony			Parties may agree the results are binding final and non-appealable; otherwise parties have the right to file a direct appeal

Short, Summary, and Expedited Civil Action Programs Around the Country

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
W.D. Pa.	Pilot Program for Expedited Civil Litigation		2012	Voluntary	Exchange initial disclosures within 7 days after Stip. approved if not previously; Rule 26(a)(2) disclosures no later than 30 days prior to discovery close; discovery to be completed no later than 90 days after the Expedited Trial Conf.; discovery limited to 20 interrogatories, 10 requests for production, 10 requests for admission, and 15 hours of depositions, per side	Documents may be admitted without authentication	Initial Case Management Conference serves as Expedited Trial Conference	Trial to be held no later than 6 months after the Expedited Trial Conference	3 hours per side, not including opening and closing		Court to set time limits for voir dire, opening statements, and closing argument	6 jurors, may proceed with 5	Testimony limited to one expert per side; parties may agree to submit expert reports in lieu of testimony			Binding with limited grounds for appeal
W.D. Wash.	Individualized Trial Program	Local Civil Rule 39.2	2012	Voluntary; parties complete an "Agreement for Individualized Trial and Request for Approval"	Initial disclosures due in 7 days after agreement approved if not already exchanged; discovery to be completed no later than 90 days after the individualized trial conference; discovery limited to 10 interrogatories, 10 requests for production, 10 requests for admissions, and 15 deposition hours, per side		Individualized trial conference within 30 days of filing the agreement; joint individualized trial statement due 7 days before invidualized trial conference; pretrial conference held no later than 150 days after agreement approved	Trial to be held no later than 6 months after the agreement is approved	3 hours per side, not including opening and closing		Includes a trial before a judge or a jury	7 jurors and may proceed with 6	Only one expert witness may testify per party			Binding with limited grounds for appeal

Short, Summary, and Expedited Civil Action Programs Around the Country

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
Alabama	Expedited Civil Actions	Ala. Code § 6-1-3; draft rules currently under consideration by the Supreme Court	2012	To be determined; to be applicable to civil actions not exceeding $50,000												
Arizona, Maricopa County Superior Court	Short Trial Program	Affiliated with ADR program	1997	Alternative to mandatory arbitration or as an appeal from an unfavorable arbitration decision; also used voluntarily separate from ADR	Uses abbreviated discovery process	Stipulations to documentary evidence and pretrial motions strongly encouraged; evidentiary notebooks	Telephonic conference to be held at least three days prior to short trial; 7 days prior to trial, a Joint Pre-Trial Memorandum should be sent to JPT	Short Trials generally scheduled within 90 days of referral	1 day jury trial; 2 hours per side with 10 minutes for opening and closing statements	Judge pro tempore oversees the trial only	Parties allocated 3 peremptory challenges	4 jurors; 3 required for verdict	Live testimony discouraged; witnesses can be used by deposition or affidavit; evidentiary notebooks may also be used	No record		Binding with limited grounds for appeal

Short, Summary, and Expedited Civil Action Programs Around the Country

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
California	Expedited Jury Trial Program	Expedited Jury Trials Act, 2010 Cal. Stat. 3660 (codified at Cal. Civ. Proc. Code §§ 630.01-.12); Cal. R. Ct. 3.1545-3.1552; amended to add Cal. Civ. Proc. Code §§ 630.20-.27 re: mandatory expedited jury trials	2010; amended by Assembly Bill No. 555 dated Sept. 28, 2015	Voluntary; as of 7/1/16 there will be mandatory expedited jury trials (MEJT) in limited jurisdiction civil cases, either party can opt out if listed criteria met, and voluntary expedited jury trials still an option (VEJT)	The parties may follow existing rules and procedures or may modify the rules by joint stipulation; pretrial exchange between parties no later than 25 days prior to trial; supplemental exchange of evidence no later than 20 days before trial	Rules of evidence apply unless agreed to otherwise; parties allowed to enter into agreements governing the rules of procedure, including manner and method of presenting evidence; evidentiary notebooks encouraged	Pretrial conference to be held no later than 15 days prior to trial		3 hours per side, excluding jury selection; as of 7/1/16 time extended to 5 hours per side, including voir dire, for both voluntary and mandatory	Presiding judge is responsible for assignment; may assign civil court judge or a temporary judge to conduct expedited trial	One hour for voir dire, with 15 minutes for the judicial officer and 15 minutes per side; three peremptory challenges per party; joint form questionnaire encouraged; as of 7/1/16 four peremptory challenges	8 jurors (or fewer by stipulation) with 6 required for verdict; as 7/1/16 for mandatory proceedings 8 jurors plus one alternate unless agreement to fewer	Parties are encouraged to limit the number of live witnesses		Yes	Binding, subject to any high/low agreement. Right to bring appeal or bring post-trial motions waived except on limited grounds; as of 7/1/16, for mandatory proceedings the verdict is appealable, and still subject to any high/low agreement

Short, Summary, and Expedited Civil Action Programs Around the Country

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
Colorado	Simplified Procedure for Civil Actions	Colorado Rule of Civil Procedure 16.1	2003	Applicable where a party claims $100,000 or less, although parties may elect to be excluded (no cause required); various case types are automatically excluded (e.g. domestic relations); recovery limited to $100,000	Automatic disclosures due 35 days after the case is at issue; depositions available only in lieu of trial testimony or to obtain and authenticate documents; no additional discovery unless as agreed to by parties	Juror notebooks; rules of evidence and procedure apply except as provided in Colo. R. Civ. P. 16.1(k)		Cases proceeding under simpolified procedure to be given early trial settings and hearings				No less than 6 jurors and one alternate unless stipulated otherwise	Direct testimony limited to discussing information in disclosures, with exceptions			Binding
Florida	Expedited Trials	Florida Stat. § 45.075	1999	Voluntary	Discovery to be completed within 60 days of the court adopting the joint stipulation; all interrogatories and requests for production to be served within 10 days after the order is entered and responses served within 20 days	Standard rules of evidence and procedure apply, except where otherwise stated		Case may be tried within 30 days after the 60 day discovery cutoff, if such schedule does not impose undue burden on the court calendar	1 day jury trial; 1 hour for jury selection, 3 hours per side inclusive of opening and closing statements		Voir dire limited to one hour		Parties are permitted to introduce written reports by experts instead of testimony; deposition excerpts and video permissible			Binding

Short, Summary, and Expedited Civil Action Programs Around the Country

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
Georgia	Summary Jury Trial	Ga. Code. Ann. § 15-23-2; Ga. Alt. Dispute. Resolution R. I. Ga. Unif. R. Dispute Resolution Programs, App'x A, Introduction, R.2	1993	Voluntary												Advisory
Indiana	Mini trial	Ind. Alt. Dispute Resolution R. 4	1991		Discovery proceeds according to standard rules						Jury deliberations time-limited		Evidence to be presented in expedited fashion	Deemed confidential		Advisory
Indiana	Summary Jury Trial	Ind. Alt. Dispute Resolution R. 5	1991				Agreement must set date for pretrial conference	Firmly fixed time for trial must be set at pretrial conference	Evidence to be presented in expedited fashion			6 jurors; jury deliberations time-limited		Deemed confidential		The parties may agree to make the verdict binding

Short, Summary, and Expedited Civil Action Programs Around the Country

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
Iowa	Expedited Civil Action	Iowa Court Rule 1.281	2015	Voluntary by plaintiffs, based on claimed damages of $75,000 in damages or less; both parties can request through joint motion, without limit on damages	Must be completed 60 days before trial; no more than 10 interrogatories per side, no more than 10 requests for production per side, no more than 10 requests for admission			Within 12 mos, with extension to 15 months possible	2 days, unless extended for good cause; each side allowed 6 hours for jury selection, opening statements, presentation of evidence, examination and cross-examination of witnesses, and closing arguments	If jury desired, must file a demand for jury trial	6 jurors, 5 must agree for a verdict; each side must strike 3 out of 12 person panel		One party depostion per side; two non-party depositions per side; one expert each, unless showing good cause to increase; witness/expert can complete Healthcare Provider Statement in lieu of testimony			
Minnesota	Expedited Civil Litigation Track Pilot Project	Special Rules for the Pilot Expedited Civil Litigation Track	2013, expanded in 2016	Mandatory for included civil actions filed in First and Sixth Judicial Districts on or after July 1, 2013	Parties required to serve automatic disclosures; discovery period limited to 90 days post Case Management Conference; limited to 15 interrogatories, 15 rquests for production, 25 admissions		A Case Management Conference is held within 45 to 60 days of the date of filing (or ELT Election)	Trial is to be held within four to six months								

Short, Summary, and Expedited Civil Action Programs Around the Country

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Minnesota	Summary Jury Trial	Minn. Gen. R. Prac. 114.02, 114.08, 114.13; Minn. Stat. §604.11	1993									6		Deemed confidential		Advisory
Nebraska	Summary Jury Trial	L.B. 225, 1987 Neb. Laws 600 (1987), codified at Neb. Rev. Stat. §25-1154 to -1157	1987	Voluntary					As agreed to by parties and court			6	Parties to exchange summaries of evidence at least ten days prior to trial			Advisory and not appealable

Short, Summary, and Expedited Civil Action Programs Around the Country

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
Nevada	Short Trial Program	Nev. Rev. Stat. Ann. § 38.250; Nev. Rev. Stat. Ann. § 67.060 /Nevada Short Trial Rules	2000	Mandatory component of the ADR program in Clark and Washoe Counties; also used voluntarily in 2 other counties; recovery not to exceed $50,000 excl. attys fees, costs, and interest, unless otherwise stipulated	Parties required to meet with judge for a mandatory discovery conference to exchange documents, identify witnesses, formulate discovery plan	Evidentiary objections to be submitted at time of pretrial memorandum; subject to timely objection, documentary evidence may be admitted without necessity of authentication or foundation of a live witness; joint evidentiary notebooks	Joint pretrial memorandum due to judge 7 days prior before pretrial conference; pretrial conference held no later than 10 days before trial	Not later than 120 days after assignment of presiding judge, and 240 days after filing of a written stipulation for parties that enter by stipulation	Typically one day, with 3 hours per side unless otherwise agreed to by parties and court	Judge pro tempore assigned by ADR Commissioner	15 minutes per side for voir dire, two peremptory challenges each	4 or 6 members (up to 8 if good cause)	Parties encouraged to use written reports in lieu of oral testimony in court; written reports by experts encouraged in lieu of live testimony; numerous mandatory provisioins to simplify presentation of evidence	No formal reporting of the proceedings unless paid for by the party or parties	Parties may set high/low; $3,000 cap on attorneys fees; and $500 cap on expert witness fees that can be recovered by a party	Advisory, unless otherwise agreed the results are binding. Direct appeal available to state supreme court, except where the parties have agreed the results are binding

Short, Summary, and Expedited Civil Action Programs Around the Country

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
New Hampshire	Summary Jury Trial	Civil Rule 31 of the Superior Court of the State of New Hampshire	1986	Voluntary; the parties may stipulate that the verdict is a final determination on the merits, or any other use of the verdict to help aid resolution of the case		Exhibits must be marked and exchanged prior to trial and objections raised			Each side has 1 hour to present their case			6 jurors or fewer if stipulated	No direct testimony. Evidence to be presented through the attorneys	No record permitted except in extraordinary circumstances.		Advisory unless otherwise agreed; counsel may stipulate that a consensus verdict will be deemed a final determination on the merits and that judgment will be entered
New Jersey	Expedited Jury Trial Program	Available through Civil Complementary Dispute Resolution Program		Voluntary			The parties meet prior to trial for a preliminary hearing at which time exhibits are entered into evidence and all objections heard and ruled on		Typically one to two days; time limits only on opening statements (15 minutes) and summations (30 minutes)		Jury selection is streamlined by limiting jury to six members and 3 peremptory challenges	Six jurors, may proceed with 5	Generally only the parties testify live and the remaining evidence is presented by counsel (via report and deposition)			No limits on damages and final judgments appealable

Short, Summary, and Expedited Civil Action Programs Around the Country

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
New York	Summary Jury Trial Program	Various local court rules.	1998	Voluntary		Generally relaxed rules of evidence, subject to determinations at evidentiary hearing	All documentary evidence exchanged prior to trial; evidentiary hearing prior to trial/	Placed on calendar for trial at earliest possible date	Generally a one-day jury trial; 10 minute opening and closing and one hour presentation of case	No less than 6 jurors and one alternate unless stipulated otherwise	If conducted by court, parties have 10 minutes to also voir dire the jury; 2 peremptory challenges		Live witnesses limited to two; portions of video may be played in lieu of actual appearances		Yes, recited in stipulation signed by attorneys	Generally binding. Right to appeal waived
North Carolina (under general court rules)	Summary Jury Trial	N.C. Super. & Dist. Cts. R. 23	1991	Voluntary				As per agreement of the parties	As agreed to by parties and court	Presider is referee selected by parties	As agreed to by the parties		As agreed to by parties and court			Advisory, unless otherwise agreed
North Carolina (under mediated settlement rules)	Summary Bench Trial or Summary Jury Trial	N.C. Super. Ct. Mediated Settlement Conf. R. 13	2002	Voluntary						Presiding officer selected by parties	Three peremptory challenges per side	Procedure for jury selection provided	Evidence presented in summary fashion by the attorneys			Advisory or binding upon agreement of parties

Short, Summary, and Expedited Civil Action Programs Around the Country

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North Dakota	Summary Jury Trial	N.D. R. Ct. 8.8	1999	Voluntary					To be conducted in a summary abbreviated fashion				Expert-jurors may be used	Deemed confidential		Advisory
Oregon	Expedited Civil Jury Trial Program	Or. Unif. Trial Ct. R. 5.150	2012	Voluntary, the decision to accept or reject a case for designation is within the sole discretion of the presiding judge; if accepted, the case is removed from mandatory arbitration and all forms of required ADR	Discovery must be complete no later than 21 days prior to trial; discovery may proceed by stipulation (if not, 2 depositions, 1 set of requests for production; 1 set of requests for admission; all discovery requests served no later than 60 days before trial)	Encouraged to expedite trial	Initial case conference within 10 days of the expedited case designation with all trial counsel and self-represented parties required to appear; pretrial conference no later than 14 days before trial; pretrial motions not allowed without prior leave of court	Trial date set no later than 4 months from the date of the order	No time limits		Short voir dire		Parties encouraged to limit live witness testimony			No limits on appeals
Ohio	Summary Jury Trial	Wood Cnty. (Ohio) Gen. Div. C.P. Ct R. 7.12					Court may conduct pre-hearing conference		1 hour per side			6	Evidence presented through the attorneys	No record unless otherwise arranged for by the parties		Non-binding unless otherwise stipulated to by the parties

Short, Summary, and Expedited Civil Action Programs Around the Country

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
Pennsylvania (various counties)	Summary Jury Trial	Various local court rules.	2003			Partially provided for in local rule			One hour per side			6, with 5 needed for verdict	Presentation of evidence by counsel	No record		Generally non-binding
South Carolina	Fast Track Jury Trial Process	March 7, 2013 Admin. Order implementing program statewide and providing Rules and Procedures/Order on Fast Track Jury Trial Process, Appellate Case No. 2013-000389 (S.C. Mar. 7, 2013)(state supreme court administrative order)	2013	Voluntary		The parties may agree to use streamlined rules of evidence	A pretrial conference is typically held 10 days prior to trial during which the Special Hearing Officer rules on objections to documentary evidence previously exchanged and witness lists are exchanged	Trial set for a mutually convenient date; standard trials to have priority over Fast-Track Jury trials in scheduling or use of court resources	Generally a one-day jury trial	Special Hearing Officer chosen and compensated by the parties	Voir dire to be conducted by Special Hearing Officer or judge; two peremptory challenges per side	6	Parties encouraged to limit live witness testimony	No record of proceeding unless either party elects to have a transcript of the proceeding, which shall be at that party's expense	High-low agreements honored	Binding; parties may waive right to post-trial motions and parties waive appeal absent fraud
Tennessee	Summary Jury Trial	Tenn. Sup. Ct. R. 31 § 2-3, 10, 24							To be conducted in an expedited fashion				Evidence presented through the attorneys	Not recorded unless otherwise agreed by the parties		Advisory

Short, Summary, and Expedited Civil Action Programs Around the Country

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
Texas	Expedited Actions	Texas Rule of Civil Procedure 169	2013	Mandatory in all cases where all claimants affirmatively plead that they seek only monetary relief aggregating $100,000 or less, including damages, penalties, costs, expenses, pre-judgment interest, and attorneys fees (with case type exceptions); $100,000 cap on recovery	Discovery ends 180 days after the first request for discovery is served; discovery is limited to 6 hours of depositions/15 written interrogatories, requests for production, and admissions			Trial must be set within 90 days of the end of discovery	8 hours/side for jury selection, opening, presentation, and closing		Total time for trial, including jury selection, limited to eight hours per side, with exceptions		Ability to challenge expert testimony limited			Binding
Texas	Mini trial	Tex. Civ. Prac. & Rem. Code Ann. § 154.024	1987	Voluntary										Each party and counsel present the position of the party before select representatives or an impartial third party		Advisory

Jurisdiction	Program Name	Applicable Statute/Rule	Date First Enacted	Voluntary or Mandatory	Discovery	Evidentiary Agreements	Pretrial Conference	Trial Date	Length of Trial	Judicial Officer	Jury Selection Procedure	Number of Jurors	Witnesses	Transcript	High-Low Agreements Allowed	Binding or Appealable
Texas	Summary Jury Trial	Tex. Civ. Prac. & Rem. Code Ann. § 154.026	1987	Voluntary								6				Advisory
Utah	Expedited Jury Trial	Utah Code Ann. 78B-3-901-to 909; Utah R. Jud. Admin. R 4-501	2011	Voluntary					No more than 3 hours per side	Jury	Limited to 1 hour, each side will exercise no more than one peremptory challenge	Six jurors with no alternates, five required for verdict	Agreement of parties to include limitations on witnesses		High-low agreement mandatory	Binding; limited right to appeal or to seek new trial
Virginia	Summary Jury Trial	Va. Code Ann. §8.01-576.1 to 576.3	1988	Voluntary						Jury		7	Parties to present a summary of evidence and given opportunity to rebut			Non-binding unless otherwise stipulated to by the parties

A Return to Trials:

Implementing Effective Short, Summary, and Expedited Civil Action Programs

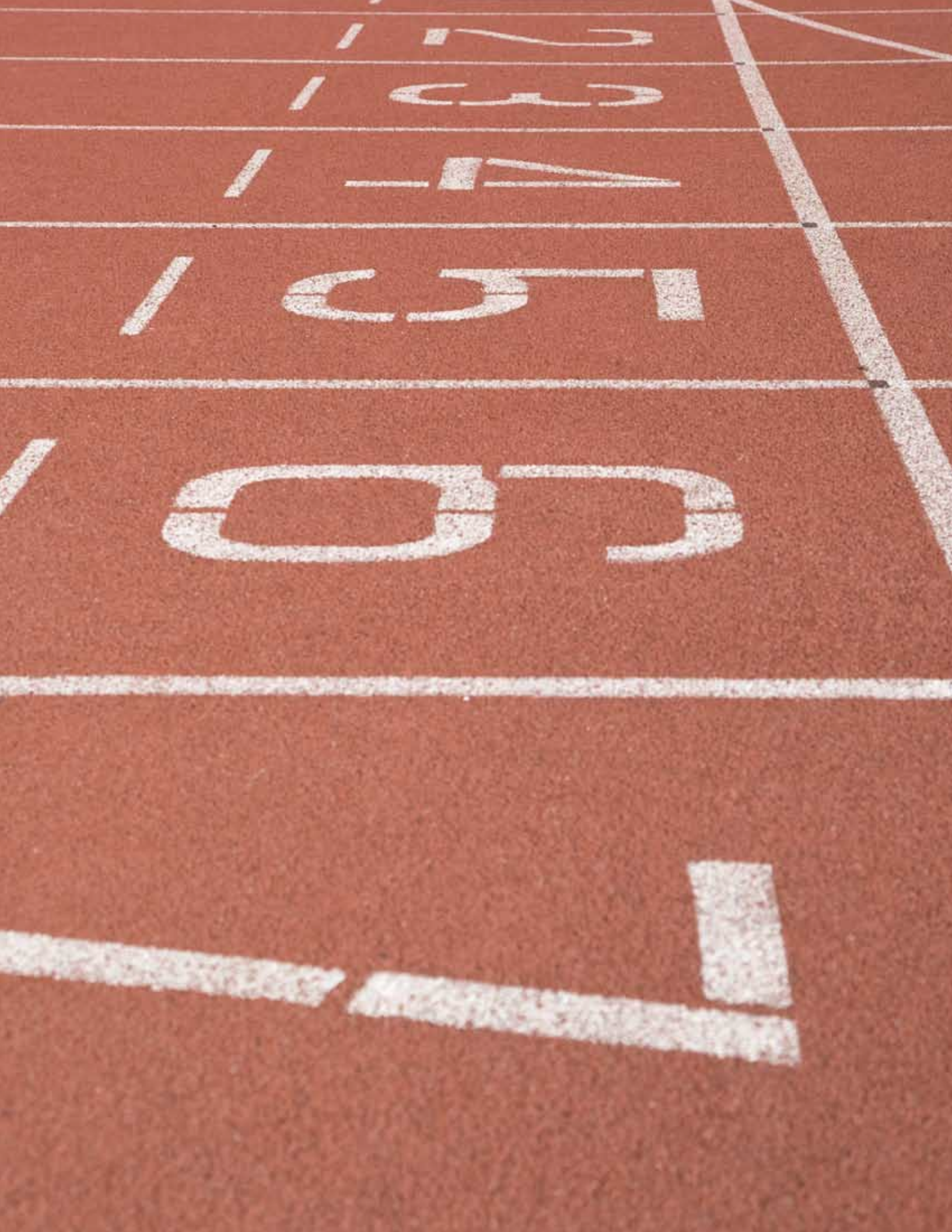


RULE ONE INITIATIVE

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A Return to Trials:

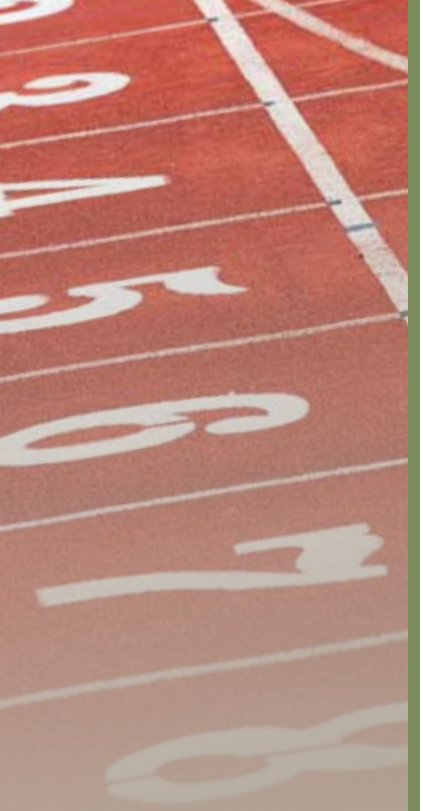
Implementing Effective Short, Summary, and Expedited Civil Action Programs

October 2012

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IAALS, the Institute for the Advancement of the American Legal System, is a national independent research center at the University of Denver dedicated to continuous improvement of the process and culture of the civil justice system. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications, and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models, and will to advance a more accessible, efficient, and accountable civil justice system.

Rebecca Love Kourlis — Executive Director

Brittany K.T. Kauffman — Manager, *Rule One Initiative*

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, *Rule One Initiative* empowers, encourages, and enables continuous improvement in the civil justice process.



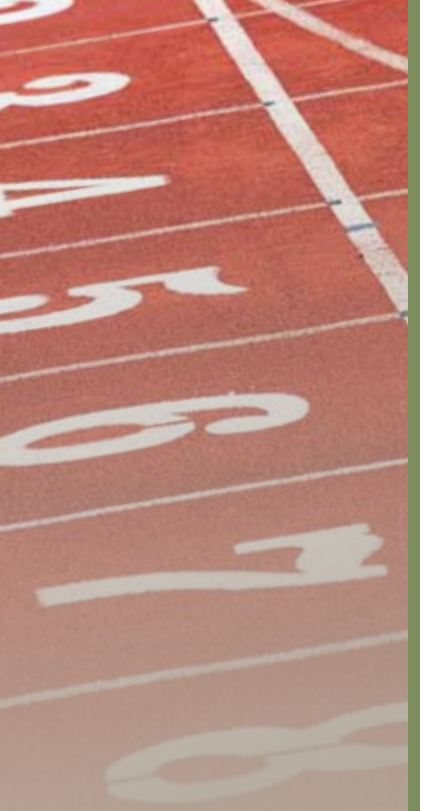
About ABOTA

The American Board of Trial Advocates, founded in 1958, is an organization dedicated to defending the American civil justice system. With a membership of 6,800 experienced attorneys representing both plaintiffs and defendants in civil cases, ABOTA is uniquely qualified to speak for the value of the constitutionally mandated jury system as the protector of the rights of persons and property. ABOTA publishes *Voir Dire* magazine, which features in-depth articles on current and historical issues related to constitutional rights, in particular the Seventh Amendment right to trial by jury.

ABOTA's National Board of Directors has taken a stand regarding expedited jury trials and unanimously passed the following resolution:

> **Expedited Jury Trials**
>
> Whereas, ABOTA recognizes that the number of civil cases in the United States actually tried to a jury is rapidly decreasing and that litigation costs and delays are a major contributor to the reduction in the number of civil juries trials, and
>
> Whereas, ABOTA recognizes that several states have adopted expedited jury trial programs which provide for streamlined pretrial procedures and abbreviated jury trials in many civil cases in an effort to thereby reduce the cost and time involved, yet preserving the civil jury system in this Country,
>
> It is therefore, RESOLVED, that ABOTA supports the concept of streamlined pretrial procedures and expedited jury trials and that ABOTA, through its leaders and members, should support existing expedited jury trial programs and encourage the adoption of similar programs throughout all jurisdictions.
>
> — Jan. 14, 2012

American Board of Trial Advocates
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National Center for State Courts
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The National Center for State Courts (NCSC) is a nonprofit organization dedicated to improving the administration of justice by providing leadership and service to the state courts and courts around the world. Founded in 1971, the NCSC provides education, training, technology, management, and research services to the nation's state courts. The NCSC Center for Jury Studies engages in cutting-edge research to identify practices that promote broad community participation in the justice system, that enhances juror confidence and satisfaction with jury service, that provides jurors with decision-making tools necessary to make informed and fair judgments in the cases submitted to them, and that respects jurors contributions to the justice system by using their time effectively and making reasonable accommodations for their comfort and privacy. The NCSC is headquartered in Williamsburg, Virginia and has offices in Denver, Colorado, Arlington, Virginia, and Washington, DC.

Mary C. McQueen President

Richard Schauffler Director of Research Services

Paula Hannaford-Agor Director, NCSC Center for Jury Studies

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Introduction

There is a widespread perception—among lawyers and litigants—that the civil justice system is too complex, costs too much, and takes too long. There is also data documenting that civil jury trials have decreased precipitously over the last decade.[1] The decline in jury trials has meant fewer cases that have the benefit of citizen input, fewer case precedents, fewer jurors who understand the system, fewer judges and lawyers who can try jury cases—and overall, a smudge on the Constitutional promise of access to civil, as well as criminal, jury trials.

As one response to these realities, various jurisdictions—both state and federal—have implemented an alternative process that is designed to provide litigants with speedy and less expensive access to civil trials. The programs involve not only a simplified pretrial process, but also a shortened trial on an expedited basis. While some programs focus on jury trials, the overall goal of such programs is to provide access to a shorter pretrial and trial procedure, both for jury and bench trials. For purposes of this report, we are calling these programs Short, Summary, and Expedited Civil Action programs (SSE programs).

The National Center for State Courts (NCSC) has just completed a report detailing the elements of various examples of these programs.[2] In the wake of that report, the NCSC, IAALS (the Institute for the Advancement of the American Legal System at the University of Denver), and the American Board of Trial Advocates (ABOTA) have taken on the task of collating information about what seems to be working in these programs, how to use the process well, and how a jurisdiction might choose to put a program in place if it does not now have one.

For all three organizations, this work represents an ongoing commitment to processes that provide less expensive access to the civil justice system and a commitment to the preservation of the civil jury trial.

In preparation for the drafting of this report, the three organizations formed a Committee (members listed on Appendix A), agreed upon a charge to the Committee (Appendix B), and reviewed all available information regarding existing programs around the country. The Committee then met in person and thereafter worked collaboratively on the report. The Committee was chosen on the basis of balance, knowledge about different programs, and experience.

The recommendations that follow are designed to assist those around the country who are considering implementing an SSE program. Because of the variability

1 According to state court disposition data collected by NCSC from 2000 to 2009, the percentage of civil jury trials dropped 47.5% across the period to a low 0.5% in 2009. Data on federal civil cases shows a decline in cases resolved by trial from 11.5 percent in 1962 to 1.8 percent in 2002, illustrating the historic trend away from trials. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459, 461, 464 (2004) (noting that in 1938, "the year that the Federal Rules of Civil Procedure took effect, 18.9 percent of terminations were by trial").

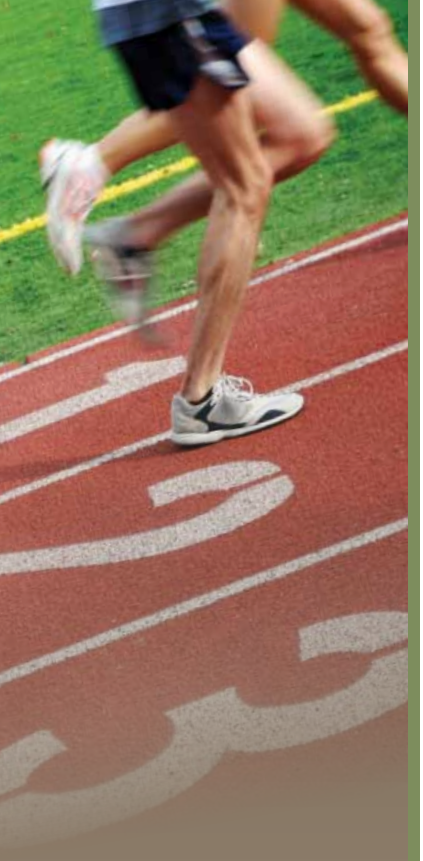
2 National Center for State Courts, Short, Summary & Expedited: The Evolution of Civil Jury Trials (2012), *available at* http://www.ncsc.org/SJT/.

of existing programs, and the different needs that each of these programs meet in their respective jurisdictions, the Committee has chosen not to recommend a specific set of parameters to be implemented in every program and for every case. Instead, the following recommendations are meant to serve as a flexible roadmap for reform, with the details of each program to be determined at the local level.

Just as importantly, we hope this manual also serves as a call for implementation of such programs on a national scale. The organizations and individual members who make up this Committee believe in the importance of Rule One of the Federal Rule of Civil Procedure's goals of a "just, speedy, and inexpensive determination" of every civil action. Yet today, pressures on client and court resources have only increased, making access even more problematic. While these pressures make attainment of this goal more difficult, they also create space for innovation. Our organizations hope that what follows is a resource for creating and implementing these innovative programs in your jurisdiction.



"The following recommendations are meant to serve as a flexible roadmap for reform, with the details of each program to be determined at the local level. Just as importantly, we hope this manual also serves as a call for implementation of such programs on a national scale."



What is a Short, Summary, and Expedited (SSE) Civil Action Program?

Before trying to identify what works and what does not, it is important to define the characteristics of an SSE program for purposes of this Report. The programs vary greatly across the country, and none are identical.

However, there are five constants that the Committee suggests are present in almost all of the programs and are critical for success:

First, the trial itself is short.

Most jurisdictions limit the trial to one or two days. The Committee believes that the length is not necessarily dispositive, but there must be an expectation that the trial will be short and to the point. By necessity, the evidence also must be limited. Length of trial is a critical component, both for purposes of the trial itself and for purposes of structuring the pretrial process, which is then necessarily focused and abbreviated.

Second, the trial date must be certain and fixed.

The trial date must not be susceptible to continuance, at the behest of the court or counsel, except in extraordinary circumstances. One of the key features of the programs is the fact that litigants know they must be prepared for the trial on the date on which it is set. Such certainty drives the pretrial process and many of the benefits of the programs. In some of the more successful programs, the litigants also know who their judge will be if they choose the SSE program: either they have access to a judge pro tempore, whom they jointly choose, or they know who the judge assigned to the case will be. Hence, the program achieves a level of certainty and predictability that may not otherwise be available.

Third, the program extends to the whole litigation process—not just the trial.

The pretrial process is also expedited and focused.

Fourth, the program encourages issue agreements and evidentiary stipulations.

Rules promoting evidentiary agreements, encouraging stipulations, and allowing relaxed evidentiary foundational standards save time and narrow the focus to the key issue(s) to be addressed at trial.[3]

3 For examples of pretrial and trial agreements, *see* Stephen D. Susman, Trial by Agreement, http://trialbyagreement.com (last visited Sept. 24, 2012).

Fifth, almost all of the programs are either partially or wholly voluntary.

The litigants have the option of choosing this particular track for their case, and they are not forced to do so. Although voluntary processes are often slow to catch on, because people in general—and attorneys in particular—do not embrace change, voluntary programs nonetheless preserve the right of the litigants and counsel to decide whether the case at issue is appropriate for an abbreviated process and the program.

While one or a few of these characteristics may be instrumental in achieving greater access and quicker resolution, such as establishing a firm trial date and utilizing agreements and stipulations to achieve a more streamlined trial, the SSE programs discussed here generally include most, if not all five, of these characteristics. While generally applicable rules and case management techniques that mandate streamlined pretrial process and expedited trial settings do not in and of themselves satisfy the defining characteristics of an SSE program (such as voluntariness), the Commitee does not mean to infer that such procedures may not also be an effective means of assuring access and efficiency.

Beyond these fundamental characteristics, however, there are a host of variations. All of these variations are components that the local bench and bar can review and build upon. The program characteristics chosen by a particular jurisdiction should be responsive to its needs and is likely to be quite individualized.

Benefits of SSE Programs

There are a variety of benefits that SSE programs can provide. First, the BENEFITS TO THE COURT SYSTEM itself include the dedication of fewer judicial officers and court staff to the process. In one jurisdiction, the whole process happens without any involvement from the court, except for the assignment of a courtroom and the summoning of jurors. In other jurisdictions, sitting judges oversee the process, but it takes far less time than civil cases handled under the traditional rules of civil procedure. Once judges become familiar with the SSE program, they tend to like the process because it allows them to clear their docket, achieve better closed case numbers, and preside over jury trials, without investing weeks of court time. The system also benefits from the increased numbers of jury trials, which involve more people in the system and inform them about the process. More broadly, by making good on the promise of access to a civil jury trial, it is possible that such a program can revive confidence in the jury system to some extent, particularly if jury trials increase in frequency and the quality of the verdicts is well-regarded. The court system benefits equally from SSE bench trials. Judges are able to resolve matters more quickly and efficiently, with streamlined procedures and a short trial that resolves the case in a day or two.



“By making good on the promise of access to a civil jury trial, it is possible that such a program can revive confidence in the jury system to some extent, particularly if jury trials increase in frequency and the quality of the verdicts is well-regarded.”



> "SSE programs seek to address inefficiencies that currently exist in our civil justice system by streamlining both pretrial and trial proceedings in select cases."

The BENEFITS FOR THE LITIGANTS are, first and foremost, that their case will take less time and cost less money than if they had proceeded along a regular case track. In short, the process increases access to the system and decreases expense and time. But there are additional benefits as well. The process may provide more certainty. This can include certainty of trial date and perhaps of judge assignment. In some programs, this can include certainty of outcome, with limited appeal rights, and possible risk containment, if damages are limited or agreed to on a high-low basis.[4]

BENEFITS FOR JURORS include more opportunity to participate and a shorter, more focused process when they do participate. Jurors benefit from serving for both a shorter and more defined period of time.[5] Because of the streamlined process, and resulting streamlined issues, SSE programs also create less confusion and greater clarity for jurors about what is being asked of them. For these reasons, SSE programs may actually result in a better process for the jurors.

BENEFITS FOR ATTORNEYS are both immediate and long-term. First, these trials may provide an opportunity for younger attorneys to handle jury trials. Second, being able to take smaller or less complex cases for less investment on a per-case basis may actually serve to increase an attorney's client base and build good will. Lastly, an expedited process forces attorneys to focus very acutely on what is important in a case—and to shape both the discovery and the trial presentation around those key issues. It improves case management skills, attention to what is important, and clarity and brevity of trial presentations. It can also encourage cooperation in the discovery process in order for the attorneys to get the discovery they need in a short period of time. In jurisdictions where the whole process is the result of attorney negotiation, there is additional incentive to cooperate. Appendix C identifies a set of criteria that counsel can use to identify appropriate cases for an SSE program, as well as recommendations for maximizing effective preparation for and presentation at an SSE trial.

The development of all of those skills has possible pervasive implications. The current litigation process encourages attorneys to develop an all-inclusive, litigious approach to cases, whereas the SSE program prioritizes and hones the skill of highlighting only what is important. SSE programs seek to address inefficiencies that currently exist in our civil justice system by streamlining both pretrial and trial proceedings in select cases. It is also possible to make the pretrial and trial process more efficient in non-SSE program cases by incorporating some of these same principles. Moreover, the more attorneys try cases in front of juries, the more comfortable they become both with the process and the potential outcome. Thus, it is possible that use of SSE programs could actually change the litigation culture as a whole over time.

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4 Some parties that agree to a short, summary, and expedited procedure also enter into a high-low agreement, where both parties agree that the outcome of the case will be no less than the low amount, nor in excess of the high amount.

5 Employers also benefit significantly from reduced employee absence and, as a result, employers may be more willing to pay employee wages even when not required by law.

Implementing an SSE Program

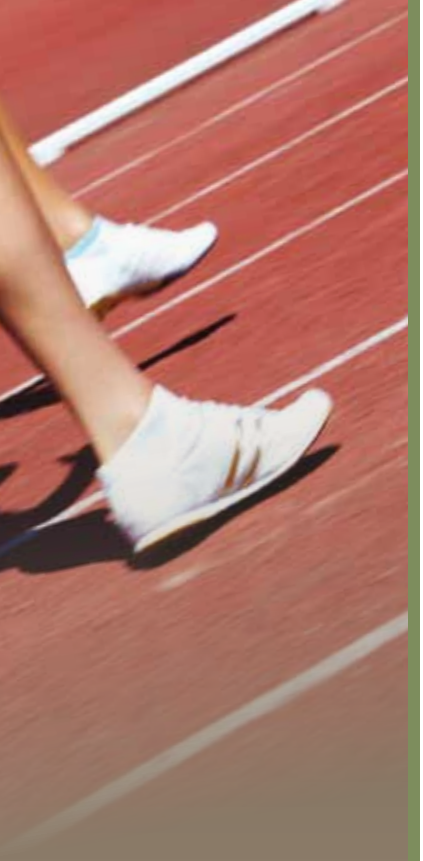
The Design

The Committee has pooled both anecdotal and empirical data about SSE programs around the country and has drawn from the individual expertise of the Committee members. Out of that pool of information, the Committee has distilled the elements that characterize the more successful programs and has also created a check-list of decisions that a jurisdiction should review when designing a program.

The SSE program should be designed to address existing obstacles that impede efficient case processing and resolution in that jurisdiction, but without introducing procedures or requirements that affect otherwise well-functioning processes. The table below identifies some common obstacles described in the NCSC study and the solutions that the SSE programs implemented to address those obstacles. At the same time, changes in procedures should be made only as needed to craft an effective SSE program. For example, jury procedures should be the same in the SSE programs as in regular civil litigation wherever possible.

The obstacles posed, and the corresponding SSE program benefits that may be achieved, may also shift during the course of an individual case. For this reason, programs should be sufficiently flexible to permit early entry, for those who seek a streamlined pretrial procedure, and late entry, for those who just want an abbreviated trial, perhaps because only one issue remains after summary judgment. Other components of successful programs appear to be presenting the option to counsel and the parties on an individualized basis (through case management orders or at status conferences) and creating certainty regarding who the judge will be for the case.

Common Obstacles	Potential SSE Program Solutions
Civil case backlogs create scheduling delays for civil trials with regularly assigned civil trial judges	Permit SSE program trials to be tried to non-judicial personnel (e.g., special referees, judges pro tempore) or magistrate judges
Calendaring preferences for non-civil trials undermine trial date certainty	Permit SSE program trials to be tried to non-judicial personnel (e.g., special referees, judges pro tempore) or magistrate judges
Pretrial case management does not permit early identification of trial judge	Assign SSE program cases to one or more highly qualified and SSE designated trial judges
Length of civil trials makes it difficult to calendar cases for trial	Restrict trial length; restrict amount or form of trial evidence
Length of voir dire makes civil jury trials too lengthy	Designate smaller jury panel size; provide fewer peremptory challenges; shorter voir dire time
Expert witness fees make it too expensive to take cases to trial	Restrict expert evidence (number and/or form)
Discovery process is disproportionately excessive for lower value or less complex cases	Restrict the scope and/or time limit for discovery
Discovery disputes take too long to resolve, increasing expenses and delaying trial readiness	Create a process to expedite resolution of discovery disputes, including more immediate access to trial judge or discovery master and preference for informal telephonic conferences rather than formal motions, briefs, and hearings
Mandatory ADR creates needless procedural hurdles without significantly improving case resolution rates	Permit SSE program cases to opt out of mandatory ADR



When implementing a program, the local jurisdiction should review the following checklist of possible components:

- Rigid versus tailor-made procedures:
  - Some programs allow counsel great latitude in deciding upon the particular rules that will govern both the trial and the pretrial process.
  - Other jurisdictions have fairly rigid procedures that apply to every case submitted to the program.
- The questions to be addressed—either by counsel in a stipulation, or by rules or case management orders—are:
  - Time limits: How much time is allotted for discovery, as well as the length of the trial itself?
  - Rules of evidence: Do they apply, and to what extent?
  - Discovery: Requests for production, depositions, and interrogatories—what will be allowed?
  - Experts: Are expert witnesses allowed? If so, do they provide a report, can they be deposed, and do they testify at trial?
  - Motions: Will motions be allowed? If so, what kinds of motions? Does the court provide an expedited process for the resolution of those motions?
  - Client consent: Is a client's signature documenting informed consent required?
- Selection of judge: Will the judge be assigned or chosen by the parties (e.g., a senior judge, judge pro tempore, magistrate judge, or sitting judge)?
- When opt-in may occur: Is there a limited window of time at the beginning of the case when the parties may opt in, or is it available throughout the litigation process?
- Number of jurors (almost all specify a smaller panel than other civil jury trials).
- Unanimous jury verdict? If non-unanimous verdicts are permitted, what decision rule applies?
- Binding decision or not?
- On the record or not?
- Appealable decision or not?
- Is the program perceived as a form of alternative dispute resolution (this relates directly to whether it is binding)?
- Is the program statutory, supported by statewide rules, or put in place by a particular judge in his or her courtroom?
- Extent of informal versus formal procedures recognized.
- Restrictions on the amount of trial time and division of that time between the parties.
- Calendaring variations (some programs mandate a trial within four months, others within six months).
- Limits on damage awards coming out of the process: Many jurisdictions specifically limit the process to smaller cases and cap damage awards; other jurisdictions make the process available more broadly, but attorneys often agree to high-low parameters for the verdict.

This list illustrates the variation in program elements across the country. As a jurisdiction is designing an SSE program, it should balance the tailoring of the above variations to meet its specific needs with the benefits of uniformity and consistency. There is value in uniformity where program elements have continually been successful, and we encourage anyone implementing a program to look both at what works within their own jurisdictions already and the successful elements of existing SSE programs around the country.

The New York model provides a useful example. What began as a local Summary Jury Trial (SJT) program on a pilot basis has since expanded to all thirteen judicial districts in the state. The New York program was not expanded wholesale, but rather has been implemented with flexibility to allow the program to meet local needs. Nevertheless, there are rules and procedures that are consistent across the program, including

> (1) an evidentiary hearing before trial; (2) a statement determining whether the SJT is binding or nonbinding: (3) expedited jury selection with limited time for attorney voir dire; (4) opening statements limited to ten minutes; (5) case presentation limited to one hour; (6) modified rules of evidence, such as acceptance of affidavits and reports in lieu of expert testimony; and (7) presentation of trial notebooks provided to the jury, and closing statements limited to ten minutes.[6]

Judicial support of the program has been a hallmark since its inception, first under Justice Joseph Gerace's guidance, and today with the efforts of the program's statewide coordinator Justice Lucindo Suarez.[7]

In contrast, the South Carolina's Summary Jury Trial program is an attorney-controlled program that takes advantage of relatively abundant court resources such as courtrooms and jurors, while addressing the need for additional judicial resources by utilizing temporary judges.[8] Because jury trials are assigned to a rolling docket in South Carolina's circuit court such that the cases are on call for trial, everyone involved also benefits from a firm trial date. The South Carolina program has evolved to meet the needs of the legal community and stands as a testament to the importance of considering what resources a jurisdiction brings to the table, as well as those that may be in scarce supply, when designing a program.

The Implementation Process

First and foremost, the program should be developed by the bench and bar—and perhaps community—in an individual jurisdiction, and it should be responsive

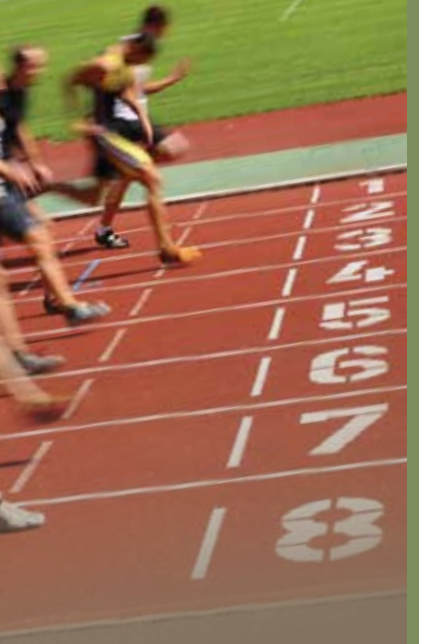
6 National Center for State Courts, *supra* note 2, at 35.

7 *See generally* Lucindo Suarez, *Summary Jury Trials: Coming Soon to a Courthouse Near You*, NYSBA Trial Law. Sec. Dig., Fall 2007.

8 See National Center for State Courts, *supra* note 2, at 12-25.



"There is value in uniformity where program elements have continually been successful, and we encourage anyone implementing a program to look both at what works within their own jurisdictions already and the successful elements of existing SSE programs around the country.



to the needs of that jurisdiction. There is no one-size-fits-all formula. Further, when the program is the result of local investment, it is much more likely to succeed. The first step, therefore, should be to identify the problems that the program is intended to address. The bench and the bar in a jurisdiction interested in building out an SSE program should identify a small group of individuals who can assess the problems of the jurisdiction and build the specifics of a program designed to address those problems. The group should then distribute their proposal broadly and invite input.

There must be broad judicial and administrative support for the program. It cannot just be one judge who champions it, but rather a full bench or court system. If one judge takes the lead, as is true with many other programs, when that judge rotates or leaves, the program falters. Similarly, there must be broad-based administrative support. Court staff must view the program as good for the system, and cooperate in making it work. The program should NOT be viewed as a second-class program designed for less important matters. Rather, it should be viewed as an expedited process, available to all litigants for any appropriate case.

Communications and training are essential. When the program is launched, there should be widespread communication. The program should be touted in terms of benefits that the system, the attorneys, jurors and—most importantly—litigants stand to gain. Judges, court staff, and attorneys all need training on the benefits and application of the program. Because of their length, SSE trials can also more easily be taped and used for education and promotion, for practicing attorneys and law students. In the Eighth Judicial District Court of Nevada, instruction has been an important tool in selling the program, in addition to educating participating attorneys about the process. Several short trials have been conducted at the William S. Boyd School of Law at the University of Nevada, Las Vegas, and observed by attorneys, law students, and faculty. If there is a failure in either communication or training, the program will remain dormant—few will use it. Investing in a central coordinator can be valuable in ensuring that the communication and training component has adequate planning and support.

Judges should make counsel and litigants aware of the program on a case-by-case basis, not just as an existing rule. The challenges that any jurisdiction will face are in building trust in the bench and the bar. Attorneys will inherently distrust the process because of concerns that it will limit their ability to discover and present information, and could limit their possible damages. The South Carolina model, where attorneys design every aspect of the process on a case-by-case basis, seems to enjoy greater attorney acceptance. On the other hand, it may also create an advantage for experienced, knowledgeable attorneys and a disadvantage for younger, inexperienced attorneys, which undermines one of the potential goals of the program.

As a related matter, attorneys may have malpractice concerns. For example, if they lose their case in an SSE process, will their client assert malpractice against them?

There are multiple ways to address this issue, such as in California where the client's signature is required to document informed consent. Addressing those concerns in advance would go a long way toward alleviating attorney reticence.

The most effective way to defuse distrust is through data and education. In the New York model, using data from other jurisdictions with such programs to convince attorneys of its utility is very powerful. Attorneys from those other jurisdictions are also generally very willing to share their experiences with other program users and offer advice.

Each jurisdiction should develop a system for keeping data about the program from the beginning, and should share that information with other jurisdictions around the country experimenting with similar programs. The jurisdiction should make a commitment to reexamine the program—perhaps every year for the first two or three years—to tailor and adapt it based upon the data. After at least two years of annual review, reexamination can be moved to every other or every third year.

The Importance of Data

Historically, SSE programs were developed as a creative reframing of how to reach a resolution in a civil dispute, capitalizing on the inherent strengths of a jury as the fact-finder. Successful SSE programs today both enhance access to justice for litigants and remove numerous local or state-level barriers to trials. However, for these programs to be effective, they must document not only program operations, but also measure the program's performance through sound performance management.

Brian Ostrom and Roger Hanson of the NCSC have proposed a High Performance Framework as best practices for performance measurement and performance management. Within this Framework lies the concept of perspectives, which are "how the interest and positions of different individuals and groups involved in the legal process are affected by administrative practices."[9] The four perspectives include: 1) the customer perspective; 2) the internal operating perspective; 3) the innovation perspective; and 4) the social value perspective.

Applying these principles, SSE programs are encouraged to:

- Collect data to monitor performance on an ongoing basis so as to be responsive to fluctuations in performance over time;
- Conduct analyses of the program's performance to ensure compliance with program requirements;
- Supplement performance data for use in education and training programs for participants; and
- Communicate the program's results to its partners, policy makers, and the public to promote support and buy-in.

9 Brian Ostrom & Roger Hanson, National Center for State Courts, Achieving High Performance: A Framework for Courts v-vi (April 2010).



"Successful SSE programs today both enhance access to justice for litigants and remove numerous local or state-level barriers to trials."



"While programs are most successful when they are designed to meet the particular needs of jurisdictions, similarly, the most sustainable programs are those that evolve to meet changing needs."

Unfortunately, data collection and performance management, a key component of program development, are often left to the last minute or even overlooked completely. Of the six SSE programs examined in the NCSC monograph, for example, only the New York State and the Eighth Judicial District Court of Nevada programs have implemented rigorous data collection and reporting strategies.[10] Our Committee cannot overemphasize the importance of collecting data and assessing the program regularly. Only through the use of empirical data will any jurisdiction truly be able to determine what is working to correct the problems of cost, delay, and access to jury trials. Likewise, only through empirical data will jurisdictions be able to determine what efforts have failed to achieve their goals and to understand why. Innovation is extremely important—but not blind innovation.

Appendix D contains a detailed set of recommendations about how to design and execute an effective data collection program. Any committee charged with creating an SSE program should become familiar with the data collection requirements; and any court charged with implementing an SSE program should put the data collection process in place from the beginning.

Sustaining an SSE Program

Experience from existing programs around the country proves that sustaining an SSE program is just as important, and often just as challenging, as implementing one. The same requirements for creating a solid program—including leadership by the bench and bar, training, and publicizing the benefits and data—are essential for sustaining a program long term.

While programs are most successful when they are designed to meet the particular needs of jurisdictions, similarly, the most sustainable programs are those that evolve to meet changing needs. Where the needs and circumstances change, and the program does not keep pace, the program falters. For this reason, it is essential that these programs be revisited regularly to determine whether changes need to be made. Data collection plays a key role in monitoring the success of the program and providing support for needed changes.

Finally, it is also critical to create a broad base of judicial and administrative support. Where programs have been championed by a single judge or administrator who subsequently retires, the program has waned. While such a champion can be the key to a program's success in the first instance, jurisdictions must strive for underlying support and ensure that there is someone or some group to continue the charge.

10 *See* National Center for State Courts, *supra* note 2, at 33-57.

Conclusion

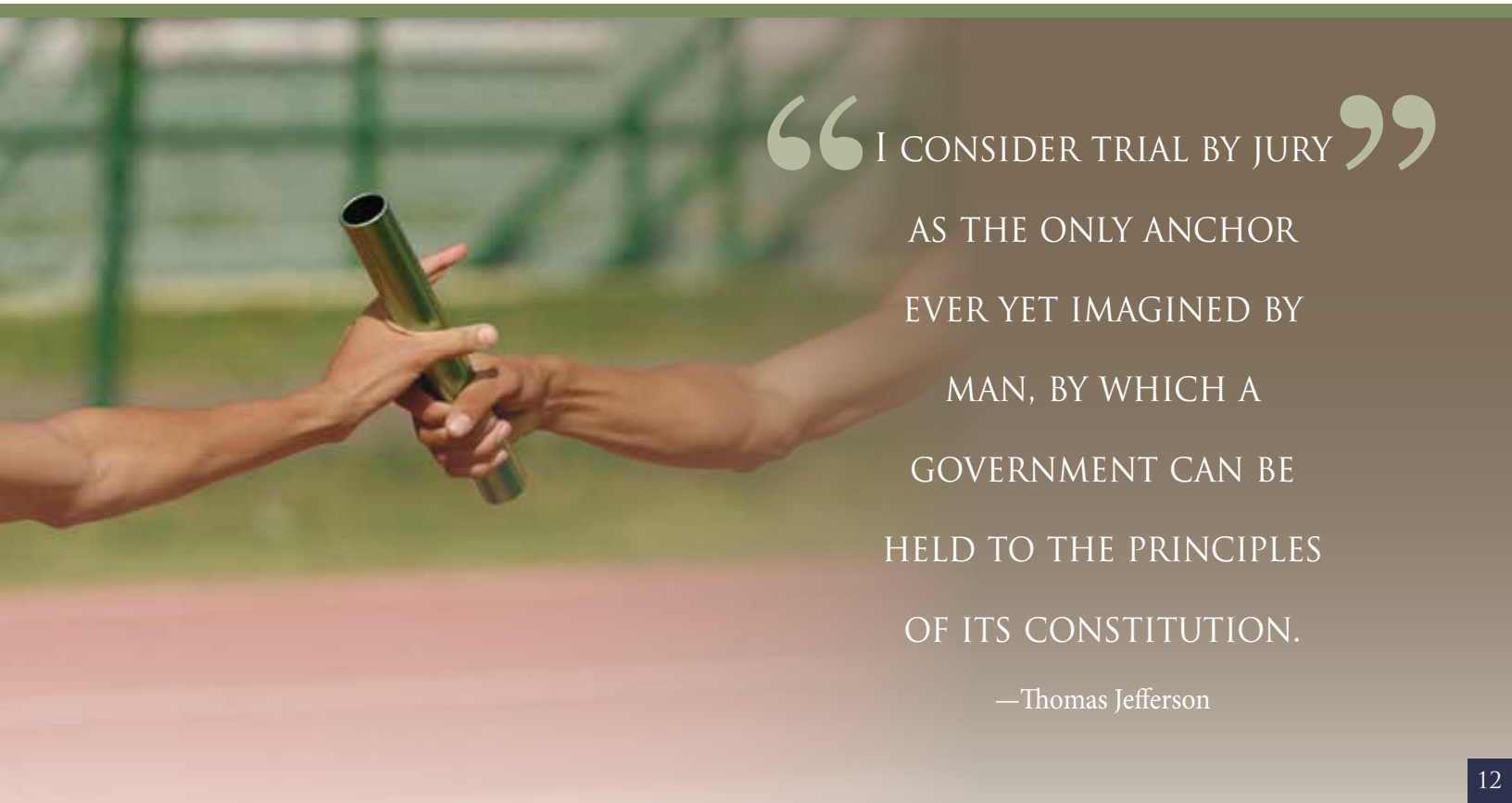
The general themes of this report have broad application across a variety of court reform efforts.

To succeed, court reform must have the following components:

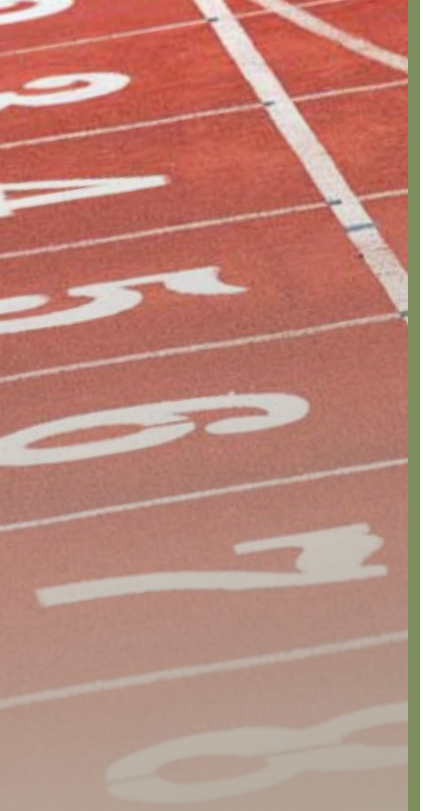
- Initial and continuing judicial and court leadership;
- Buy-in from the bar;
- Responsiveness to real needs of the jurisdiction;
- Training available in advance and on an ongoing basis; and
- Data collection and assessment to ensure continuous improvement.

More specifically, jurisdictions interested in building or improving upon an SSE program can benefit from the experience of other jurisdictions as set out in this report.

Indeed, a just, speedy, and inexpensive resolution of every action is the goal, and SSE programs are one of the vehicles that may achieve that goal—both for an individual case, and perhaps, over time, in changing the culture of the legal system. The mere process of pulling together a group of judicial, bar and administrative leaders, identifying problems within a jurisdiction, coming up with proposed solutions for those problems, and experimenting with different procedures is, in and of itself, a step in the right direction.



> "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."
>
> —Thomas Jefferson



Appendix A

SSE Committee Membership

Chris A. Beecroft, Jr.
ADR Commissioner
Eighth Judicial District Court, Nevada

Paula Hannaford-Agor
Director, Center for Jury Studies
National Center for State Courts

Richard Gabriel
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Michael P. Maguire
Michael P. Maguire & Associates
American Board of Trial Advocates

Judge Adrienne C. Nelson
Multnomah County Circuit Court, Oregon

Justice Lucindo Suarez
Statewide Coordinating Judge for Summary Jury Trials
Bronx County Supreme Court

Nicole L. Waters, Ph.D.
Principal Court Research Consultant
National Center for State Courts

Magistrate Judge Bernard Zimmerman
Northern District of California

Appendix B

SSE Committee Charge

The American Board of Trial Advocates, IAALS—the Institute for the Advancement of the American Legal System, and the National Center for State Courts wish to undertake a joint project. This Charge outlines the reasons for the project, the allocation of responsibilities, the goals, and the time line.

ABOTA, IAALS, and NCSC are all organizations that have, as part of their missions, a focus on access to the civil justice system in general and to jury trials in particular.

Certain jurisdictions have developed what have come to be called "Expedited" or "Summary" Jury Trial procedures that are designed to provide an alternative for certain types or sizes of cases. Some of the procedures have pretrial components; others relate exclusively to the shortened trial itself. In each instance, the intent is to increase access to the process.

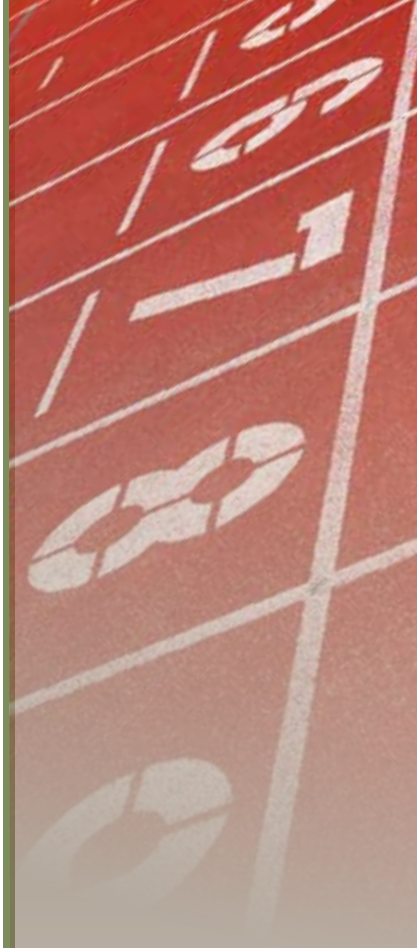
ABOTA, IAALS, and NCSC wish to compile information about the procedures and from that information develop a manual that can be distributed nationally to identify what emerge as best practices, both in developing and implementing a Short, Summary, and Expedited (SSE) procedure and in maximizing the effectiveness of such a procedure once implemented.

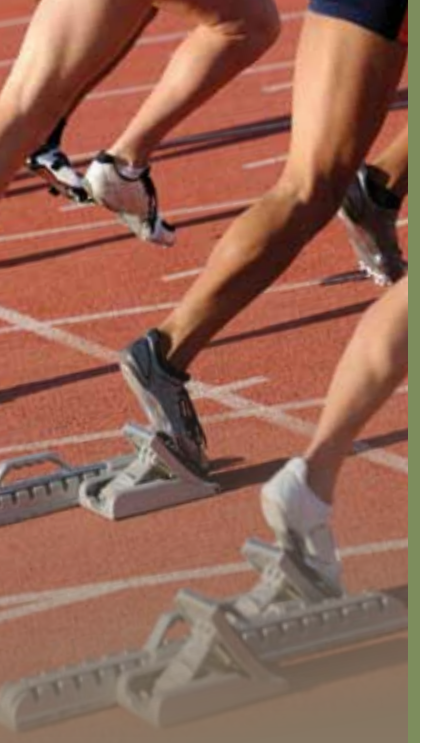
The joint project SSE Committee shall consist of two representatives from ABOTA, IAALS, and NCSC each and up to five additional members from around the country—judges, lawyers, researchers and academics who have experience with EJT procedures. The additional members shall be chosen by the six ABOTA, IAALS, and NCSC members.

The Committee shall convene at IAALS in Denver as soon as schedules permit. Each member of ABOTA, IAALS, or NCSC shall pay their own (or their organization shall pay) associated expenses.

IAALS shall staff the Committee, by compiling and distributing information in advance and taking the lead in drafting a manual/template/report (to be determined) that shall then be distributed among all members for comment. NCSC has already done the research about SSE procedures around the country. That information will be the starting place for the project.

The Committee shall make every possible effort to produce a product by the end of September of 2012. The product will bear the logos of all three organizations (unless one organization wishes to withdraw from the project at any time) and shall be available on all three websites.





Appendix C

Best Practices for Case Identification, Preparation, and Presentation

Assuming that the process is completely optional, the choice falls to counsel to decide which cases might be amenable for resolution through an SSE process. It may well be true that once the attorneys and litigants are familiar with the process, the list of appropriate cases can begin to expand. In reality, it is not just the small case, the low-dollar case, or the simple case that can benefit from an expedited and streamlined process. Many cases can benefit from a process that costs less and that forces litigants, their attorneys, and the fact-finders to focus on the most important issues in the case.

But, in the first instance, the cases that are most likely to be appropriate for this process are:

- Cases with single or limited issues to be resolved;
- Cases where many facts can either be stipulated or determined by the uncontested admission of reports or documents;
- Cases where the likely value doesn't warrant the expense of live expert testimony or exhaustive trial;
- Cases where it is desirable to limit exposure or guarantee recovery (high-low agreements);
- Cases that can be resolved in one or two days of testimony and deliberations;
- Cases involving limited witness testimony;
- Time sensitive cases where the usual docket wait will be prejudicial to a party's ability to present its case;
- Cases where the parties desire a certain (or almost certain) trial commencement date;
- Cases in which the parties fully understand the benefits and risks of participating in the SSE program and have consented to those risks;
- Cases with insurance coverage limit concerns where a high-low agreement is desirable;
- Cases involving insurance coverage where the carrier has consented to be bound by the proceeding.

Guidelines for Preparation and Presentation

These guidelines have been developed for participants engaged in SSE programs. If properly organized and presented, the trier of fact, be it the court or a jury, will be able to understand complex case issues and evidence in a shortened trial setting. By participating in this program, the participants agree that they have chosen to be bound by statutory or contractual obligations in presenting their cases. This guide is intended to help participants better prepare, organize, and present their cases to accommodate this shortened trial format so that the judge or jury will be able to clearly understand the case in order to make their most informed decision.

Known Limitations:
Participants should thoroughly review the statutory or contractual language to understand the time limitations and evidentiary restrictions in presenting the case. As SSE trials are conducted in such a limited fashion, each moment is precious, including that of the judge and the jury. Participants should endeavor to be timely and respectful of all the time limits.

Cooperation:
SSE trials necessitate greater agreement and cooperation between the parties. This usually means revealing more information to opposing parties prior to trial than in a traditional trial. This in no way diminishes the ability of counsel to be a zealous advocate for their client. In fact, the ability to have greater knowledge about the scope of evidence and testimony that will be presented in these trials allows the attorneys to better plan their presentations and to concentrate on the meritorious issues in the case. By necessity, attorneys for both sides in an SSE trial must exchange exhibits, including any highlighting or additional emphasis, in advance of the trial. These trial formats are not conducive to gamesmanship. And while this does not demand that counsel reveal all of their strategies regarding the way they conduct the case, they must reveal the substantive nature of their evidence. Agreed-upon evidentiary booklets also facilitate cooperation, remove surprises, and help keep the trial short, summary, and efficient.

Pretrial Hearings:
An effective pretrial hearing is essential for achieving a short, summary, and expedited trial. Many jurisdictions with SSE programs include specific requirements for the pretrial hearings, as this hearing is essential for a streamlined and efficient trial. The court and the parties should utilize this hearing to address any questions and concerns regarding all aspects of the trial, and review parameters and expectations of the trial from voir dire to verdict. The court can make rulings on previously exchanged evidentiary submissions, proposed Pattern Jury Instruction charges, and proposed verdict sheet questions. Some of these matters may involve the increase and or redistribution of peremptory challenges where more than two attorneys appear on a case, the need for an interpreter, and physical disability issues with parties.

New Information:
In preparing the case presentations, SSE participants should remember that the jury is hearing evidence for the first time. They do not have the background or familiarity with the subject matter that the attorneys, experts, and parties have. In preparing the evidence, it is important for participants to constantly evaluate the information that must be conveyed so that the jury will understand the testimony or exhibit. A commonly asked question to discern needed information for the jury would be, "If you were listening to this for the first time, what would you need to know?" If there are issues of some complexity in the case that may require time to explain in order for the jury to have context or background for the evidence, the attorneys should consider whether they would wish to draft an agreed upon tutorial to be read by the judge in the case or a glossary of terms to familiarize jurors with acronyms or terminology. This should not only address potential confusion but also potential misconceptions the jury may have about the issues in the case.

Theme:
Jurors respond best to a narrative framework or story of the case. This story helps them to organize and understand the evidence. Every case has a central theme or organizing principle. This is usually a single phrase or sentence. One of the easiest ways to develop a theme is to fill in the phrase, "This case is about . . . ." While development of a theme is important in every case, it is even more so in SSE programs, where jurors need to quickly understand the case and render a verdict.

Three to Five Points:

Once counsel has developed the theme, it is best to identify the three to five main evidentiary points that support this central principle. While this does not preclude counsel from having a different number of points, three to five main points have been shown to provide a better organizing structure to ease the comprehension level of the jury. Moreover, this will assist attorneys in narrowing the focus of their presentation so as to fit within the constraints of an SSE trial. If possible, each of these main points should be stated in a single sentence, like a headline for a news article. These single sentence headlines help jurors to retain and organize the main issues in the case. These main points should be selected because counsel believes these issues will lead the jury to an appropriate verdict in the case. This is not to exclude other important points or evidentiary issues.

Other salient issues should be examined to see if they could fit into the categories of the main points. In determining these main points, the attorneys can ask themselves several questions:

1) Why is this one of the most important points in the case?
2) What do you want the jury to conclude from this point?
3) How does this point connect to the verdict you want the jury to render in the case?

Distinguish between what the jury needs to know about the case from what the attorneys want them to know. Remember to connect all of the dots in the narrative story of the case in order to avoid leaving the jury with unanswered questions. Although pretrial rulings or time constraints may not allow the attorneys to answer all of the jury's questions in the case, they should endeavor to answer the main questions the jury will have:

Who are the parties?
What happened?
What is the dispute?
What am I supposed to decide?

While it may not be essential to script out the entire presentation of the case, it is advisable to create a detailed outline in order to ensure that each side is able to present the optimal amount of essential evidence the attorneys feel is necessary to meaningfully represent their client's case. While there is a tendency in a standard trial to repeat information in the belief that this repetition will influence the jury, one of the most common complaints of jurors is their belief in the needless redundancy of testimony or issues.

Outline for the Case:

These three to five main points can become an outline for presenting the case and they help the attorney to organize the testimony and exhibits. And while it is understandable that attorneys would want to include as much as they can about what they have learned about the case, given the time constraints of an SSE trial, it is advantageous to keep the presentation focused on these main points.

Sequence:

Because of the shortened time in these trials, it is also advisable to put these main points in a prioritized, sequential order that makes the best sense for the case. In other words, one point should lead to the next point, which would lead to the next point. This sequence can be organized in chronological order of the events in the case that counsel wants to describe, but can also be organized by legal issues, main conclusions of expert witnesses, or other sequential ordering.

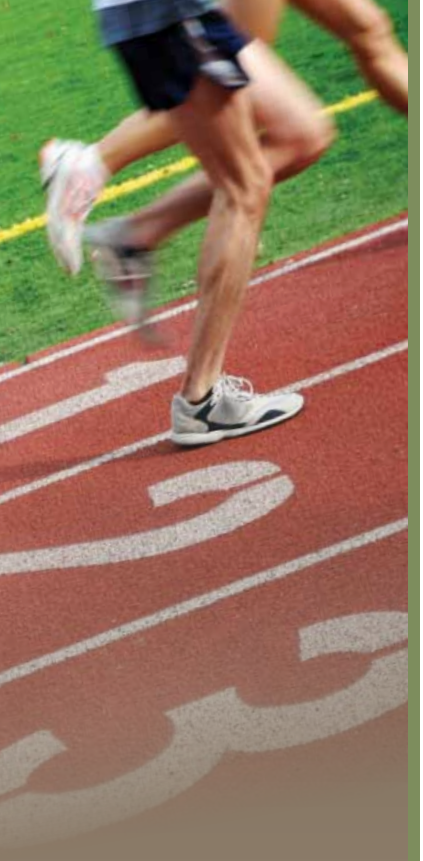
Scheduling:
Many attorneys are not used to the rigorous scheduling of an SSE trial. It is advisable, once the attorneys have agreed upon the schedule for voir dire, opening statements, and case presentations, that they consciously plan out and allocate the amount of time they need for each of their witnesses according to the priority of issues in their case. They should then confirm that the witnesses are available on the date and time of their scheduled testimony.

Witnesses:
SSE trials generally allow attorneys to present most of their case directly to the judge or jury. However, if the attorney is able or wishes to present witnesses, include only those witnesses that are most essential to the case. For this, attorneys can ask themselves which witnesses will reasonably illustrate the three to five main points outlined above. As the rules for laying foundation or qualifying experts may be relaxed in these trials, attorneys should try and focus the testimony on the most needed areas to illustrate the main issues in his or her case. In most cases, these witnesses will have prescribed or agreed upon time for their testimony.

To ensure conformance with the agreed upon testimony, in preparing both lay and expert witnesses, it is advisable to go over these few needed questions in advance. If there is agreement to have the witness testify by videoconferencing, make sure that the internet, phone or videoconferencing equipment is tested and working at the time of testimony. If there is an agreement to include recorded witness testimony, either from deposition or by mutual consent on direct and cross examination, attorneys should conform the testimony to the time limits and the agreed upon scope of the testimony, as well as the form of the testimony (recorded testimony only, recorded testimony with subtitles, recorded testimony with deposition transcript). The attorneys should decide whether the recorded testimony will be available for later review by the jury. To help focus the testimony of each witness, the attorney may ask himself or herself what they would ask the witness if they only had five questions. That way, they can prioritize the testimony of the witness into the most germane areas. Additionally, if attorneys will be presenting a witness' testimony (such as an expert's) themselves, either by reading deposition transcripts, or presenting the report of that witness, it is advisable to present the written testimony or exhibit on a document projector or electronically through an LCD projector as well as giving the jurors individual copies.

Exhibits:
Similarly, in preparing exhibits for the trial, the attorney should only include exhibits that illustrate the key points the attorneys are trying to make in their presentations or illuminate the witnesses' testimony. If there is agreement to include these in an exhibit notebook, it is important that these be clearly tabbed, marked, and limited to the information related to specific testimony. If additional exhibits are included in the document notebooks that have not been approved or have no relation to the testimony the jurors are hearing, it is counter-productive and can be misleading, causing more confusion for the jury. If the exhibit includes attorney highlighting, make sure these are pre-approved by opposing counsel before including these in the jurors' books. Pre-approval is important to ensure that there are not later disputes about the inclusion or argumentative nature of the exhibits.





Trial Presentation:

If any of the presentations and exhibits will be shown in a PowerPoint, Trial Director, or other trial presentation system, ensure that these presentations are approved by the judge and opposing counsel before trial. Additionally, it is essential that these presentation systems be tested before the trial day to ensure they are in working order. If the attorneys would like to use blowups, a flip chart, a white board, or a Smart Board for their presentations, it is advisable that they obtain agreement on their use and practice with this media prior to the actual trial. Attorneys should also strive to be consistent in how they highlight information on a document or a demonstrative exhibit to avoid juror confusion.

Juror Note-Taking and Questions:

Whenever possible, jurors should be encouraged to take notes to aid their case organization and comprehension. Although the time frame is extremely tight, if agreed, attorneys and their clients should consider allowing juror questions. This will hopefully highlight for counsel the information jurors need to better understand and make decisions in the case.

Practice:

After months or more of working on a case, there is a natural tendency when one is working from an outline to add in details from the extensive knowledge that the attorney has of the case. When this happens in an SSE trial, with the strict time constraints, attorneys may simply run out of time to present their case, perhaps even leaving essential evidence or important issues out of their presentation. One of the ways for attorneys to avoid this unfortunate situation is to practice in order to time their presentations precisely. Additionally, with practice sessions, the attorneys may hear arguments or issues that simply seem less important when they say them out loud. This also allows counsel to avoid unwanted confusion or argumentation.

Jury Instructions and Verdict Forms:

In a short, summary, and expedited trial, the jury instructions and verdict questions are decided in advance of the beginning of the trial. This should help counsel to focus their presentations, both in their openings statements and in their presentation of evidence. In submitting instructions to the court, it is advisable to focus on only the special instructions or key definitions that are the most salient to the case. If allowed, these relevant instructions and verdict questions should be introduced to jurors at the beginning of the case to allow them to become more familiar with these legal guidelines and the questions they will need to answer. Many of the pattern jury instructions do not need to be submitted to the judge. The parties and the judge should evaluate the necessary scope of the instructions, given the limited length of the trial and deliberations. In prioritizing the evidence, counsel can ask themselves which testimony and demonstrative evidence will best address the verdict questions the jury has to answer and the instructions they will have to follow. The particular wording of a pattern jury instruction charge should be stipulated to before the evidentiary hearing. If opposing counsel does not agree, the attorney should be prepared with a draft of the charge with possible case or statutory support, and the reasons for inclusion of the charge. If attorneys are allowed closing arguments, it is advisable to use the stipulated juror instructions and verdict form in the closing argument, while showing jurors the instructions and walking them through the form, illustrating how counsel feels the evidence supports particular conclusions.

Simplify:
After the attorneys have fully planned their trial presentations, it is prudent for them to re-examine them prior to the actual trial to test the presentations for comprehension. For this, they should examine whether they can state any of the evidence or issues in a simpler and more direct manner in order for the jurors to fully understand the case. It is important that they not only analyze this simplicity themselves but also discuss the case with laypeople to assure that the comprehension levels are appropriate for the jury.

Voir Dire:
The attorneys will have extremely limited voir dire in a short, summary, and expedited trial, if allowed at all. Thus, it is important to identify the central issues that may create a bias for potential jurors in the case. After these issues have been identified, counsel should write the three main questions that identify a bias, negative predisposition, or side preference that they would not want on the jury. In asking these questions of the panel, it is important to ask open-ended questions that require the jurors to speak about the experiences or attitudes that may affect their ability to be fair and impartial in the case. It is not a good use of the limited voir dire time to ask indoctrination or leading agreement or promise questions. If there are additional concerns, the attorneys may also submit these questions for the judge to ask the jurors with support as to why the particular questions address a bias. Counsel are advised to review the voir dire and jury selection rules in an SSE trial in order to better understand whether there is attorney-conducted voir dire, the length of time allotted for questioning, how cause and peremptory challenges are conducted, and how many jurors and alternates are seated, as well their seating order.

Avoid Excessive Argument:
In an SSE trial, jurors assimilate a large amount of information in a short period of time. Thus, they will respond better to a clear presentation of evidence than to a great deal of argument. If jurors hear too much argument before closing statements in the case when they have no context, they may minimize or discredit the evidence they do hear.

Appendix D

Best Practices for Data Collection

This section describes best practices for developing and implementing a data collection plan for your SSE program.

Types of Data Collection

Court-based programs typically collect two different types of information about program performance: case-level data and participant feedback. Case-level data documents objective information about the trials that take place through the program, such as the number of trials, the types of cases, trial length, and trial outcomes. Ideally, information of this type should be collected by a single person with direct knowledge or involvement in the trial, such as the trial judge or courtroom staff. Participant feedback typically focuses on the individuals who participated in the trial or have a direct investment in the trial outcome—lawyers, litigants, and jurors—to document their perceptions about program effectiveness and fairness and to solicit recommendations for program improvement. Most participant feedback methods consist of questionnaires or focus groups.

Focus of Data Collection

Some basic information should be collected about all SSE trials such as the case number, the case name, the type of case (e.g., automobile tort, premises liability, breach of contract, etc.), the trial start and end date(s), and the trial outcome. This type of basic information accomplishes three things: (1) it documents the actual volume of program activity; (2) it facilitates comparison of the SSE cases with non-SSE cases and with jury trials under similar SSE programs in other jurisdictions; and (3) provides empirical evidence of fairness by documenting plaintiff versus defendant win rates.



In addition to basic information, the program should document other aspects of the SSE program. In developing the data collection methods, the overriding philosophy should be to tailor the data collection efforts to program objectives. This approach will ensure that program developers and participants can point to solid, empirical information about program accomplishments. Table D-1 below illustrates some common objectives of SSE programs and applicable data elements to measure to assess performance.

Table D-1

If the purpose of the program is to …	Data collection should focus on …
Bring cases to trial faster	Case filing date (or date case entered program)
Reduce trial costs	Trial length Amount and form of evidence introduced at trial: • Number of witnesses • Live witness/expert testimony vs. written reports
Provide a venue for younger, less experienced lawyers to gain trial experience	Attorney characteristics: • Number of years in practice • Law firm size Assessments of the program as an educational opportunity
Continue to attract participants (growth)	Names of the participating insurance carrier Insurance policy limits Existence and range of high-low agreements Identify other repeat players

The SSE programs in New York and the Eighth Judicial District Court of Nevada offer useful illustrations of how the program managers developed their respective data collection strategies to further program objectives. See State of New York Summary Jury Trial Data Collection Form (attached as Exhibit B) and Eight Judicial District Court of Nevada Sample Data Collection Form (attached as Exhibit C). Both programs identify the case name, case number, trial date, jury verdict, and the amount of damages awarded. Because the New York State program is statewide, the NY Data Collection Form also identifies the specific type and the location of the court in which the trial took place.

The Short Trial Program in the Eighth Judicial District Court of Nevada operates under the auspices of the ADR Office. Thus, much of the detail captured on the Short Trial Information Sheet was designed to provide the ADR Commissioner with a view of Short Trial performance compared to other ADR options, including the total number of cases proceeding on the arbitration and Short Trial tracks, the number of cases scheduled for Short Trial or arbitration, and the number of completed Short Trials or arbitration decisions entered. Because many of the Short Trial cases are appeals from mandatory arbitration, the Short Trial Information Sheet also collects detailed information about the amount of damages claimed by the plaintiff and the actual damages awarded by the jury for medical expense reimbursement, pain and suffering, and lost wages, which permits a detailed comparison between jury and arbitrator decision-making in the same case. Because the decision to include previous arbitration decisions in the materials provided to the jury was somewhat contentious, the Short Trial Juror Exit

Survey largely focused on the impact that knowledge about the arbitration decision had on the jury verdict. Both the Juror Exit Survey results and the comparison of arbitration decisions with jury verdicts demonstrated that the impact was negligible, putting to rest concerns that the practice interfered with the jury's independent judgment.

The NY Data Collection Form continues to evolve over time. In addition to basic identifying information, the current version was designed to measure the efficiencies introduced by Summary Jury Trials compared to non-Summary Jury Trial cases. For example, information about the anticipated trial length for a non-Summary Jury Trial (Question 8) provides a concrete measure for the number of trial days saved using the SSE procedures. Similarly, details about the amount of time allotted for the various segments of the summary jury trial provide benchmarks for the "normal" timeframe for conducting these trials. (The forthcoming version of the data collection form will eliminate many of these questions because they revealed almost no variation in these measures across case types or among judicial districts.) A unique feature of the NY Data Collection Form is the identification of the insurance carrier representing the defendant. This information serves as a barometer to both plaintiff and defendant's bars, as do the insurance policy limits and high-low agreement parameters, of the breadth of acceptance of Summary Jury Trials as a method of case resolution. Over time, this information has documented significant growth of participating carriers, with policy limits and high-low parameters trending higher.

Exhibit A provides a template of data elements that SSE program developers may consider when designing their own data collection instruments. Ideally, comparable information about non-SSE program trials should be routinely available or easily compiled from existing sources to provide baseline information.[11]

In developing case-level data collection forms or SSE participant surveys, it is often tempting to collect extremely detailed information about the cases and trials adjudicated. Program developers should keep in mind that, as the data collection process becomes lengthier and more detailed, it also becomes more time and labor-intensive and requires more resources to support. A useful technique to keep data collection objectives from eclipsing the broader objectives of the SSE program is to review each proposed data element or survey question with the following criteria in mind.

Is/Does the data element or survey question . . .
Essential documentation of basic program operations?
Clearly measure the performance of key program objectives?
Readily available from the case management system, case files, or trial participants?
Duplicate other data elements or survey questions?

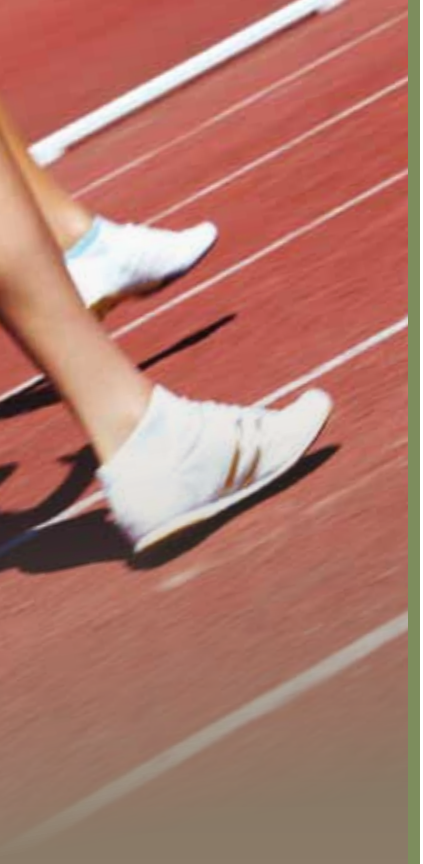
Process of Data Collection

An important part of the data collection strategy is ensuring that this task is undertaken by individuals with the appropriate skills, resources, and authority to do so.

Questions that SSE program developers should address are:

- Who is responsible for collecting the data, reviewing the data to ensure its completeness, and compiling the data for analysis?
- What authority does that individual or agency have to enforce compliance with data collection efforts?
- Is any of the information collected confidential? If so, who should have access to that information? What procedures should be implemented to ensure confidentiality?

11 For more information about effective program evaluation, see IAALS, A Roadmap for Reform: Measuring Innovation (2010).



- How frequently are the data compiled and analyzed? To whom and in what format are findings reported?
- Where are program reports and data archived?

Data collection should not be undertaken for its own sake, but rather to support program maintenance and sustainability. As such, it is important that program participants from whom or about whom information is collected understand the purpose of data collection and how the information will be used. Program developers should also consider the form of data collection. Electronic forms such as online surveys or fill-in PDF forms require more technological expertise to develop, but offer greater accuracy and legibility and are less labor-intensive to compile. In addition to streamlining the data collection process, involving individuals with technology expertise in the design process can facilitate the process of generating both routine and ad hoc reports.

Program developers should also have a plan to disseminate the findings from data collection efforts. In the Eighth Judicial District Court of Nevada, the ADR Commissioner provides reports detailing the number of cases that entered the Short Trial Program, were scheduled for trial, and were completed to the local court administration and to the Nevada Administrative Office the Courts. Because the Eighth Judicial District Court is largely funded by local taxpayers, the Short Trial Program reports are routinely shared with the local Board of Commissioners to show how the Short Trial Program helps the court use those resources more effectively. The statewide ADR reports, including Short Trial statistics, are provided to the Nevada Legislature as mandated by statute. Under the mandatory arbitration program, arbitrators are supposed to make decisions according to how a jury would decide the case. Thus, the arbitration versus Short Trial verdict comparisons provide valuable training for and feedback to the arbitrators assigned to those cases. In addition, those comparisons are also excellent tools for dispelling common myths circulating in the legal community about how juries evaluate and assign monetary values to different categories of damage awards.

In New York State, Justice Lucindo Suarez provides quarterly reports detailing the number of Summary Jury Trials held for each of the 13 judicial districts to the Chief Administrative Judge of the New York Judicial Branch and to each of the district administrative judges. He also sends copies of the reports to each of the judges who presided in a Summary Jury Trial during the preceding quarter and their judicial clerks who submitted the data collection forms. This approach provides further encouragement for the judges and clerks to submit their data and ensures that the reports accurately reflect the actual volume of Summary Jury Trials conducted in those courts. "The judges and clerks will always let me know if they think I've made a mistake by omitting any of their trials from the total counts," he explained. "I then make the corrections and resend the corrected reports with the subsequent quarterly reports." Justice Suarez also uses the data during training workshops with judges and lawyers across the state to illustrate details about these trials such as the amount of time typically allocated for various segments of the trial or the proportion of trials undertaken with high-low agreements.

Exhibit A

SAMPLE DATA COLLECTION FORM

Case name: _____ Case number: _____

Case type (check one):

☐ auto tort ☐ premises liability ☐ contract ☐ other (please specify) _____

Filing date: _____/_____/_____

Trial date(s): _____/_____/_____to _____/_____/_____

Insurance carrier: _____ ☐ Not applicable

Policy limits: _____ ☐ Not applicable

High/low agreement range: _____ to _____

Arbitration decision: _____ ☐ Not applicable

Damages claimed:

Medical expenses: $_____

Pain & suffering: $ _____

Lost wages: $ _____

Other damages: $ _____

Jury size (if variable): _____

Length of … (in minutes)

Voir dire: _____

Opening statements: _____

Plaintiff evidence: _____

Defendant evidence: _____

Closing arguments: _____

Jury deliberations: _____

Plaintiff evidence:

Number of fact witnesses: _____ Number testifying in person: _____

Number of expert witnesses: _____ Number testifying in person: _____

Defendant evidence:

Number of fact witnesses: _____ Number testifying in person: _____

Number of expert witnesses: _____ Number testifying in person: _____

Verdict:

☐ Plaintiff ☐ Defendant

Unanimous verdict:

☐ Yes ☐ No

Damages Awarded:

Medical expenses: $_____

Pain & suffering: $ _____

Lost wages: $ _____

Other damages: $ _____

Exhibit B

STATE OF NEW YORK
UNIFIED COURT SYSTEM

SUMMARY JURY TRIAL DATA COLLECTION FORM

UCS-413 (08/11)

Please mail, fax or scan this Data Collection Form for every Summary Jury Trial. Submit to Hon. Lucindo Suarez, Supreme Court - Bronx County, 851 Grand Concourse, Bronx, NY 10451; Fax: 718-537-5076. Attention Hon. Lucindo Suarez; Scan: lsuarez@courts.state.ny.us

1. **INDEX NUMBER:** _____ 2. **CASE NAME:** _____

3. **COUNTY:** _____ 4. **COURT:** ❍ Supreme ❍ NYC Civil Court ❍ County ❍ City/District

5. **CASE TYPE:** ❍ Commercial ❍ Tort ❍ Motor Vehicle ❍ Other: _____

6. **NUMBER OF ATTORNEYS:** Plaintiff(s) ☐ Defendant(s) ☐ 7. **INSURANCE CARRIER:** _____

8. **EXPECTED NUMBER OF JUDICIALLY DETERMINED TRIAL DAYS IF NO SJT:** ☐☐

9. **DATE OF SUMMARY JURY TRIAL:** ☐☐ / ☐☐ / ☐☐☐☐ **(month / day / year)**

10. **ISSUES:** ❍ Liability only ❍ Damages only ❍ Liability and damages 11. **WAS SJT:** ❍ Binding ❍ Non-binding

12. **IF THERE WAS A HIGH/LOW AGREEMENT, PLEASE INDICATE:** $_____ High $_____ Low ❍ None
12a. Carrier(s): _____ _____ **12b. Policy Limit(s)** $_____

13. **DID THE CASE SETTLE?** ❍ No ❍ Yes **13a. When?** ❍ Before SJT ❍ During SJT ❍ After SJT
13b. What was the settlement amount? ❍ $_____ ❍ Don't know ❍ Not applicable

THE PROCEEDINGS

14. **WAS THE SUMMARY JURY TRIAL PRESIDED OVER BY A:** ❍ Judge ❍ JHO

15. **HOW MANY JURORS WERE ON THE PANEL CALLED FOR THE SUMMARY JURY TRIAL?** ☐☐ ❍ Don't know

16. **HOW MUCH TIME (IN MINUTES) WAS ALLOTTED FOR VOIR DIRE?**

Judge	❍ 20	❍ 30	❍ 40	❍ more than 40
Plaintiff(s)	❍ 5	❍ 10	❍ 15	❍ more than 15
Defendant(s)	❍ 5	❍ 10	❍ 15	❍ more than 15

17. **HOW MUCH TIME (IN MINUTES) WAS ALLOTTED FOR...**

... opening statements?	**Judge**	❍ 20	❍ 30	❍ 40	❍ more than 40
	Plaintiff(s)	❍ 5	❍ 10	❍ 15	❍ more than 15
	Defendant(s)	❍ 5	❍ 10	❍ 15	❍ more than 15
... case presentation?	**Plaintiff(s)**	❍ 30 or less	❍ 40	❍ 50	❍ 60 or more
	Defendant(s)	❍ 30 or less	❍ 40	❍ 50	❍ 60 or more
... closing statements?	**Judge**	❍ 20	❍ 30	❍ 40	❍ more than 40
	Plaintiff(s)	❍ 5	❍ 10	❍ 15	❍ more than 15
	Defendant(s)	❍ 5	❍ 10	❍ 15	❍ more than 15

18. **HOW MANY WITNESSES TESTIFIED (LIVE OR BY VIDEO) FOR THE...**

Plaintiff(s)	❍ 0	❍ 1	❍ 2	❍ more than 2
Defendant(s)	❍ 0	❍ 1	❍ 2	❍ more than 2

19. **HOW MANY EXPERT REPORTS WERE SUBMITTED FOR THE...**

Plaintiff(s)	❍ 0	❍ 1	❍ 2	❍ more than 2
Defendant(s)	❍ 0	❍ 1	❍ 2	❍ more than 2

20. **WAS ANY DOCUMENTARY OR DEMONSTRATIVE EVIDENCE GIVEN TO THE JURY?** ❍ Yes ❍ No

THE VERDICT

21. **FOR HOW LONG (IN MINUTES) DID THE JURY DELIBERATE?** ❍ 30 or less ❍ 40 ❍ 50 ❍ 60 or more

22. **VERDICT:** ❍ Plaintiff ❍ Defendant ❍ Split ❍ Hung

23. **DAMAGES AWARDED:** $_____ ❍ Settled before deliberations

WHO COMPLETED THIS FORM?

NAME: _____

PHONE NUMBER: _____ **DATE:** _____

Exhibit C

QUESTIONS TO THE JURY ABOUT THE SHORT TRIAL PROGRAM

EIGHTH JUDICIAL DISTRICT COURT

PLEASE MAIL WITHIN 10 DAYS OF THE COMPLETION OF THE TRIAL TO:

ADR Commissioner
c/o ADR OFFICE
330 S. Third St.
Las Vegas, NV 89155
Fax…(702) 671-4484
ATTN: STP Jury Survey

1. How did you feel this morning when you were advised that you would be participating in the Short Trial Program ("STP")?

2. How did you feel when you learned that you would be a juror for just one day?

3. How do you feel about the fact that only four jurors were chosen?

4. [If applicable] Did the jury instruction regarding the fact that an arbitrator had previously heard this case and rendered an award have any impact on your verdict today?

5. [If applicable] If so, how (i.e., did it help or hinder you reaching a verdict)?

6. [If applicable] How do you feel about being given this information?

7. What did you think about the evidentiary booklet?

8. How did you feel when you were able to reach a (unanimous?) verdict?

9. What did you like most about the STP?

10. What did you like least about the STP?

11. If summoned, would you sit as a juror in the STP again?

12. If you could recommend any change(s) be made to the program, what would it/they be?

Exhibit C

SHORT TRIAL INFORMATION SHEET

1. Case Name: _____.

2. Case No.: _____ **3.** Trial Date: _____.

4. **NAME of COUNSEL (@ TRIAL) for:** Plaintiff:_____.

Defendant: _____.

Other Party: _____.

5. **Nature** of Damages: (e.g., soft tissue, broken bones, contractual, etc.): _____

_____.

6. Damage **Amounts** Claimed (e.g., medical expenses incurred, property damage amount, amount of lost wages, etc.):

_____.

7. Testimony from **[please use NAMES of ALL witnesses]** Oral Written

Plaintiff(s): _____ ☐ ☐

Plaintiff's expert(s): _____ ☐ ☐

Defendant(s): _____ ☐ ☐

Defendant's expert(s): _____ ☐ ☐

Other(s): _____ ☐ ☐

Other's expert(s): _____ ☐ ☐

8. Verdict: Party Verdict Amounts (e.g., meds, P & S, LW)

_____ _____

_____ _____

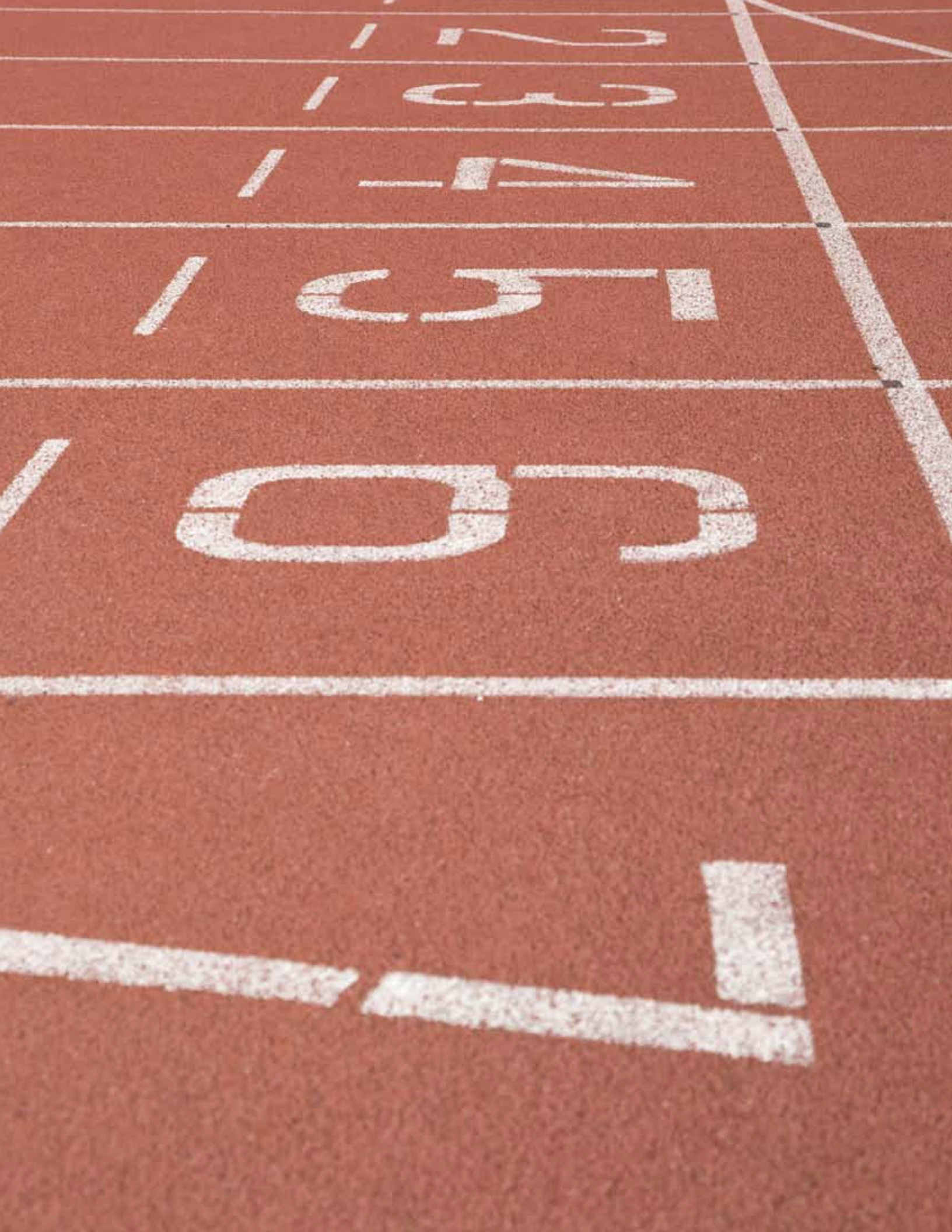
9. Verdict Unanimous: Y / N. **10.** Liability Admitted: Y / N.

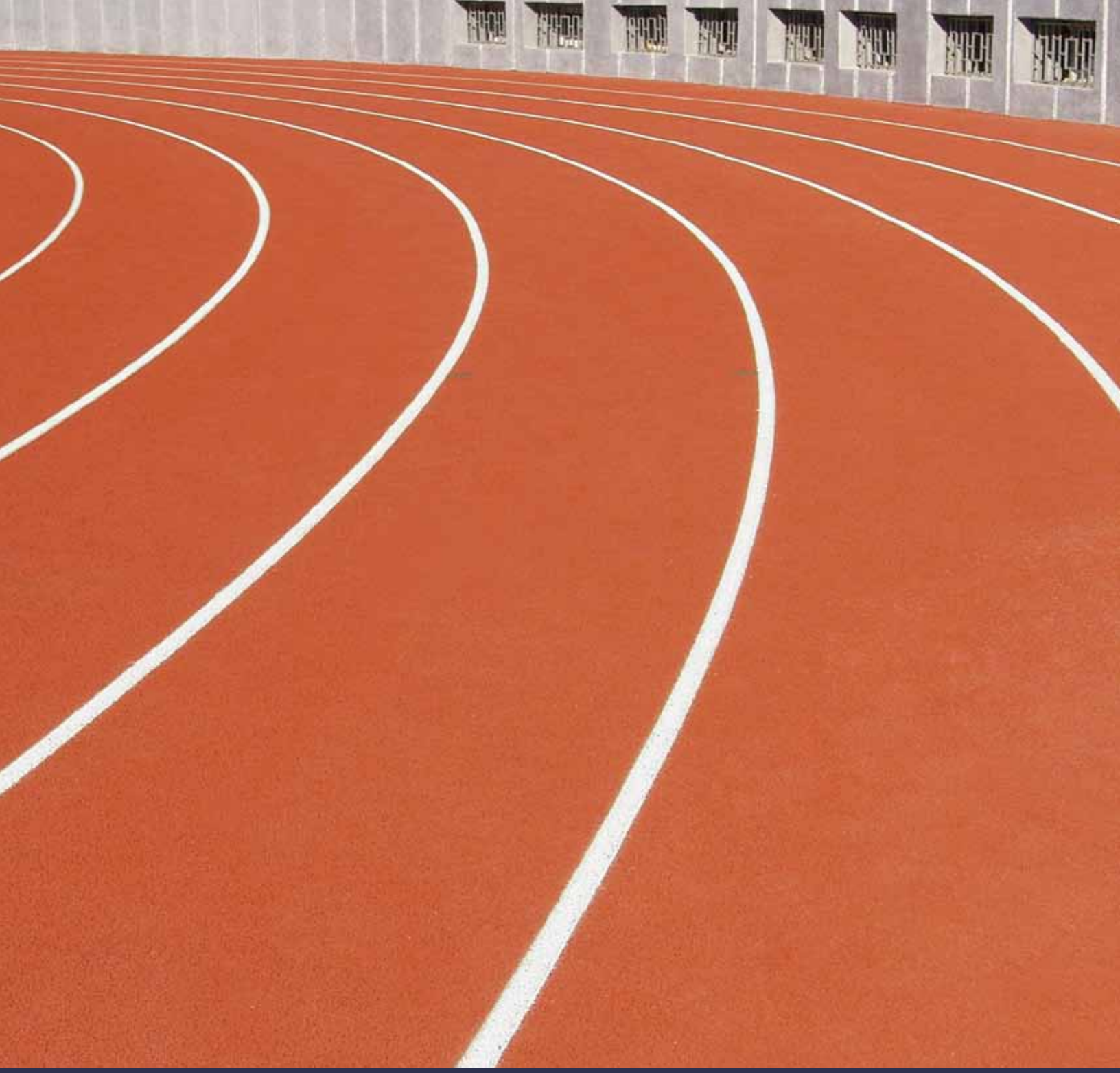
11. Length of: Trial (EXCL. lunch):_____; Jury deliberation:_____.

12. Interesting Notes: _____

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Simplified Rules of Federal Procedure?

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SIMPLIFIED RULES OF FEDERAL PROCEDURE?

*Edward H. Cooper**

FOREWORD

Writing in 1924, seventy-eight volumes ago, Professor Edson R. Sunderland began *The Machinery of Procedural Reform* with this sentence: "Much has been said and written about the imperfections of legal procedure."[1] Much of his article describes circumstances in which procedural reform occurred only in response to conditions that had become "intolerable." A decade later, Congress enacted the Rules Enabling Act that still provides the framework for reforming federal procedure.[2] The Enabling Act establishes a deliberate and open process for amending the rules initially adopted under its authority. It may take longer today to consider and adopt a single rule amendment than the original rulesmakers took to create the original body of Civil Rules.[3] The process surely provides the "close and pains-taking study

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Professor Cooper is Reporter for the United States Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure. The draft rules discussed here were prepared for consideration by the Advisory Committee. The Advisory Committee has begun work on the draft, but has not yet decided whether there is reason to pursue the project further. If the project is pursued, any rules that emerge will be strongly influenced by the designation of the cases that may be governed by the rules. The draft thus remains in its original form as an outline of one of many possible approaches to the task. It is a Reporter's draft and does not in any way represent the work or position of the Advisory Committee. — Ed.

1. Edson R. Sunderland, *The Machinery of Procedural Reform*, 22 MICH. L. REV. 293 (1924).

2. The core of the current version is 28 U.S.C. § 2072 (1994). The full scope of the enterprise is reflected in 28 U.S.C. §§ 331, 2071-77. Section 331 directs the Judicial Conference of the United States to:

> carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court * * *.

3. A succinct summary of the creation of the Civil Rules is provided in 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1004 (2d ed. 1987). The original Advisory Committee — of which Professor Sunderland was a member — was appointed on June 3, 1935. The Committee submitted its third draft to the Supreme Court in May 1936. The final report issued in November 1937. After submission to Congress, the rules took effect on September 16, 1938.

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of an intricate mechanism which is necessary for successful regulation" that Professor Sunderland hoped for.[4] It is difficult to be as confident about the overall effect of the painstaking changes that have gradually accumulated since the Civil Rules first took effect in 1938.

It may be inevitable that a continuing revision process lengthens the rules and adds complexity to them. Doubts grow up around old solutions, and new problems appear. The Civil Rules have not escaped this effect. Yet time and again, the Rules adhere to a pervading characteristic. The effort is less to provide detailed controls and more to establish general policies that guide discretionary application on a case-specific basis. Many a district judge may view one provision or another as an unwarranted intrusion on the proper sovereignty of a trial court, but vast discretion remains at virtually every turn. It does not yet seem fair to charge the revision process with a descent into the niggling detail and sterile ossification that have overtaken earlier procedural systems.

Rigidity is not, however, the only danger to be avoided. Discretion is a useful rulemaking technique when it is difficult — as it almost always is — to foresee even the most important problems and to determine their wise resolution. Reliance on discretion is vindicated only when district judges and magistrate judges use it wisely most of the time and in most cases. The ongoing revisions of the Civil Rules time and again reflect an implicit judgment that confidence is well placed in the discretionary exercise of power by federal trial judges. In a wonderful way, there may be an interdependence at work — the very fact that there is discretionary authority to guide litigation to a wise resolution may enable us to attract to the bench judges who will use the authority wisely. It is not clear beyond dispute, but let us assume that the open-textured reliance on trial-judge discretion is working well. Even then, another set of questions remains.

Open-ended rules that call for wise discretion cannot depend on the wisdom of trial judges alone. The structure of our courts — considered in relation to the volume of litigation, the structure of the legal

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Current consideration of Rule 23, the class-action rule, has been rather more deliberate. After a deliberate moratorium following the 1966 amendments, the Advisory Committee took the subject up again in 1991. An interim memorial of the project is provided by the four-volume ADMIN. OFF. OF THE U.S. CTS., WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23 (1997). A related undertaking is reflected in ADVISORY COMM. ON CIVIL RULES & WORKING GROUP ON MASS TORTS, REPORT ON MASS TORT LITIGATION (Feb. 15, 1999). The only amendment yet to be adopted was the addition of a new Rule 23(f), effective on December 1, 1998, establishing a system for permissive interlocutory appeals from orders granting or denying class certification. The continuing work is reflected in proposed amendments to Rule 23 and 23(f) published for comment in August 2001. *See* 201 F.R.D. 586. The amendments also are available at http://www.uscourts.gov/rules. Still further amendments remain under consideration. This is not the work pace of the original rulemakers.

4. Sunderland, *supra* note 1, at 298.

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profession, and the basic nature of an adversary system — requires reliance on the willingness of litigators to work within the general spirit of the rule structure. One cause for concern is doubt whether we have sufficiently contained the risks of inept misuse and the temptations of deliberate strategic over-use of the rules. There are some grounds for reassurance on that score, noted tangentially below, but also grounds for continuing concern. A different cause for concern is that the sheer power of the rules structure, with the concomitant complexity and cost, has grown out of proportion. Some litigation that might better be brought in federal court may be discouraged, either to go to state court or to vanish without filing.

This fear that the *Federal Rules of Civil Procedure* provide too much procedure for some cases underlies a current Advisory Committee project. The Simplified Rules project was launched at the suggestion of Judge Paul V. Niemeyer during his term as Advisory Committee Chair. Part of the inspiration for considering adoption of an alternative and simplified procedure was the ongoing work on The American Law Institute/UNIDROIT *Principles and Rules of Transnational Civil Procedure*.[5] The evolving transnational rules model involves, among many other things, a paring back and simplification. This Introduction is a brief description of the general issues that surround a vaguely similar undertaking to simplify federal procedure for an uncertainly defined subset of cases. The pages that follow set out the first draft to be submitted to the Advisory Committee, (many) imperfections and all.

The basic character of the draft is easily described. The draft proposes more detailed pleading, enhanced disclosure obligations, and restricted discovery opportunities. Other provisions seek to reduce the burden of motion practice and establish an early and firm trial date. The core justification for this approach is that current reliance on notice pleading and searching discovery puts too much weight on time-consuming and expensive discovery. This justification deserves a few more words of examination, after a preliminary look at the question of choosing the cases that might come within the simplified rules.

Draft Rule 102 is no more than a preliminary sketch of the issues that must be addressed in determining the cases that might come within a set of simplified rules. It was drafted for purposes of illustra-

5. Discussion Draft No. 2 of this project was circulated for discussion and comment on April 12, 2001. The basic purpose is to draft a set of procedure rules for transnational disputes, based on the common principles that underlie both "common" and "civil" law systems, as well as other legal systems that do not derive from either of those great traditions. The hope is that the rules could be adopted in many countries, providing a good procedure that is comfortingly familiar to litigants from many different systems. Even as the project remains in midstream, it is apparent that it requires simplification, a stripping away of details to reveal a basic core procedure that is significantly different from any particular domestic system.

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tion, suggesting the issues by seeming to resolve them. It would make application of the rules mandatory in an action "in which the plaintiff seeks only monetary relief and the amount is less than $50,000." Rather complicated provisions contemplate application to other actions by consent of the parties and exclude certain categories of actions. All of the other rules depend on the choices made in determining which cases are covered. As one simple illustration, a decision to apply the rules only when all parties consent would open the possibility of discarding jury trial. Any attempt to discard jury trial without party consent would require such elaborate justification, and encounter such stiff resistance, as to impede seriously, if not fatally, any serious attempt at adoption.

The justification for attempting to frame a simplified procedure must withstand many challenges. Most of the challenges raise empirical issues. Two sets of empirical issues lead the list. One ties directly to the definition of cases covered by the rules — it makes little sense to create a set of rules for cases that do not, and should not, come to the federal courts. The other set goes directly to the underlying premise: are the present rules in fact too complex, too full of opportunities for excessive lawyering and strategic manipulation, to work well with some cases that do, or should, come before the federal courts?

The draft that applies the simplified rules to all actions that seek money only, and less than $50,000, prompted the question whether such actions exist in the federal courts. The Federal Judicial Center — a constant source of valuable assistance in considering empirical rules-reform questions — undertook to examine the data currently available. Looking at all cases filed in federal courts from 1989 through 1998 — some 2,248,547 cases — they found that information about a stated money demand greater than $0 was available for only 610,002, less than 28%. Of this reduced set of cases, 236,212 involved demands from $1 to $50,000. Another 103,326 involved demands from $51,000 to $150,000.[6] It is not possible to assume that the same distribution would hold for all cases if the amount of the dollar demand were known for all. That more than one-half of the cases in this subset involved demands for less than $150,000 is an interesting datum, but little more. That nearly a quarter of a million cases in ten years involved less than $50,000 is more tangible. If there is otherwise reason to fear that the Civil Rules provide more procedure than is appropriate for relatively small-dollar litigation, there are cases enough to justify further consideration.

That observation leads directly to the empirical question whether general federal procedure is indeed too elaborate for many of the actions brought in federal court. There are many reasons to question the

6. Letter from Thomas E. Willging to Hon. Paul V. Niemeyer, Chair, Civil Rules Advisory Committee (Dec. 21, 1999) (on file with author).

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premise that federal procedure often proves unnecessarily burdensome. Empirical studies of discovery have repeatedly disclosed that for most cases in federal court no discovery occurs, or only a few hours are devoted to it.[7] Recent amendments have sought to reduce the burden of discovery still further by adopting and then modifying disclosure requirements and by providing for the Rule 26(f) meeting of the parties. Many practicing lawyers have reported that the Rule 26(f) meeting has proved useful. If lawyers actually confer about the realistic needs of the case, they commonly agree to behave reasonably.

The counterpoint to assertions that federal procedure is too elaborate for some cases commonly is that state procedure is more suitable. But many state systems are modeled on the federal rules, and outsiders are not likely to view the more distinctive state systems as more efficient. If there is a point in this comparison, the most likely support lies in the procedures adopted for state courts of limited, not general, jurisdiction.

Even if there is reason to fear that general federal procedure should not apply in all its sweep to every case in federal court, it is not clear that "general federal procedure" is as procrustean as the champions of simplified procedure may claim. The Civil Rules provide many opportunities for tailoring procedure to the realistic needs of individual actions. Judges are given general and discretionary authority to cabin discovery and to manage the litigation. Vigorous use of this authority can directly limit the dangers of excessive procedure. Indirect benefits may prove even greater as lawyers come to understand that they will be forced to behave reasonably.

The general power to shape procedure to specific cases has been elaborated in some districts by adoption of differentiated case management plans. Several courts have established tracking systems that are designed to provide expedited procedures for cases that do not require full utilization of all the tools the Civil Rules make available. The experience of these courts is important to the simplified procedure proposal for at least two reasons. The first is that these practices may provide all the relief that is needed. If so, reliance on these procedures may prove more effective than an attempt to generate special rules and to identify the categories of cases to be covered by special rules. The second is that if special rules remain a promising approach, local tracking systems may point the way toward the kinds of procedures that prove useful and the kinds of cases that benefit from them.

Examples of the more specific issues presented by local tracking systems are easy to provide. Several systems attempt to assign tracks by case categories only for cases that can be categorized with relative ease — cases involving review on an administrative record, bank-

7. *See* THOMAS E. WILLGING ET AL., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE (1997).

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ruptcy appeals, and so on. Other cases are assigned to tracks by a judge after a Rule 16 conference that considers such matters as the number of parties, the degree of contentiousness, the stakes, the level of agreement on what issues need to be resolved, and so on. Most cases wind up on the "standard" track. "Expedited" tracks seem not to draw many cases. All of this may suggest that case-by-case determinations by a judge who is actively involved in the early stages are better than an attempt to establish more abstract definitions and categories.[8]

Another example is provided by the common requirement in differentiated case management plans, similar to the Rule 26(f) meeting, that attorneys meet to prepare a joint statement before the first Rule 16 conference. This joint statement supports the track assignment. When approached in the proper spirit, the attorney conference and Rule 16 conference may provide a far more direct and effective method of identifying the nature of the dispute and the issues that need to be resolved than any method that relies on detailed pleading and unilateral disclosure.

Yet another alternative is possible. In 1992, the Advisory Committee proposed to amend Civil Rule 83 to authorize adoption, with Judicial Conference approval, of experimental local rules inconsistent with the national rules. The proposal was withdrawn in the June 1992 Standing Committee meeting. The proposal presented obvious statutory difficulties — 28 U.S.C. § 2071(a) authorizes district courts to prescribe rules "consistent with * * * rules of practice and procedure prescribed under section 2072 * * *." It may seem circular to make an inconsistent local rule consistent with the national rules by adopting a national rule that authorizes inconsistent local rules. There also may be some hesitation about wishing the tasks of review and approval on the Judicial Conference. But as compared to the uncontrolled proliferation of local rules, more or less at random, there may be real advantages in facilitating well-designed and carefully monitored local experiments. Empirical data are hard to come by in the world of procedure. "Pilot" and "demonstration" programs may yield valuable insights. Rather than adopt national rules that apply to all federal courts at once, local experiments might better advance progress toward simplified procedure, whether for some distinctive portion of the federal docket or for all cases.

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8. Information about differentiated case management plans remains diffuse. Two good sources provide information about general variations; although the details of specific court programs have surely changed, the overall picture remains useful. *See* DAVID RAUMA & DONNA STIENSTRA, THE CIVIL JUSTICE REFORM ACT EXPENSE AND DELAY REDUCTION PLANS: A SOURCEBOOK (1995); DONNA STIENSTRA ET AL., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 (1997). A summary of Judge Jean C. Hamilton's description of the expedited track in the Eastern District of Missouri plan is provided in the Civil Rules Advisory Committee, Minutes (Oct. 16-17, 2000), *available at* http://www.uscourts.gov/rules.

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These empirical questions, and the possibility of experimental local rules, point to another possible purpose in adopting simplified rules for a yet-to-be-defined portion of federal civil actions. The simplified rules could themselves be an experiment, designed to pave the way for gradual revision of the rules for all actions. The approach that combines notice pleading with sweeping discovery is deeply entrenched. But it is not inevitable. Discovery and the recently adopted and amended disclosure rules have been the subject of continual study by the Advisory Committee since the work that led to the 1970 discovery amendments.[9] Should some form of simplified rules be adopted, it is possible that several years of developing experience would provide the foundations for simplifying the general rules as well.

SIMPLIFIED PROCEDURE

INTRODUCTION

Some of the persisting questions about the Federal Rules of Civil Procedure arise from the "one size fits all" character of the Rules. The Committee has struggled regularly with the "transsubstantive" character of the rules, ordinarily reaching the conclusion that serious Enabling Act questions are posed by any effort to create special rules for specific substantive problems. Perhaps the time has come to consider a different aspect of the Rules' unvarying uniformity. As they stand now, and as they have been from the beginning, the Rules apply alike to all cases, no matter how complex or how simple. It has been common to wonder whether the inevitable compromises have produced rules that work well for most litigation in the middle range, but do not work as well for cases at the extremes. One extreme has been frequently studied. The recent discovery proposals are only the most recent in a long line of efforts to adapt the rules to the needs of complex or contentious litigation. Not as much has been done for simple litigation. It is possible to adopt special provisions for simple litigation without in any way departing from the transsubstantive principle. The purpose would not be to establish a second-class set of procedures for second-class litigation, but to provide procedures that provide more efficient, more affordable, and better justice for litigation that cannot reasonably bear the costs of unnecessarily complex procedures.

The simplified rules that follow are very much a first draft. Coverage is limited to actions demanding only money damages, and in relatively small amounts, unless all parties agree to adopt the rules. The central feature is a major transfer of pretrial communication away

9. A concise history of the discovery rules is provided in 8 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: CIVIL §§ 2002-2003.1 (2d. ed. 1994).

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from discovery and to fact pleading and disclosure. There also is a demand-for-judgment procedure that could accelerate and clarify disposition of many actions that today go by default. Use of Rule 16(b) scheduling orders is made optional. Finally, there is a beguiling proposal to require court permission for presentation of expert testimony under Evidence Rules 702, 703, or 705.

The draft is presented to stimulate thinking at several levels. The first is consideration of whether it is sensible to launch a project of this nature. It should be easier to consider this question in light of a model, however crude, of the core topics that are likely to be addressed in any effort to create a simplified procedure track.

A second set of questions goes directly to the topics addressed by the draft. Can we effectively restore fact pleading that achieves the hopes of the Field Code drafters, not the sorry legalisms that lawyers and judges conspired to inflict on the worthy Code provisions? Should we require pleading of law as well as fact — something not done by the draft? Should we at least provide limited law-pleading requirements for special situations? (One possibility would be to require a party to plead the source of the governing law — federal or state, which state or foreign country, and so on.) How far should initial disclosure be expanded beyond the 1993 26(a)(1) model? How far should discovery be restricted — an illustration is provided by the alternatives in Rule 106 that either allow three depositions as a matter of right or require court permission for any deposition?

A third set of questions goes to the questions that might be addressed outside the core. One possibility, for instance, would be to encourage the parties to agree to a partly paper trial, in which witness statements or deposition transcripts are used in place of direct testimony and live trial testimony focuses on cross-examination and, perhaps, rebuttal. Or, as a variation, trial could be integrated with summary judgment in a process by which the court first considers the paper record, then determines what witnesses should be heard in court and shapes the trial accordingly. The following list exemplifies, but does not begin to exhaust, the questions that might be addressed.

Finally, review of questions not addressed suggests a different issue. It is tempting to adopt in the simplified rules provisions that seem to be improvements for all actions but that also seem easier to move through the Enabling Act process if limited to actions that do not have an actively involved constituency. Summary judgment procedure is an illustration. Rule 56 could be substantially improved. A substantially improved Rule 56 failed in the Judicial Conference nearly a decade ago, and it has been difficult to muster enthusiasm for a renewed attempt. But it might be possible to adopt revisions for the simplified rules.

Should permissive Rule 13(b) counterclaims be permitted in a simplified action? Why not make optional counterclaims that arise out

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of the same transaction or occurrence as the claim, and prohibit others? If counterclaims are permitted, should all claims be aggregated to determine whether the simplified rules apply? Should a counterclaim for injunctive relief automatically oust application of the simplified rules in the cases identified by Rule 102 for mandatory application?

It seems likely that a relatively high proportion of simplified procedure cases will be resolved by default. The Rule 104 demand for judgment is a beginning effort to expedite and clarify this outcome, but — even if something like Rule 104 is adopted — cannot resolve all default cases. Should we adopt an express requirement for proof of the claim by affidavit? Should the requirement be measured differently than the test that would justify summary judgment on the affidavits if there are no opposing affidavits? Is this an illustration of a reform that should be adopted as part of Rule 55 for all cases?

Direct attorney-fee provisions seem outside the scope of Enabling Act rules. But many people believe that the rules can affect implementation of fee statutes. One temptation is to revise the offer-of-judgment procedure so that a Rule 68 offer does not cut off the right of a prevailing plaintiff to recover statutory attorney fees. (An illustration: the rejected offer is for $100,000; the plaintiff wins $90,000. The offer now destroys the right of the plaintiff to recover statutory attorney fees if, but only if, the statute describes the fee recovery as "costs." This wildly improbable result cries out for correction for all cases. But correction quickly becomes bogged down in the dismal swamp of Rule 68.) There may be a special justification for addressing this question in the simplified rules, since they will apply in many actions that will be feasible only if there is a realistic prospect of recovering attorney fees. Fear of the strategic gamesmanship inherent in Rule 68 may deter initial filing, and may easily distort the decision whether to accept an unfair Rule 68 offer.

Now that the rulemaking power includes determinations of appealability, it would be possible to seek out rules that impose particular burdens in small-stakes litigation. The most obvious candidate, official-immunity appeals, is likely to prove untouchable. The sorrily confused discussion in 15A Federal Practice & Procedure: Jurisdiction 2d, § 3914.10 (current supplement) reflects an even deeper confusion in the law. One suspicion, increasingly voiced by the courts of appeals, is that official defendants are using immunity appeals to inflict delay. There may be a substantial number of small-stakes § 1983 actions and potential actions that are deterred by the availability of (potentially multiple) interlocutory appeals. The deterrent effect is likely to be greater in small-stakes cases, affording some excuse to approach these problems in the simplified rules. One easy but partial remedy would be to provide that only one pretrial immunity appeal may be taken. A more effective remedy would be to expand the scope of the one permitted appeal, permitting direct review of a denial of summary judg-

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ment. Official-immunity appeal doctrine, however, derives from the substantive perception that this form of immunity — unlike many other important protections, such as the rules of personal jurisdiction — affords a right to be protected against the burdens of pretrial and trial procedures. Even with the enthusiastic cooperation of the Appellate Rules Committee and staunch support of the Standing Committee, efforts to address these problems could undermine a simplified rules project.

As drafted, the simplified rules model does not address a set of scope problems that likely require consideration. If application of the rules is defined in terms of amount in controversy, what happens when cases are consolidated or claims are severed?

Would it be desirable to consider a majority-verdict rule for jury trials? (There is no possibility of ousting jury trial, and little point in making it more difficult to demand jury trial.)

Should the Rule 53 special masters Subcommittee be asked to consider a provision barring reference to a special master in a simplified rules case?

How about a rule that establishes presumptive time limits for trial — perhaps one day per "side"? (See this again with Rule 109.)

Traditionally the rules have left res judicata to be developed by decisional law. But the nature of simplified procedure raises at least one question. Is it fair to base nonmutual issue preclusion on a simplified-procedure judgment? How far should this question depend on the nature of the simplified rules: is it unwise to belittle the fairness and adequacy of the rules by providing that the results are acceptable to dispose of "small" claims but not to govern something that "really matters"?

If simplified rules are adopted, Rule 81 should be amended to recognize them.

There is another frustrating choice that also must be considered. The draft simply incorporates the Civil Rules for most questions. That approach makes the project much easier. But it also defeats one of the goals of a simplified procedure. A pro se party will not find any of the comfort that might be provided by a self-contained, short, and clearly stated set of rules. This draft does not address directly any of the questions that are raised by the proposal of the Federal Magistrate Judges' Association that a special set of rules should be adopted for pro se actions.

Many other questions are likely to be raised as collective deliberation is brought to bear. The immediate questions are two: Should this project be developed? And if it is to be developed, what forms of support might be sought in developing a more polished model for publication?

A more general question might be added. What sorts of actions are likely to be encouraged by these rules? Will the result be to bring to

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federal courts actions that otherwise would be brought in state courts — and is that a good use of federal judicial resources? Will the result be to encourage people to bring in federal court actions that otherwise would not be brought in any court? If the ceiling for mandatory application is set at $50,000, is there something awkward about wishing on civil rights actions, or maintenance-and-cure claims, or proceedings that cannot readily be inflated above $50,000, procedures that are not invoked for any diversity action?

XII. SIMPLIFIED PROCEDURE[10]

Rule 101. Simplified Rules

These simplified rules govern the procedure in actions described in Rule 102. They should be construed and administered to secure the advantages of simplified procedure to serve the just, speedy, and economical determination of these actions.

Committee Note

The Civil Rules have applied a single general form of procedure to all civil actions. Many changes have been made over the years to facilitate individualized adaptation of the general rules to the distinctive needs of complex litigation and to the need to provide increased judicial management when adversary contentiousness threatens to disrupt orderly disposition. Not as much has been done to adapt the rules to the needs of simple litigation that can be managed by the parties with little need for elaborate discovery or pretrial management. Often the parties meet this need on their own. Several studies have shown, for example, that no discovery at all is conducted in a significant portion of federal civil cases. See *Willging, Shapard, Stienstra, & Miletich, Discovery and Disclosure Practice, Problems, and Proposals for Change* (Federal Judicial Center 1997). The lack of discovery, and the limited use of formal discovery in another significant portion of cases, often reflects a low level of fact dispute. In other cases the parties recognize the need to hold the costs of litigation in sensible proportion to the stakes. Yet such restraint is not universal. Whether from excessive zeal, ineptitude, or deliberate motive to increase cost and delay, notice pleading and sweeping discovery practices can entail pretrial practice out of any sensible relationship to the stakes or needs of relatively simple litigation. These rules are designed to provide an improved package of pleading and discovery procedures that will enhance the opportunity to avoid costly discovery. More exacting pleading and dis-

10. The following is the Reporter's Draft, reproduced in its original form.

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closure requirements are provided to reduce further the need for formal discovery.

Other changes are made to complement the alternative pleading, disclosure, and discovery practices. These changes, however, are modest. The core of the simplified procedure is the alternative pleading, disclosure, and discovery practice.

Rule 102. Application of Rules

(a) Except as provided in Rule 102(b), these simplified rules apply in an action:

(1) in which the plaintiff seeks only monetary relief and the amount is less than $50,000; or

(2) in which the plaintiff seeks only monetary relief and the amount is less than $250,000, if all plaintiffs elect [in the complaint] to proceed under these rules [and if no defendant objects to application of these rules by notice filed no later than 20 days after service of the summons and complaint {on the objecting defendant}].

(b) These simplified rules do not apply in an action described in Rule 102(a):

(1) for interpleader under Rule 22 or under 28 U.S.C. § 1335;

(2) under Rules 23, 23.1, or 23.2;

(3) under 28 U.S.C. §§ 1602-1611;

(4) for condemnation of real or personal property under Rule 71A;

(5) in which the United States is a party and objects to application of these rules

(A) in the complaint, or

(B) — if a defendant — by notice filed no later than

(i) 30 days after service of the summons and complaint, or

(ii) a motion to substitute the United States as party-defendant; or

(6) if the court, on motion or on its own, finds good cause to proceed under the regular rules.

(c) These simplified rules apply in an action in which:

(1) all plaintiffs offer in the complaint to proceed under these rules,

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(2) all defendants named in the complaint accept the offer by notice filed no later than 20 days after the last of these defendants is served, and

(3) no party involuntarily joined after the offer is accepted shows good cause to proceed under the regular rules.

Committee Note

Determination of the actions that the simplified rules govern should be approached conservatively at the outset. Broader application may prove appropriate after experience with the rules determines their success and points the way to improvements.

Subdivision (a) establishes the basic core of application. The simplified rules apply to all actions in which the plaintiff seeks only monetary relief less than $50,000. They apply also to actions for only monetary relief less than $250,000 if the plaintiff elects to invoke them and no defendant makes timely objection. The rules do not apply if the plaintiff seeks specific relief such as a declaratory judgment, an injunction, specific performance, or habeas corpus, unless the parties agree to apply the rules under subdivision (c). The exclusion of actions for specific relief enables a plaintiff to impose the regular civil rules on a defendant who would prefer simplified procedures. The cost of attempting to measure the significance of the stakes in actions that seek more than money, however, seems too great to bear, at least while the simplified rules are new.

Subdivision (b) excludes specific categories of actions that do not seem amenable to simplified procedure because of the dignity of a party or the potential complexities of multiparty proceedings. Paragraph (6) allows the court to exclude any other action for good cause. The court may exercise this power at any time, and may act at the behest of a party or on its own.

Subdivision (c) allows the parties to any action to agree to follow the simplified rules. The agreement is made by the plaintiffs and defendants identified in the initial complaint; a party who is involuntarily joined after the agreement may move to have the action governed by the regular rules for good cause.

Reporter's Comment

The scope of the simplified rules is critical. The choice as to scope is bound up with the actual rules. The more curtailed the simplified rules, the narrower the scope of initial application. The more closely the simplified rules approach the regular rules, the broader the scope of application might be.

The brackets in Rule 102(a)(2) flag one of the issues that deserves attention: Should the plaintiff be given sole choice whether to invoke

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these rules for an action seeking less than $250,000? Or should the plaintiff be given only the power to invite the defendant to accept the rules? There is a powerful argument that allowing a defendant to opt back into the regular Civil Rules will lead many defendants to choose the more cumbersome, prolonged, and expensive procedure for wrong reasons — the hope is to harass and wear down the plaintiff, not to achieve a better disposition on the merits. On the other hand, few people would regard stakes between $50,000 and $250,000 as insignificant, and lawsuits are brought against real people as well as institutions that may view the loss of a quarter of a million dollars with equanimity. The issues may have a factual complexity beyond the dollars involved. In the end, the choice may turn on our level of confidence in the rules that emerge. If we believe that they will work well even in more complex cases, we might simply raise the mandatory threshold, or give the plaintiff — but not the defendant — a choice. Giving the plaintiff a unilateral choice may not be unfair — if the action is indeed one that requires resort to the regular rules, the plaintiff may be relied upon to choose them.

All of the exclusions in Rule 102(b) are tentative; perhaps none of them deserve adoption. The exclusion of the United States, for example, may be challenged; an accommodation is made in Rule 109 to allow an additional month before trial when the action involves the United States or a United States agency or employee.

Subdivision (c) is an effort to allow all parties to agree to proceed under the simplified rules, free from any of the limits in (a) or (b). The provision that allows later-added parties to defeat the initial election is limited in two ways. It does not apply to those who voluntarily become parties, as by an amended complaint or intervention. And it requires a showing of good cause. These limitations are suggested because of the risks of disruption that would follow if it were too easy to shift procedural tracks after the initial election. Perhaps it would be better to add a simpler alternative: "These simplified rules apply in an action in which all parties agree to proceed under these rules, or * * *."

If we go down this road, consideration must be given to several complicating factors. Rule 81(c) applies "these rules" to removed actions, but requires repleading only if ordered by the court. Pleading a dollar amount may not be required, or even permitted, by state practice. Must we provide for this in the rule?

Another problem arises from Rule 54(c) — "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." More than $50,000 or $250,000? Injunctive relief? Can we allow curtailed procedure to yield unrestricted judgments? To the extent that we make the simplified rules mandatory, we cannot rely on a waiver theory, unless it is waiver by choosing to go to federal court [and not be removed]. (A much smaller problem arises with

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respect to declaratory judgments: there is no apparent reason to oust these rules in a "reversed parties" action in which the declaratory plaintiff seeks only to establish nonliability for less than $50,000.)

Rule 103. Pleading

(a) General Rules. Except as provided in Rule 103(b), (c), (d), (e), (f), and (g), pleading in actions governed by these rules is governed by Rules 7 through 15.

(b) Stating a claim. A pleading that asserts a claim for relief must, to the extent reasonably practicable:

(1) state the details of the time, place, participants, and events involved in the claim; and

(2) attach each document the pleader may use to support the claim.

(c) Answering a claim. A pleading that answers a claim for relief must admit or deny the matters pleaded in asserting the claim under Rule 8(b) and also, to the extent reasonably practicable:

(1) state the details of the time, place, participants, and events involved in the claim to the extent those details are not admitted; and

(2) attach each document the pleader may use to support its denials or Rule 103(c)(1) statement.

(d) Avoidances and affirmative defenses. A pleading that asserts an avoidance or affirmative defense must:

(1) identify the avoidance or affirmative defense as an avoidance or affirmative defense; and

(2) plead the avoidance or affirmative defense under the requirements of Rule 103(b) for making a claim for relief[, including attachment of each document the pleader may use to support the avoidance or affirmative defense].

(e) Reply.

(1) A party must reply to an avoidance or affirmative defense identified under Rule 103(d)(1) by admissions, denials, and avoidances or affirmative defenses.

(2) A party must serve a reply no more than twenty days after being served with the pleading addressed by the reply.

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(f) Length. No pleading may exceed a limit of twenty pages, eight and one-half inches by eleven inches, with reasonable spacing, type size, and margins.

(g) Forms. Forms 3 through 22 in the Appendix of Forms do not suffice under Rule 103.

Committee Note

The fact pleading required by Rule 103 is, with the expanded disclosure requirements in Rule 105, the foundation for the Rule 106 discovery limits and the core of the simplified rules. Fact pleading is adopted for these rules to encourage careful preparation before filing. The general system of notice pleading and sweeping discovery works well for most litigation, but can, when misused, impose undue costs. It is hoped that shifting part of the pretrial exchanges between the parties from discovery to more detailed pleading and disclosure can enhance the realistic opportunity of all parties to litigate effectively claims that involve amounts of money that are relatively small in relation to the costs that litigation can entail. Plaintiffs can better afford to pursue worthy claims, and defendants can better afford to resist rather than capitulate to unworthy claims.

Fact pleading cannot be successful if it is approached in a spirit of technicality, much less hypertechnicality. Neither can it be successful if it assumes the mien of detailed witness statements or deposition transcripts. The spirit that has characterized notice pleading should animate Rule 103 fact pleading. What is expected is a clear statement of the pleader's claim, denial, or defense in the detail that might be provided in proposed findings of fact, recognizing that the information available at the pleading stage often is not as detailed or as reliable as the information available at the trial stage.

The test for measuring attachment of a document as one a party "may use" to support a claim, denial, or defense is the same as the test used under Rule 26(a)(1)(A) and (B). The duty to supplement the initial attachments to reflect information gained after filing the pleading is not a matter of pleading but of disclosure under Rule 105.

A reply is required to respond to an avoidance or affirmative defense, but only if the avoidance or affirmative defense is identified under Rule 103(d). To the extent that a reply asserts an avoidance or affirmative defense, a reply to the reply is required, although it is expected that this situation will arise infrequently. The twenty-day period to reply is borrowed from Rule 12(a)(2) because it seems better to have a single period to reply to a pleading that states both an avoidance or affirmative defense and also a counterclaim.

A party who believes that its positions cannot be pleaded adequately in 20 pages may seek leave to amend under Rule 15.

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Reporter's Comment

This rule really gets to the heart of the project.

The decision to invoke the general pleading rules has great and obvious advantages. One obvious question is whether to incorporate all of Rule 9, which includes particularity requirements not only in the oft-invoked provisions of Rule 9(b) but also in Rules 9(a) and 9(c). Rule 9(g) on pleading special damage may raise a similar question. On balance, it seems better to retain these familiar provisions. The fact pleading required by this draft should not be equated automatically to the "particularity" requirements attached to specific claims, and most especially should not be equated to the statutory pleading requirements in the securities laws.

Another question is whether to retain the time provisions of Rule 12. The 60-days to answer allowed the United States or its employees seems long, but the reasons for allowing the additional time seem compelling even in this setting. Compare the proposal that the United States be allowed to opt out of the simplified rules, Rule 102(b)(5). There also is a temptation to expedite matters by providing that the time to answer is not suspended by a Rule 12(b) motion. On balance, this temptation seems better resisted.

Perhaps the most important question is whether to retain without change the Rule 15 amendment provisions. A policy of free amendment might undermine the purposes of fact pleading. But easy amendment may be even more important in a system that requires the parties to state relatively detailed positions early in an action; this need may be enhanced by the prospect that expensive prefiling investigation may not make sense in low-stakes actions. The greatest temptation, indeed, is to use the simplified rules as the excuse for a change in Rule 15 that may well be warranted for all cases. There is much to be said for allowing a plaintiff to amend once, as a matter of course, after an answer points out defects in the complaint. The same is true when a reply points out defects in an answer. Present Rule 15(a) allows amendment once as a matter of course if a defect is pointed out by motion but not if it is pointed out by pleading. This question deserves further consideration.

The reply obligation is limited to an avoidance or affirmative defense identified as such. Too much grief would come from requiring a reply to "new matter."

The particularized pleading requirement raises interesting questions about compliance with Rule 11: is more careful investigation required to support more careful pleading? Is that backward — we make it more difficult to bring a small-stakes action, even though the burdens are less, than to bring a more complex action?

Rule 104. Demand for Judgment

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(a) Demand for judgment. A party may attach a demand for judgment to a pleading that asserts a contract claim for a sum certain. The demand must be supported by:

(1) a verified copy of any writing that evidences the obligation, and

(2) a sworn statement of

(A) facts establishing any obligation that is not completely evidenced by a writing,

(B) facts establishing total or partial nonperformance of the obligation, and

(C) the amount due.

(b) Response to demand for judgment.

(1) Within the time provided for answering the pleading asserting the claim, a party served with a demand for judgment must admit the amount due stated in the demand or file a response.

(2) The response must be sworn, and must respond specifically by admission, denial, avoidance, or affirmative defense to each matter set forth in the demand for judgment. The answer to the pleading asserting the claim may incorporate the response by reference.

(c) Judgment. Unless the court directs otherwise, the clerk must prepare, sign, and enter judgment for any amount admitted due under Rule 104(b). A judgment that does not completely dispose of the action is not final unless the court directs entry of final judgment under Rule 54(b).

Committee Note

The demand-for-judgment procedure is new. A substantial number of actions in federal court are brought by the United States to collect relatively small sums that are due on unpaid loans or overpaid benefits. The demand procedure is essentially a motion for summary judgment that is made with the pleading that states the claim, paving the way for efficient and inexpensive disposition of the cases in which the plaintiff sues only for the amount that in fact is due. This procedure also may be useful in other small claims brought under federal law, and in diversity actions that fall under these rules through Rules 102(a)(2) or 102(c).

Reporter's Comment

It may be asked why this procedure is not available to defendants as well as plaintiffs: an opportunity to confess judgment in a stated

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amount. At least two observations may be offered. Defendants have summary judgment. And a competing offer-of-judgment procedure would be just that: a Rule 68-like device. Probably we do not want to go down that road with a simplified procedure. A defendant always can concede liability even if the plaintiff does not make a demand for judgment.

Rule 104A. Motion Practice

(a) Rule 12 applies to actions under these simplified rules except as provided by Rule 104A(b), (c), and (d).

(b) The times to answer provided by Rule 12(a)(1), (2), and (3) are not suspended by any motion; Rule 12(a)(4) does not apply to an action governed by these simplified rules.

(c) The answer to a pleading stating a claim for relief must state any defenses described in Rule 12(b).

(1) A motion to dismiss based on any of the defenses enumerated in Rule 12(b)(2), (3), (4), (5), or (7) may be made in the answer or by separate motion filed no later than 10 days after the answer is filed.

(2) A motion under Rule 104A(c)(1) does not suspend any time limitation for further proceedings unless the court by order in the particular case directs a different time limitation.

(d) A party seeking an order under Rules 12(b)(6), 12(c), 12(f), or 56 must combine the relief sought under any of those Rules into a single motion filed no later than 30 days after the filing of the answer or reply to the pleading stating the claim for relief addressed by the motion. If one party makes a timely motion under this Rule 104A(d), any other party may file a motion under this Rule 104A(d) no later than 20 days after being served with the first Rule 104A(d) motion.

Committee Note

Many lawyers and judges express frustration with the delays that arise from pretrial motion practice, and often note a suspicion that pretrial motions frequently are made for the purpose of inflicting delay and expense on an adversary. Rule 104A is designed to reduce the delay, while preserving the necessary functions served by Rules 12 and 56. Other pretrial motions are not affected by Rule 104A.

Subdivision (b) removes the delay that may be occasioned by Rule 12(a)(4). To make the meaning clear, the redundant clauses both state that Rule 12(a)(4) does not apply and that the time to answer is not suspended by any motion. It is important to establish the basic frame-

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work of the pleadings as early as possible so that other pretrial activities can proceed.

Subdivision (c) sets outer limits on the time to move to dismiss on grounds that go to personal jurisdiction or venue. A motion based on failure to join a party under Rule 19 is included as well, but the court retains power to act on its own or on suggestion by a party when needed to protect the interests of an absent person. This subdivision further provides that a motion to dismiss under paragraph (1) does not suspend the time limitations for further proceedings; Rule 105 disclosures provide an immediate illustration.

Subdivision (d) combines into a single motion the motions to dismiss for failure to state a claim, for judgment on the pleadings, to strike matters from the pleadings, and for summary judgment. Because the time provided is short with respect to summary judgment, the moving party may add to the motion a request for additional time under Rule 56(f).

Reporter's Comment

This is a very rough first pass at a very complicated set of questions. The questions addressed seem likely candidates for discussion. It is possible that we will want to consider time limits on motion practice, or perhaps elimination of some motions, even if we decide to abolish the dramatic 6-month trial date proposed in Rule 109. But if we adhere to Rule 109 or anything much like it, we almost certainly will have to do something to prevent the use of motion practice to make a shambles of pretrial preparation.

It might be possible to add deadlines for ruling on motions. There are so many problems, however, that perhaps this question can be put aside.

Rule 105. Disclosure

(a) General. Disclosure requirements are governed by Rule 26(a), 26(e), 26(f), 26(g), [and 37(c)(1)], except as provided in Rule 105(b), (c), (d), and (e).

(b) Plaintiff's disclosure. No later than twenty days after the last pleading due from any present party is filed, each plaintiff must, with respect to its own claims, provide to other parties:

(1) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to facts disputed in the pleadings, identifying the subjects of the information *{, together with a sworn statement of relevant facts made by plaintiff, if the plaintiff has discoverable information, and by any other person whose sworn statement is reasonably available to the plaintiff}*;

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(2) a copy of all documents, data compilations, and tangible things in the possession, custody, or control of the party that are known to be relevant to facts disputed in the pleadings; and

(3) the damages computations and insurance information described in Rule 26(a)(1)(C) and (D).

(c) Other Parties' Disclosures. No later than twenty days after a plaintiff's Rule 105(a) disclosures are due, unless the time is extended by stipulation or court order, each other party must provide to all other parties a disclosure that meets the requirements of Rule 105(a)(1), (2), and (3) *{, including a sworn statement made by the disclosing party, if the disclosing party has discoverable information, and by any other person whose sworn statement is reasonably available to the disclosing party and has not already been provided in the action}.*

(d) Disclosure of Expert Testimony. If the court permits expert testimony under Rule 108, Rule 26(a)(2) governs disclosure unless the court limits or excuses the disclosure.

(e) Available Information; Obligation not Excused.

(1) A disclosure under Rule 105(a), (b), (c), or (d) must be based on the information then reasonably available to the disclosing party.

(2) The disclosure obligation is not excused because the disclosing party:

(A) has not fully completed its investigation of the case,

(B) challenges the sufficiency of another party's disclosure, or

(C) has not been provided another party's disclosures.

Committee Note

The disclosure obligation is expanded beyond Rule 26(a)(1)(A) and (B) obligations to disclose witnesses and documents in the belief that disclosure will prove more efficient than discovery for many of the actions governed by these simplified rules. Disclosure is required, however, only with respect to facts disputed in the pleadings. If a defendant defaults, or concedes liability under Rule 104, a plaintiff need not make any disclosure.

As to witnesses, it is required that a party provide the party's own sworn statement if the party has discoverable information, and also the sworn statement of any other witness that is reasonably available to the disclosing party. The test of reasonable availability is deliberately pragmatic, and is to be administered in the understanding that a party is not

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always able to secure a statement from a person that seemingly would be willing to cooperate. If a person's sworn statement has already been provided in the action, another disclosing party need provide a supplemental statement by the same person only if the disclosing party wishes to elicit additional evidence from that person. Disclosure of these statements is an important support for the restrictions on deposition practice in Rule 106(d).

Disclosure requires copies of documents, not mere identification, but extends only to documents known to be relevant to facts disputed in the pleadings. A document is "known to be relevant" if a party, an agent of a party, or an attorney responsible for participating in the litigation is consciously aware of the document and its relevance. No duty is imposed to search for documents that a party does not seek out in its own investigation and preparation of the case.

Disclosures are sequenced, with plaintiffs going first, so that the plaintiffs' disclosures will provide a framework for more meaningful disclosures by other parties. Disclosures by other parties are due twenty days after plaintiffs' disclosures are due, whether or not plaintiffs have complied with their disclosure obligations. The parties may stipulate to a later date for disclosures after the first plaintiff's disclosure. The court likewise may order a later date; the best reason for deferring disclosure by other parties is a substantial failure of disclosure by the plaintiffs. A plaintiff who makes Rule 105(b) disclosures with respect to its own claims may make separate disclosures as to the claims of other parties under Rule 105(c), but may elect instead to combine those disclosures with its Rule 105(b) disclosures.

Rule 108 discourages the use of expert testimony in actions governed by these simplified rules. But if expert testimony is to be permitted at trial, Rule 26(a)(2) disclosure may be an important substitute for discovery. In determining whether to direct Rule 26(a)(2) disclosure, the court should consider whether the need for disclosure justifies the expense of securing a written report from the expert.

Reporter's Comment

Rule 105(e)(2) is taken from the final paragraph of Rule 26(a), as a matter of emphasis without cross-reference.

Rule 106. Discovery

(a) General. Discovery is governed by Rules 26 through 37, except as provided in Rule 106(b), (c), (d), (e), (f), and (g).

(b) Discovery Conference. A Rule 26(f) conference must be held only if requested [in writing] by a party. The request may be made before or after disclosures are due under Rule 105.

(c) Timing of Discovery. A party may make discovery requests only after a Rule 26(f) conference, or on stipulation of all parties or court order.

(d) Depositions.

(1) Number. The number of depositions permitted under Rule 30(a)(2)(A) and Rule 31(a)(2)(A) without leave of court is three. *{Alternative: A deposition may be taken under Rule 30 or Rule 31 only on stipulation of all parties or court order.}*

(2) Duration. The presumptive time limit for a deposition under Rule 30(d)(2) is one day of three, not seven, hours.

(e) Interrogatories. The presumptive number of interrogatories permitted under Rule 33 is ten.

(f) Rule 34 Discovery. A request for production or inspection of documents and tangible things under Rule 34 must specifically identify the things requested *{unless the court grants permission to identify the things requested by reasonably particular categories}*.

(g) Requests to Admit. A party may serve more than ten Rule 36 requests to admit on another party only on stipulation of all parties or court order.

Committee Note

The Rule 106 limitations on discovery are made possible by the expanded pleading requirements of Rule 103 and the expanded disclosure requirements of Rule 105. Together, these rules seek to assure plaintiffs that an action for relatively small stakes can be brought without undue expense, and to provide comparable assurance to defendants contemplating the costs of defending rather than defaulting.

The Rule 26(f) discovery conference is made available on request by any party. The discovery conference is not made mandatory because it is expected that the pleading and disclosure requirements of Rules 103 and 105, supplemented by the Rule 104 demand for judgment, will greatly reduce the need for discovery. But if a party wishes to use any discovery device, it must request a discovery conference or obtain a stipulation or court order allowing discovery without the conference.

Limits on the numbers of depositions and interrogatories are reduced to match the predictable reasonable limits of discovery in cases governed by the simplified rules. Expansion in the numbers may be obtained in the same way as under Rules 30, 31, and 33. A parallel limitation has been created for requests to admit.

Rule 34 requests are subjected to an obligation to specifically identify the documents or tangible things requested. Rule 105 imposes an

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obligation to produce, as disclosure, copies of all documents known to be relevant to facts disputed in the pleadings. Full and honest compliance with this obligation, including the duty to supplement initial disclosures under Rule 26(e)(1), will meet the reasonable needs of most litigation governed by these simplified rules. *{Although no express limit is built into the provision allowing a court to permit a request that identifies the things requested by reasonably particularized categories, permission should be granted only if there is some reason to suspect that a reasonable further inquiry will produce useful information.}*

Reporter's Comment

Rules 106(d) and (e) are drafted by reference. The intention is to incorporate, for example, all of Rule 30(a)(2)(A), substituting "three" for "ten." That means all plaintiffs get three depositions, all defendants get three, all third-party defendants get three. It may be better to adopt a lengthier, but self-contained version that tracks the language of Rules 30, 31, 33, and 36.

Rule 107. Scheduling Orders

A rule 16(b) scheduling order is not required, but the court may, on its own or on request of a party, make a scheduling order.

Committee Note

Although Rule 16(b) scheduling orders may be useful in an action governed by the simplified rules, it is hoped that the shift in the balance between pleading, disclosure, and discovery will enable the parties to manage most actions without need for judicial administration.

Reporter's Comment

It is tempting to attempt to provide a firm discovery cutoff and a firm trial date by uniform rule. It seems likely, however, that the obstacles that persuaded the Advisory Committee not to adopt that approach for all civil actions will be found even with simplified actions. There may be a significant number of districts where it is not possible to provide a meaningfully firm trial date even for small-claims actions. In addition, it may be wondered whether it is wise to introduce an indirect docket priority for these actions by way of a firm trial date.

Rule 108. Expert Witnesses.

A party who wishes to present evidence under Federal Rules of Evidence 702, 703, or 705 must move for permission no later than the time for serving its initial disclosures under Rule 105, ten days after another party has moved for permission to present such evidence, or a different time set by the court. The court should consider the nature of

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the disputed issues, the amount in controversy, and the resources of the parties in determining whether to permit expert testimony. The court also may consider appointment of an expert under Rule 706 of the Federal Rules of Evidence as an alternative to hearing testimony from experts retained by the parties.

Committee Note

There is a risk that a party to an action governed by these simplified rules may seek to increase the costs of litigating by offering expert testimony that would not be offered if the only motive were a desire to invest an amount reasonably proportioned to the stakes of the litigation. A party who seeks to offer expert testimony that is reasonably justified in terms of the difficulty of the issues to be tried should be allowed to present the testimony, even though the expense seems great in relation to the money at stake, unless the result may be an unfair advantage in relation to another party who cannot reasonably incur the cost of securing its own expert testimony.

Rule 108 cannot be applied to exclude expert testimony that is required by applicable substantive law. In professional malpractice actions, for example, expert testimony often is required to establish the elements of the claim.

Rule 109. Trial date

(a) Trial Date Set on Filing. At the time an action governed by these rules is filed, the clerk must set a trial date that is [no later than]:

(1) six months from the filing date, or

(2) seven months from the filing date if any party is the United States, an agency of the United States, an officer or employee of the United States sued in an official capacity, or an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States.

(b) Serving Notice of Trial Date. Notice of the Rule 109(a) trial date must be served

(1) with the summons and complaint or,

(2) if a defendant has waived service, promptly after the action is {filed} [commenced].

(c) Amending Trial Date. The Rule 109(a) trial date may be extended by order [of the court] to a date later than the period set by Rule 109(a) only on showing that:

(1) the plaintiff had good reason for failing to serve a defendant within 20 days from the filing date, or

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(2) extraordinary reasons require a deferred trial date, but it is not sufficient reason **(A)** that the parties have not completed disclosure or discovery, nor **(B)** that the nature of the action requires deferral.

Committee Note

Expeditious disposition is an important element of these simplified rules. Setting a firm trial date when the action is filed will prompt the parties to proceed expeditiously. This effect requires that the date be quite firm. Extensions are allowed only when there is good reason for failing to effect service within 20 days from filing, or when extraordinary reasons require greater time. Failure to complete disclosure and discovery, and pleas that an action is by its nature too complex to prepare in six months (or seven months if the parties include the United States or its agents), do not provide sufficient reason. It is expected that courts will manage their dockets so that only extraordinary docket conditions will require an extension because the court is unable to honor the initial trial date.

Reporter's Comment

This provision might well be moved up to lie between Rule 103 and Rule 104.

The draft Committee Note points to the objections that may be advanced to the "speedy trial" requirement. Particularly with individual docket systems, it may prove very difficult to honor a trial date set at the time of filing. On the other hand, the importance of speedy trial cannot be denied, particularly with a procedural system that is designed to achieve economy. These issues are important, and deserve hard work to craft the best possible rule. A firm six-month trial date could be more easily achieved if districts that have a substantial number of judges would adopt a centralized docket for these cases. If indeed these cases are amenable to simplified procedure, a centralized docket system might work reasonably well.

Because this draft rule was a last-minute addition, it has been created without attempting to work through the many issues that should be considered if it is to be adopted. A six-month trial date could create havoc if the plaintiff is allowed to make service at any time within the 120-day period allowed by Rule 4(m). Many other time periods also need to be considered, including those that suspend the time to answer while a Rule 12 motion is pending, the time to complete disclosure, and so on. Beyond the time periods set in the Rules, it may be necessary to consider time periods set by local rules — a lengthy notice requirement for motions in general, or more specific timing requirements for summary judgment motions, could be incompatible with the 6-month trial date.

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Another source of time problems may arise from local ADR practices. Commonly ADR establishes a "time out" from ordinary requirements. Adjustments may be needed on this score as well.

All of these firm timing requirements suggest another problem. If firm deadlines are set for several steps along the way, the result may be more expensive litigation. Forced to "do it now or never," lawyers may feel compelled to do many things that, without this pressure, would never be done. It is not necessarily a good answer to require that all motions be made within X days, or to require that an answer be filed before the court decides a motion to dismiss or for more definite statement, and so on.

A firm trial date provision could be drafted in different terms that might reduce these difficulties. For example, the date might be set by order after the pleadings are closed.

In addition to a firm trial date, it also may be desirable to think about trial time limits. It might be provided, for instance, that good cause must be shown to obtain more than one trial day for all plaintiffs or for all defendants.

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