FOURTH CIVIL JUSTICE REFORM SUMMIT

Creating the Just, Speedy, and Inexpensive
COURTS OF TOMORROW

February 25-26, 2016 | Denver, Colorado

MATERIALS

Presented by:

RULE ONE INITIATIVE

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

Sponsored by:

AMERICAN COLLEGE OF TRIAL LAWYERS FOUNDATION

SUMMIT SCHEDULE

Thursday, February 25, 2016

Registration: 7:15am-8:00am

Program: 8:00am-5:30pm

Reception and Dinner: 5:30pm-8:00pm

Friday, February 26, 2016

Program: 8:00am-3:00pm

This program, hosted by IAALS, the Institute for the Advancement of the American Legal System, will provide an opportunity to discuss the challenges of implementing change and to chart the next steps for creating the just, speedy, and inexpensive courts of tomorrow.

We are grateful to the ACTL Foundation for their generous support of this convening.

Thursday, February 25, 2016

7:15 **Registration and Breakfast** (Great Hall)

8:00 **Welcome and Introductions** (Theater)
Hon. Rebecca Love Kourlis (Ret.)
Brittany K.T. Kauffman

8:15 **State Projects and Rules Update: Experiences, Empirical Research, and Expectations** (Theater)
Hon. Jerome B. Abrams
Paula Hannaford-Agor
Brittany K.T. Kauffman
Linda Sandstrom Simard
Francis M. Wikstrom

9:30 **Federal Projects and Rules Update: Experiences, Empirical Research, and Expectations** (Theater)
John Barkett
Hon. Jeremy Fogel
Hon. John G. Koeltl
Emery G. Lee, III
Hon. Jeffrey S. Sutton

10:45 **Break** (Great Hall)

11:00 **The Simpler Cases: Experiences, Empirical Research, and Expectations** (Theater)
Hon. David G. Campbell
Sherri R. Carter
Hon. Janice Davidson (Ret.)
Gilbert A. Dickinson
Paula Hannaford-Agor

12:00 **Lunch and International Panel** (Great Hall)
Discussion Leader:
Hon. Rebecca Love Kourlis (Ret.)

Hon. Colin L. Campbell (Ret.) (Canada)
Hon. Seiu Kin Lee (Singapore)
Tania Sourdin (Australia)
Hon. Master Steven Whitaker (Ret.) (England)

1:45 **Shifting Our Mentality Regarding Discovery: Proportionality and Beyond** (Theater)
Thomas Y. Allman
Jennie Lee Anderson
Steven S. Gensler
Hon. John G. Koeltl
Hon. Lee H. Rosenthal
Paul C. Saunders

3:15 **Break** (Great Hall)

3:30 **The Intersection of Cooperation and Advocacy** (Theater)
William P. Butterfield
Hon. Jeremy Fogel
Robert L. Levy
Linda Sandstrom Simard
Kenneth J. Withers
Hon. Jack Zouhary

4:30 **The Role of Lawyers in Achieving a Just, Speedy, and Inexpensive System** (Theater)
John Barkett
Steven S. Gensler
William C. Hubbard
William A. Rossbach
Hon. Craig B. Shaffer
Stephen D. Susman

5:30 **Cocktail Reception** (Great Hall)

6:30 **Dinner** (Great Hall)
Keynote Speaker:
Hon. Carolyn Kuhl

Friday, February 26, 2016

7:30 **Breakfast** (Great Hall)

8:00 **The Role of Judges: Management and Engagement** (Theater)
Hon. Jerome B. Abrams
Hon. David G. Campbell
Hon. Paul W. Grimm
Hon. David Prince
Hon. Craig B. Shaffer
Hon. Jack Zouhary

9:15 **The Role of the Courts: Serving Litigants** (Theater)
Hon. Thomas A. Balmer
Laura A. Briggs
Sherri R. Carter
Hon. Jeremy Fogel
Mary McQueen
James J. Waldron

10:30 **Break** (Great Hall)

10:45 **Implementation and Culture Change: Perspectives from the Users of the System** (Theater)
R. Stanton Dodge
Daniel C. Girard
Hannah Lieberman
Jonathan M. Redgrave
Kevin Traskos

12:00 **Creating the Just, Speedy, and Inexpensive Courts of Tomorrow** (Great Hall)
Group Brainstorming over Lunch

1:00 **Creating the Just, Speedy, and Inexpensive Courts of Tomorrow: Observations from the Bench** (Theater)
Discussion Leader:
Hon. Rebecca Love Kourlis (Ret.)
Hon. Jerome B. Abrams
Hon. Thomas A. Balmer
Hon. David G. Campbell
Hon. Lee H. Rosenthal
Hon. Jeffrey S. Sutton

2:30 **Summary and Conclusions** (Theater)
Hon. Rebecca Love Kourlis (Ret.)

3:00 **Program Concludes**

Hon. Carolyn Kuhl (Presiding Judge, Superior Court of California, County of Los Angeles)

Judge Kuhl is the Presiding Judge of the Superior Court of the State of California for the County of Los Angeles. She previously served as the Assistant Presiding Judge in 2013 and 2014, and has been a Superior Court judge since 1995. Before becoming the Assistant Presiding Judge, she served as the Supervising Judge of the civil departments, a position she also held from 2003 through 2004. Previously, she was Managing Judge of the complex litigation program for six years. She was a Member of Judicial Council, the policy-making body for the California state court system, from 2006 through 2009. She served on the statewide Advisory Committee on Civil Jury Instructions from 2001 through 2003.

Judge Kuhl served on the Governing Committee of the California courts' Center for Judicial Education and Research. She is a Member of the Council of the American Law Institute and serves on the Board of Overseers for the Rand Institute. She is a Member of the Executive Committee of the Los Angeles County Bar Association Litigation Section and serves on the Board of the Association of Business Trial Lawyers.

Prior to taking the bench, Judge Kuhl was a partner in the law firm of Munger, Tolles & Olson. From 1981 through 1986 she served in the United States Department of Justice as Special Assistant to the Attorney General, Deputy Assistant Attorney General (Civil Division), and Principal Deputy Solicitor General.

Judge Kuhl was a law clerk to the Honorable Anthony M. Kennedy when he sat as a Judge of the United States Court of Appeals for the Ninth Circuit. She graduated with distinction from Duke Law School, was an editor of the Duke Law Journal, and received an A.B. cum laude from Princeton University.

Hon. Jerome B. Abrams (District Judge, First Judicial District of Minnesota)

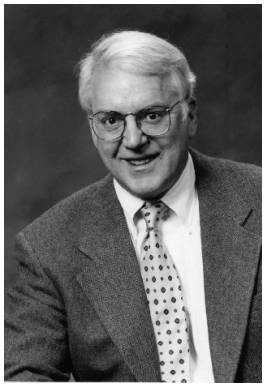
Minnesota State District Court Judge Jerome (Jerry) Abrams came on to the Bench in 2008 after 27 years of a busy civil trial practice. As a lawyer he tried numerous cases, some enormous, some large and some not so large in a number of state and federal courts. Judge Abrams is a member of the American Board of Trial Advocates. He is also a member and Director of the American College of Business Court Judges.

Judge Abrams serves as a regular adjunct faculty member at the University of Minnesota Law School and Mitchell Hamline College of Law where he has taught Complex Litigation. He has served on the Minnesota Civil Justice Reform Task Force and its predecessor group which recommended major changes in the civil justice system recently adopted. Judge Abrams is a frequent speaker at state and national continuing education programs on Complex Case Management, Civil Justice Reform, ESI and related topics. He also serves as a member of the Conference of Chief Justices Civil Justice Improvements Committee, and chair of that Committee's Rules/Litigation Subcommittee.

He currently is operating a pilot expedited litigation program in Dakota County, which provides truncated discovery and fixed jury trial dates within six months of filing for designated types of civil cases. In the past, Judge Abrams has presided over several major state multidistrict litigations, including the statewide challenge to alcohol breath testing equipment which involved over 4,000 cases.

Thomas Y. Allman (Sen. Vice President and General Counsel (Ret.), BASF Corporation)

Tom Allman is an attorney residing in Cincinnati, Ohio and an Adjunct Professor of Law at the University of Cincinnati College of Law. Prior to his retirement as Senior Vice President and General Counsel of BASF Corporation, he was an early advocate of what became Rule 37(f) of the 2006 Amendments to the Federal Rules of Civil Procedure, and then Rule 37(e). He is Chair Emeritus of Sedona Conference® Working Group on Electronic Production and Retention ("WG 1") as well as the Lawyers for Civil Justice E-Discovery Subcommittee. He was a Member of the E-Discovery Panel at the 2010 Duke Litigation Conference and has been active in monitoring and commenting on the 2015 federal rule amendments, including the Rule 37(e).



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Jennie Lee Anderson (Andrus Anderson LLP)

Jennie Lee Anderson, of Andrus Anderson LLP, has extensive experience representing plaintiffs in a variety of class action and complex litigation cases, including employment, personal injury, product liability, consumer protection and antitrust cases.

Upon graduating from law school, Ms. Anderson joined the law firm of Lieff Cabraser Heimann & Bernstein, LLP, where she represented plaintiffs in a variety of class and representative cases. She went on to practice with the law firm of Lerach Coughlin Stoia Geller Rudman & Robbins LLP (currently Robbins Geller Rudman & Dowd LLP) prosecuting both securities and consumer protection class actions.

Ms. Anderson serves on the American Association for Justice ("AAJ") Board of Governors, is a past Co-chair the AAJ Class Action Litigation Group and Chair-Elect of the AAJ Business Torts Section. Ms. Anderson is also a member of the San Francisco Trial Lawyers Association, Consumer Attorneys of California, the Bar Association of San Francisco, the American Bar Association and the Public Justice Foundation.

Hon. Thomas A. Balmer (Chief Justice, Oregon Supreme Court)

Thomas A. Balmer has served as Chief Justice of the Oregon Supreme Court since May 1, 2012, and as a member of that court since 2001. Prior to his appointment, he was in private practice in Portland, including serving as managing partner of Ater Wynne LLP. He was Deputy Attorney General of Oregon (1993-1997), served as a Trial Attorney with the Antitrust Division of the U.S. Dept. of Justice (1979-80), and practiced with firms in Boston and Washington, D.C. As a lawyer in private practice, Chief Justice Balmer represented individuals and businesses in a variety of civil disputes, including antitrust, intellectual property, employment, energy and other commercial cases. As Deputy Attorney General, he advised the Attorney General, the Governor, and other officials on constitutional, election, and administrative law matters, and represented the state in trial and appellate courts, including argument before the U.S. Supreme Court.

Chief Justice Balmer currently serves as the Chair of the Conference of Chief Justices (CCJ) Civil Justice Improvements Committee and a board member of CCJ. He has also served on numerous law-related boards, including the Visiting Committee of the University of Chicago Law School, Classroom Law Project, Multnomah County Legal Aid Service, and the Advisory Committee of the Campaign for Equal Justice. Chief Justice Balmer has participated in various international legal programs, including lecturing on judicial ethics in Tashkent, Uzbekistan (under the auspices of the United Nations); working with judges and schools on law-related education in Zagreb, Croatia; and speaking to judges and court administrators through the Russian-American Rule of Law Consortium.

Chief Justice Balmer is a graduate of Oberlin College and the University of Chicago Law School.

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John Barkett (Shook, Hardy & Bacon LLP)

John is a partner at Shook, Hardy & Bacon L.L.P. in Miami. He graduated from the University of Notre Dame (B.A., 1972, *summa cum laude*) and Yale Law School (1975). He served as a law clerk to the Honorable David Dyer on the Fifth Circuit Court of Appeals. In March of 2012, Chief Justice Roberts appointed John to the Civil Rules Advisory Committee. John also served on the ABA Standing Committee on Ethics and Professional Responsibility (2014-2015).

John is a commercial and environmental litigator, and is serving or has served as a mediator, arbitrator (domestically and internationally), and allocator in matters involving in the aggregate more than $4 billion. In November 2003, he was appointed to serve as a Special Master overseeing the enforcement of the federal Consent Decree between the United States and Florida governing the restoration of the Florida Everglades. He also provides clients with evaluations of legal strategy and risk and consultation on questions of legal ethics, and serves as an e-discovery special master in federal and Florida courts.

John teaches "E-Discovery" at the University of Miami Law School. He has published *E-Discovery: Twenty Questions and Answers* (First Chair Press, Chicago, October 2008) and *The Ethics of E-Discovery* (First Chair Press, Chicago, January 2009). He is also the recipient of the Burton Award for excellence in legal writing for his article, *Skinner, Matrixx, Souter, and Posner: Iqbal and Twombly Revisited*, 12 The Sedona Conference Journal 69 (2011).

Laura A. Briggs (Clerk, U.S. District Court, Southern District of Indiana)

Laura Briggs has been Clerk of the United States District Court for the Southern District of Indiana since 1998 and on the court's staff since 1995 when she was hired as a pro se law clerk. She later became attorney to the clerk and special projects coordinator. Briggs received a J.D. from the State University of New York at Buffalo School of Law in 1992 and graduated summa cum laude and Phi Beta Kappa from Wheaton College in 1989.

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William P. Butterfield (Hausfeld, LLP)

William P. Butterfield is a partner at Hausfeld LLP, a global claimants' law firm. He focuses his practice on antitrust litigation, financial services litigation and electronic discovery.

Mr. Butterfield developed his interest in electronic discovery in the early 1990's when he helped design and implement an electronic document repository to manage more than 15 million pages of documents in a complex securities case. He has testified as an expert witness on e-discovery issues, and speaks frequently on that topic domestically and abroad.

Mr. Butterfield is on the Steering Committee of The Sedona Conference® Working Group on Electronic Document Retention and Production, where he served as editor-in-chief of the *Case for Cooperation* (2009), and was a co-editor of *The Sedona Conference® Commentary On Preservation, Identification and Management of Sources of Information that are Not Reasonably Accessible* (2008). He is also a member of Sedona Conference® Working Group on International Electronic Information Management, Discovery and Disclosure. Mr. Butterfield is an adjunct professor at American University, Washington College of Law, where he teaches a course in electronic discovery. He also serves on the Masters Conference Advisory Board, and on the faculty of Georgetown University Law Center's Advanced E-Discovery Institute.

Hon. Colin L. Campbell (Ret.) (Amicus Chambers)

The Hon. Colin L. Campbell, Q.C. has established his mediation, arbitration and case management practice at Amicus Chambers following a distinguished career as litigation counsel and 15 years as a judge of the Ontario Superior Court of Justice. For 31 years Colin's general litigation practice was primarily in the civil (professional negligence) and corporate commercial fields at all levels of Courts and before regulatory tribunals across Canada including numerous appearances before the Supreme Court of Canada. Prior to his appointment to the Superior Court in 1998, Colin trained and practiced in both mediation and arbitration and was a bencher of the Law Society of Upper Canada.

Mr. Campbell chaired the Task Force on Discovery in Ontario and served as a member of the Joint Task Force on Discovery and Trial Reform of the American College of Trial Lawyers and IAALS. Colin is a founding member of what is known as Sedona Canada and a founding Director of Pro Bono Law Ontario and a member of the Board of the Canadian Conference of Judicial Mediation.

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Hon. David G. Campbell (District Judge, U.S. District Court, District of Arizona)

Judge Campbell is a United States District Judge for the District of Arizona. He is the immediate past chair of the Advisory Committee on the Federal Rules of Civil Procedure, having served on that committee for eight years.

Before his appointment to the bench, Judge Campbell was a commercial litigator with the Phoenix, Arizona law firm of Osborn Maledon. He graduated from the University of Utah Law School and served as a law clerk for Justice William H. Rehnquist of the U.S. Supreme Court and Judge J. Clifford Wallace of the Ninth Circuit Court of Appeals. Judge Campbell is working with the courts of Botswana, South Africa, and Namibia on improving judicial case management, and has taught civil procedure and constitutional law at the Arizona State and Brigham Young University Law Schools.

Sherri R. Carter (Executive Officer/Clerk, Los Angeles Superior Court)

Sherri R. Carter is the Executive Officer/Clerk of the Los Angeles Superior Court. Carter formerly served as the Court Executive Officer for the Riverside Superior Court. She also served as the Executive Officer and Clerk of Court of the U.S. District Court for the Central District of California, the largest federal district in the nation, and as the Trial Court Executive and Clerk of Court for the Eighth Circuit Court for the State of Utah. Carter graduated summa cum laude with a degree in business administration from the University of California at Riverside.

Hon. Janice Davidson (Senior Judge, Colorado Court of Appeals (Ret. Chief Judge))

Chief Judge Janice Davidson joined IAALS in January 2014 as Senior Advisor to the *Honoring Families Initiative*. Currently, she is serving as a Senior Judge on the Colorado Court of Appeals, where previously, she served for twenty-five years before retiring in 2013. She had served as Chief Judge of that court since 2003. Chief Judge Davidson graduated with Highest Honors from Skidmore College in 1966, and from the University of Pennsylvania School of Law in 1969. From 1969-1971, Chief Judge Davidson was an appellate attorney with the New York Legal Aid Society and was a Colorado State Public Defender from 1971-1973. She continued in public interest law, including nine years with the Colorado Attorney General's Office until 1985, when she was appointed to the county court bench in Denver, where she served until her appointment in 1988 to the Colorado Court of Appeals.

Chief Judge Davidson served as the Chairperson of the Colorado Supreme Court Standing Committee on Appellate Rules for twenty-five years. During that time, she was also a member of the Colorado Supreme Court Standing Committee on Rules of Civil Procedure and the Colorado Standing Committee on Rules of Evidence. She was a contributing writer to the Colorado Appellate Handbook, First Edition, and is Managing Editor of the Second and Third Editions. In June 2012, Chief Judge Davidson was awarded the Mary Lathrop Trailblazer Award by the Colorado Women's Bar Association, and, in October 2013, she received the Colorado Judicial Institute's Distinguished Judicial Leadership Award.

Gilbert A. Dickinson (Dickinson Prud'homme Adams LLP)

Gilbert A. Dickinson is senior partner at Dickinson, Prud'Homme, Adams & Ingram, LLP, practicing in the area of medical malpractice defense and general insurance defense. Mr. Dickinson received his undergraduate degree, Magna Cum Laude, and his Juris Doctor from the University of Colorado at Boulder, in 1975.

He is a member of the American Board of Trial Advocates (rank of advocate) and currently serves as National Board Representative for the State of Colorado. He served as President of the Colorado Chapter in 1994. He is also a member of the Association of Trial Lawyers of America, Colorado Defense Lawyers Association, Colorado Trial Lawyers Association, Defense Research Institute and the Denver, Colorado and American Bar Associations. Mr. Dickinson has been actively involved in Colorado and nationally in helping to develop and promote access to the civil justice system through procedural reform and expedited discovery and trial practices. He was on the drafting committee for the Colorado Civil Access Program and has been the program chair for 2011, 2013, and 2015 Jury Summit programs sponsored by the American Board of Trial Advocate, focusing on restoring access to civil jury trials.

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R. Stanton Dodge (Executive Vice-President, General Counsel and Secretary, DISH Network LLC)

R. Stanton Dodge serves as Executive Vice President, General Counsel and Secretary of DISH Network Corporation (NASDAQ: DISH). Mr. Dodge is responsible for all legal and government affairs for DISH and its subsidiaries and oversees Corporate Communications. Since joining DISH in November 1996, Mr. Dodge has held positions of increasing responsibility in the legal department. He was responsible for human resources from January 2010 through July 2011, and has been responsible for corporate communications since February 2015. Mr. Dodge recently received the Richard Schaden "Adopted Alumnus" Award from the University of Colorado Law School, recognizing individuals who have made exceptional contributions to the law school. In 2014, he received the "Legends in Law" Award from the Burton Awards Program in association with the Library of Congress, recognizing outstanding corporate general counsel in the United States. In 2013, he was selected for the inaugural The Legal 500 – *Corporate Counsel 100: United States*, recognizing the 100 most influential in-house lawyers in the United States. Mr. Dodge is actively involved in many community and philanthropic causes. He serves on the board of directors of National Jewish Health, and is a member of Colorado Concern and the E-Discovery Committee of the United States District Court for the District of Colorado. Prior to joining DISH, Mr. Dodge was a law clerk to the Hon. Jose D.L. Marquez of the Colorado Court of Appeals. He received his J.D., *magna cum laude*, from Suffolk University Law School in 1995 and his B.S. in accounting from the University of Vermont in 1991.

Hon. Jeremy Fogel (Director, Federal Judicial Center)

Judge Jeremy Fogel was selected as the Director of the Federal Judicial Center in 2011. Judge Fogel served as a District Judge of the United States District Court for the Northern District of California from 1998 to 2011. Prior to that, he served for nearly seventeen years as a judge in the California state courts. He was also the Founder and Directing Attorney of the Mental Health Advocacy Project from 1978 to 1981. Judge Fogel has served as a faculty member of the Federal Judicial Center since 2002 and as a lecturer at Stanford Law School since 2003. He also served as a faculty member of the California Continuing Judicial Studies Program and California Judicial College from 1987 to 2010. He received a B.A. degree from Stanford University in 1971 and a J.D. degree from Harvard Law School in 1974.

Judge Fogel has received numerous accolades, including the President's Award for Outstanding Service to the California Judiciary from the California Judges Association in 1997. He was named Judge of the Year by the Santa Clara County Trial Lawyers Association in 1997, 2005, and 2011, as well as by the San Francisco Trial Lawyers Association in 2007. Judge Fogel also received the Special Award for Exemplifying Highest Standards of Professionalism in the Judiciary by the Santa Clara County Bar Association in 2002.

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Steven S. Gensler (University of Oklahoma College of Law)

Professor Steven S. Gensler teaches courses on civil procedure, conflict of laws, federal courts, complex litigation, and alternative dispute resolution at the University of Oklahoma College of Law. He joined the OU law faculty in 2000 after serving two years as a Visiting Assistant Professor at the University of Illinois College of Law. During 2003-04, Professor Gensler was the Supreme Court Fellow at the Administrative Office of the United States Courts. From 2005 to 2011, Professor Gensler served as a member of the United States Judicial Conference Advisory Committee on Civil Rules. He currently serves as a member of the Local Civil Rules Committee for the Western District of Oklahoma and as the Vice Chair of the Oklahoma Bar Association's Civil Procedure Committee. He was elected to the American Law Institute in 2006 and currently serves on the ALI Council. Professor Gensler began his legal career as a law clerk to the Honorable Deanell Reece Tacha on the United States Court of Appeals for the Tenth Circuit (1992-93) and to the Honorable Kathryn H. Vratil on the United States District Court for the District of Kansas (1993-94). He then worked as a litigation associate in Milwaukee, Wisconsin for four years, most recently with Michael, Best & Friedrich, LLP.

Daniel C. Girard (Girard Gibbs LLP)

Daniel Girard is the founder and managing partner of Girard Gibbs LLP, a San Francisco and New York-based litigation firm with a nationwide practice, specializing in representing plaintiffs in class actions and complex litigation. His experience extends to matters involving securities, antitrust, consumer, telecommunications, privacy and civil rights laws. He served as one of the lead attorneys in securities litigation arising out of the collapse of Lehman Brothers Holdings, and lead attorney for investors in the Provident Royalties shale gas investment scheme. Most recently, he served as lead counsel in the Peregrine Financial Group Customer Litigation. He devotes a significant portion of his practice to representing underserved groups. His current case work includes representing indigenous residents of Alaska's Yukon-Kuskokwim Delta in an action to recover for deficient wireless service and native residents of Guam in an action to enforce territorial laws mandating compensation for properties returned to Guam by the United States following World War II. Mr. Girard also serves as counsel to several institutional investors in securities litigation matters and advises corporate clients on litigation risk management and corporate governance issues. Mr. Girard served on the United States Judicial Conference's Advisory Committee on Civil Rules from 2004-2010. He was appointed by Chief Justice John G. Roberts to serve the Standing Committee on Rules of Practice and Procedure beginning October 1, 2015. He is a member of the American Law Institute and serves on IAALS's Advisory Board. He is a 1984 graduate of the School of Law, University of California at Davis, where he served as an editor of the Law Review. He received his undergraduate degree from Cornell University in 1979.

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Hon. Paul W. Grimm (District Judge, U.S. District Court, District of Maryland)

Paul W. Grimm serves as a District Judge for the United States District Court for the District of Maryland. He was appointed to the Court on December 10, 2012. Previously, he was appointed to the Court as a Magistrate Judge in February 1997 and served as Chief Magistrate Judge from 2006 through 2012.

In September 2009 the Chief Justice of the United States appointed Judge Grimm to serve as a member of the Advisory Committee for the Federal Rules of Civil Procedure, a role in which he served until 2015. Judge Grimm was also the chair of the Advisory Committee's Discovery Subcommittee. Additionally, Judge Grimm is an adjunct professor of law at the University of Baltimore School of Law and the University of Maryland School of Law, where he teaches courses on evidence and discovery, and he has written extensively on both topics.

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

Paula Hannaford-Agor, the Director of the Center for Juries Studies, joined the Research Division of the National Center in May 1993. In this capacity, she regularly conducts research and provides technical assistance and education to courts and court personnel on the topics of jury system management and trial procedure, civil litigation, and complex and mass tort litigation.

She has authored or contributed to numerous books and articles on the American jury including *Jury Trial Innovations* (2d ed. 2006), *The Promise and Challenges of Jury System Technology* (NCSC 2003), and *Managing Notorious Trials* (1998). She is faculty for the ICM courses *Jury System Management* and *Promise and Challenges of Jury System Technology.* As adjunct faculty at William & Mary Law School, she teaches a seminar on the American jury.

Ms. Hannaford-Agor received the 2001 NCSC Staff Award for Excellence. In 1995, she received her law degree from William & Mary Law School and a Masters degree in Public Policy from the Thomas Jefferson Program in Public Policy of the College of William and Mary.

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William C. Hubbard (Nelson Mullins Riley & Scarborough LLP)

William C. Hubbard served as the Immediate Past President of the American Bar Association (2014-2015). He previously served a two-year term as Chair of the ABA's House of Delegates. Mr. Hubbard is a past president of the American Bar Foundation and the American Bar Endowment. He is a member of the Council of the American Law Institute and is an Honorary Bencher of Middle Temple in London. Mr. Hubbard is Chairman of the Board of the World Justice Project. He is a Fellow of the American College of Trial Lawyers and the American Board of Trial Advocates. Mr. Hubbard has served on the Board of Trustees of the University of South Carolina since 1986 and served as Chairman of the Board from 1996-2000.

In 2002, Mr. Hubbard was presented the Order of the Palmetto, the highest civilian award presented by a South Carolina Governor. In 2007, Mr. Hubbard received the American Inns of Court Professionalism Award for the United States Court of Appeals, Fourth Circuit.

Mr. Hubbard earned his B.A. and J.D. degrees from the University of South Carolina. He was law clerk to U.S. District Judge Robert F. Chapman. He is a partner with Nelson Mullins Riley & Scarborough LLP.

Brittany K. T. Kauffman (Director, *Rule One Initiative*, IAALS)

Brittany Kauffman has been the Director of the *Rule One Initiative* at IAALS since the Spring of 2012, where she provides legal and empirical research and analysis, facilitates collaboration among stakeholders, assists in developing and disseminating recommendations, and undertakes national outreach and advocacy to further the goals of promoting greater accessibility, efficiency, and accountability in the civil justice system. Kauffman previously practiced for eight years with Arnold & Porter, LLP, focusing her practice in the areas of environmental and Indian law, as well as appellate work. She was honored in 2009 as a nominee for the Colorado Lawyers Committee Individual of the Year Award for her pro bono efforts. Previously, she served as a law clerk for the Honorable Judge Paul J. Kelly, Jr., of the United States Court of Appeals for the Tenth Circuit.

Kauffman received her J.D. from the University of Colorado School of Law in 2003. She was honored as a member of Order of the Coif and a Breitenstein Scholar. She was a member of the University of Colorado Law Review and served as a Casenote and Comment Editor. Kauffman also served on the University of Colorado School of Law's Honor Council and as the student liaison to the Colorado Women's Bar Association Board of Directors. Kauffman obtained her undergraduate degree from Colorado College in 1998, where she graduated *cum laude* with a B.A. in Chemistry and an Environmental Studies minor. She is a member of Phi Beta Kappa and a Boettcher Scholar.

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Hon. John G. Koeltl (District Judge, U.S. District Court, Southern District of New York)

Judge Koeltl was appointed United States District Judge for the Southern District of New York on August 11, 1994 and entered on duty on September 9, 1994. He graduated from Georgetown University with an A.B. degree *summa cum laude* in 1967 and received a J.D. degree *magna cum laude* from Harvard Law School in 1971, where he was an editor of the Harvard Law Review. From 1971 to 1972, Judge Koeltl was a law clerk to the Hon. Edward Weinfeld, United States District Judge, Southern District of New York and from 1972 to 1973 he was a law clerk to Hon. Potter Stewart, United States Supreme Court. He served as an Assistant Special Prosecutor, Watergate Special Prosecution Force, Department of Justice from 1973 to 1974. In February 1975 he joined Debevoise & Plimpton, where he remained until his appointment to the bench in 1994. Judge Koeltl is a member of the American Bar Association, the American Law Institute, the Association of the Bar of the City of New York, the New York State Bar Association, the NewYork County Lawyers Association, the Federal Bar Council, the Fellows of the American Bar Foundation, the American Judicature Society, Phi Beta Kappa Associates, the Supreme Court Historical Society and the Harvard Law School Association of New York. He is an Adjunct Professor of Law at New York University School of Law. Judge Koeltl is a former member of the Civil Rules Advisory Committee and the Court Administration and Case Management Committee of the Judicial Conference of the United States.

Hon. Rebecca Love Kourlis (Ret.) (Executive Director, IAALS)

Former Justice Rebecca Love Kourlis believes in the foundations of the American legal system and has dedicated her career, both in and out of the courts, to ensuring that the system provides justice for all. She served Colorado's judiciary for nearly two decades, first as a trial court judge and then as a justice of the Colorado Supreme Court. During her time on the bench, Justice Kourlis witnessed a system increasingly under attack from outside forces—one that was often failing to deliver the justice she swore to uphold. So, in January 2006, she resigned from the Supreme Court to do something about it and established the Institute for the Advancement of the American Legal System (IAALS). Her work at the helm of IAALS is resolute in its focus on continuous improvement of the American legal system, and a logical off-shoot of her accomplishments on the bench where she spearheaded significant reforms in the judicial system. Justice Kourlis began her career with the law firm of Davis Graham & Stubbs, and then started a small practice in rural northwest Colorado where she worked in natural resources, water, public lands, oil and gas, and mineral law. In 1987, she was appointed as a trial court judge with a general jurisdiction docket. She served as Water Judge and later as Chief Judge of the district. In 1994, she returned to Denver and worked as an arbitrator and mediator for the Judicial Arbiter Group. She was appointed to the Colorado Supreme Court in 1995. Justice Kourlis earned a B.A. in English from Stanford University with distinction and a J.D. from Stanford University Law School. Over the course of her career, Justice Kourlis has received numerous individual honors and awards.

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Emery G. Lee, III (Senior Research Associate, Federal Judicial Center)

Emery G. Lee III is a senior researcher at the Federal Judicial Center (FJC), the research and education agency within the federal judicial branch. He serves as the FJC liaison to the Judicial Conference Advisory Committee on Civil Rules and provides research support for the Judicial Panel on Multidistrict Litigation and the Judicial Conference Committee on Federal-State Jurisdiction. He has also managed projects for the Seventh Circuit E-Discovery Pilot Program, the Southern District of New York, the District of Kansas, and the Eastern District of California.

Prior to joining the FJC, Lee was the Supreme Court Fellow at the Administrative Office of the U.S. Courts, 2005–06. He holds a Ph.D. in political science from Vanderbilt (1996) and a J.D. from Case Western Reserve (2001), where he was editor in chief of the law review, 2000–01. Lee served as a judicial law clerk for the Honorable Karen Nelson Moore, United States Court of Appeals for the Sixth Circuit, 2001–02.

Hon. Seiu Kin Lee (Judge, Singapore Supreme Court)

Justice Seiu Kin Lee was appointed a Judge of the Supreme Court of Singapore in April 2006, after having served as a Judicial Commissioner of the Supreme Court and as Second Solicitor-General in the Attorney-General's Chambers. Justice Lee headed the development of the eLitigation System of the Singapore judiciary that was launched in 2013. He chairs the recently formed Legal Technology Committee of the Singapore Academy of Law which is charged with leading the exploitation of Infocomm Technology in the legal sector. His involvement in legal IT goes back to 1990 when, as State Counsel in the Attorney-General's Chambers, he was appointed project director of LawNet. In that and other capacities, he steered the development of LawNet from its humble beginnings as a database of Singapore legislation to its present day form as an electronic law library for legal practitioners in Singapore in both government and the private sector. LawNet contains all the written laws of Singapore and judgments of the courts of Singapore, England and other Commonwealth countries as well as a substantial collection of secondary materials.

Justice Lee began his career in 1977 as a civil engineer and worked in the Public Works Department for 6 years before reading law. In 1987 he began his legal career as a prosecutor in the Attorney-General's Chambers. Apart from his engineering degree, he holds an LL.B (Hons) from the National University of Singapore and an LL.M from Cambridge University as well as an MBA from INSEAD.

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Robert L. Levy (Counsel, Civil Justice Reform and Law Technology, ExxonMobil)

Robert is an attorney in the Law Department of Exxon Mobil Corporation. His duties include representing ExxonMobil on Civil Justice Reform initiatives and advising on Law Technology, including Electronic Discovery Issues and Records Management.

He serves as President of the Civil Justice Reform Group and is the Co-Chair of the eDiscovery and Federal Rules Subcommittee. He is also on the Executive Committee of Lawyers for Civil Justice and chairs its Federal Rules Committee where he was active in leading LCJ's efforts in support of revisions to the Federal Rules of Civil Procedure, including participation in the Federal Civil Rules Advisory Committee's 2010 Duke Civil Litigation Conference and September 9, 2011 Mini-Conference on Preservation and Sanctions. Robert is a member of the Texas Supreme Court Advisory Committee and he is involved in the U.S. Chamber of Commerce Institute for Legal Reform as well as the American Tort Reform Association. He was an active member of The Sedona Conference Working Group 1 on Electronic Discovery for over 7 years.

Prior to joining ExxonMobil, Robert was a partner at Haynes and Boone, LLP for over 14 years where he practiced in the Business Litigation Section, focusing on International Arbitration and Technology Litigation as well as advising on Records Management and Electronic Discovery issues. He also served as a briefing attorney for the Honorable Judge Robert Parker of the Eastern District of Texas. Robert has been practicing law for over 25 years and received his Law Degree from the University of Texas School of Law in 1986 where he graduated with honors. He also practiced at Johnson & Gibbs and Weil, Gotshal & Manges.

Hannah Lieberman (Executive Director, Neighborhood Legal Services Program)

Since 2012, Hannah Lieberman has been the Executive Director of Neighborhood Legal Services Program of Washington, D.C (NLSP), a private, non-profit law firm that provides free civil legal services to low-income residents of the District of Columbia. During the past two years, she has also served as a Member of the Civil Justice Improvements Committee established by the Conference of Chief Justices to make recommendations regarding civil case processing in state courts.

Prior to joining NLSP, Hannah consulted with legal services programs, their funders and national organizations, focusing on strengthening advocacy, strategic planning, training and evaluation. Between 1998 and 2008, she served as the Director of Advocacy and Deputy Executive Director of the Maryland Legal Aid Bureau. From 1992 to 1998, she was the Director of Advocacy for Community Legal Services (CLS) in Arizona. Before she entered the legal services arena, Hannah was a litigation Partner in the Washington, DC law firm of Shaw Pittman Potts & Trowbridge (now Pillsbury Winthrop Shaw Pittman).

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Mary McQueen (President, National Center for State Courts)

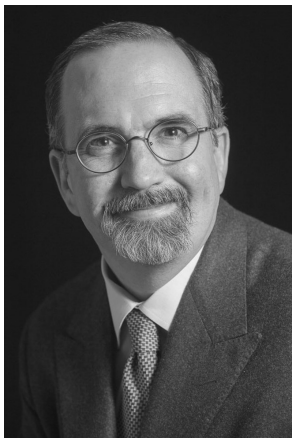
Mary C. McQueen has served as president of the National Center for State Courts since August 2004. Previously McQueen served as Washington State court administrator from 1987-2004 and director of Judicial Services for the Washington State Office of the Administrator for the Courts, 1979-1987, president of the Conference of State Court Administrators in 1995-96, and chair of the Lawyer's Committee of the American Bar Association/Judicial Administration Division.

She is a member of the Washington and U.S. Supreme Court Bars. She has received the American Judicature Society's Herbert Harley Award and the NCSC Innovation in Jury Management Award. Recently, McQueen received the John Marshall Award, presented by the American Bar Association Judicial Division in recognition of her lifetime contributions to the improvement of the administration of justice, judicial independence, justice reform and public awareness. President McQueen serves as Secretary General of the International Organization on Judicial Training (IOJT) consisting of 80 country members. She holds a bachelors of arts degree from the University of Georgia and a juris doctorate from Seattle University Law School.

Hon. David Prince (District Judge, Fourth Judicial District of Colorado)

Judge David Prince serves as the deputy chief judge for the Fourth Judicial District in Colorado. He was appointed to the district court in 2006 and was identified as the number one rated trial judge in Colorado by the Judicial Performance Commission.

He pioneered a customized approach to civil case management in a pilot program that began in 2006. He has written about improving civil case management and teaches on the topic. Judge Prince is also a member of faculty with the National Judicial College.



Before taking the bench, Judge Prince was an AV rated civil litigator with Holland & Hart. He practiced in trial and appellate courts across the country. His practice focused on complex litigation but included representing individuals in more straightforward disputes.

He served on the management committee for Holland & Hart and devoted significant time to developing technology tools for supporting modern litigation. In school, Judge Prince served on the law review and graduated Order of the Coif.

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Jonathan M. Redgrave (Redgrave LLP)

Jonathan is a founding partner of Redgrave LLP. He has extensive experience in all areas of complex litigation in both state and federal courts and focuses his practice in the areas of Information Law, which include electronic discovery, records and information management, as well as data protection and privacy issues. He has authored, co-authored, and edited numerous publications, including serving as Editor-in-Chief of The Sedona Principles®, and speaks around the world on topics including cross-border discovery, information governance, privacy, data security, and emerging technologies.

Jonathan helped found, was the first Chair of, and is currently Chair Emeritus of The Sedona Conference® Working Group on Electronic Document Retention and Production (WG-1). He also serves on the Advisory Board of The Sedona Conference®. Jonathan was a founding member of the Advisory Board of the Georgetown University Law School E-Discovery Institute. Jonathan also serves on the Advisory Committee on Electronic Records Archives for the United States National Archives and Records Administration and is a member of several trade and bar associations including ARMA International and the International Association of Privacy Professionals.

Hon. Lee H. Rosenthal (District Judge, U.S. District Court, Southern District of Texas)

Judge Lee H. Rosenthal was appointed a United States District Court Judge for the Southern District of Texas, Houston Division in 1992. Before then, she was a partner at Baker & Botts in Houston, Texas. She received her undergraduate and law degrees from the University of Chicago and served as law clerk to Chief Judge John R. Brown, United States Court of Appeals for the Fifth Circuit. Judge Rosenthal was a member of the Judicial Conference Advisory Committee on Civil Rules from 1996 to 2003, when she became chair. From 2007 to 2011, she chaired the Judicial Conference Committee on the Rules of Practice and Procedure, which coordinates and oversees the work of the Advisory Committees for the Civil, Criminal, Evidence, Appellate, and Bankruptcy Rules. Judge Rosenthal is a member of the American Law Institute and its Council, serving as the ALI's Second Vice-President.

Judge Rosenthal has taught, written, and lectured extensively, concentrating on topics in complex litigation and civil procedure, including case management, discovery, and class and mass actions.

Judge Rosenthal serves on the Board of Trustees of Rice University and on the Board of Trustees for the Baylor College of Medicine. She is the 2012 recipient of the Lewis F. Powell, Jr. Award for Professionalism and Ethics given by the American Inns of Court, and in 2014, was elected to the American Academy of Arts and Sciences.

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William Rossbach (Rossbach Hart, PC)

William A. Rossbach was admitted to practice in Montana in 1977 and focuses his litigation practice on the areas of Medical Negligence, Products Liability, Environmental Law, Toxic Torts, Railroads, and Federal Employers Liability Act. Bill is a member of the Montana State Bar, the American Bar Association, the Montana Trial Lawyers Association, where he has served as a member of the Board of the Directors and as past president, the American Association for Justice, where he has served as a state delegate, a member of the Board of Governors, and Public Justice, where he has served on the Executive Committee and as a member of the Board of Directors. He is also the author of a number of publications, including: "The Long Arm of Montana's Rule 4 (b), Due Process Limits to the Exercise of Jurisdiction over Foreign Defendants," Montana Law Review, Summer 1976; "A Framework for Analysis of Products Liability in Montana," Montana Law Review, Summer 1977. Bill was born in Oak Park, Illinois and received his J.D. from the University of Montana.

Paul C. Saunders (Cravath, Swaine & Moore LLP)

Paul C. Saunders is recently retired from Cravath, Swaine & Moore LLP's Litigation Department, where his practice included jury trials and international arbitration, primarily in the areas of antitrust, securities, intellectual property, and public and private international law. He is a Fellow of the American College of Trial Lawyers, was Chair of its National Moot Court Competition Committee and its Downstate New York Committee, Vice Chair of its Committee on Special Problems in the Administration of Justice, Chair of its Task Force on Discovery and Civil Justice and is currently Chair of its Judiciary Committee. He is Chair and a member of the Board of Directors of the Commonweal Magazine Foundation and was a member of the Board of Trustees of Fordham University until June 2010, when he became a Trustee Fellow. He is a Board member and former Chair of the International Rule of Law Project and is currently Chair of the New York State Judicial Institute for Professionalism in the Law. In 2003, Mr. Saunders was appointed Distinguished Visitor from Practice at Georgetown University Law Center, where he is currently on the faculty. He received an A.B. egregia cum laude from Fordham College in 1963, and a J.D. from Georgetown University Law Center in 1966. Mr. Saunders also attended the Institut d'Études Politiques in Paris, France. From 1967 to 1971, he was on active duty as a Captain in the U.S. Army Judge Advocate General's Corps and was awarded the Meritorious Service Medal

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Hon. Craig B. Shaffer (Magistrate Judge, U.S. District Court, District of Colorado)

Craig B. Shaffer has been a U.S. Magistrate Judge for the District of Colorado since January 2001. Judge Shaffer graduated from the College of William and Mary in 1976 and received his juris doctor cum laude from Tulane University's School of Law in 1979. Judge Shaffer is a member of the Judicial Conference's Advisory Committee on Civil Rules. He has been an adjunct faculty member with the University of Denver's Sturm College of Law for the past fourteen years, teaching courses on pretrial practice and electronic discovery, and is a member of the faculty of the Annual ALI/ABA Environmental Litigation Seminar. Judge Shaffer currently is a member of the Judicial Advisory Board for the Sedona Conference and the Advisory Board for the Georgetown University Law Center's Advanced eDiscovery Institute. He is a frequent presenter at conferences and seminars dealing with electronic discovery in both civil and criminal litigation, including presentations organized by the Sedona Conference Institute, the Federal Judicial Center, BNA, the ABA, the Sandra Day O'Connor College of Law, Georgetown University Law Center's Advanced E-Discovery Institute, and the Institute for the Advancement of the American Legal System (IAALS). Judge Shaffer is a co-author of *Looking Past the Debate: Proposed Revisions to the Federal Rules of Evidence*, The Federal Courts Law Review (September 2013), and the author of *The "Burdens" of Applying Proportionality*, The Sedona Conference Journal (Fall 2015), and *"Defensible" by What Standard?*, The Sedona Conference Journal (Fall 2012).

Linda Sandstrom Simard (Suffolk University Law School)

Linda Sandstrom Simard, Professor and former Associate Dean, is an active participant in national, international and state civil procedure organizations. As a member of the Civil Justice Improvements Committee appointed by the Conference of Chief Justices, she has contributed to a national report that seeks to reduce cost and delay in state courts around the country by implementing procedural reform. She served as the National Reporter for the International Association of Procedural Law Conference in Buenos Aires, Argentina in 2012 where she reported on American class action procedure. On the state level, she is an appointed member of the Standing Advisory Committee on Civil and Appellate Rules for the Massachusetts Supreme Judicial Court and she served on a Massachusetts Superior Court Working Group on Civil Procedure. Professor Simard is active in the Association of American Law Schools, having been elected Chair of the Civil Procedure Section and serving as a member of the Executive Committee of that Section. Specializing in issues relating to complex civil litigation, her scholarship includes research on the deterrent value of class action litigation, the inclusion of foreign citizens in transnational class actions, the constitutional limits of personal jurisdiction and the role of amicus curiae in federal court. Prior to joining the Suffolk Law faculty, Professor Simard practiced complex litigation at the Boston firm of Hale and Dorr (currently Wilmer, Cutler, Pickering, Hale and Dorr) and she clerked for Judge William G. Young on the

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Tania Sourdin (Direcyor, Australian Centre for Justice Innovation)

Professor Tania Sourdin is the Foundation Chair and Director of the Australian Centre for Justice Innovation at Monash University in Australia. Professor Sourdin has led national research projects and produced important recommendations for justice reform. In the past two decades, she has conducted qualitative and quantitative research projects into aspects of the justice system systems in 11 Courts and Tribunals and five external dispute resolution schemes. Other research has focused on justice innovation, technology, delay and systemic reforms. Professor Sourdin is the author of books, articles and papers, and has published and presented widely on a range of topics including justice issues, mediation, conflict resolution, collaborative law, artificial intelligence, technology and organisational change. She is also a Visiting Professor at the University of Sydney and has worked as a senior Tribunal member in respect of appellate matters and as a mediator for more than 25 years. She has worked extensively overseas as an expert consultant in relation to disputes and dispute system design. In 2014 she was appointed as the National Broadband Network (NBN) Industry Dispute Adviser in Australia and also co chaired the 2014 National Mediation Conference. In 2015 she chaired expert forums in relation to access to justice, technology and law and won the Deans award for Research Impact in relation to her work on behavioural change in the justice sector.

Stephen D. Susman (Susman Godfrey LLP)

Steve Susman has been trying lawsuits for almost 50 years. Forty years ago, he founded Susman Godfrey, the country's first commercial litigation boutique, specializing in representing plaintiffs on a contingent fee basis in complex business disputes including antitrust and securities fraud class actions. The firm now has four offices around the country and more than 100 trial lawyers. As a pioneer in creating fee arrangements that compensate trial counsel for results rather than effort, Susman has devoted his career to eliminating unnecessary expense in trying cases. In the mid-90s, as chair of the Texas Supreme Court Discovery Advisory Committee, Susman succeeded in having Texas adopt rules that limited discovery. In 1998, he was a member of the ABA's Task Force that wrote the original Civil Trial Practice Standards. Susman has urged lawyers and courts to encourage parties to agree upon their own rules to streamline trials and reduce expenses. He has developed and maintained TrialbyAgreement.com, a website that allows counsel and judges to communicate about innovative discovery and trial protocols. He was a member of the Federal Circuit's Committee on limiting e-discovery and he co-chaired the trial committee of the SDNY's task force to implement a pilot project for expediting civil jury trials. Most recently, Susman has been on a crusade to save jury trials in civil cases. Susman served as a law clerk to Supreme Court Justice Hugo Black, the Court's most staunch defender of juries in modern times. Now Susman has established The Civil Jury Project at NYU Law School. Mr. Susman is still trying cases while serving as the Executive Director of the Project and teaching a course on "How to Try a Jury Case Intelligently". He is a frequent lecturer on trial advocacy skills at CLE programs around the country.

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Hon. Jeffrey S. Sutton (Judge, U.S. Court of Appeals, Sixth Circuit)

Jeffrey S. Sutton is a judge for the United States Court of Appeals for the Sixth Circuit. Prior to this, he was a partner with the law firm of Jones, Day, Reavis & Pogue, Columbus, Ohio branch, since 1996. Before that he was an associate with the firm where he specialized in Commercial Litigation, Constitutional Litigation, and Appellate Practice.

Since 1993, Judge Sutton has been an Adjunct Professor of Law at the Ohio State University College of Law, teaching seminars on the United States Constitution and State Constitutional Law. Since 2012, Judge Sutton has taught a class on State Constitutional Law at Harvard Law School. From 1995-1998, he was State Solicitor of Ohio, overseeing all appellate litigation on behalf of the Attorney General and participating in complex litigation on her behalf at the trial level. In 1991 and 1992, Judge Sutton worked as a Law Clerk to The Honorable Lewis F. Powell, Jr., Associate Justice (Ret.) and The Honorable Antonin Scalia, Associate Justice for the Supreme Court of the United States. Judge Sutton has argued twelve cases in the United States Supreme Court.

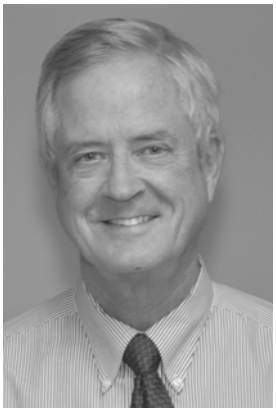
Judge Sutton received his B.A. from Williams College and his J.D. from the Ohio State University College of Law.

Kevin Traskos (Civil Division Chief, U.S. Attorney's office)

Kevin Traskos is the Chief of the Civil Division at the United States Attorney's Office for the District of Colorado. He has represented federal agencies and employees in hundreds of civil cases, and manages a division of attorneys who regularly appear in court for the federal government.

Traskos graduated from Yale University in 1992 and from the University of Michigan Law School in 1995. From 1995 to 1997 he served as a law clerk in the Southern District of New York for the Honorable Louis L. Stanton. He practiced as a civil litigator for several years at Arnold & Porter in Washington, D.C. and Denver before joining the United States Attorney's Office in 2002. Since joining the office, he has received a number of awards, including winning the Attorney General's Distinguished Service Award, the Department of Justice's highest award, three times.

Traskos served for six years as a Director on the Board of the Faculty of Federal Advocates, an organization dedicated to improving the level of advocacy in the federal district court in Colorado. He currently serves on the Committee on Conduct for the federal district court in Colorado, and served as Chair of that Committee from 2014 to 2015. He has regularly submitted and commented on proposals to change the district court's local rules to enhance the efficiency and fairness of litigation.



James J. Waldron (Clerk, U.S. Bankruptcy Court, District of New Jersey)

James J. Waldron is the Clerk of the United States Bankruptcy Court for the District of New Jersey. He has held this position since August 1984. He has worked in the Federal Courts for 39 years, previously working for seven years at the Administrative Office of the US Courts in Washington, DC. He graduated from St. Vincent College in with a BA in History. He earned his J.D. from Rutgers School of Law in 1988. He is a member of the National Conference of Bankruptcy Clerks, and has served and chaired many advisory groups/ committees for the Federal Courts as well as the Federal Judicial Center. He serves as the Clerk Advisor to the United States Supreme Court Advisory Committee on Bankruptcy Rules. He chaired the Pro Se Electronic Filing Project and completed the IT grant for Website Standardization in the Third Circuit which is currently being utilize by most federal courts. He serves on the Bankruptcy Clerks Advisory Group, the Information Technology Advisory Group and the Ad Hoc Task Force on Judiciary Email and Collaboration Tools. He has received several awards over the years: Directors Award for Outstanding Leadership in 2004 from US Courts, District of New Jersey's Donald A. Robinson Meritorious Service Award, Distinguished Service Award from the Historical Society of the United States District Court for the District of New Jersey, National Conference of Bankruptcy Clerks: Outstanding Service Award (1993) Outstanding Service Award (2005), Outstanding Achievement Award (2006). He is a 2016 Fellow of the American College of Bankruptcy.

Hon. Master Steven Whitaker (Ret.) (Senior Master, Senior Courts Queen's Bench)
Master of the Queen's Bench Division 2002-07; created the specialist list for asbestos litigation and the special procedure for the swift, just, proportionate and inexpensive disposition of the tsunami of mesothelioma claims; Senior Master of the Queen's Bench Division, Queen's Remembrancer and Central Authority for the Hague Convention and the EU Regulations on service and taking of evidence 2007-14. As Senior Master, was responsible for case management of group and heavy multi-party litigation, and foreign process. Member of the Civil Procedure Rules Committee from 2002-08; chaired the working party which drafted Practice Direction 31B for handling of e-disclosure, and the Electronic Documents Questionnaire for use to enhance practical understanding, and foster cooperation, in the electronic disclosure process. Chaired the sub-committee that re-wrote the Rules on service of process and documents. Member of the judicial group advising the Secretary of State on the use of IT in the Civil and Family Courts. Trained as a mediator by CEDR in 2003. Assisted Lord Justice Jackson in the development of the electronic disclosure and costs management aspects of the April 2013 Jackson Reforms. Authored the seminal decision in Goodale & Ors v The Ministry of Justice [2009] EWHC B41 (QB) (05 Nov 2009), the first case in which the Electronic Documents Questionnaire was used by parties and expressed the importance of a staged approach to electronic disclosure to avoid running up unnecessary and disproportionate costs. Authored in 2013 the training materials on e-disclosure for English High Court Judges. General Editor of Sweet and Maxwell's "Civil Procedure" (The White Book) and Chief Advisory Editor of LexisNexis "Atkins Court Forms" 2008-14. An international speaker on e-disclosure and case management of complex claims.

Francis M. Wikstrom (Parsons Behle & Latimer)

Fran Wikstrom is a trial lawyer at Parsons Behle & Latimer. He is a Fellow of the American College of Trial Lawyers and immediate past president. His practice consists of complex civil litigation and white collar criminal defense. He formerly served as an Assistant United States Attorney and as a U.S. Attorney for the District of Utah. He has been with Parsons Behle & Latimer since 1982. He has tried cases in numerous jurisdictions involving patent infringement, trade secrets, contracts, real property, stray current, shareholder disputes, construction claims, employment discrimination, premises liability, franchises, fraud, and white collar crimes.

Wikstrom has argued appeals before the U.S. Tenth and Ninth Circuits and the Federal Circuit, the Utah Supreme Court, the Utah Court of Appeals, the Minnesota Supreme Court, and the Minnesota Court of Appeals. He is also a Fellow of the International Academy of Trial Lawyers, the International Society of Barristers, and the American Bar Foundation.

Wikstrom earned his B.S. degree at Weber State College and his J.D. from Yale Law School.

Kenneth J. Withers (Deputy Executive Director, The Sedona® Conference)

Ken is the Deputy Executive Director of The Sedona Conference, an Arizona-based nonprofit law and policy think tank which has been on the forefront of issues involving complex litigation, intellectual property, and antitrust law. Since 1989, he has published several widely-distributed papers on electronic discovery, hosted a popular website on electronic discovery and electronic records management issues, and given presentations at more than 300 conferences and workshops for legal, records management, and industry audiences. His most recent publications are "Ephemeral Data and the Duty to Preserve Discoverable Electronically Stored Information" in the University of Baltimore Law Review (2008); "Living Daily with Weekley Homes" in the Texas State Bar Advocate (Summer 2010); and "Risk Aversion, Risk Management, and the Overpreservation Problem in Electronic Discovery" in the South Carolina Law Review (2013). From 1999 through 2005, he was a Senior Education Attorney at the Federal Judicial Center in Washington D.C., where he developed Internet-based distance learning programs for the federal judiciary concentrating on issues of technology and the administration of justice. Ken also contributed to several well-known FJC publications, including the Manual for Complex Litigation, Fourth Edition (2004), Effective Use of Courtroom Technology (2001), and

Hon. Jack Zouhary (District Judge, U.S. District Court, Northern District of Ohio)

Jack Zouhary graduated *cum laude* from Dartmouth College (‘73) and returned to his hometown for a law degree from the University of Toledo (‘76) where he was an Associate Editor of the Law Review. He was in private practice with a mid-size regional law firm (RCO Law), primarily litigation, until January 2000 when he took a position as Senior Vice President and General Counsel for S. E. Johnson Companies (highway construction and quarry operations in Ohio, Michigan and Indiana). He was appointed by the Ohio Governor to the state trial court bench in March 2005, and then nominated by the President to the federal District Court in December 2005 with unanimous Senate confirmation in March 2006. He has served as a visiting district court judge in Michigan, Texas, Arizona, California and Connecticut, and by designation on the Sixth and Ninth Circuit Courts of Appeals.

Judge Zouhary is a Fellow of the American College of Trial Lawyers and a Master in the Morrison Waite Chapter of the Inns of Court. He currently serves on the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

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- Inst. for the Advancement of the Am. Legal Sys. & Am. Coll. of Trial Lawyers, Reforming our Civil Justice System: A Report on Progress and Promise (2015)
- Brittany K.T. Kauffman, Inst. for the Advancement of the Am. Legal Sys., Change the Culture, Change the System: Top Ten Cultural Shifts Needed to Create the Courts of Tomorrow (2015)
- 2015 Year-End Report on the Federal Judiciary

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- Paula Hannaford-Agor, Scott Graves & Shelley Spacek Miller, Nat'l Ctr. for State Cts., The Landscape of Civil Litigation in State Courts (2015)
- Hannah E.M. Lieberman, Linda Sandstrom Simard & Ed Marks, Problems and Recommendations for High Volume Dockets (2015)
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- Southern District of New York, In re: Counseled Employment Discrimination Cases Assigned to Mediation by Automatic Referral, Second Amended Standing Administrative Order (M10-468)
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- 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)
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- Tom Allman's Memo Providing a Snapshot of Recent Rule 26(b)(1) cases (Jan. 19, 2016)

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 1. Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, ~~and~~ administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

Committee Note

Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way. Most lawyers and parties cooperate to achieve these ends. But discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is

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* New material is underlined; matter to be omitted is lined through.

consistent with — and indeed depends upon — cooperative and proportional use of procedure.

This amendment does not create a new or independent source of sanctions. Neither does it abridge the scope of any other of these rules.

Rule 4. Summons

* * * * *

(m) Time Limit for Service. If a defendant is not served within ~~120~~90 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A).

* * * * *

Committee Note

Subdivision (m). The presumptive time for serving a defendant is reduced from 120 days to 90 days. This

change, together with the shortened times for issuing a scheduling order set by amended Rule 16(b)(2), will reduce delay at the beginning of litigation.

Shortening the presumptive time for service will increase the frequency of occasions to extend the time ~~for good cause~~. More time may be needed, for example, when a request to waive service fails, a defendant is difficult to serve, or a marshal is to make service in an in forma pauperis action.

The final sentence is amended to make it clear that the reference to Rule 4 in Rule 71.1(d)(3)(A) does not include Rule 4(m). Dismissal under Rule 4(m) for failure to make timely service would be inconsistent with the limits on dismissal established by Rule 71.1(i)(1)(C).

Shortening the time to serve under Rule 4(m) means that the time of the notice required by Rule 15(c)(1)(C) for relation back is also shortened.

Rule 16. Pretrial Conferences; Scheduling; Management

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(b) Scheduling.

(1) ***Scheduling Order.*** Except in categories of actions exempted by local rule, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference ~~by telephone, mail, or other means~~.

(2) ***Time to Issue.*** The judge must issue the scheduling order as soon as practicable, but ~~in any event~~unless the judge finds good cause for

delay, the judge must issue it within the earlier of ~~120~~90 days after any defendant has been served with the complaint or ~~90~~60 days after any defendant has appeared.

(3) ***Contents of the Order*.**

* * * * *

(B) *Permitted Contents*. The scheduling order may:

* * * * *

(iii) provide for disclosure, ~~or~~discovery, or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after

information is produced, including agreements reached under Federal Rule of Evidence 502;

(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;

(~~v~~vi) set dates for pretrial conferences and for trial; and

(~~vi~~vii) include other appropriate matters.

* * * * *

Committee Note

The provision for consulting at a scheduling conference by "telephone, mail, or other means" is deleted. A scheduling conference is more effective if the court and parties engage in direct simultaneous communication. The conference may be held in person, by telephone, or by more sophisticated electronic means.

The time to issue the scheduling order is reduced to the earlier of 90 days (not 120 days) after any defendant has been served, or 60 days (not 90 days) after any defendant has appeared. This change, together with the shortened time for making service under Rule 4(m), will reduce delay at the beginning of litigation. At the same time, a new provision recognizes that the court may find good cause to extend the time to issue the scheduling order. In some cases it may be that the parties cannot prepare adequately for a meaningful Rule 26(f) conference and then a scheduling conference in the time allowed. Litigation involving complex issues, multiple parties, and large organizations, public or private, may be more likely to need extra time to establish meaningful collaboration between counsel and the people who can supply the information needed to participate in a useful way. Because the time for the Rule 26(f) conference is geared to the time for the scheduling conference or order, an order extending the time for the scheduling conference will also extend the time for the Rule 26(f) conference. But in most cases it will be desirable to hold at least a first scheduling conference in the time set by the rule.

Three items are added to the list of permitted contents in Rule 16(b)(3)(B).

The order may provide for preservation of electronically stored information, a topic also added to the provisions of a discovery plan under Rule 26(f)(3)(C). Parallel amendments of Rule 37(e) recognize that a duty to preserve discoverable information may arise before an action is filed.

The order also may include agreements incorporated in a court order under Evidence Rule 502 controlling the effects of disclosure of information covered by attorney-client privilege or work-product protection, a topic also added to the provisions of a discovery plan under Rule 26(f)(3)(D).

Finally, the order may direct that before filing a motion for an order relating to discovery the movant must request a conference with the court. Many judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion, but the decision whether to require such conferences is left to the discretion of the judge in each case.

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(b) Discovery Scope and Limits.

(1) ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need

not be admissible in evidence to be discoverable. ~~— including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

(2) ***Limitations on Frequency and Extent.***

* * * * *

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

* * * * *

(iii) the ~~burden or expense of the~~ proposed discovery is outside the scope permitted by Rule 26(b)(1) ~~outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues~~.

* * * * *

(c) Protective Orders.

(1) ***In General.*** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending — or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

* * * * *

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

* * * * *

(d) Timing and Sequence of Discovery.

* * * * *

(2) *Early Rule 34 Requests.*

(A) *Time to Deliver*. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) *When Considered Served.* The request is considered to have been served at the first Rule 26(f) conference.

(~~2~~3) ***Sequence.*** Unless~~, on motion,~~ the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

* * * * *

(f) Conference of the Parties; Planning for Discovery.

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(3) ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

* * * * *

(C) any issues about disclosure, ~~or~~discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

* * * * *

Committee Note

Rule 26(b)(1) is changed in several ways.

Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party's claim or defense and is proportional to the needs of the case. The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one addition.

Most of what now appears in Rule 26(b)(2)(C)(iii) was first adopted in 1983. The 1983 provision was explicitly adopted as part of the scope of discovery defined by Rule 26(b)(1). Rule 26(b)(1) directed the court to limit the frequency or extent of use of discovery if it determined that "the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." At the same time, Rule 26(g) was added. Rule 26(g) provided that signing a discovery request, response, or objection certified that the request, response, or objection was "not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation." The parties thus shared the responsibility to honor these limits on the scope of discovery.

The 1983 Committee Note stated that the new provisions were added "to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The

new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c). . . . On the whole, however, district judges have been reluctant to limit the use of the discovery devices."

The clear focus of the 1983 provisions may have been softened, although inadvertently, by the amendments made in 1993. The 1993 Committee Note explained: "[F]ormer paragraph (b)(1) [was] subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4)." Subdividing the paragraphs, however, was done in a way that could be read to separate the proportionality provisions as "limitations," no longer an integral part of the (b)(1) scope provisions. That appearance was immediately offset by the next statement in the Note: "Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery."

The 1993 amendments added two factors to the considerations that bear on limiting discovery: whether "the burden or expense of the proposed discovery outweighs its likely benefit," and "the importance of the proposed discovery in resolving the issues." Addressing these and other limitations added by the 1993 discovery amendments, the Committee Note stated that "[t]he revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery . . . ."

The relationship between Rule 26(b)(1) and (2) was further addressed by an amendment made in 2000 that added a new sentence at the end of (b)(1): "All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)[now Rule 26(b)(2)(C)]." The Committee Note recognized that "[t]hese limitations apply to discovery that is otherwise within the scope of subdivision (b)(1)." It explained that the Committee had been told repeatedly that courts were not using these limitations as originally intended. "This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery."

The present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.

Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.

Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.

The parties may begin discovery without a full appreciation of the factors that bear on proportionality. A party requesting discovery, for example, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. Many of these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference and in scheduling and pretrial conferences with the court. But if the parties continue to disagree, the discovery dispute could be brought before the court and the parties' responsibilities would remain as they have been since 1983. A party claiming undue burden or expense ordinarily has far better information — perhaps the only information — with respect to that part of the determination. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.

The direction to consider the parties' relative access to relevant information adds new text to provide explicit focus on considerations already implicit in present Rule 26(b)(2)(C)(iii). Some cases involve what often is called "information asymmetry." One party — often an individual plaintiff — may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily

retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.

Restoring proportionality as an express component of the scope of discovery warrants repetition of parts of the 1983 and 1993 Committee Notes that must not be lost from sight. The 1983 Committee Note explained that "[t]he rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis." The 1993 Committee Note further observed that "[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression." What seemed an explosion in 1993 has been exacerbated by the advent of e-discovery. The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management. It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own.

It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized "the significance of the substantive issues, as measured in

philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved." Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.

So too, consideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party. The 1983 Committee Note cautioned that "[t]he court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent."

The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available.

A portion of present Rule 26(b)(1) is omitted from the proposed revision. After allowing discovery of any matter relevant to any party's claim or defense, the present rule

adds: "including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples. The discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case. Framing intelligent requests for electronically stored information, for example, may require detailed information about another party's information systems and other information resources.

The amendment deletes the former provision authorizing the court, for good cause, to order discovery of any matter relevant to the subject matter involved in the action. The Committee has been informed that this language is rarely invoked. Proportional discovery relevant to any party's claim or defense suffices, given a proper understanding of what is relevant to a claim or defense. The distinction between matter relevant to a claim or defense and matter relevant to the subject matter was introduced in 2000. The 2000 Note offered three examples of information that, suitably focused, would be relevant to the parties' claims or defenses. The examples were "other incidents of the same type, or involving the same product"; "information about organizational arrangements or filing systems"; and "information that could be used to impeach a likely witness." Such discovery is not foreclosed by the amendments. Discovery that is relevant to the parties' claims or defenses may also support amendment of the

pleadings to add a new claim or defense that affects the scope of discovery.

The former provision for discovery of relevant but inadmissible information that appears "reasonably calculated to lead to the discovery of admissible evidence" is also deleted. The phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use of the "reasonably calculated" phrase to define the scope of discovery "might swallow any other limitation on the scope of discovery." The 2000 amendments sought to prevent such misuse by adding the word "Relevant" at the beginning of the sentence, making clear that "'relevant' means within the scope of discovery as defined in this subdivision . . . ." The "reasonably calculated" phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that "Information within this scope of discovery need not be admissible in evidence to be discoverable." Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery.

Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of the considerations that bear on proportionality to Rule 26(b)(1). The court still must limit the frequency or extent of proposed discovery, on motion or on its own, if it is outside the scope permitted by Rule 26(b)(1).

Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that allocate expenses for

disclosure or discovery. Authority to enter such orders is included in the present rule, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority. Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.

Rule 26(d)(2) is added to allow a party to deliver Rule 34 requests to another party more than 21 days after that party has been served even though the parties have not yet had a required Rule 26(f) conference. Delivery may be made by any party to the party that has been served, and by that party to any plaintiff and any other party that has been served. Delivery does not count as service; the requests are considered to be served at the first Rule 26(f) conference. Under Rule 34(b)(2)(A) the time to respond runs from service. This relaxation of the discovery moratorium is designed to facilitate focused discussion during the Rule 26(f) conference. Discussion at the conference may produce changes in the requests. The opportunity for advance scrutiny of requests delivered before the Rule 26(f) conference should not affect a decision whether to allow additional time to respond.

Rule 26(d)(3) is renumbered and amended to recognize that the parties may stipulate to case-specific sequences of discovery.

Rule 26(f)(3) is amended in parallel with Rule 16(b)(3) to add two items to the discovery plan —

issues about preserving electronically stored information and court orders under Evidence Rule 502.

Rule 30. Depositions by Oral Examination

(a) When a Deposition May Be Taken.

* * * * *

(2) ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

* * * * *

(d) Duration; Sanction; Motion to Terminate or Limit.

(1) ***Duration.*** Unless otherwise stipulated or ordered by the court, a deposition is limited to one day of 7 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

* * * * *

Committee Note

Rule 30 is amended in parallel with Rules 31 and 33 to reflect the recognition of proportionality in Rule 26(b)(1).

Rule 31. Depositions by Written Questions

(a) When a Deposition May Be Taken.

* * * * *

(2) ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

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Committee Note

Rule 31 is amended in parallel with Rules 30 and 33 to reflect the recognition of proportionality in Rule 26(b)(1).

Rule 33. Interrogatories to Parties

(a) In General.

(1) ***Number.*** Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2).

* * * * *

Committee Note

Rule 33 is amended in parallel with Rules 30 and 31 to reflect the recognition of proportionality in Rule 26(b)(1).

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

* * * * *

(b) Procedure.

* * * * *

(2) ***Responses and Objections.***

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(2) — within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that

inspection and related activities will be permitted as requested or state ~~an objection~~ with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) *Objections*. An objection must state whether any responsive materials are being withheld on the basis of that objection. An

objection to part of a request must specify the part and permit inspection of the rest.

* * * * *

Committee Note

Several amendments are made in Rule 34, aimed at reducing the potential to impose unreasonable burdens by objections to requests to produce.

Rule 34(b)(2)(A) is amended to fit with new Rule 26(d)(2). The time to respond to a Rule 34 request delivered before the parties' Rule 26(f) conference is 30 days after the first Rule 26(f) conference.

Rule 34(b)(2)(B) is amended to require that objections to Rule 34 requests be stated with specificity. This provision adopts the language of Rule 33(b)(4), eliminating any doubt that less specific objections might be suitable under Rule 34. The specificity of the objection ties to the new provision in Rule 34(b)(2)(C) directing that an objection must state whether any responsive materials are being withheld on the basis of that objection. An objection may state that a request is overbroad, but if the objection recognizes that some part of the request is appropriate the objection should state the scope that is not overbroad. Examples would be a statement that the responding party will limit the search to documents or electronically stored information created within a given period of time prior to

the events in suit, or to specified sources. When there is such an objection, the statement of what has been withheld can properly identify as matters "withheld" anything beyond the scope of the search specified in the objection.

Rule 34(b)(2)(B) is further amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. The response to the request must state that copies will be produced. The production must be completed either by the time for inspection specified in the request or by another reasonable time specifically identified in the response. When it is necessary to make the production in stages the response should specify the beginning and end dates of the production.

Rule 34(b)(2)(C) is amended to provide that an objection to a Rule 34 request must state whether anything is being withheld on the basis of the objection. This amendment should end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections. The producing party does not need to provide a detailed description or log of all documents withheld, but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection. An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been "withheld."

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery.

* * * * *

(3) ***Specific Motions.***

* * * * *

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

* * * * *

(iv) a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit

inspection — as requested under Rule 34.

* * * * *

(e) Failure to ~~Provide~~Preserve Electronically Stored Information. ~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

* * * * *

Committee Note

Subdivision (a). Rule 37(a)(3)(B)(iv) is amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. This change brings item (iv) into line with paragraph (B), which provides a motion for an order compelling "production, or inspection."

Subdivision (e). Present Rule 37(e), adopted in 2006, provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." This limited rule has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information. Federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.

New Rule 37(e) replaces the 2006 rule. It authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used. The rule does not affect the validity of an independent tort claim for

spoliation if state law applies in a case and authorizes the claim.

The new rule applies only to electronically stored information, also the focus of the 2006 rule. It applies only when such information is lost. Because electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere.

The new rule applies only if the lost information should have been preserved in the anticipation or conduct of litigation and the party failed to take reasonable steps to preserve it. Many court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve. The rule does not apply when information is lost before a duty to preserve arises.

In applying the rule, a court may need to decide whether and when a duty to preserve arose. Courts should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant. A variety of events may alert a party to the prospect of litigation. Often these events provide only limited information about that prospective litigation, however, so that the scope of information that should be preserved may remain uncertain. It is important not to be blinded to this reality by hindsight arising from familiarity with an action as it is actually filed.

Although the rule focuses on the common-law obligation to preserve in the anticipation or conduct of litigation, courts may sometimes consider whether there was an independent requirement that the lost information be preserved. Such requirements arise from many sources — statutes, administrative regulations, an order in another case, or a party's own information-retention protocols. The court should be sensitive, however, to the fact that such independent preservation requirements may be addressed to a wide variety of concerns unrelated to the current litigation. The fact that a party had an independent obligation to preserve information does not necessarily mean that it had such a duty with respect to the litigation, and the fact that the party failed to observe some other preservation obligation does not itself prove that its efforts to preserve were not reasonable with respect to a particular case.

The duty to preserve may in some instances be triggered or clarified by a court order in the case. Preservation orders may become more common, in part because Rules 16(b)(3)(B)(iii) and 26(f)(3)(C) are amended to encourage discovery plans and orders that address preservation. Once litigation has commenced, if the parties cannot reach agreement about preservation issues, promptly seeking judicial guidance about the extent of reasonable preservation may be important.

The rule applies only if the information was lost because the party failed to take reasonable steps to preserve the information. Due to the ever-increasing volume of electronically stored information and the multitude of

devices that generate such information, perfection in preserving all relevant electronically stored information is often impossible. As under the current rule, the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps to preserve lost information, although the prospect of litigation may call for reasonable steps to preserve information by intervening in that routine operation. This rule recognizes that "reasonable steps" to preserve suffice; it does not call for perfection. The court should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than others who have considerable experience in litigation.

Because the rule calls only for reasonable steps to preserve, it is inapplicable when the loss of information occurs despite the party's reasonable steps to preserve. For example, the information may not be in the party's control. Or information the party has preserved may be destroyed by events outside the party's control — the computer room may be flooded, a "cloud" service may fail, a malign software attack may disrupt a storage system, and so on. Courts may, however, need to assess the extent to which a party knew of and protected against such risks.

Another factor in evaluating the reasonableness of preservation efforts is proportionality. The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including

governmental parties) may have limited staff and resources to devote to those efforts. A party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms. It is important that counsel become familiar with their clients' information systems and digital data — including social media — to address these issues. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.

When a party fails to take reasonable steps to preserve electronically stored information that should have been preserved in the anticipation or conduct of litigation, and the information is lost as a result, Rule 37(e) directs that the initial focus should be on whether the lost information can be restored or replaced through additional discovery. Nothing in the rule limits the court's powers under Rules 16 and 26 to authorize additional discovery. Orders under Rule 26(b)(2)(B) regarding discovery from sources that would ordinarily be considered inaccessible or under Rule 26(c)(1)(B) on allocation of expenses may be pertinent to solving such problems. If the information is restored or replaced, no further measures should be taken. At the same time, it is important to emphasize that efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information to claims or defenses in the litigation. For example, substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative.

Subdivision (e)(1). This subdivision applies only if information should have been preserved in the anticipation or conduct of litigation, a party failed to take reasonable steps to preserve the information, information was lost as a result, and the information could not be restored or replaced by additional discovery. In addition, a court may resort to (e)(1) measures only "upon finding prejudice to another party from loss of the information." An evaluation of prejudice from the loss of information necessarily includes an evaluation of the information's importance in the litigation.

The rule does not place a burden of proving or disproving prejudice on one party or the other. Determining the content of lost information may be a difficult task in some cases, and placing the burden of proving prejudice on the party that did not lose the information may be unfair. In other situations, however, the content of the lost information may be fairly evident, the information may appear to be unimportant, or the abundance of preserved information may appear sufficient to meet the needs of all parties. Requiring the party seeking curative measures to prove prejudice may be reasonable in such situations. The rule leaves judges with discretion to determine how best to assess prejudice in particular cases.

Once a finding of prejudice is made, the court is authorized to employ measures "no greater than necessary to cure the prejudice." The range of such measures is quite broad if they are necessary for this purpose. There is no all-purpose hierarchy of the severity of various measures;

the severity of given measures must be calibrated in terms of their effect on the particular case. But authority to order measures no greater than necessary to cure prejudice does not require the court to adopt measures to cure every possible prejudicial effect. Much is entrusted to the court's discretion.

In an appropriate case, it may be that serious measures are necessary to cure prejudice found by the court, such as forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies. Care must be taken, however, to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information's use in the litigation. An example of an inappropriate (e)(1) measure might be an order striking pleadings related to, or precluding a party from offering any evidence in support of, the central or only claim or defense in the case. On the other hand, it may be appropriate to exclude a specific item of evidence to offset prejudice caused by failure to preserve other evidence that might contradict the excluded item of evidence.

Subdivision (e)(2). This subdivision authorizes courts to use specified and very severe measures to address or deter failures to preserve electronically stored information, but only on finding that the party that lost the

information acted with the intent to deprive another party of the information's use in the litigation. It is designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information. It rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.

Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have. The better rule for the negligent or grossly negligent loss of electronically stored information is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit the most severe measures to instances of intentional loss or destruction.

Similar reasons apply to limiting the court's authority to presume or infer that the lost information was unfavorable to the party who lost it when ruling on a pretrial motion or presiding at a bench trial. Subdivision (e)(2) limits the ability of courts to draw

adverse inferences based on the loss of information in these circumstances, permitting them only when a court finds that the information was lost with the intent to prevent its use in litigation.

Subdivision (e)(2) applies to jury instructions that permit or require the jury to presume or infer that lost information was unfavorable to the party that lost it. Thus, it covers any instruction that directs or permits the jury to infer from the loss of information that it was in fact unfavorable to the party that lost it. The subdivision does not apply to jury instructions that do not involve such an inference. For example, subdivision (e)(2) would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision. These measures, which would not involve instructing a jury it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice. In addition, subdivision (e)(2) does not limit the discretion of courts to give traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial.

Subdivision (e)(2) requires a finding that the party acted with the intent to deprive another party of the information's use in the litigation. This finding may be made by the court when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial. If a court were to

conclude that the intent finding should be made by a jury, the court's instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information's use in the litigation. If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.

Subdivision (e)(2) does not include a requirement that the court find prejudice to the party deprived of the information. This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position. Subdivision (e)(2) does not require any further finding of prejudice.

Courts should exercise caution, however, in using the measures specified in (e)(2). Finding an intent to deprive another party of the lost information's use in the litigation does not require a court to adopt any of the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.

Rule 55. Default; Default Judgment

* * * * *

(c) Setting Aside a Default or a Default Judgment. The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).

* * * * *

Committee Note

Rule 55(c) is amended to make plain the interplay between Rules 54(b), 55(c), and 60(b). A default judgment that does not dispose of all of the claims among all parties is not a final judgment unless the court directs entry of final judgment under Rule 54(b). Until final judgment is entered, Rule 54(b) allows revision of the default judgment at any time. The demanding standards set by Rule 60(b) apply only in seeking relief from a final judgment.

Rule 84. Forms

[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015).]

~~The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.~~

Committee Note

Rule 84 was adopted when the Civil Rules were established in 1938 "to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate." The purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled. Accordingly, recognizing that there are many ~~excellent~~ alternative sources for forms, including the website of the Administrative Office of the United States Courts, the websites of many district courts, and local law libraries that contain many commercially published forms, Rule 84 and the Appendix of Forms are no longer necessary and have been abrogated. The abrogation of Rule 84 does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8.

APPENDIX OF FORMS

[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015).]

Rule 4. Summons

* * * * *

(d) Waiving Service.

(1) ***Requesting a Waiver.*** An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

* * * * *

(C) be accompanied by a copy of the complaint, 2 copies of ~~a~~the waiver form appended to this Rule 4, and a prepaid means for returning the form;

(D) inform the defendant, using ~~text prescribed in Form 5~~the form appended to this Rule 4, of the consequences of waiving and not waiving service;

* * * * *

Rule 4 Notice of a Lawsuit and Request to Waive Service of Summons.

(Caption)

To (*name the defendant or — if the defendant is a corporation, partnership, or association — name an officer or agent authorized to receive service*):

Why are you getting this?

A lawsuit has been filed against you, or the entity you represent, in this court under the number shown above. A copy of the complaint is attached.

This is not a summons, or an official notice from the court. It is a request that, to avoid expenses, you waive formal service of a summons by signing and returning the enclosed waiver. To avoid these expenses, you must return the signed waiver within (*give at least 30 days or at least 60 days if the defendant is outside any judicial district of the United States*) from the date shown below, which is the

date this notice was sent. Two copies of the waiver form are enclosed, along with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may keep the other copy.

What happens next?

If you return the signed waiver, I will file it with the court. The action will then proceed as if you had been served on the date the waiver is filed, but no summons will be served on you and you will have 60 days from the date this notice is sent (see the date below) to answer the complaint (or 90 days if this notice is sent to you outside any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will arrange to have the summons and complaint served on you. And I will ask the court to require you, or the entity you represent, to pay the expenses of making service.

Please read the enclosed statement about the duty to avoid unnecessary expenses.

I certify that this request is being sent to you on the date below.

Date: _____

_____

(Signature of the attorney
or unrepresented party)

_____
(Printed name)

_____
(Address)

_____
(E-mail address)

_____
(Telephone number)

Rule 4 Waiver of the Service of Summons.

(Caption)

To (*name the plaintiff's attorney or the unrepresented plaintiff*):

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from _____, the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

Date: _____

_____
(Signature of the attorney
or unrepresented party)

_____
(Printed name)

_____
(Address)

_____
(E-mail address)

_____
(Telephone number)

(Attach the following)

Duty to Avoid Unnecessary Expenses of Serving a Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the expenses of service, unless the defendant shows good cause for the failure.

"Good cause" does not include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

Committee Note

Subdivision (d). Abrogation of Rule 84 and the other official forms requires that former Forms 5 and 6 be directly incorporated into Rule 4.

IAALS
Empowering Improvement.
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University of Denver

REFORMING OUR CIVIL JUSTICE SYSTEM:

A REPORT ON PROGRESS & PROMISE

A joint project of the
American College of Trial Lawyers Task Force on Discovery and Civil Justice
and IAALS—the Institute for the Advancement of the American Legal System

REFORMING OUR CIVIL JUSTICE SYSTEM:

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THE AMERICAN COLLEGE OF TRIAL LAWYERS
TASK FORCE ON DISCOVERY AND CIVIL JUSTICE

AND

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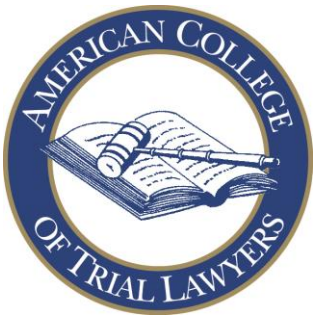
APRIL 2015



American College of Trial Lawyers

19900 MacArthur Boulevard, Suite 610, Irvine, California 92612
www.actl.com

The American College of Trial Lawyers, founded in 1950, is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and those whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of 15 years' experience before they can be considered for Fellowship. Membership in the College cannot exceed 1% of the total lawyer population of any state or province. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases; those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice. The College strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession.

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

Rebecca Love Kourlis	Executive Director
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Janet L. Drobinske	Legal Assistant, *Rule One Initiative*

E. Osborne Ayscue, Jr., Charlotte, North Carolina, a member of IAALS' Board of Advisors and a Fellow of the American College of Trial Lawyers, participated as IAALS' liaison to the project.

Rule One is an initiative of IAALS dedicated to advancing empirically informed models to promote greater accessibility, efficiency, and accountability in the civil justice system. Through comprehensive analysis of existing practices and the collaborative development of recommended models, the *Rule One Initiative* empowers, encourages, and enables continuous improvement in the civil justice process.

ACKNOWLEDGEMENTS

IAALS and the American College of Trial Lawyers Task Force on Discovery and Civil Justice gratefully acknowledge the assistance of the Foundation of the American College of Trial Lawyers, which provided financial support, along with IAALS, for the work of the Task Force. The Foundation is dedicated to the improvement of the quality of trial and appellate advocacy, the ethics of our profession, and the administration of justice.

A REPORT FROM THE JOINT PROJECT OF
THE AMERICAN COLLEGE OF TRIAL LAWYERS
TASK FORCE ON DISCOVERY AND CIVIL JUSTICE
AND
IAALS—THE INSTITUTE FOR THE ADVANCEMENT OF
THE AMERICAN LEGAL SYSTEM

REFORMING OUR CIVIL JUSTICE SYSTEM

In 2009, the American College of Trial Lawyers Task Force on Discovery and Civil Justice ("Task Force") and IAALS, the Institute for the Advancement of the American Legal System at the University of Denver, issued a Report containing our findings regarding the state of the civil justice system in the United States and 29 proposed Principles for reform of that system ("Final Report"). That Report came after two years of study and work and took into account the results of an extensive survey of the Fellows of the American College of Trial Lawyers ("College"). The Final Report was then accepted and adopted by the Board of Regents of the College.

One of our main hopes was that the publication of the Final Report would generate a "lively and informed debate" and a "nationwide discussion" about the state of our civil justice system and active consideration of proposed changes in that system to make it more accessible, affordable, efficient, and just.

As we had hoped, the publication of the Final Report generated intense discussion among practitioners, academics, and judges. It also led to requests from several courts for the creation of a set of rules that could be used to put the 29 Principles into practice in pilot projects in both federal and state courts. Those requests led in turn to our promulgation, in 2011, of a set of Pilot Project Rules, published as a part of the IAALS "Roadmap for Reform" series, that are meant to apply the Principles set forth in the Final Report. Pilot projects, several of which are based on the Principles and the Roadmap suggestions, are now well underway in federal and state courts, and are summarized in the attached Appendix A.

The federal Judicial Conference Committee on Rules of Practice and Procedure (the "Standing Committee") and the Advisory Committee on Civil Rules (the "Advisory Committee") have played key roles in the discussion and reform efforts as well, and in May of 2010, the Advisory Committee convened a Conference on Civil Litigation at Duke University Law School to study the current state of the civil justice system and to work toward solutions to the identified problems. Building on the 2010 Duke Conference work, and several years of study, the Advisory Committee developed proposed rule changes intended to remedy some of those problems. The proposed rules were published for comment, more than 2,300 written comments were received, and several public hearings were held, at which more than 120 witnesses testified. In May 2014, the Standing Committee unanimously approved a set of proposed amendments to the Federal

Rules of Civil Procedure that, if approved by the Supreme Court and not acted upon by Congress, will become effective on December 1, 2015. Those proposed amendments and the process through which they were adopted are briefly summarized in the attached Appendix B.

The Task Force endorses all of the proposed amendments to the Federal Rules of Civil Procedure. They are thoughtful and timely. In some respects, they are consistent with our Principles as, for example, they give prominence to the notion of proportionality. In other respects, our Principles go further than the proposed amendments, and we continue to urge both state and federal rules officials to consider our Principles in their continued efforts to reform the civil justice system.

At the state level, the Conference of Chief Justices ("CCJ") has established a Civil Justice Initiative that is focused on making recommendations with the goal of significant reform at the state level, also drawing from the pilot project experiences and evaluations around the country. As many of the pilot projects come to their natural conclusions, those states are also considering the statewide adoption of various aspects of the projects that were most effective. For example, New Hampshire has implemented its pilot project reforms statewide and Colorado is currently considering statewide rule amendments. Utah adopted statewide changes to its discovery rules in 2011 without going through a pilot project phase.

Looking at the activity at both the state and federal level, much has happened since our Final Report in 2009. We also recognize that there is still work to be done. As it has been said, "life is a marathon, not a sprint," and that notion has been applied in many other contexts, including leadership and success. It applies equally in the context of civil justice reform. The pilot projects test many of the Principles in practice. We must learn from those experiences and continue the forward momentum. Thus, we have taken this opportunity to revisit the Final Report and note how our thinking has evolved in light of the lessons learned from the pilot projects and proposals for reform around the country. In some cases, we have left the Principles intact; in other cases, we have eliminated them; and in still others, we have substantially revised them.

We have also made our revisions to the Principles and comments with an eye toward the current efforts around the country. Because the proposed federal amendments are broad and take into account many of the proposals made in our 2009 Final Report, as well as the comments that were made during the Duke Conference in 2010, we do not anticipate another round of sweeping amendments to the Federal Rules for some time. For that reason, this report focuses primarily on the various state systems of civil justice. We recognize the efforts of other entities, like the CCJ's Civil Justice Initiative, that may lead to significant reform of the various state systems of civil justice and we hope that this report will be useful to those entities as they do their work.

In our 2009 Final Report, we unanimously recommended that the proposed Principles be made the subject of public comment, discussion, debate, and refinement. We encouraged lively and informed debate among interested parties with the goal of achieving a fair and more efficient system of justice. We stand by our original call for a dialogue—and now add a call for action. To extend the marathon analogy, civil justice reform cannot falter mid-race. We must see the reforms to the finish line, so that we truly achieve our goals of a more fair, accessible, and efficient system for all who come before the courts with their disputes.

GENERAL OBSERVATIONS

1. As we have studied the Rules and reviewed the comments and the results of the pilot projects, one thing has become very clear to us: rules reform without a change in culture will not be effective. Much has been written about the benefits of cooperation and we endorse those sentiments, but they are not enough. The cultural change that we believe must occur is an understanding from all participants in the system, including the parties, that the object of litigation is a full, fair, and rational resolution of disputes. Whatever leads to that objective is good; whatever impedes that objective should be shunned.

2. Procedural rules should be designed to achieve the just resolution of every civil action. The concept of "just resolution" should include procedures proportionate to the nature, scope, and magnitude of the case that will produce a reasonably prompt, reasonably efficient, and reasonably affordable resolution. It is our hope that proportionality serves as a guiding principle not just for discovery, but for the process as a whole.

3. One of our Fundamental Principles is that the "one size fits all" approach to litigation does not work. By the numbers, simple cases in state courts comprise the largest percentage of cases in the nation. Yet our system has not been designed with these cases in mind. On the other hand, complex cases are indeed different and that is why so many of the existing rules and some of our Principles do not apply easily to them. For example, although we favor early and robust initial disclosures, we are fully cognizant of the fact that in some cases, such as complex cases with voluminous documents, the timing and staging of initial disclosures may require individualized treatment and more cooperation between the parties. We believe that, as the federal and many state rules have demonstrated, even in such cases there is merit in requiring some initial disclosure. Rules reform efforts must take into account the fact that, as our Principle holds, there should be "different sets of rules for different types of cases."

4. We have seen in the pilot projects that many courts have decided to test some, but not all, of our Principles. It bears repeating that because our Principles were the result of long discussion and efforts to balance different views, it is our intent that they should be taken as a whole. They were meant to work together; using only some of them may not give full effect to the many compromises reflected in the Principles.

5. It also bears repeating that the Principles are meant to suggest ways to reform the civil justice system so that it becomes more efficient, less costly, more accessible, and more just. Those four essentials should lie at the heart of any attempted reform.

6. In the few short years since the Final Report was published, we have seen an explosion in technology. E-filing, for example, is now the norm in many courts. E-mail is ubiquitous. "Predictive coding" and "statistical sampling" may revolutionize document discovery and especially electronic discovery. Unfortunately, for many courts, the technological explosion has had little or no effect. That needs to change. Technology can

reform civil justice precisely because it is, almost by definition, efficient, affordable and accessible. Its use should be universal.

PRINCIPLES FOR CIVIL JUSTICE REFORM

FUNDAMENTAL PRINCIPLES

PRINCIPLE 1:

- **Procedural rules should be construed and administered by the courts, the parties, and their lawyers to secure the just, speedy, and inexpensive determination of every action.**

This is taken directly from the proposed amendment to Rule 1 of the Federal Rules of Civil Procedure, to which we have added "lawyers." The amendment makes it clear that the obligation to follow Rule 1 applies to the parties and their lawyers as well as to the courts. This is consistent with the culture change that we believe is essential to an improved system of civil justice.

PRINCIPLE 2:

- **The "one size fits all" approach of the current federal and most state rules should be discouraged. Case management should allow for flexibility to create different sets of rules and protocols for certain types of cases so that all cases can be resolved expeditiously and efficiently.**

When the Federal Rules of Civil Procedure became effective in 1938, they replaced the common law forms of actions at law and the differing sets of procedures for those actions required by the Conformity Act of 1872 (each district court used the procedures of the state in which it was located) as well as the Equity Rules of 1912, which had governed suits in equity in all of the district courts. The intent was to adopt a single, uniform set of rules that would apply to all cases. Uniform rules made it possible for lawyers to appear in any federal jurisdiction knowing that the same rules would apply in each.

We call this a "fundamental principle" because we believe that one of the most effective changes that could be made in our civil justice system is the creation of specialized rules and protocols for certain types of cases.

It is time that the rules generally reflect the reality of practice. This Principle recognizes that this "one size fits all" approach is not the most effective approach for all types of cases. Over the years, courts have realized this and have informally developed special rules and procedures for certain types of cases. Examples include specific procedures to process employment

discrimination, patent, and medical malpractice cases. Congress also perceived the need for different rules by enacting the Private Securities Litigation Reform Act for securities cases. Since our Final Report in 2009, a consistent theme across the pilot projects has been to define rules by case type or case complexity. Examples include the Initial Discovery Protocols for Employment Cases Alleging Adverse Action, the Colorado Civil Access Pilot Project ("CAPP") focused on business litigation and the Southern District of New York's Pilot Project Regarding Case Management Techniques for Complex Civil Cases. The new Utah rules divide cases into tiers based on amounts in controversy and also provide for particularized initial disclosure based on case type.

The concern that the development of different rules will preclude lawyers from practicing across districts is no longer a reality of present-day practice, as advances in technology allow for almost instant access to local rules and procedures. One lesson from CAPP is that case differentiation can present challenges in terms of defining and designating cases for application of different rules schemes. As different rules are developed and implemented, we caution rulemakers to think about how such rules will operate on the ground, so as not to add undue complexity and so any differentiation reflects true differences in case needs.[1]

We are not suggesting a return to the chaotic and overly complicated pre-1938 litigation environment, nor are we suggesting differential treatment across districts. This Principle is based on recognition that the rules should reflect the reality that there are case types that may require different treatment and provide for exceptions where appropriate. Specialized rules should be encouraged.

PRINCIPLES RELATING TO CASE MANAGEMENT

The Purpose of Case Management: This is an idea whose time has come. Effective judicial case management, tailored to the needs of the case, will save the parties time and money and will, in most cases, lead to a more informed and, we think, reasonable resolution.

PRINCIPLE 3:

- **A single judge should be assigned to each case at the beginning of a lawsuit and should stay with and supervise the case through its termination.**

The ACTL Survey (the "Survey") respondents agreed overwhelmingly (89 percent) that a single judicial officer should oversee the case from beginning to end. Respondents also agreed (74 percent) that the judge who is going to try the case should handle all pre-trial matters.

[1] *See* CORINA D. GERETY & LOGAN CORNETT, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., MOMENTUM FOR CHANGE: THE IMPACT OF THE COLORADO CIVIL ACCESS PILOT PROJECT 35-36 (2014) [hereinafter MOMENTUM FOR CHANGE], *available at* http://iaals.du.edu/images/wygwam/documents/publications/Momentum_for_Change_CAPP_Final_Report.pdf.

In many federal districts, the normal practice is to assign each new case to a single judge and that judge is expected to stay with the case from the beginning to the end. Assignment to a single judge is the most efficient method of judicial management. We believe that the principal role of the judge should be to manage the case toward trial and ultimately, if appropriate, try the case. Judges who are going to try cases are in the best position to make pre-trial rulings on evidentiary and discovery matters and dispositive motions.

This Principle is strongly supported by the experiences within the states. For example, a survey of Oregon lawyers and judges revealed frustration and inefficiency related to having different decision-makers for each appearance, and moving to one judge per case was frequently suggested as a way to improve the process.[2] In Colorado, the CAPP rules provided that the judge assigned to the case was to handle all pre-trial matters and try the case. The evaluation of the pilot project found that the CAPP cases saw a judge earlier and more often and were also resolved more quickly. Lawyers felt the judge was more accessible and fair.[3]

We are aware that in some state courts, judges are rotated from one docket to another and that in some federal districts, magistrate judges handle discovery matters. We are concerned that such practices deprive the litigants of the consistency and clarity that assignment to a single docket, without rotation, brings to the system of justice.

We are also aware that it is not always possible to assign a single judge to every case. Where that is not possible, we recommend that the multiple judges who are assigned utilize a team approach and we urge that lessons learned from the joint IAALS/ACTL Report, *Working Smarter, Not Harder: How Excellent Judges Manage Cases*, be followed.[4] Some of those lessons include:

1. Requiring lead lawyers to participate in Case Management Conferences, preferably in person, but at least by phone;

2. Using Case Management Conferences to narrow and prioritize discovery;

3. Requiring lead lawyers to personally discuss discovery disputes before filing motions and providing the opportunity for, or mandating, oral presentations of discovery disputes to the court before filing written motions;

4. Ruling on motions from the bench, if possible, and promptly, in any case, to avoid delays and to keep later judges from having to re-plow the same ground; and

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[2] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SURVEY OF THE OREGON BENCH & BAR ON THE OREGON RULES OF CIVIL PROCEDURE 62 (2010), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Survey_Oregon_Bench_Bar2010.pdf.

[3] MOMENTUM FOR CHANGE, *supra* note 1, at 18, 22-23, 25.

[4] INST. FOR ADVANCEMENT OF THE AM. LEGAL SYS. & AM. COLL. OF TRIAL LAWYERS, WORKING SMARTER, NOT HARDER: HOW EXCELLENT JUDGES MANAGE CASES 21-23 (2014) [hereinafter WORKING SMARTER], *available at* http://iaals.du.edu/images/wygwam/documents/publications/Working_Smarter_Not_Harder.pdf.

5. Keeping parties focused on the real and important issues in the case while doing everything possible to hold the trial date.

Where it is possible, assigning a single judge to all aspects of a case promotes consistency and clarity. In those situations in which the scarcity of judicial resources will not allow for the assignment of every case to a single judge, we recommend an increase in judicial resources including more judges and support staff so that this Principle can be consistently followed as often as possible.

PRINCIPLE 4:

- **Unless requested earlier by any party, a Case Management Conference should be held as soon as practicable after the appearance of all parties.**

This Principle calls for a robust Case Management Conference at the beginning of a case in all but those very few cases that do not require or are not amenable to such a conference.[5] In our Survey, 67 percent of respondents thought that such conferences inform the court about the issues in the case, and 53 percent thought that such conferences identified and, more important, narrowed the issues. In our Final Report, we called such conferences "Initial Pre-Trial Conferences" but we are now of the view that the term "Case Management Conference" is more accurate, because we envision that such a conference will be a robust discussion of the issues, required discovery, and the timetables for effective and efficient resolution of the case.

Case Management Conferences are a useful, if not essential, vehicle for involving the court at the earliest possible time in the management of the case. They are useful for keeping the judge informed about the progress of the case and allowing the court to guide the work of counsel. We are aware that there are those who believe that judges should not become involved in litigation too early and should allow the parties to control the litigation without judicial supervision. However, we believe that, especially in complex cases, the better procedure is to involve judges early and often. Even when counsel reach agreement between themselves, the Court should be informed if the agreement they reach will impact the case schedule.

Early judicial involvement is important because not all cases are the same and because different types of cases require different case management. Some, such as complex cases, require more; some, such as relatively routine or smaller cases, require less. In some simpler cases, it may actually cost the parties more to require a Case Management Conference, so, here too, we endorse the creation of differentiated procedures. The goal is the just, cost-effective, and expeditious resolution of disputes.

Seventy-four percent of the Fellows in our Survey said that early intervention by judges helped to narrow the issues, and 66 percent said that it helped to limit discovery. Seventy-one percent

[5] In our earlier Report, we called for such conferences in every case, but we now recognize that, for a variety of reasons, such a conference may not be possible or necessary in every case.

said that early and frequent involvement of a judicial officer leads to results that are more satisfactory to the client.

One of the key features of CAPP was an early initial Case Management Conference, which provided the judge the opportunity to focus on the issues early and shape the pre-trial process proportionally to the needs of the case. Surveyed lawyers were enthusiastic about the conference, reporting that "it can set the standard of conduct, frame the issues and provide the parties with a valuable opportunity for judicial input on the case prior to commencing discovery."[6] Moreover, judges applied case management appropriately and selectively "in those cases demonstrating the greatest need."[7] Indeed, the focus on early, active, and ongoing judicial management received more positive feedback than any other aspect of the Colorado project. The Massachusetts Business Litigation Session Pilot Project also highlighted the initial Case Management Conference and its importance in the proportionality assessment. The surveyed lawyers from that project were also very positive in terms of timeliness, cost-effectiveness of discovery, the timeliness of case events, and access to a judge to resolve discovery issues.[8]

We believe that, in most cases, a Case Management Conference should be held early and that in those conferences courts should identify pleading and discovery issues, specify when they should be addressed and resolved, describe the types of limited discovery that will be permitted, and set a timetable for completion. We also believe the conferences are important for a speedy and efficient resolution of the litigation because they allow the court to set directions and guidelines early in the case.

We suggest the following topics for further consideration by the court during the Case Management Conference:[9]

1. Limitations on scope of initial disclosures and discovery;

2. Limitations on persons from whom discovery can be sought;

3. Limitations on the types of discovery (e.g., only document discovery, not interrogatories);

4. Numerical limitations (e.g., only 20 interrogatories or requests for admissions; only 50 hours of deposition time);

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[6] MOMENTUM FOR CHANGE, *supra* note 1, at 25.

[7] *Id.* at 24.

[8] SUFFOLK SUPERIOR COURT BUSINESS LITIGATION SESSION PILOT PROJECT, FINAL REPORT ON THE 2012 ATTORNEY SURVEY (2012), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Final_BLS_Survey_Report.pdf.

[9] *See generally* WORKING SMARTER, *supra* note 4, at Appendix D.

5. Elimination of depositions of experts where their testimony is strictly limited to the contents of their written report;

6. Limitations on the time available for discovery;

7. Cost shifting/co-pay rules;

8. Financial limitations (i.e., limits on the amount of money that can be spent or that one party can require its opponent to spend on discovery);

9. Discovery budgets that are approved by the clients and the court;

10. Whether there will be dispositive motions and, if so, whether initial disclosures and discovery should be stayed;

11. Setting a trial date (see Principle 5 below);

12. Preservation of electronically stored information ("ESI");

13. Protocols for and limitations on the production of ESI;

14. Procedures for oral submission of discovery motions; and

15. The importance of cooperation and collegiality.

PRINCIPLE 5:

- **At the Case Management Conference, the court should, with input from counsel, set a realistic date for completion of discovery and a realistic trial date. The dates should be held firm, absent good cause shown.**

There has been a good deal of debate about the benefits of the early setting of a trial date. In 1990, the Judicial Conference of the United States asked the Advisory Committee on Civil Rules to consider amending Rule 16 to require the court to set a trial date at the Rule 16 conference. The Advisory Committee chose not to do so "because the docket conditions in some districts would make setting a realistic trial date early in the case unrealistic."[10] A majority of Survey respondents (60 percent) thought that the trial date should be set early in the case.

We are aware that in some cases there are judges who believe that at the beginning of a case, they (and the parties) do not know enough about the case to set a trial date. That may be so, but nevertheless we believe that there can be significant benefits to setting a trial date early in the

[10] Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?* 7 TUL. J. INT'L & COMP. L. 153, 179 (1999).

case. For example, as the known trial date approaches, the claims tend to narrow, the evidence is streamlined, and the process becomes efficient. Without a firm trial date, cases tend to drift and discovery takes on a life of its own. In addition, we believe that setting realistic but firm trial dates facilitates the settlement of cases that should be settled, so long as the court is vigilant to ensure that the parties are behaving responsibly. In addition, it will facilitate the trials of cases that should be tried.

In Delaware Chancery Court, for example, where complex, expedited cases such as those relating to hostile takeovers are heard frequently, the parties know that in such cases they will have only a limited time within which to take discovery and get ready for trial. The parties become more efficient and the process is more focused.

An IAALS study provides strong empirical support for early setting of trial dates. Based on an examination of nearly 8,000 closed federal civil cases, the IAALS study found that there is a strong positive statistical correlation between the overall time to resolution of the case and the elapsed time between the filing of the case and the court's setting of a trial date.[11]

We also believe that once set, the trial date should not be continued absent good cause shown. The IAALS study found that trial dates are routinely continued in federal court. Over 92 percent of motions to continue the trial date were granted and less than 45 percent of cases that actually went to trial did so on the trial date that was first set. The parties have a right to get their case to trial expeditiously, and if they know that the trial date will be continued, there is no point in setting a trial date in the first place. It is noteworthy that the IAALS study also found that in courts in which trial dates are expected to be held firm, the parties seek trial continuances at a much lower rate and only under truly extraordinary circumstances.

In Colorado's CAPP, where continuances were "strongly disfavored" and were to be denied absent "extraordinary circumstances," the result was fewer extension motions filed and granted. The survey in Colorado highlighted some negative feedback from lawyers and judges on the strictness of that standard, with some calling for increased judicial discretion and flexibility.[12] In light of that experience, we have revised this Principle to recognize that dates should be firm, but to allow for some flexibility where good cause for moving the trial date can be shown. In addition, where the deadlines in question do not impact the ultimate discovery deadline and trial dates, more flexibility is warranted.

[11] *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL COURTS: A TWENTY-FIRST CENTURY ANALYSIS (2009), *available at* http://iaals.du.edu/images/wygwam/documents/publications/PACER_FINAL_1-21-09.pdf.

[12] MOMENTUM FOR CHANGE, *supra* note 1, at 27-29.

PRINCIPLE 6:

- **Cooperation and communication between counsel is critical to the speedy, effective, and inexpensive resolution of disputes in our civil justice system. Counsel should be required to confer and communicate early in order to resolve potential disputes, and the court should be available to resolve disputes in a timely manner, if necessary.**

Discovery and other periodic conferences between or among counsel work well and should be continued. Over half (59 percent) of our Survey respondents thought that conferences are helpful in managing the discovery process; just over 40 percent of the respondents said that discovery conferences—although they are mandatory in most cases—frequently do not occur.

Ninety-seven percent of our respondents said that when all counsel are collaborative and professional, the case costs the client less. Unfortunately, cooperation does not often occur. In fact, it is sometimes argued that cooperation is inconsistent with the adversary system. Professor Stephen Landsman has written that the "sharp clash of proofs presented by adversaries in a highly structured forensic setting" is key to the resolution of disputes in a manner that is acceptable to both the parties and society.[13]

However, United States District Judge Paul W. Grimm of the United States District Court for the District of Maryland, then writing as Chief Magistrate, referred specifically to Professor Landsman's comment and responded:

> However central the adversary system is to our way of formal dispute resolution, there is nothing inherent in it that precludes cooperation between the parties and their attorneys during the litigation process to achieve orderly and cost effective discovery of the competing facts on which the system depends.[14]

The Seventh Circuit Electronic Discovery Pilot Program's Principle 1.02 on cooperation provides that "[a]n attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions." In the Final Report on Phase Two of that Pilot Program, 84 percent of judges indicated that the application of the pilot principles, including the pilot principle on cooperation, "increased" or "greatly increased" the level of cooperation by counsel efficiently to resolve the case. While the lawyer percentage was not as high, only one percent responded that the Principle had a negative impact, indicating that cooperation can lead to greater efficiencies, with minimal negative consequences.[15]

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[13] STEPHEN LANDSMAN, ABA SECTION OF LITIGATION, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 2 (1988).

[14] *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 361 (2008).

[15] SEVENTH CIR. ELECTRONIC DISCOVERY PILOT PROGRAM COMM., SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM FINAL REPORT ON PHASE TWO May 2010-May 2012 34-35 (2012), *available at* http://www.discoverypilot.com/sites/default/files/Phase-Two-Final-Report-Appendix.pdf.

As The Sedona Conference® Cooperation Proclamation recognizes, "[t]he costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system."[16] Cooperation of counsel is a critical piece in reducing these burdens and refocusing litigation on the fair and efficient resolution of disputes. Counsel should not bring a dispute to the court for resolution without having directly spoken to each other in an attempt to resolve the dispute.

PRINCIPLE 7:

- **All issues to be tried should be identified early.**

There is often a difference between issues set forth in pleadings and issues to be tried. Some courts require early identification of the issues to be tried; in international arbitrations, terms of reference at the beginning of a case often require that all issues to be arbitrated be specifically identified. Under the Manual for Complex Litigation (Fourth), Section 11.3, "[t]he process of identifying, defining, and resolving issues begins at the initial pre-trial conference." We applaud such practices, and this Principle would require early identification of the issues in all cases.

Such early identification will materially advance the case and limit discovery to what is truly important. It should be carefully done and should not be merely a recapitulation of the pleadings. We leave to others the description of the form that such statement of issues should take; but, however it is done, the court should be informed of the issues to be tried through one of the available mechanisms, perhaps before the Case Management Conference is held, or during the conference itself or later status conferences.

PRINCIPLE 8:

- **When appropriate, the court should raise the possibility of mediation or other form of alternative dispute resolution early in the case. The court should have the discretion to order mediation, other form of dispute resolution, or other form of streamlined procedures at the appropriate time, unless all parties agree otherwise.[17]**

This is a controversial principle; however, it recognizes reality.

Over half (55 percent) of the respondents in our Survey said that alternative dispute resolution was a positive development. A surprisingly high 82 percent said that court-ordered alternative

[16] The Sedona Conference®, *The Sedona Conference® Cooperation Proclamation*, 10 SEDONA CONF. J. 331, 332 (2009 Supp.).

[17] We have eliminated the Principle dealing with a proposed new summary procedure, similar to the "Application" procedure in Canada, that was designed to address certain factual and legal issues without triggering an automatic right to discovery or trial, because we not aware of any jurisdiction in the United States that has adopted such a procedure and we now believe that current rules provide procedures to achieve that end, such as a motion for partial summary judgment.

dispute resolution was a positive development, and 72 percent said that it led to settlements without trial.

As far as expense was concerned, 52 percent said that alternative dispute resolution decreased the expense for their clients, and 66 percent said that it shortened the time to disposition.

Three conclusions could be drawn. First, this could be a reflection of the extent to which alternative dispute resolution has become efficient and effective. Second, it could be a reflection of how slow and inefficient the normal judicial process has become. Third, it could be a reflection of the fact that alternate dispute resolution may afford the parties a mechanism for avoiding costly discovery.

Whatever the reason, we acknowledge the results and therefore recommend that courts be encouraged to raise mediation as a possibility and that they order it in appropriate cases. We note, however, that if these Principles are effective in reducing the cost of discovery, parties may opt more often for judicial trials, as opposed to alternate dispute resolution. That is, at least, our hope.

We also note that under the Alternative Dispute Resolution Act of 1998 (28 USC § 651, et seq.), federal courts have the power to require parties to "consider" alternative dispute resolution or mediation and are required to make at least one such process available to litigants. We are aware that many federal district courts require alternative dispute resolution and that some state courts require mediation or other alternative dispute resolution in all cases. Some courts will not allow discovery or set a trial date until after the parties mediate. While we believe that mediation or some other form of alternate dispute resolution is desirable in many cases, we believe that the parties should have the ability to say "no" in appropriate cases where they all agree. This is already the practice in many courts.

In addition, in many states, there are streamlined procedures for certain tracks of cases that impose limitations on discovery and fast tracks to trial. Such procedures offer a process that is tailored to the proportional needs of the cases, and we endorse such procedures.

PRINCIPLE 9:

- **Courts should promptly rule on all pending motions, giving greater priority to the resolution of motions that will advance the case more quickly.**

Judicial delay in deciding motions is a cause—perhaps a major cause—of delay and expense in our civil justice system. We recognize that our judges often are overworked and without adequate resources. Judicial delay in deciding motions has a materially adverse impact on the ultimate resolution of litigation. In our Final Report, this Principle was limited to encouraging prompt decision on motions that would materially advance the litigation. While that should remain a priority, we are persuaded that this Principle should be broadened to include all motions.

Since 2009, there has been a marked increase in the number of judges who are using streamlined motion practices, including the requirement that status conferences be held on discovery disputes prior to the making of any motions, or the submission of disputes by letter instead of formal briefing. The Southern District of New York's Pilot Project Regarding Case Management Techniques for Complex Civil Cases provides one example. While we do not yet have formal data from such experiments, anecdotal reports from judges and lawyers have been positive. Further, in the Report of our joint project, *Working Smarter, Not Harder*, the judges who were interviewed described many innovative practices for streamlining motion practice and almost all favored ruling as quickly as possible.[18] In terms of cost and delay, this is a low hanging fruit ripe for the picking and we hope to see widespread adoption of these practices.

PRINCIPLE 10:

- **These Principles call for greater involvement by judges. Where judicial resources are in short supply, they should be increased.**

This Principle recognizes the position long urged by the College. Judicial resources are limited and need to be increased. This is even truer today than it was in 2009, when we originally proposed this Principle. Included in our concept of judicial resources are technological aids, paralegals, interns, legal secretaries, and other assistants who will aid the court in doing its work.

PRINCIPLE 11:

- **Trials represent a success, not a failure, of our civil justice system. Trial judges should be familiar with trial practice by experience, judicial education or training. Training programs on case management and the efficient trial of cases should be highly encouraged for trial judges.**

Knowledge of the trial process is critical for judges responsible for conducting the trial process. We urge that consideration of trial experience be an important part of the judicial selection process. Judges who have trial experience, or at least significant case management experience, are better able to manage their dockets and move cases efficiently and expeditiously. Nearly 85 percent of our respondents said that only individuals with substantial trial experience should be chosen as judges. And, somewhat surprisingly, 57 percent thought that judges did not like taking cases to trial. Accordingly, we believe that more training programs should be made available and that judges should be encouraged to attend them so that they will be able to manage and try cases in a more efficient and effective way.

[18] WORKING SMARTER, *supra* note 4, at 21-23.

PRINCIPLE RELATING TO PLEADINGS

The Purpose of Pleadings: Pleadings should notify the opposing party and the court of the factual and legal basis of the pleader's claims or defenses in order to define the issues of fact and law to be adjudicated. They should give the opposing party and the court sufficient information to determine whether the claim or defense is sufficient in law to merit continued litigation. Pleadings should set practical limits on the scope of discovery and trial, and should give the court sufficient information to control and supervise the progress of the case to trial or other resolution.

PRINCIPLE 12:

- **Pleadings should concisely set out all material facts that are known to the pleading party to establish the pleading party's claims or defenses.**

One of the principal reforms made in the Federal Rules of Civil Procedure was to permit notice pleading. In *Conley v. Gibson*,[19] the Supreme Court held that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim that would entitle the plaintiff to relief. However, after our Final Report was first drafted, the Supreme Court changed the pleading requirements in federal cases to require the pleading party to set forth sufficient facts to demonstrate the plausibility of the conduct alleged.[20] Many commentators believed that our original pleading Principle was intended to adopt the *Twombly* requirement, but it was not. We did not address the issue of plausibility. Rather, we believed that if pleadings were more specific, discovery could be more targeted, leading to lower costs and more efficiency. In addition, fact-based pleading informs the court so that it can make proportionality determinations.[21]

We would require the parties to plead, at least in complaints, counterclaims and defenses, all material facts that are known to the pleading party to establish elements of a claim for relief or a defense. In the earlier version of this Principle, we limited this requirement to affirmative defenses, but we now believe that it should apply to all defenses that are pleaded. We would not require the pleading party to plead all "relevant" facts, and we would permit pleading on "information and belief" if the pleading party cannot reasonably obtain the material facts

[19] 355 U.S. 45 (1957).

[20] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

[21] *See generally* AM. COLL. OF TRIAL LAWYERS & INST. FOR ADVANCEMENT OF THE AM. LEGAL SYS., REPORT FROM THE TASK FORCE ON DISCOVERY AND CIVIL JUSTICE OF THE AMERICAN COLLEGE OF TRIAL LAWYERS AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM TO THE 2010 CIVIL LITIGATION CONFERENCE DUKE UNIVERSITY SCHOOL OF LAW (2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/ACTL%20Task%20Force,%20IAALS,%20Report%20to%20the%202010%20Civil%20Litigation%20Conference.pdf.

necessary to support one or more elements of a claim or a defense, so long as the basis for the information and belief, which the pleading party should know, is stated.

It is clear to us that a "hide the ball" culture is counter-productive. One of the primary criticisms of notice pleading is that it leads to more discovery than is necessary to identify and prepare for a valid legal dispute. A basic premise throughout these Principles is that early exchange of information between counsel and with the court identifies disputes fairly at issue in the litigation and leads to more focused, effective, efficient, and less-expensive discovery, especially in the digital age.

Material, fact-based pleading must be accompanied by rules for responsive pleading that require a party defending a claim to admit that which should be admitted. Although it is not always possible to understand complex fact situations in detail at an early stage, an answer that generally denies all facts in the complaint simply puts everything at issue and does nothing to identify and eliminate uncontested matters from further litigation. Discovery cannot be framed to address the facts in controversy if the system of pleading fails to identify them.

Two of the recent pilot projects experimented with fact-based pleading: New Hampshire's Proportional Discovery/Automatic Disclosure ("PAD") Pilot Rules and Colorado's CAPP. New Hampshire's fact-based pleading and automatic disclosures were intended to bring the issues to light earlier in the litigation. While New Hampshire did not see a decrease in the overall time to disposition, anecdotal reports from lawyers suggested that those provisions were working well, and the rules have been implemented statewide. One unexpected result in New Hampshire has been a statistically significant decrease in default judgments. This may be attributable to fact-based pleading, which provides defendants with more information upon which they can base a defense.[22] In CAPP, which encouraged fact-based pleading and required automatic disclosures, there was a statistically significant reduction in the time to disposition that was consistent across all case types.[23] These experiences lend support to the early identification of claims and defenses.

[22] PAULA HANNAFORD-AGOR, ET AL., NAT'L CTR. FOR STATE COURTS, CIVIL JUSTICE INITIATIVE: NEW HAMPSHIRE: IMPACT OF THE PROPORTIONAL DISCOVERY/AUTOMATIC DISCLOSURE (PAD) PILOT RULES 17 (2013), *available at* http://ncsc.contentdm.oclc.org/cdm/ref/collection/civil/id/115.

[23] MOMENTUM FOR CHANGE, *supra* note 1, at 13.

PRINCIPLES RELATING TO DISCOVERY

The Purpose of Discovery: Discovery should enable a party to procure in admissible form through the most efficient, non-redundant, cost-effective method reasonably available, evidence that can be used to prove or disprove the claims and defenses asserted in the pleadings. Discovery should not be an end in itself; it should be merely a means of facilitating a just, efficient, and inexpensive resolution of disputes.

PRINCIPLE 13:

- **Proportionality should be the most important principle applied to all discovery.**

Discovery is not the purpose of litigation. It is merely a means to an end. If discovery does not promote the just, speedy, and inexpensive determination of actions, then it is not fulfilling its purpose.

Unfortunately, many lawyers believe that they should─or must─take advantage of the full range of discovery options offered by the rules. They believe that zealous advocacy (or the potential threat of malpractice claims) demands no less, and the current rules certainly do not dissuade them from that view. Such a view, however, is at best a symptom of the problems caused by the current discovery rules, and at worst a cause of the problems we face. In either case, we must eliminate that view. It is crippling our civil justice system. As technology has evolved from the use of photocopiers and scanners to the current explosion of electronic information in its many forms, discovery has become increasingly burdensome on the parties and the civil justice system. The high cost of litigation often prevents the pursuit or defense of a claim in court or precludes the possibility of a trial. Even when cases are brought and defended, pre-trial expenses are compounded by the concern that a lawyer's failure to obtain all discovery permitted by Rule 26 will put the client at a disadvantage or expose the lawyer to risk. What will address that concern is a change in culture from an "all you can eat" model to "you get what you need."

The parties and counsel should attempt in good faith to agree on proportional discovery at the outset of a case but, failing agreement, courts should quickly become involved. There simply is no justification for the parties to spend more on discovery than a case requires. Courts should be encouraged, with the help of the parties, to specify what forms of discovery will be permitted in a particular case. Courts should be encouraged to stage discovery to ensure that discovery related to potentially dispositive issues is taken first so that those issues can be isolated and timely adjudicated.

One of the most consistent themes across the pilot projects and state rule reforms is the incorporation of the concept of proportionality. New Hampshire's PAD Pilot Rules, Massachusetts' Business Litigation Session's Pilot Project, Colorado's CAPP, the Seventh Circuit's Electronic Discovery Pilot Program, and Utah's statewide rule changes all incorporate

proportionality as a guiding principle. The results have been positive, with reports that the time and costs are proportional to the issues at stake.[24] In addition, proportionality is a key theme in the proposed amendments to the Federal Rules of Civil Procedure. Proportionality has been moved up into the scope of what is discoverable under Rule 26(b)(1) to give it prominence and ensure that proportionality serves as a guiding principle throughout discovery.

PRINCIPLE 14:

- **All facts are not necessarily subject to discovery.**

This is a corollary of the preceding Principle. We now have a system of discovery in which parties are entitled to discover all facts, without limit, unless and until courts call a halt, which they rarely do. As a result, in the words of one Survey respondent, discovery has become an end in itself and we routinely have "discovery about discovery." Recall that our current rules were created in an era before copying machines, computers, and e-mail. Advances in technology are overtaking our rules, to the point that the Advisory Committee Notes to Rule 26(b)(2)(B) of the Federal Rules of Civil Procedure state that "It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information."

There is, of course, a balance to be established between the burdens of discovery on the one hand and the search for evidence necessary for a just result on the other hand. This Principle is meant to remind courts and litigants that discovery is to be limited and that the goal of our civil justice system is the "just, speedy, and inexpensive determination of every action and proceeding."

Discovery planning creates client expectations about the time and the expense required to resolve the case. Additional discovery issues, which may have been avoidable, and their consequent expense may impair the ability of the client to afford or be represented by a lawyer at trial.

The Utah statewide rule changes and Colorado's CAPP represent efforts to switch the paradigm, from a world where all facts are discoverable to a world where discovery is tailored to the needs of the case. While this is a culture change, the experimentation around the country confirms that it is possible, with positive results.

[24] *See, e.g., id.* at 12-17.

PRINCIPLE 15:

- **Shortly after the commencement of litigation, each party should produce all known and reasonably available non-privileged, non-work-product documents and things that support or contradict specifically pleaded factual allegations. The parties should retain the right in individual cases to make a showing to the court that this initial production may not be appropriate or may need to be modified.**

In 2008, the results of our Survey reflected that only 34 percent of the respondents thought that the current initial disclosure rules reduced discovery, and only 28 percent said they save the clients money. The national surveys that have followed further confirm that lawyers nationwide generally do not believe that Federal Rule of Civil Procedure 26(a)(1) initial disclosures reduce discovery, nor do they believe that such disclosures save their clients money.[25] The same surveys reflect that very high percentages report requiring additional discovery after initial disclosures. In contrast, in a study of Arizona's experience, where parties are required to make extensive initial disclosures, there is a consensus that such disclosures reveal pertinent facts early in the case, do not substantially increase satellite litigation, and do not raise litigation costs.[26] Our original Principle recognized that the initial disclosure rules need to be revised. This holds even truer today. It is time to make initial disclosures broader to ensure that they are truly effective.

This Principle is similar to Rule 26(a)(1)(ii) of the Federal Rules of Civil Procedure's requirement for initial disclosures, but it is broader in two ways. Whereas the current Rule permits description of documents by categories and location, we would require production. This Principle is also broader because it would require the production of all known and reasonably available documents and things that support or contradict specifically pleaded factual allegations.

The disclosures must be meaningful and robust. The rationale for this Principle is simple: each party should produce, without delay and without a formal request, documents that are known and reasonably available and that support or contradict specifically pleaded factual allegations. The goal of this Principle is to encourage the parties to bring the facts and issues to light at the earliest opportunity, thus allowing the litigation process to be shaped by the true nature of the dispute.

Our Principle does not require the parties to do an exhaustive search for or to produce all documents in the party's possession, custody or control that meet this definition at this early stage of the case. Initial production, as we envision it, is defined by what is then known and reasonably available. By including the requirement that the documents must be "known" and "reasonably available," we contemplate, as an example, the situation in which a party collects

[25] *See* AM. BAR ASS'N, ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: FULL REPORT 56-59 (2009); REBECCA M. HAMBURG & MATTHEW C. KOSKI, NAT'L EMP'T LAWYERS ASS'N, SUMMARY OR RESULTS OF FEDERAL JUDICIAL CENTER SURVEY OF NELA MEMBERS, FALL 2009 29 (2010).

[26] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SURVEY OF THE ARIZONA BENCH & BAR ON THE ARIZONA RULES OF CIVIL PROCEDURE 19-26 (2010), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Survey_Arizona_Bench_Bar2010.pdf.

documents for the purpose of supporting a factual allegation in a complaint or in a defense and runs across a document that contradicts a specifically pleaded factual allegation. Many current rules would require the production of the "supporting" document in the initial disclosures. We would now require the production of the "contradictory" document as well. Where responsive documents might be voluminous and entail a substantial and expensive burden to produce within the timeframe for initial disclosures, such documents may not be considered to be "reasonably available." We also acknowledge that the parties should retain the right in individual cases to make a showing to the court that initial production (i.e., production of documents and things before there is a "reasonably particular" request) may not be appropriate or may need to be modified.

While there should be an ongoing duty to supplement initial and subsequent productions, as there is now, we do not intend this Principle to replace the decades-old and well-understood rule that in discovery (as opposed to initial production), document requests must describe the documents to be produced with "reasonable particularity." To the extent that discovery is required after initial production (or in cases where there is no initial production), that definition should still be the test for document requests.

We note that the proportionality Principle (Principle 13) applies to initial production, just as it underlies all of our Principles on discovery. Under Principle 19, in appropriate cases, the court should consider staying initial production pending the decision on a dispositive motion. We also expect counsel to confer as soon as possible in order to reach an agreement as to what initial production is appropriate in a particular case and to reach an agreement as to the timing of any such production. Federal Rule of Civil Procedure 26(f) requires such a conference before there can be any initial disclosures or discovery. The Seventh Circuit Electronic Discovery Pilot Program also recognizes the importance of this early conference to discuss discovery and identify disputes for early resolution.

To those charged with applying such a Principle, we suggest that the plaintiff could be required to make the required initial production very shortly after the complaint is served and that the defendant, who, unlike the plaintiff, may not be presumed to have prepared for the litigation beforehand, be required to produce such documents within a somewhat longer period of time, say 30 days after the answer is served.

Our changes to this Principle are informed by the experiences around the country, including those in Colorado and Arizona, both of which require early robust disclosure of relevant documents, whether supportive or harmful. In neither jurisdiction has there been a backlash against the more robust disclosures. In fact, in Arizona, lawyers who have experience with both state and federal systems prefer the Arizona scheme to the federal rules.[27] One takeaway from both jurisdictions is that enforcement is essential. Thus, it is critical that there be consequences related to the lack of initial disclosures or inadequate disclosures. A sanction for a bad faith failure to comply absent cause or excusable neglect could be included in the rules implementing this Principle. Examples include an order precluding use of such evidence at trial, or a denial of

[27] *See id.*

the right to object to the admissibility of the evidence at trial, although we urge caution about creating a scheme that would encourage "discovery about discovery" or unwarranted sanctions litigation.

We also urge the specialty bars to develop specific initial disclosure rules for certain types of cases that could supplement or even replace this Principle.[28]

By requiring early, meaningful initial production, the goal of this Principle is to limit gamesmanship throughout the pre-trial process, to decrease the current concentration of resources on the litigation of discovery disputes, and to increase the opportunity for meritorious trials. This change represents a dramatic shift in litigation practice, but business as usual is not working for clients and it is certainly not ideal for legal professionals. It is our hope that this Principle will lead to significant cultural change. The civil pre-trial process should not be a game of "hide the ball," with the outcome decided by attrition. Rather, the arguments should be about the merits, with the outcome decided by the evidence (whether at trial or through settlement).

PRINCIPLE 16:

- **Discovery in general, and document discovery in particular, should be limited to documents or information that would enable a party to prove or disprove a claim or defense or enable a party to impeach a witness.**

The current Federal Rules permit discovery of all documents and information relevant to a claim or defense of any party, and the proposed amendments add the requirement of proportionality to that definition. It is not uncommon to see discovery requests that begin with the words "all documents relating or referring to . . . ." Such requests are far too broad and are subject to abuse. They should not be permitted, and we are hopeful that the addition of a proportionality requirement will eliminate such requests.

Especially when combined with notice pleading, discovery is very expensive and time consuming, and easily permits substantial abuse. We recommend changing the scope of discovery to allow only such limited discovery as will enable a party to prove or disprove a claim or defense, or to impeach a witness.

Until 1946, document discovery in the federal system was limited to things "which constitute or contain evidence material to any matter involved in the action," and then only upon motion showing good cause. The scope of discovery was changed for depositions in 1946 to the "subject matter of the action." It was not until 1970 that the requirement for a motion showing good cause was eliminated for document discovery. According to the Advisory Committee Notes, the "good cause" requirement was eliminated "because it has furnished an uncertain and erratic protection to the parties from whom production [of documents] is sought . . . ." The change also was

[28] *See, e.g.*, FED. JUDICIAL CTR., PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION (2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/DiscEmpl.pdf/$file/DiscEmpl.pdf.

intended to allow the system to operate extrajudicially, but the result was to afford virtually no protection at all to the parties from whom discovery was sought. Ironically, the change occurred just as copying machines were becoming widely used and just before the advent of the personal computer.

The "extrajudicial" system has proven to be flawed. Discovery has become broad to the point of being virtually limitless. We have even seen lawyers take depositions solely to establish that the deponent does not have any relevant information. While there may be rare cases in which such depositions are necessary, the practice is unduly expensive and rarely productive. This Principle would require courts and parties to focus on what is important to the fair, expeditious, and inexpensive resolution of disputes.

As noted, the proposed amendments to the Federal Rules of Civil Procedure would modify the definition of what is discoverable by adding a proportionality requirement. Since our Principle 13 requires proportionality throughout the discovery process, including with respect to initial disclosures, we see no need to repeat that limitation here. The proposed federal amendments also make it clear that the familiar incantation—"information reasonably calculated to lead to the discovery of admissible evidence"—was never meant to be a definition of what is discoverable, although most lawyers and many courts thought it was.

PRINCIPLE 17:

- **There should be early disclosure of prospective trial witnesses.**

Identification of prospective witnesses should come early enough to be useful within the designated time limits. We do not take a position on when this disclosure should be made, but it should certainly come before discovery is closed and it should be subject to the continuing duty to update. The identification of persons who have information that may be used at trial that the current federal rule requires as an initial disclosure (Rule 26(a)(1)(A)(i)) probably comes too early in many cases and often leads to responses that are useless.

PRINCIPLE 18:

- **After complete initial production is made, only limited additional discovery subject to proportionality should be had. Once that limited discovery is completed, no more should be allowed absent a court order, which should be granted only upon a showing of good cause and proportionality.**

This was a radical proposal when we first made it, and it was our most significant proposal. It challenged the current practice of broad, open-ended, and ever-expanding discovery that was a hallmark of the federal rules as adopted in 1938 and that has become an integral part of our civil justice system. This Principle changed the default. The default had been that each party may take virtually unlimited discovery unless a court said otherwise. We would reverse the default.

Our discovery system may not be completely broken, but most participants at the Duke Conference believed, as do we, that it was in need of serious repair. Fewer than half of the

respondents in our Survey thought that our discovery system worked well, and 71 percent thought that discovery was used as a tool to force settlement.

The history of discovery reform efforts further demonstrates the need for radical change. Serious reform efforts began under the mandate of the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, commonly referred to as the Pound Conference. Acting under the conference's mandate, the American Bar Association's Section of Litigation created a Special Committee for the Study of Discovery Abuse, which published a report in 1977 that recommends numerous specific changes in the rules to correct the abuse identified by the Pound Conference. The recommendations, which included narrowing the subject-matter-of-the-action scope, resulted in substantial controversy and extensive consideration by the Advisory Committee on Civil Rules and numerous professional groups. In a long process lasting more than a quarter of a century, many of the recommendations were eventually adopted in one form or another.

There is substantial opinion that all of those efforts have accomplished little or nothing. Our Survey included a request for expressions of agreement or disagreement with a statement that the cumulative effect of the 1976-2007 changes in the discovery rules significantly reduced discovery abuse. Only about one third of the respondents agreed; forty-four percent disagreed and an additional 12 percent strongly disagreed.

Efforts to limit discovery must begin with a definition of the type of discovery that is permissible, but it is difficult, if not impossible, to write that definition in a way that will satisfy everyone or that will work in all cases. Our definition is set forth in Principle 16. Relevance surely is required and some rules, such as the International Bar Association Rules of Evidence, also require materiality. Whatever the definition, broad, unlimited discovery is now the default, notwithstanding that various bar and other groups have complained for years about the burden, expense, and abuse of discovery. It should not be.

This Principle changes the default while still permitting a search, within reason, for the proverbial "smoking gun." Today, the default is that there will be discovery unless it is blocked. This Principle, together with our definition of what is discoverable in Principle 16, permits, under more active judicial supervision, limited discovery proportionately tied to the claims actually at issue, after which there will be no more. The limited discovery contemplated by this Principle would be in addition to the robust initial disclosures required by Principle 15. This Principle also applies to electronic discovery.

For this Principle to work, the contours of the limited discovery we contemplate must be clearly defined. For certain types of cases, it will be possible to develop standards for discovery defaults. For example, in employment cases, the standard practice is that personnel files are produced and the immediate decision maker is deposed. In patent cases, disclosure of the inventor's notebooks and the prosecution history documents might be the norm. The plaintiff and defense bars for certain types of specialized cases should be able to develop appropriate discovery protocols for those cases. Some such work has already begun and we applaud those efforts.[29]

[29] *See, e.g., id.*

We emphasize that the primary goal is to change the default from unlimited discovery to limited discovery. No matter how the limitations are defined, there should be limitations. Additional discovery beyond the default limits should be allowed only on a showing of good cause and proportionality.

We hasten to note again that this Principle should be read together with the Principles requiring fact-based pleading and initial disclosures. We expect that the limited discovery contemplated by this Principle and the initial disclosure Principle would be swift, useful, and virtually automatic in most cases. There should of course be a continuing duty to supplement initial disclosures and discovery responses.

This concept of limited discovery has been implemented in Utah, with success. The preliminary results suggest that the rules have had a positive impact, in terms of discovery disputes and time. In addition, in Utah there has not been a lot of discovery after the initial disclosures, even in larger cases.

PRINCIPLE 19:

- **Courts should consider staying initial production and discovery in appropriate cases until after a motion to dismiss is decided.**

Discovery should be a mechanism by which a party discovers evidence to support or defeat a valid claim or defense. It should not be used for the purpose of enabling a party to see whether or not a valid claim exists. If, as we recommend, the complaint must comply with fact-based pleading standards, courts should have the ability to test the legal sufficiency of that complaint in appropriate cases before the parties are required to embark on expensive disclosures and discovery that may never be used. [30]

We do not propose an absolute rule, but one that calls upon the court to decide whether initial production and discovery should be stayed in an appropriate case. There may be good reasons for staying discovery while a motion to dismiss is pending, so long as the motion is not frivolous. On the other hand, the Colorado experience highlights the competing tensions relating to motions and stays. In Colorado's CAPP, motions to dismiss did not stay the obligation to file an answer or any of the pleading or disclosure requirements.[31] However, in implementing the lessons learned of CAPP statewide, the Colorado Rules Committee has proposed amendments that would stay the case where such motions are based on lack of jurisdiction and insufficiency of process, but not for a motion to dismiss based on a failure to state a claim upon which relief may be granted or the failure to join a party. It is important for courts to consider the relevant competing considerations so that, on the one hand, costly discovery that may ultimately prove unnecessary because the case will be dismissed does not need to occur while, on the other hand, stays do not result in the very costs and delays they are meant to avoid.

[30] We have eliminated as unnecessary the former Principle relating to damages discovery.

[31] MOMENTUM FOR CHANGE, *supra* note 1, at 26-27, 30.

PRINCIPLE 20:

- **Shortly after the commencement of litigation, the parties should discuss the preservation of electronically stored information ("ESI") and attempt to reach agreement about preservation. The parties should discuss the manner in which ESI is stored and preserved. If the parties cannot agree, the court should issue an order governing ESI as soon as possible. That order should specify which ESI should be preserved and should address the scope and timing of allowable proportional ESI discovery and the allocation of its cost among the parties.**

Electronically stored information ("ESI") is fundamentally different from other types of discovery in the following respects: it is ubiquitous, often hard to access, and typically and routinely erased. Once litigation is reasonably anticipated, the parties have an obligation to preserve all material that may prove relevant during a civil action, including ESI. That is very difficult, if not impossible in some cases, to accomplish in an environment in which litigants maintain enormous stores of electronic records. Electronic recordkeeping has led to the retention of information on a scale not contemplated by the framers of the procedural rules, a circumstance complicated by legitimate business practices that involve the periodic erasure of many electronic records.

Often, the cost of preservation in response to a "litigation hold" can be enormous, especially for a large business entity.

Under Federal Rule of Civil Procedure 16(b) (which was amended in 2006 to include planning for the discovery of ESI) the initial pre-trial conference, if held at all, does not occur until months after service of the complaint. By that time, the obligation to preserve all relevant documents has already been triggered and the cost of preserving electronic documents has already been incurred. This is a problem.

It is desirable for counsel to agree at the outset about ESI preservation and many local rules require such cooperation. Absent agreement of counsel, this Principle requires prompt judicial involvement in the identification and preservation of electronic evidence. We call on courts, shortly after a complaint is served, to inquire of the parties whether they have reached an agreement with respect to ESI preservation or, in the alternative, for the parties to make such a report to the court. The court should then make an order with respect to the preservation of ESI.[32] We are aware of cases in which, shortly after a complaint is filed, a motion is made for the preservation of ESI that otherwise would be destroyed in the ordinary course.[33] Our Principle would obviate such motions.

[32] The proposed amendments to the Federal Rules of Civil Procedure call for a Case Management Conference at the earlier of 90 days after any defendant has been served or 60 days after any defendant has appeared. However, if there is a dispute about the preservation of ESI, earlier court intervention will be required.

[33] *See, e.g., Keir v. Unumprovident Corp.*, No. 02 Civ. 8781, 2003 WL 21997747 (S.D.N.Y. Aug. 22, 2003) (counsel told court that simply preserving all backup tapes from 881 corporate servers "would cost millions of dollars" and court fashioned a very limited preservation order after requiring counsel to confer).

Before such an order is entered, there should be a safe harbor for routine, benign destruction, so long as it is not done deliberately in order to destroy evidence.

The issue here is not the scope of ESI discovery; rather, the issue is what must be preserved before the scope of permissible ESI discovery can be determined. It is the preservation of ESI at the outset of litigation that engenders expensive retention efforts, made largely to avoid collateral litigation about evidence spoliation. Litigating ESI spoliation issues that bloom after discovery is well underway can impose enormous expense on the parties and can be used tactically to derail a case, drawing the court's attention away from the merits of the underlying dispute. Current rules and the proposed amendments to some of those rules do not adequately address this issue.

This Principle is supported by and consistent with the experiences of the Seventh Circuit Electronic Discovery Pilot Program. That pilot program recognizes the importance of appropriate preservation requests and orders and provides for an early conference of the parties, at which the preservation and production of ESI is discussed.

PRINCIPLE 21:

- **The obligation to preserve ESI requires reasonable and good faith efforts to retain information that may be relevant to claims and defenses in pending or threatened litigation; however, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant ESI.**

In order for this Principle to be effective, early and good faith communication between counsel is essential. The goals of this Principle are straight-forward, but the implementation is often difficult and requires good faith and cooperation between counsel.

PRINCIPLE 22:

- **ESI discovery should be limited by proportionality.**

While the discovery of ESI is included under the broader discovery umbrella, we felt it important to underscore the need for proportionality as related to ESI.

Although ESI is becoming extraordinarily important in civil litigation, it is proving to be enormously expensive and burdensome. The strong majority (75 percent) of our Survey respondents confirmed the fact that ESI discovery has resulted in a disproportionate increase in the expense of discovery and thus an increase in total litigation expense. ESI discovery, however, is a fact of life that is here to stay.

Because of its unique characteristics and the challenges associated with keeping ESI discovery proportional, our guiding Principle is all the more important in this context.

PRINCIPLE 23:

- **In order to contain the expense of ESI discovery and to carry out the Principle of proportionality, attorneys practicing civil litigation should become familiar with the technology employed by their clients for storage of ESI and the technology necessary to deal with ESI discovery requests, employing "technology liaison assistance" where appropriate. Judges should have access to and attend technical workshops where they obtain a full understanding of the complexity of ESI.**

The 2012 Rand Report "Where the Money Goes" found that review of ESI typically consumes 73 percent of all ESI production costs and argued that technology-assisted review would be far less expensive than manual techniques.[34] Yet, 76 percent of the respondents in our Survey said that courts do not understand the difficulties that parties face in providing ESI discovery.

Courts need to understand the complexity of the technical issues associated with ESI to avoid making orders that are unworkable or result in the imposition of unreasonable burdens on the parties. Courts are not assisted when lawyers appearing before them are not familiar with the technical issues or fail to cooperate by taking overly adversarial positions.

At a minimum, courts making decisions about ESI discovery should fully understand the technical aspects of the issues they must decide, including the feasibility and expense involved in complying with orders relating to such discovery. Accordingly, we recommend workshops for judges to provide them with technical knowledge about the issues involved in ESI discovery. We also recommend that trial counsel become educated in such matters. An informed bench and bar will be better prepared to understand and make informed decisions about the relative difficulties and expense involved in ESI discovery. Decisions on relevance and privilege, which should be made by counsel, should not be delegated to third-party providers, which may needlessly add to the time and cost of ESI discovery.

We applaud efforts such as the Seventh Circuit's Electronic Discovery Pilot Program, and, in particular, its pilot principle 2.02, which calls for the appointment of an "e-discovery liaison" in the event of a dispute concerning the preservation of ESI. Other courts have appointed Special Masters to resolve complex, technical ESI disputes.

[34] NICHOLAS M. PACE & LAURA ZAKARAS, RAND INST. FOR CIVIL JUSTICE, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY xv-xvii (2012).

PRINCIPLE RELATING TO EXPERTS

PRINCIPLE 24:

- **Experts should usually be limited to one per issue per party. Experts should be required to furnish a written report setting forth all opinions, the bases therefore, a complete curriculum vitae, a list of cases in which they have testified, and all materials they have reviewed. The court must limit direct testimony to the content of the report. No depositions of experts may be taken unless approved by the court.**

Too often the "battle of experts" devolves into a numbers game. By limiting each party to one expert per issue, the case can proceed without repetitive opinions.

The need to depose an expert should be obviated by the written report. Expert depositions often do more to educate the witness for cross examination than to aid the party in preparation for trial. However, the reason for our Principle has to do with limiting expenses, not trial tactics.

Both Colorado's CAPP and Utah's statewide rule changes have implemented limits on expert discovery. CAPP provided for one expert witness per side per issue, with discovery and testimony limited to the report and no depositions. In Utah, an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. While the parties have the option of a deposition or a report, most opt for just the expert report.

While recognizing that some jurisdictions operate well with no expert depositions, there are conceivable instances in which a deposition may be warranted. Therefore, we have added the provision for an allowable deposition if the Court approves. It is our thinking that such allowable depositions should be limited to a showing of "good cause" or to a bona fide challenge to the adequacy of the written report.

The written report contemplated by this Principle should include all requirements of Federal Rule of Civil Procedure 26(a)(2)(b).

We also endorse Federal Rule 26(b)(4)(B) and (C), and recommend comparable state rules that would prohibit discovery of draft expert reports and most communications between experts and counsel.

THE ROAD TO REFORM

This is a report of progress and promise. Since we began our work in 2007, there has been much progress in civil justice reform. We intended to spark a serious discussion about reform. As we have seen, there has been more than a discussion; there has been a movement toward reform. There is much promise in that movement. Serious significant steps toward reform have been taken, but there is still much more work to be done. We hope that this report will continue to inspire substantive discussion and action among practicing lawyers, the judiciary, the academy, legislators and, most important, clients and the public. In the words of Task Force member The Honorable Mr. Justice Colin L. Campbell, formerly of the Superior Court of Justice, Toronto, Ontario:

> Discovery reform . . . will not be complete until there is a cultural change in the legal profession and its clients. The system simply cannot continue on the basis that every piece of information is relevant in every case, or that the "one size fits all" approach of Rules can accommodate the needs of the variety of cases that come before the Courts.

With financial support provided by IAALS and the ACTL Foundation, the members of the Task Force and the IAALS staff have applied their experience to a seven-year long process in which we collectively invested thousands of hours in analyzing the apparent problems in our civil justice system, studying the history of previous reform attempts and in debating and developing a set of Principles for reform. We believe that these Principles will one day form the bedrock of a reinvigorated civil justice process; a process that may spawn a renewal of public faith in America's system of justice.

Our civil justice system is critical to our way of life. In good times or bad, we must all believe that the courts are available to us to enforce rights and resolve disputes and to do so in a fair and cost-effective way. Unfortunately, the majority of the American people still cannot afford lawyers or our system of attrition. Discovery delays and expense are the biggest part of the economic equation. Scorched-earth litigation comes with too high a price. Civil jury trials in state and federal courts are quickly disappearing. If we do not change, public trust and confidence will soon follow. As a profession, we must continue to apply our experience, our differing perspectives and our commitment to justice in order to devise meaningful reforms that will reinstate a trustworthy civil justice system in America.

APPENDIX A

IAALS' Review of Pilot Projects and Statewide Rule Changes across the United States

Just as in the Final Report, the updated Principles set forth in this report were not developed in a vacuum. IAALS and the Task Force intended that the Principles from the Final Report in 2009 be tested and evaluated in pilot projects in courts around the country. To support those efforts, IAALS and the Task Force jointly developed and published a model set of Pilot Project Rules for this purpose.[1] The Pilot Project rules, published in 2009, reduced the Principles to operational rules that could be utilized by jurisdictions around the country.

Jurisdictions took up this call. Today, there are numerous pilot projects in various stages of consideration, implementation, and evaluation around the country. The overarching purpose of these experiments is to develop rules that work to achieve the goals of a just, speedy, and inexpensive process for civil litigation. While some jurisdictions have recently implemented reforms (e.g., Minnesota[2] and Iowa[3]), others have run their course, evaluation is forthcoming or complete, and even broader implementation is underway (e.g., New Hampshire,[4] Massachusetts,[5] Colorado,[6] Utah,[7] New York,[8] and the Seventh Circuit[9]). There are common themes among these

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[1] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., A ROADMAP FOR REFORM, PILOT PROJECT RULES (2009), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Pilot_Project_Rules2009.pdf.

[2] CIVIL JUSTICE TASK FORCE, RECOMMENDATIONS OF THE MINNESOTA SUPREME COURT CIVIL JUSTICE REFORM TASK FORCE: FINAL REPORT (2011), *available at* http://archive.leg.state.mn.us/docs/2012/other/120214.pdf.

[3] IOWA CIVIL JUSTICE REFORM TASK FORCE, REFORMING THE IOWA CIVIL JUSTICE SYSTEM (2012), *available at* http://www.iowacourtsonline.org/wfdata/files/Committees/CivilJusticeReform/FINAL03_22_12.pdf.

[4] *See* Supreme Court of New Hampshire, Order (Apr. 2010), *available at* http://iaals.du.edu/images/wygwam/documents/publications/NH_PAD_Final_Report.pdf.

[5] *See* BUS. LITIG. SESSION, MASS. SUPERIOR COURT, BLS PILOT PROJECT, *available at* http://www.mass.gov/courts/docs/press/superior-bls-pilot-project.pdf (last visited Mar. 23, 2015).

[6] *See Colorado Civil Rules Pilot Project*, JUD. BRANCH ST. OF COLO., *available* http://www.courts.state.co.us/Courts/Civil_Rules.cfm (last visited Mar 23, 2015).

[7] *See Utah Rules of Civil Procedure*, UTAH ST. CTS. http://www.utcourts.gov/resources/rules/urcp/ (last visited Mar. 23, 2015) (showing numerous amendments to rules governing discovery). Utah is included here because of the broad, sweeping changes that have been implemented. These changes are not technically a "pilot program" because they have been implemented permanently rather than on an experimental basis.

[8] *See* JUDICIAL IMPROVEMENTS COMM. OF THE S. DIST. OF N.Y., PILOT PROJECT REGARDING CASE MANAGEMENT TECHNIQUES FOR COMPLEX CIVIL CASES (2011), *available at* http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot.pdf.

efforts, but each project is unique in its proposed solutions and design. For example, Utah has implemented broad-sweeping, permanent statewide rule changes that mandate proportionality through tiers of discovery based on the amount in controversy.[10] The Colorado Supreme Court, through its Civil Access Pilot Project ("CAPP"), implemented rule changes in business cases in select judicial districts for a period of two and a half years, and the court is now considering statewide rule changes applicable to all civil cases.[11] The efforts in both states are based on the ACTL's proposed Principles, with the goal of narrowing and framing the issues to achieve proportional and targeted discovery.

Various entities—including the National Center for State Courts, the Federal Judicial Center, and IAALS—have taken on the responsibility of evaluating the projects, and there are multiple evaluations that have informed this report. We summarize the pilot projects and evaluations below, as they have been foundational to this report. Moreover, they stand on their own as evidence of the march toward comprehensive reform across the United States.

A SUMMARY OF STATE PROJECTS

Colorado Civil Access Pilot Project

In August 2009, a group of local practitioners and members of the Colorado judiciary began meeting in order to explore whether Colorado courts might be a viable jurisdiction for a pilot project based on the Principles from the Final Report.[12] On June 22, 2011, the Colorado Supreme Court voted to implement a pilot project that would apply generally to "business actions" as specifically defined based on the claims set forth in the initial complaint. The pilot project went into effect on January 1, 2012, in four judicial districts, for a two-year period.[13] At the request of the Court, IAALS evaluated the effects of the pilot project. In June 2013, then-Chief Justice Michael L. Bender amended Chief Justice Directive 11-02 and extended the pilot project for one year, to run through December 31, 2014, so as to provide "more data and a detailed evaluation" and "give the court time to determine whether the rules as piloted achieved the stated goals." The

[9] *See Statement of Purpose and Preparation of Principles*, DISCOVERY PILOT: SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM, www.discoverypilot.com (last visited Mar. 23, 2015).

[10] *See* UTAH R. CIV. P. 26.

[11] *See* Chief Justice Directive 11-02: Adopting Pilot Rules for Certain District Court Civil Cases (Colo. amended July 2014) [hereinafter Chief Justice Directive 11-02], *available at* http://www.courts.state.co.us/Courts/Supreme_Court/Directives/11-02amended%207-11-14.pdf.

[12] A History and Overview of The Colorado Civil Access Pilot Project Applicable to Business Actions in District Court, *available at* https://www.courts.state.co.us/userfiles/file/Court_Probation/Educational_Resources/CAPP%20Overview%20R8%2014%20%28FINAL%29.pdf (last visited Mar. 23, 2015).

[13] *See* Chief Justice Directive 11-02, *supra* note 11.

Directive was extended a second time by Chief Justice Nancy E. Rice for an additional six months to give the Court further time to consider the evaluation and proposed rule changes.[14]

The CAPP rules provide for proportionality as the guiding principle.[15] The rules provided that parties should plead all material facts that are known in the complaint and responsive pleadings so as to help define and narrow the disputed issues. Initial disclosures were more robust, staggered, filed with the court, and included all documents related to the claims and defenses, whether they are supportive or harmful. The rules also provided that motions to dismiss do not stay the obligation to file an answer, with continuances and extensions strongly disfavored. In CAPP, the rules provided that a single judge be assigned to the case for the duration, and that the judge would hold an initial case management conference with lead counsel to shape the pre-trial process, including determining the amount of discovery, guided by proportionality. One expert per side per issue was permitted, with expert discovery limited to the report.

In October 2014, IAALS released its final evaluation of the project, *Momentum for Change: The Impact of the Colorado Civil Access Pilot Project*.[16] The analysis reveals that the CAPP process as a whole has succeeded in achieving many of its intended effects, including a reduced time to resolution, increased court interaction, proportional discovery and costs, and reduced motions practice. Much of the positive feedback relates to CAPP's early, active, and ongoing judicial management of cases. CAPP cases were more likely to see a single judge, and to see that judge earlier and twice as often. Judges point to the initial case management conference as the most useful tool in shaping the pre-trial process to ensure that it was proportional. The evaluation also highlighted various issues. The rolling and staggered deadlines at the beginning of the case raised various logistical issues and increased costs in some cases (e.g., where plaintiffs were required to file initial disclosures prior to the defendants' appearance in cases that ended in default). One lesson learned is that enforcement of expanded pleading and initial disclosure requirements is critical to ensure these have their intended effect. Finally, while CAPP cases saw a positive reduction in the time to resolution, there was feedback that the "extraordinary circumstances" standard for continuances was challenging in application.[17]

Iowa Civil Justice Reform Task Force

In December 2009, the Iowa Supreme Court established the Iowa Civil Justice Reform Task Force to develop a blueprint for the reform of the state's civil justice system. The Iowa Task Force was to develop proposals to make the system faster, less complex, more affordable, and better equipped to handle complex cases, such as complex business cases and medical

[14] *Id.*

[15] *Id.*

[16] *See* CORINA D. GERETY & LOGAN CORNETT, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., MOMENTUM FOR CHANGE: THE IMPACT OF THE COLORADO CIVIL ACCESS PILOT PROJECT (2014), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Momentum_ for_Change_CAPP_Final_Report.pdf.

[17] *Id.* at 1-2.

malpractice matters. To inform its work, the Task Force administered a survey of the Iowa bench and bar, focusing on specific problems and potential solutions. Informed by the results of that survey, the Task Force issued a final report, *Reforming the Iowa Civil Justice System*, in March 2012.[18] Among the recommendations was the establishment of a business court pilot project, one judge/one case and date certain for trial, adoption of the Federal Rules' initial disclosure regime, and a two-tiered differentiated case management pilot project.

Iowa has been in the process of implementing those recommendations. As a first step, in December 2012, the Iowa Supreme Court established a three-year pilot project for an Iowa Business Specialty Court for complex cases, beginning May 1, 2013.[19] Cases are eligible to be heard in the Business Court Pilot Project if compensatory damages totaling $200,000 or more are alleged, or the claims seek primarily injunctive or declaratory relief. In addition, eligible cases must satisfy one or more of the criteria listed in the Memorandum of Operation issued by the Supreme Court. Additional rule amendments became effective January 1, 2015.[20] As part of those amendments, the Iowa Supreme Court adopted an expedited civil action rule for actions involving $75,000 or less in money damages. The new expedited civil action rule includes limits on discovery and summary judgment motions, an expedited trial, and limitations on the length of trial. The court also adopted a package of discovery amendments that include initial disclosures, limitations on the frequency and extent of discovery, a discovery plan, and an expert report requirement.

Massachusetts Business Litigation Session Pilot Project

The Massachusetts Business Litigation Session (BLS) Pilot Project was developed as a joint effort of the BLS judges and the BLS Advisory Committee, to address the increasing burden and cost of civil pre-trial discovery, particularly electronic discovery.[21] The pilot project was implemented on a voluntary basis, effective January 4, 2010, for all new cases in Suffolk Superior Court's BLS, and all cases that have not previously had an initial Rule 16 case management conference. The pilot project ran for an initial one-year period and was extended by Superior Court Chief Justice Barbara Rouse for a second calendar year, ending in December 2011. While the BLS pilot project has not been officially made permanent, it continues to be implemented on a voluntary basis.

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[18] IOWA CIVIL JUSTICE REFORM TASK FORCE, REFORMING THE IOWA CIVIL JUSTICE SYSTEM (2012), *available at* http://www.iowacourtsonline.org/wfdata/files/Committees/CivilJusticeReform/FINAL03_22_12.pdf.

[19] Memorandum of Operation In the Matter of Establishment of the Iowa Business Specialty Court Pilot Project (Dec. 2012), *available at* http://www.iowacourts.gov/wfdata/files/Committees/BusinessCourts/MemorandumOfOperation.pdf.

[20] Order regarding Revisions to Expedited Civil Action Rule and Recent Amendments to Iowa Discovery Rules (Oct. 2014), *available at* http://www.iowacourts.gov/wfdata/files/ECA/103014%20Ord%20Re%20Civl%20Act%20Rule%20and%20Disc%20Rules.pdf.

[21] *See* BUS. LITIG. SESSION, MASS. SUPERIOR COURT, BLS PILOT PROJECT, http://www.mass.gov/courts/docs/press/superior-bls-pilot-project.pdf (last visited Mar. 23, 2015).

The project was heavily influenced by the *Final Report*, citing directly to the Principles. Under the pilot project, the "concept of limited discovery proportionally tied to the magnitude of the claims actually at issue" was the "guiding principle."[22] Following initial disclosures, the pilot project rules provided that the judge manage the amount of discovery, including electronic discovery, to settle on the right amount of discovery proportionate to the type of case at hand. Staging of discovery was encouraged, and the parties were expected to confer early and often regarding discovery.

The Court has published a *Final Report on the 2012 Attorney Survey*, based on a 10-question "Pilot Project Evaluation" survey administered in the fall of 2012.[23] Despite the program's voluntary nature, the survey found that few respondents opted out when they had eligible cases. In addition, the pilot program fared well across nearly all key indicators in comparison to both BLS and non-BLS cases. In comparison with other BLS cases, most respondents concluded the pilot was "much better" or "somewhat better" with respect to the timeliness and cost-effectiveness of discovery, the timeliness of case events, access to a judge to resolve discovery issues, and the cost-effectiveness of case resolution. In comparison with non-BLS session cases, 80% of respondents had a "much better" or "somewhat better" overall experience in the pilot project.

Minnesota Civil Justice Reform Task Force

In November 2010, Minnesota Supreme Court Chief Justice Lorie S. Gildea signed an order establishing the Civil Justice Reform Task Force, for the purpose of reviewing civil justice reform initiatives undertaken in other jurisdictions and recommending changes to facilitate efficient and cost-effective processing of civil cases. The Minnesota Task Force submitted its final report to the Minnesota Supreme Court in December 2011, with a number of rule and case management recommendations.[24] The Minnesota Task Force recommendations included the incorporation of a proportionality consideration for discovery, the adoption of the federal regime of automatic disclosures, the adoption of an expedited procedure for non-dispositive motions, and an expedited litigation track pilot program and a complex case program. The Minnesota Task Force also recommended a trial date certain and assignment of civil cases to a single judge. Following the report, the Minnesota Supreme Court directed the Minnesota Task Force to prepare particular proposed rule changes, case management orders, and forms. In May 2012, the Minnesota Task Force submitted a Supplemental Report including the requested items.[25]

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[22] *Id.*

[23] SUFFOLK SUPERIOR COURT BUSINESS LITIGATION SESSION PILOT PROJECT, FINAL REPORT ON THE 2012 ATTORNEY SURVEY (Dec. 2012), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Final_BLS_Survey_Report.pdf.

[24] CIVIL JUSTICE TASK FORCE, RECOMMENDATIONS OF THE MINNESOTA SUPREME COURT CIVIL JUSTICE REFORM TASK FORCE: FINAL REPORT (2011), *available at* http://archive.leg.state.mn.us/docs/2012/other/120214.pdf.

[25] CIVIL JUSTICE TASK FORCE, RECOMMENDATIONS OF THE MINNESOTA SUPREME COURT CIVIL JUSTICE REFORM TASK FORCE: SUPPLEMENTAL REPORT (2012), *available at*

The Minnesota Supreme Court received public comments in the fall of 2012, and issued final amendments to the Rules of Civil Procedure and the General Rules of Practice for the District Courts on February 12, 2013.[26] The amendments, which went into effect on July 1, 2013, adopt many of the recommendations of the Minnesota Task Force, including incorporating proportionality into the scope of discovery, automatic disclosures, a discovery plan, an expedited process for non-dispositive motions, and a new Complex Case Program. The Supreme Court also created an Expedited Civil Litigation Track Pilot, which provides for early involvement by the judge, limited discovery, curtailed continuances, and the setting of a trial date within four to six months.[27] The goal of the project, which applies to cases involving contract disputes, consumer credit, personal injury, and some other types of civil cases, is to see whether this expedited process can reduce the duration and cost of civil suits.

New Hampshire Proportional Discovery/Automatic Disclosure (PAD) Pilot Project

In August 2009, at the request of Chief Justice John T. Broderick, Jr., a committee was established to determine whether and to what degree the problems with the civil justice system identified at the national level apply to the New Hampshire state system.[28] The committee designed the Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules Project to refocus the civil justice system in New Hampshire on the principle that the purpose of a trial is to do justice for the parties involved—which means a system that is efficient, affordable, and accessible to all citizens who turn to the court system to resolve disputes.

The PAD Pilot Rules Project was launched in Strafford and Carroll County Superior Courts on October 1, 2010. In 2012, the pilot rules were extended to the Superior Courts for Hillsborough County-Northern District and Hillsborough County-Southern Judicial District. Because of the positive feedback regarding the PAD Project, by order dated January 9, 2013, New Hampshire made the pilot project rules applicable statewide. New Hampshire has since revised its Rules of Civil Procedure for all civil cases to fully incorporate the pilot project rules, and the new rules went into effect on October 1, 2013.

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http://www.mncourts.gov/Documents/0/Public/Court_Information_Office/Civil_Justice_Ref_Task_Force_Supp_Rpt_May_2012.pdf.

[26] Minnesota Supreme Court, Order Promulgating Corrective Amendments to the Rules of Civil Procedure and General Rules of Practice Relating to The Civil Justice Reform Task Force (Feb. 2013), *available at* http://www.mncourts.gov/Documents/0/Public/Clerks_Office/Rule%20Amendments/2013-02-12%20Order%20Corrective%20Amendments%20Civ%20Proc.pdf.

[27] Minnesota Supreme Court, Order Relating to the Civil Justice Reform Task Force, Authorizing Expedited Civil Litigation Track Pilot Project, and Adopting Amendments to the Rules of Civil Procedure and the General Rules of Practice (May 2013), *available at* http://iaals.du.edu/images/wygwam/documents/publications/2013-05-07_Order_Authorizing_Expedited_Civil_Litigation_Track.pdf.

[28] *See* Supreme Court of New Hampshire, Order (Apr. 2010) *available at* http://iaals.du.edu/images/wygwam/documents/publications/NH_PAD_Final_Report.pdf.

The pilot project rules implemented temporary changes to the Superior Court pleading and discovery rules. The pleading standard was changed to fact pleading from a notice pleading system where the plaintiffs filed a writ with notice of suit, the defendants entered an appearance acknowledging suit, but neither party was required to include the factual basis for the suit until discovery. The pilot rules required the parties to meet and confer early in the case to establish deadlines, and where there was agreement, a case structuring conference was not required. The rules also provided for telephonic case structuring conferences rather than in-court conferences. In terms of discovery, the pilot project rules required early initial disclosures, after which only limited additional discovery was permitted.

The National Center for State Courts has published a report summarizing its evaluation of the pilot project, titled *New Hampshire: Impact of the Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules*.[29] The evaluation compared case processing outcomes for cases filed in the pilot courts under the PAD Pilot Rules with those outcomes for non-pilot project cases, and also included interviews with key stakeholders and attorneys. The results from the pilot project are mixed. There was not a statistically significant decrease in the time from filing to disposition—a significant goal of the pilot project. Anecdotal reports from attorneys with pilot project cases, however, suggest the provisions worked well and that fact pleading gets the cases moving along faster. Although the rules appeared to have reduced the frequency of structuring conferences, with a majority of those held conducted telephonically, anecdotal reports suggested issues with the early timelines and logistics of scheduling the teleconferences. NCSC reported that judges were moving back to in-court hearings. One interesting outcome is that the change to fact pleading appears to have decreased the number of default judgments.

New York Task Force on Commercial Litigation in the 21st Century

New York Chief Judge Jonathan Lippman formed the Task Force on Commercial Litigation in the 21st Century to explore and recommend reforms to enhance the already world-class status of the Commercial Division of the New York Supreme Court. Recognizing the increased pressures and demands on the Division, the Chief Judge wanted to ensure the quality of the Division going forward. The New York Task Force submitted its final report in June 2011.[30] The New York Task Force's key recommendations included: 1) endorsing the Chief Judge's legislative proposal to establish a new class of Court of Claims judges, appointed by the Governor and assigned to the Commercial Division; 2) implementing several measures to provide additional support to the Division, including additional law clerks and the creation of a panel of "Special Masters;" 3) implementing procedural reforms to facilitate prompt and cost-effective resolution of cases; 4) implementing initiatives to facilitate early case resolution and arbitration; and 5) appointing a statewide Advisory Council to review the recommendations and guide implementation.

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[29] PAULA HANNAFORD-AGOR, ET AL., NAT'L CTR. FOR STATE COURTS, CIVIL JUSTICE INITIATIVE: NEW HAMPSHIRE: IMPACT OF THE PROPORTIONAL DISCOVERY/AUTOMATIC DISCLOSURE (PAD) PILOT RULES (2013), *available at* http://ncsc.contentdm.oclc.org/cdm/ref/collection/civil/id/115.

[30] THE CHIEF JUDGE'S TASK FORCE ON COMMERCIAL LITIGATION IN THE 21ST CENTURY, REPORT AND RECOMMENDATIONS TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (June 2012), *available at* http://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf.

In 2013, Chief Judge Lippman established a permanent Commercial Division Advisory Council, as recommended by the New York Task Force.[31] The Council has been working on implementing the recommendations, and multiple rule amendments have been implemented. Some of the changes in 2014 included: 1) amendments that provide for more robust expert disclosure, 2) an accelerated adjudication procedure, 3) a pilot mandatory mediation program, 4) a limit to the scope and number of interrogatories, 5) a preference for the use of "categorical designations" in privilege logs, 6) guidelines for discovery of electronically stored information from nonparties, 7) replacing the calendar call system with specific time slots, and 8) a special masters pilot program for referral of complex discovery issues. The Advisory Council is continuing to work on implementation of the recommendations set forth in the New York Task Force report, and additional proposals are expected.

Ohio Supreme Court Task Force on Commercial Dockets

In April 2007, the late Chief Justice Thomas J. Moyer announced the formation of the Supreme Court Task Force on Commercial Dockets to "develop, oversee, and evaluate a pilot project implementing commercial civil litigation dockets in select courts of common pleas." The Ohio Task Force began working in June 2007 and submitted an interim report in 2008 summarizing the Ohio Task Force's work, along with a proposed set of rules for the establishment of a commercial docket pilot project. Commercial dockets were established in four counties in 2009. The Ohio Task Force submitted a second interim report in March 2011, noting the great success of the pilot project at that time, but also highlighting its challenges. In December 2011, the Ohio Task Force submitted its final Report and Recommendations, wherein it recommended creating a permanent program for courts operating specialized dockets to resolve business-to-business disputes.[32] The Ohio Task Force also recommended operating the docket with at least two judges, and creating a Commission on Commercial Dockets to oversee the program. The report found that the benefits of the program include accelerating decisions, creating expertise among judges, and achieving consistency in court decisions around the state.

In February 2013, the Supreme Court of Ohio adopted permanent rules that govern the establishment and operation of commercial dockets in Ohio. The rules went into effect July 1, 2013.

Texas Expedited Civil Actions

In May 2011, the Texas legislature passed H.B. 274 relating to the reform of certain remedies and procedures in civil actions and family law matters.[33] Among the bill's provisions, Article 2

[31] New York State Unified Court System, Press Release, Chief Judge Names Members of Commercial Division Advisory Council (Mar. 2013), *available at* http://www.courts.state.ny.us/press/PDFs/PR13_05.pdf.

[32] THE SUPREME COURT OF OHIO, REPORT AND RECOMMENDATIONS OF THE SUPREME COURT OF OHIO TASK FORCE ON COMMERCIAL DOCKETS (Dec. 2011), *available at* http://www.supremecourt.ohio.gov/Boards/commDockets/Report.pdf.

[33] Texas H.B. No. 274 (May 24, 2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/billtext/html/HB00274F.htm.

directed the Texas Supreme Court to adopt rules to promote "the prompt, efficient, and cost-effective resolution of civil actions." The rules were to apply to civil actions in which the amount in controversy does not exceed $100,000, and H.B. 274 required the rules to "address the need for lowering discovery costs in these actions." The Texas Supreme Court appointed a Task Force to advise the court in developing the program and the Task Force issued its final report on January 25, 2012, and presented rules to the Supreme Court Advisory Committee (SCAC) on January 27, 2012.[34]

The Task Force was unable to come to an agreement about whether the process should be mandatory or merely voluntary. As a result, the Task Force submitted two separate sets of rules. In November 2012, the Texas Supreme Court issues the long-awaited rules for expedited handling of cases. The rules are mandatory and put limits on pre-trial discovery and trial in cases where the party seeks "monetary relief of $100,000 or less, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees." The final rules went into effect on March 1, 2013, with some minor revisions, including additional commentary to the Rule that provides guidance on when "there is good cause to remove the case from the process or extend the time limit for trial."[35] The National Center for State Courts is evaluating this program.

Utah Statewide Amendments to the Rules of Civil Procedure

The Utah Supreme Court's Advisory Committee on the Rules of Civil Procedure developed, proposed, and ushered through significant statewide rule changes to address the expansion and increased cost of discovery, and its impact on the state civil justice system.[36] Prior to presenting their proposed rules changes for official notice and comment, the Committee spoke to bar groups, judges, and other interested organizations to inform them about, and receive comments on, the proposed changes. After working through comments and specific sections of the proposed changes, the Committee officially published the proposed rules for a notice and comment period.[37] On August 29, 2011, the Utah Supreme Court approved the proposed rule changes, with the exception of the proposed heightened pleading standard which the court chose not to adopt. The rules went into effect statewide on November 1, 2011.

The new rules focus on proportional discovery, flipping the presumption from one where discovery is allowable unless the rules or a judge say otherwise to a scheme where discovery is

[34] THE TASK FORCE FOR RULES IN EXPEDITED ACTIONS, FINAL REPORT TO THE SUPREME COURT OF TEXAS (Jan. 25, 2012), *available at* http://iaals.du.edu/images/wygwam/documents/publications/SCAC_Expedited_Actions_Final_Task_Force_Report.pdf.

[35] *See generally* Tex. R. Civ. P. 47, 169, & 190, *available at* http://www.txcourts.gov/media/514725/TRCP_2014_01_01.pdf.

[36] *See Utah Rules of Civil Procedure*, UTAH ST. CTS. http://www.utcourts.gov/resources/rules/urcp/ (last visited Mar. 23, 2015) (showing numerous amendments to rules governing discovery).

[37] Utah State Court Rules – Published for Comment, http://www.utcourts.gov/resources/rules/comments/20110621/ (June 21, 2011).

prohibited unless the rules or a judge say otherwise. The changes include comprehensive initial disclosures, a requirement that discovery be proportional, and tiered discovery based on amount in controversy. Discovery is tiered as follows: 1) actions claiming $50,000 or less are limited to three deposition hours, zero interrogatories, five requests for production, five requests for admission, and 120 days to complete discovery; 2) actions claiming more than $50,000 and less than $300,000 or non-monetary relief are limited to fifteen deposition hours, ten interrogatories, ten requests for production, ten requests for admission, and 180 days to complete discovery; and 3) actions claiming more than $300,000 are limited to thirty deposition hours, twenty interrogatories, twenty requests for production, twenty requests for admission, and 210 days to complete discovery.[38] These limits apply unless the parties agree or a court orders otherwise. Expert discovery is limited to either a four-hour deposition or a report that limits the expert's testimony at trial. The Utah Rules have also adopted an expedited process for resolving discovery disputes.

The National Center for State Courts is studying the statewide rule changes, with a report expected in 2015. To address the additional case management needs of Tier 3 cases, Utah is implementing a Tier 3 Case Management Pilot Program, which goes into effect April 1, 2015. The Pilot Program includes various recommended management techniques, including holding periodic status conferences, encouraging professionalism, exploring settlement early and periodically through the process, providing for no-motion status conferences to resolve discovery disputes, and setting a firm trial date.

A SUMMARY OF FEDERAL PROJECTS

Initial Discovery Protocols for Employment Cases Alleging Adverse Action

In the fall of 2010, Judge Lee Rosenthal convened a nationwide committee of plaintiff and defense attorneys to explore the idea of case-type-specific "pattern discovery" for federal employment law cases.[39] Chaired by Judge John Koeltl and facilitated by IAALS, the committee presented its final product to the Civil Rules Advisory Committee in November 2011. The Initial Discovery Protocols for Employment Cases Alleging Adverse Action ("Protocols") is a set of procedures intended to "encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery."[40] The Protocols create a new category of information exchange, replacing initial disclosures with initial discovery specific to employment cases alleging adverse action. While the parties' subsequent right to discovery under the Federal

[38] *See generally* UTAH R. CIV. P. 26.

[39] FED. JUDICIAL CTR., PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION (2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/DiscEmpl.pdf/$file/DiscEmpl.pdf.

[40] *Id.* at 1.

Rules is not affected, the amount and type of information initially exchanged ought to focus the disputed issues, streamline the discovery process, and minimize opportunities for gamesmanship.

The Protocols are accompanied by a standing order for their implementation by individual judges in the pilot project, as well as a model protective order that the attorneys and the judge can use as a basis for discussion. Individual judges throughout the U.S. District Courts are utilizing the Protocols and the FJC is in the process of evaluating the effects.

District of Kansas

In early March 2012, the U.S. District Court for the District of Kansas undertook an effort focused on ensuring that civil litigation in the District is handled in a "just, speedy, and inexpensive" manner, in accordance with Rule 1 of the Federal Rules of Civil Procedure.[41] Spearheaded by the court's Bench-Bar Committee, the Rule 1 Task Force broke down into six working groups with corresponding recommendations: 1) overall civil case management, 2) discovery involving ESI, 3) traditional non-ESI discovery, 4) dispositive-motion practice, 5) trial scheduling and procedures, and 6) professionalism and sanctions.

Nearly all of the Rule 1 Task Force's recommendations were approved by the Bench-Bar Committee, and then by the court. As a result of the Rule 1 Task Force's recommendations, the court revised its four principal civil case management forms: 1) the Initial Order Regarding Planning and Scheduling, 2) the Rule 26(f) Report of Parties' Planning Conference, 3) the Scheduling Order, and 4) the Pre-trial Order. The court also revised its Guidelines for Cases Involving Electronically Stored Information and its Guidelines for Agreed Protective Orders, along with a corresponding pre-approved form order, and developed new guidelines for summary judgment. The court has also adopted corresponding amendments to its local rules.

Southern District of New York Pilot Project Regarding Case Management Techniques for Complex Civil Cases

In early 2011, the Judicial Improvements Committee ("JIC") of the U.S. District Court for the Southern District of New York formed an attorneys' Advisory Group, drawn from many sectors of the bar, to work with the JIC in developing a pilot project focused on the judicial pre-trial case management of complex cases.[42] The approved Pilot Project Regarding Case Management Techniques for Complex Civil Cases took effect on November 1, 2011, and was initially scheduled for an 18-month trial period. The pilot project was extended on November 28, 2012, to run for an additional eighteen months, expiring October 31, 2014. On November 14, 2014, the

[41] U.S. DISTRICT COURT FOR THE DISTRICT OF KANSAS, RULE 1 TASK FORCE DOCUMENTS (2013), *available at* http://www.ksd.uscourts.gov/rule-1-task-force-documents/.

[42] U.S. District Court for the S.D.N.Y., Standing Order M10-468, In re: Pilot Project Regarding Case Management Techniques for Complex Civil Cases in the Southern District of New York (Nov. 1, 2011), *available at* http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot_2011-10-31.pdf.

Court entered an order recognizing the completion of the project.[43] The order recognized that judges may continue to treat any case as complex if they so choose and to abide by any, or all, of the provisions of the pilot project. In addition, practitioners can agree to voluntarily implement any, or all, of the provisions of the project they select. The bench and bar is urged to consider the provisions as best practices. The Federal Judicial Center is expected to publish an evaluation of the pilot project.

The pilot project provided for an early and comprehensive initial pre-trial conference, at which parties state their positions on a number of issues and recommend limitations on fact and expert discovery. For discovery disputes not involving issues of privilege or work product, the pilot project provided that the discovery dispute be submitted to the Court by letter rather than motions. Pre-motion conferences are provided for all other motions except motions for reconsideration, motions for a new trial, and motions *in limine*. The rules also included provisions intended to streamline privilege logs.

Seventh Circuit Electronic Discovery Pilot Program

The Seventh Circuit Electronic Discovery Pilot Program originated in the U.S. District Court for the Northern District of Illinois as a response to widespread discussion about the rising burden and cost of electronic discovery.[44] Under the leadership of Chief Judge James Holderman and Magistrate Judge Nan Nolan, a diverse E-Discovery Committee developed Principles Relating to the Discovery of Electronically Stored Information, intended to incentivize early information exchange and meaningful cooperation on commonly encountered issues relating to evidence preservation and discovery.[45]

The Seventh Circuit Principles are implemented through standing orders issued by individual judges voluntarily participating in the program. The Seventh Circuit Principles highlight the importance of cooperation and proportionality. One of the most popular aspects of the pilot project has been the e-discovery liaisons. In the event of a dispute concerning preservation or production of ESI, each of the parties designates an e-discovery liaison for purposes of meeting, conferring, and attending court hearings on the issues. The Seventh Circuit Principles also address meet and confer discussions; preservation scope, requests, and orders; and the identification and production format of electronically stored information.[46]

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[43] U.S. District Court for the S.D.N.Y., Standing Order M10-468, In re: Pilot Project Regarding Case Management Techniques for Complex Civil Cases in the Southern District of New York (Nov. 14, 2014), *available at* http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot.pdf.

[44] *See generally* www.discoverypilot.com.

[45] *See* 7TH CIRCUIT ELECTRONIC DISCOVERY COMMITTEE, PRINCIPLES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION (rev. 08/01/2010), *available at* http://www.discoverypilot.com/sites/default/files/Principles8_10.pdf.

[46] *Id.*

The Pilot Program has proceeded in phases. Phase One included an initial testing period from October 2009 through March 2010. During that phase, five district court judges and eight magistrate judges in Illinois implemented the Principles in 93 civil cases pending on their individual dockets. Although the time frame was too short to draw any definitive conclusions from the Phase One Survey, the response was generally positive. Phase Two included a longer testing period running from May 2010 to May 2012. During Phase Two, the Committee's membership tripled, including e-discovery experts from around the country. Several additional Subcommittees were also created during Phase Two, including the Criminal Discovery, National Outreach, Technology, and Web Site Subcommittees, reflecting the broad scope of the Committee's work. The Committee's work continues to expand beyond the Seventh Circuit in membership as well as outreach and education. The Seventh Circuit Principles were revised in response to the Phase One survey results, and revised Seventh Circuit Principles were promulgated August 1, 2010. During the Phase Two period, the number of participating judges grew to 40 and the number of cases to 296 in which the Pilot Program Principles were tested. In addition to a greater number of participating judges, Phase Two also saw expansion geographically beyond Illinois to include judges in Indiana and Wisconsin. The Pilot Program is now in Phase Three.

THEMES ACROSS THE PROJECTS AND EVALUATIONS

The pilot projects have been shaped by the particular circumstances and needs of the jurisdictions in which they have been implemented. Nevertheless, there are several themes that can be drawn across the projects and evaluations, including a shift away from transsubstantive rules towards differentiated rules for different types of cases, a focus on proportionality, and a commitment to efficient judicial case management.

The Task Force urged in its Final Report that "rulemakers should have the flexibility to create different sets of rules for certain types of cases so that they can be resolved more expeditiously and efficiently."[47] Subsequent surveys, conducted by IAALS and others, confirmed that there is a strong sense that our civil justice system works well for certain types of cases but not others.[48] Consistent with this theme, much of the experimentation has been around defined rules based on case type or complexity. In some jurisdictions, pilot projects have focused on the most complex of cases, irrespective of subject matter, to address the issues of cost and delay in those cases that are often the worst offenders. On the other end of the spectrum, there has also been a

[47] *See* AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 4 (rev. ed. 2009), *available at* http://iaals.du.edu/images/wygwam/documents/publications/ACTL-IAALS_Final_Report_rev_8-4-10.pdf.

[48] Corina Gerety, *Trial Bench Views: IAALS Report on Findings From a National Survey on Civil Procedure*, 32 PACE L. REV. 301, 303 (2012) (noting that state and federal judges agreed in their 2010 survey, with 70% of trial judge respondents agreeing that the "civil justice system works well for certain types of cases but not others").

groundswell of support and implementation of programs addressing the simplest of cases. These programs offer short, summary, and expedited processes for simple cases so that parties can gain access to the system, and a jury or bench trial, in a way that is affordable and proportional.[49] These programs, which are often marked both by an expedited pre-trial process and an expedited trial process, have grown in popularity around the country since 2009. The hope is that such programs address the needs of, and thereby ensure access for, the smaller cases by offering a proportionally simpler and more expedited process.

Proportionality is a second key theme across reform efforts. One of the most important Principles espoused by the Final Report is the notion that "[p]roportionality should be the most important principle applied to all discovery."[50] Jurisdictions around the country have embraced this concept, and many have incorporated proportionality as a central aspect of their pilot projects and rule reforms. Several reform efforts seek to ensure proportionality by flipping the discovery paradigm from an "all facts are discoverable unless the court decides otherwise" framework to one that expressly limits the scope of discovery unless the court decides otherwise.

Finally, pilot projects have recognized that efficient case management is an essential component to any of these reforms. Like proportionality, jurisdictions around the country have recognized the need for judges to play a role in reducing the cost and delay in the cases before them. Several reforms recognize the case management conference as an opportunity for the court to engage with the parties, focus on the issues, and tailor the subsequent pre-trial process. There is also a trend toward streamlining motions practice, either by requiring a status conference prior to filing discovery motions, or providing for brief letters and a hearing rather than full motions.

While many of the lessons learned from the evaluations are specific to the respective jurisdictions, there are themes that can be drawn from the evaluations as well, and they mirror the above themes across projects. It is clear one size does not fit all, and projects have been successful when they provide opportunities for the court and parties to tailor the process to the needs of the case. Those projects that have made proportionality an overarching principle have received positive feedback that the process and costs have been proportional. Finally, to the extent the projects have featured case management, this has been called out as a highlight of the reforms by both the bench and bar.

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[49] *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. ET AL., A RETURN TO TRIALS: IMPLEMENTING EFFECTIVE SHORT, SUMMARY, AND EXPEDITED CIVIL ACTION PROGRAMS 3–4 (2012), *available at* http://iaals.du.edu/images/wygwam/documents/publications/A_Return_to_Trials_-_Implementing_Effective_Short_Summary_and_Expedited_Civil_Action_Programs.pdf (discussing common characteristics of programs in various jurisdictions designed to provide litigants with speedy and less expensive access to civil trials); PAULA L. HANNAFORD-AGOR ET AL., NAT'L CTR. FOR STATE COURTS, SHORT, SUMMARY & EXPEDITED: THE EVOLUTION OF CIVIL JURY TRIALS 6–7 (2012), *available at* http://www.ncsc.org/~/media/Fiks/PDF/Information%20and%20Resources/Civil%20cover%20sheets/ShortSummaryExpedited-online%20rev.ashx (describing expedited procedures in six jurisdictions).

[50] FINAL REPORT, *supra* note 47, at 7.

APPENDIX B

A Review of the Rule Reform Efforts at the Federal Level

The Duke Conference

Following the adoption of our Final Report in 2009, the Standing Committee convened a conference at Duke Law School in 2010 to study the state of civil litigation in federal courts. We have been told that our Final Report was the principal impetus for that conference. At that conference, more than 40 papers, 80 presentations, and 25 compilations of empirical data were submitted. More than 70 judges, lawyers, and academics made presentations to an audience of more than 200.[1]

Following that conference, the Rules Committee created the so-called "Duke Subcommittee" to consider many of the recommendations made during the Conference. In addition, a Discovery Subcommittee was created to consider changes to Rule 37(e) (relating to electronically stored information). A third committee, called the Rule 84 Subcommittee, was created to consider abrogation of the Appendix of Forms in the Federal Rules.

The Proposed Amendments

There are four proposed amendments to Rule 26:

1. All discovery must be "proportional" to the needs of the case;

2. Language relating to the discovery of sources has been removed as unnecessary;

3. The distinction between discovery of information relevant to the claims and defenses and information relevant to the subject matter of the case on a showing of good cause has been eliminated because the latter provision was rarely used and because the "proper focus of discovery is on the claims and defenses in the litigation;"[2] and

4. The sentence allowing discovery of information "reasonably calculated to lead to the discovery of admissible evidence" has been rewritten to make it clear

[1] *See* Memorandum from Judge David G. Campbell to Judge Jeffrey Sutton, Proposed Amendments to the Federal Rules of Civil Procedure (June 14, 2014), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014-add.pdf.

[2] *Id*. at 9.

that that language was never intended to define the scope of discovery and to make it clear that "information within the scope of discovery need not be admissible in evidence to be discoverable."

There are three proposed amendments to Rule 34:

1. Objections to requests to produce must be stated "with specificity";

2. A responding party may offer to produce copies instead of permitting inspection; and

3. All objections must state whether any responsive material is being withheld on the basis of the objection.[3]

There are four proposed amendments to Rule 16:

1. Case Management Conferences with the Court may be held by any means of simultaneous communication (e.g., by video conference, but not by e-mail);

2. The time for holding such a conference is now set at the earlier of 90 days after any defendant has been served and 60 days after any defendant has appeared;

3. Now included in the list of subjects that may be addressed in a Case Management Conference are the preservation of electronically stored information and agreements under FRE 502 (non-waiver of privilege);

4. Also included in the list of subjects that may be considered at the Case Management Conference is whether the parties should request a conference with the Court before making a discovery motion.

Rule 1 has been amended to make it clear that the obligation to construe and administer the Rules to secure the just, speedy, and inexpensive determination of every action and proceeding also applies to the parties as well as the Court.

Rule 37(e) has been amended in order to resolve a circuit split as to whether or not an adverse inference instruction may be given for the loss of electronically stored information in cases due to negligence or required a showing of bad faith. The new rule provides that an adverse inference instruction may be given only upon a showing that the party acted "with the intent to deprive another party of the information's use in the

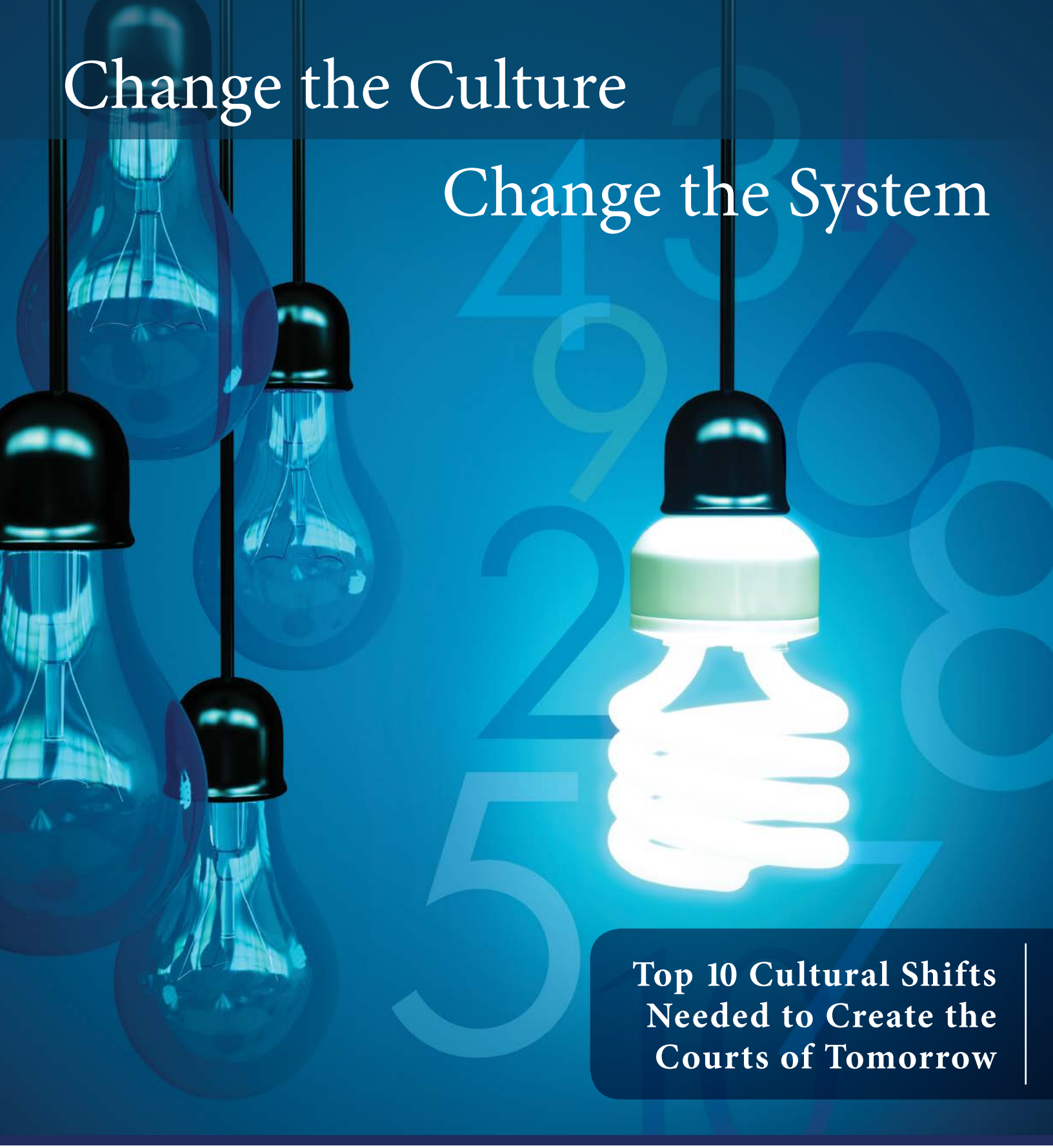
[3] The little-known and even lesser-used moratorium on the filing of a Rule 34 Request to Produce until after the Rule 26(f) discovery conference is held between the parties has been amended to allow the filing of such requests before that conference is held so that it could be discussed at the conference, but the time to respond to such a request does not begin until the date of the Rule 26(f) conference.

litigation." The new rule does not address when a duty to preserve electronically stored information was triggered or on what constituted "reasonable steps" to preserve it, although the Advisory Committee Notes do provide that determining reasonableness includes consideration of a party's resources and the proportionality of efforts to preserve. Rule 37(e) also provides that upon a finding of prejudice to a party caused by the loss of electronically stored information, the Court may order measures "no greater than necessary to cure the prejudice." Notably, the proposed amendments to Rule 37 apply only to electronically stored information, not to any other forms of information.

Rule 84 and the forms in the Appendix have been abrogated as out of date.

Change the Culture

Change the System



Top 10 Cultural Shifts Needed to Create the Courts of Tomorrow

RULE ONE INITIATIVE

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UNIVERSITY of DENVER


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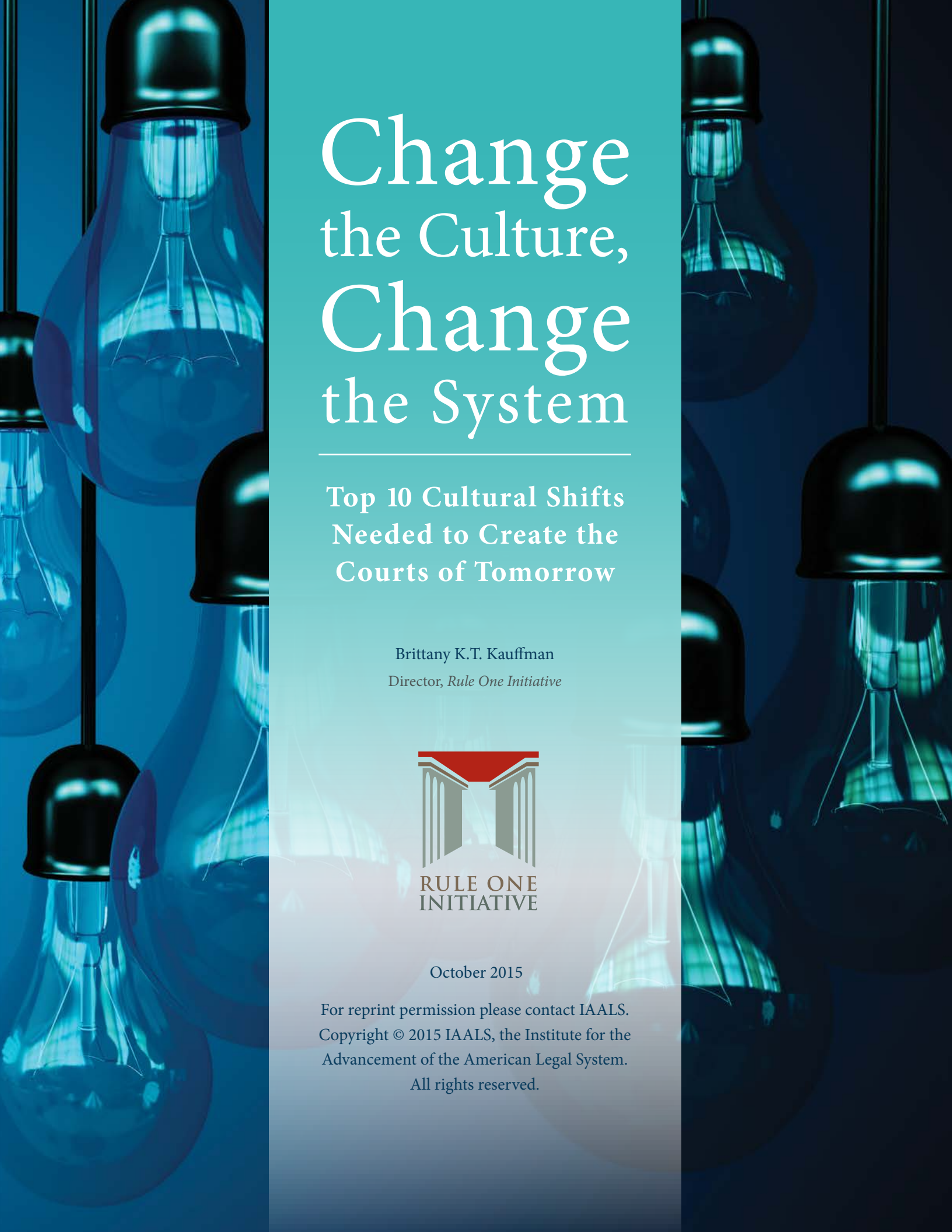

Change the Culture, Change the System

Top 10 Cultural Shifts Needed to Create the Courts of Tomorrow

Brittany K.T. Kauffman
Director, *Rule One Initiative*

RULE ONE INITIATIVE

October 2015

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

IAALS—Institute for the Advancement of the American Legal System

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

Rebecca Love Kourlis	Executive Director, IAALS
Brittany K.T. Kauffman	Director, *Rule One Initiative*
Janet L. Drobinske	Legal Assistant, *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, the *Rule One Initiative* empowers, encourages, and enables continuous improvement in the civil justice process.

Table of Contents

Message to Readers

Every change identified in this publication is important. But, before we get to the trees, I want to talk about the forest.

In order for change to be successful, each of us, as judges and lawyers, must recommit ourselves to the spirit of our work—the reason why we chose the law: the pursuit of justice. In this effort, we are talking about a system of justice in civil disputes, not the result in particular cases. We must rebuild the system such that it inspires pride and respect, not just for those of us who live in it, but most importantly, for those who observe, utilize, and, indeed, depend upon it.

It is easy to hide behind cynicism and defeatism. The system is huge; the problems are pervasive. However, the stakes are even bigger. For our society to prosper, we *must* have a system of civil justice that is accessible, fair, trustworthy, and respected. We at IAALS believe that over the course of modern history, the integrity, honesty, and predictability of the American legal system has distinguished our country from nearly all of the rest of the world, and has contributed substantially to the prosperity we have enjoyed.

Yet, our research, and the research of others over the last nearly ten years, leads us to the conclusion that there is a widespread belief that our present civil justice system fails to deliver on its first promise: "…the just, speedy, and inexpensive determination of every action and proceeding," Rule 1 of the Federal Rules of Civil Procedure—and the consequence is that the preeminence of the American civil justice system is in serious jeopardy. In America, law protects freedom. That freedom is not realized when people feel abandoned by the court system or forced to abandon justice. And when presented with the choice, people would rather flee our system for alternatives. Our goal at IAALS is to reestablish the preeminence of the American civil justice system. This goal is so important that none of us can stand mute. We must act.

Over the course of recent generations, the practice of law has moved from a selfless profession to a business. Many lawyers still think of themselves as professionals, but we must face the fact that an increasing number see the practice of law more from the entrepreneurial perspective than the professional. Thus, it is too easy to line up on either side of the "v." We too often fall into thinking that a change that might be good for defendants would never be acceptable to plaintiffs; or vice versa. No change could be good for both. What agenda is hidden beneath the changes? What unseen troll lurks under the bridge? Or, why not parlay new changes into new procedural gamesmanship? That is how lawyers are trained—to harness the process for the benefit of their clients.

Judges are not without responsibility for this predicament. Especially at the trial court level, crushing caseloads mean that moving the docket can become the top priority, yet, as always, judges are the only ones who can neutralize the brinksmanship, control the cost, and deliver the outcome in a speedy manner.

So, what about justice? What about the system? What about the level of confidence our citizenry has in the law's protection of their freedoms? Bit by bit, we have allowed it to be eroded into gamesmanship. We let that happen. And now we can reverse course.

Being a lawyer or a judge is a calling of sorts. Many of us chose it because we wanted to change something in society. Many of us chose it because we wanted to be part of something bigger, something important. We were in search of a place to do good and do well: a place where our heads and our hearts would be engaged. There is reason for pride in our profession, which we must reclaim: a basis for joy, pride, and optimism. But there is also a responsibility to deliver on our promise of a just, speedy, and inexpensive resolution of every case. To achieve that, we must truly elevate our sights and focus on the preeminent goals of access, fairness, the search for the truth, and trustworthiness.

For this new reform movement to have traction, each of us must participate: on a case by case level, doing our best to achieve fairness; and on a systemic level, being part of the "change team."

If we stand shoulder to shoulder, united in our common vision, proud to be lawyers and judges, and committed to achieving a great system, we will succeed.

Rebecca Love Kourlis

Preface

Almost ten years ago, in January 2006, IAALS, the Institute for the Advancement of the American Legal System at the University of Denver, opened its doors with a mission to improve the civil justice system. The goal was to provide original empirical research to identify the issues, develop solutions in partnership with some of the brightest minds in the country, and then support implementation and change. Ten years later, momentum toward change has built in our civil justice system at both the state and federal level. We are on the cusp of rule amendments to the Federal Rules of Civil Procedure, focused on proportionality, case management, and cooperation. Recommendations are also forthcoming at the state level from a committee appointed by the Conference of Chief Justices, intended to increase access at the state court level, where we see the vast majority of cases in the United States.

It took much hard work to get this far, but achieving the full impact of these recommendations and reforms ultimately comes down to implementation. How do we ensure that the positive changes intended by the reforms come to fruition? How do we tap into this momentum to create the just, speedy, and inexpensive courts of tomorrow? The answer to this question is as important as the recommendations themselves, for without positive implementation, the efforts thus far will be wasted.

We have posed these questions to many over the last year in order to gain input from judges, court administrators, and lawyers on both sides of the "v." We have conducted focus groups with lawyers, general counsel, and plaintiffs' counsel, and we have had individual conversations with an equally diverse group. There has been a consistent theme across these discussions—the agreement that culture change is an essential component of civil justice reform. Rules alone are not enough. And while case management is critical as well, we cannot rest this effort on the shoulders of the courts and our judges alone.

The top ten cultural shifts enumerated in this article represent a compilation of the themes across all of our discussions.[1] It is our intention that by having these conversations, and then identifying these themes, we will bring the elusive concept of "culture change" into focus so that we can move from dialogue to action.

1 My gratitude to the following individuals, who served as an ad-hoc focus group via individual conversations. I greatly appreciate their time and thoughts on culture change: Thomas Y. Allman, Michael Arkfeld, Hon. Thomas A. Balmer, John Barkett, Jason Baron, Daniel J. Becker, William P. Butterfield, Hon. David G. Campbell, Gilbert A. Dickinson, Hon. Jeremy Fogel, Steven S. Gensler, Daniel C. Girard, Hon. Paul W. Grimm, William C. Hubbard, Hon. John G. Koeltl, Robert Levy, Mary C. McQueen, Tommy Preston, Jonathan M. Redgrave, Hon. Lee H. Rosenthal, William A. Rossbach, Paul C. Saunders, Hon. Craig B. Shaffer, Linda Sandstrom Simard, Jordan M. Singer, Hon. Jeffrey S. Sutton, Francis M. Wikstrom, Kenneth J. Withers, and Hon. Jack Zouhary.

Introduction

In 2014, Merriam-Webster declared the word *culture* the "Word of the Year." Merriam-Webster noted that "[t]his year, the use of the word *culture* to define ideas in this way has moved from the classroom syllabus to the conversation at large, appearing in headlines and analyses across a wide swath of topics."[2] As Peter Sokolowski, Editor at Large for Merriam-Webster, explained, "Culture is a word that we seem to be relying on more and more. It allows us to identify and isolate an idea, issue, or group with seriousness. And it's efficient: we talk about the 'culture' of a group rather than saying 'the typical habits, attitudes, and behaviors' of that group."[3]

The concept of culture was originally used by anthropologists to describe the formal and informal customs, beliefs, rules, and rituals of a particular society. The concept has since been adopted by many other disciplines. In particular, organizational researchers and managers have used it over the past several decades to describe the norms and practices of organizations. The legal community extends beyond organizations and comprises a greater legal macroculture.[4] While legal culture can be broken down into many different and overlapping subcategories—lawyers, judges, courts, court staff, state bars—there is nevertheless an overall legal culture to which these subcategories all belong. Thus, for the same reasons noted by Merriam-Webster, the term *culture* provides an efficient way for us to speak with a common language about the habits, attitudes, and behaviors of the lawyers and judges in the United States.

Thomas Church, an early researcher in the area of "legal culture," defines legal culture broadly as the set of "expectations, practices, and informal rules of behavior" of judges and lawyers.[5] The idea of "local legal culture" has its genesis in the attempts in the 1970s to explain civil case delay. At the time, the overwhelming majority of efforts to improve civil case disposition time had either "failed completely, achieved only short-term benefits or produced marginal results."[6] To further understand the causes of civil case delay, Church undertook an ambitious project that looked at trial court delay and its causes.[7] He found that the courts with the highest caseloads were not the courts with the slowest disposition times, nor were the relatively underworked courts speedier.[8] Thus, the fundamental causes of delay were not the typical factors suggested by scholars, such as overworked courts with high trial rates, or a large proportion of serious or complex cases. Rather, case processing time was most strongly related to the informal attitudes, expectations, and practices of the legal community. Church concluded that "both speed and backlog are the result of a stable set of expectations, practices, and informal rules of behavior which is termed 'local legal culture.'"[9]

Another important observation from early research on courts as organizations suggests that "it is the interaction among the workgroup members, more than the formal rules of procedure, which determines the outcome. Potential reforms . . . must confront the organizational realities of a court. Reforms which do not alter the organizationally induced incentives will not result in real reform, but merely in compensating adjustment by workgroup members."[10] Thus, "'local legal culture' is not an explanation as much as it is a convenient restatement of the problem. It merely applies

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2 Words at Play: 2014 Word of the Year, #1: Culture, Merriam-Webster.com, http://www.merriam-webster.com/top-ten-lists/2014-word-of-the-year/culture.html (last visited 9/24/2015).

3 Press Release, Merriam-Webster, Merriam-Webster Announces "Culture" as 2014 Word of the Year (Dec. 15, 2014), *available at* http://www.merriam-webster.com/word-of-the-year/2014-word-of-the-year.htm.

4 *See generally* Edgar H. Schein, Organizational Culture and Leadership 2 (4th ed. 2010).

5 Thomas Church, Jr., Alan Carlson, Jo-Lynne Lee & Teresa Tann, National Center for State Courts, Justice Delayed: The Pace of Litigation in Urban Trial Courts, Executive Summary 14 (1978).

6 David R. Sherwood & Mark A. Clarke, *Toward an Understanding of "Local Legal Culture,"* 6 The Just. Sys. J. 200, 201 (1981).

7 *See generally* Church et al., *supra* note 5.

8 *Id.* at 2-9.

9 *Id.* at 14.

10 Joel B. Grossman, Herbert M. Kritzer, Kirstin Bumiller, & Stephen Dougal, *Measuring the Pace of Civil Litigation in Federal and State Trial Courts*, 65 Judicature 86, 91-92 (1981).

a label to what is generally accepted: that the practices and attitudes toward court processing of lawyers and court personnel play a significant role in determining the pace of litigation in a particular court."[11]

An important take-away from these studies is that legal culture—defined broadly as the shared norms and values that define the behavior of judges and lawyers, beyond the more formal rules and structure of our legal system—is pivotal to the administration of justice in our country and should be recognized as an important factor in civil justice reform. Church recognized that it is these established expectations and practices that result in considerable resistance to change.[12]

> Perhaps the most intriguing aspect of culture as a concept is that it points us to phenomena that are below the surface, that are powerful in their impact but invisible and to a considerable degree unconscious. . . . In another sense, culture is to a group what personality or character is to an individual. We can see the behavior that results, but we often cannot see the forces underneath that cause certain kinds of behavior. Yet, just as our personality and character guide and constrain our behavior, so does culture guide and constrain the behavior of members of a group through the shared norms that are held in that group.[13]

Thus, in order to make significant changes to the system, we must make changes in the pervasive legal culture.[14]

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11 *Id.* at 112.
12 *See generally* Church et al., *supra* note 5, at 15.
13 *See* Schein, *supra* note 4, at 14.
14 Thomas Church, Jr., Alan Carlson, Jo-Lynne Lee & Teresa Tann, National Center for State Courts, Justice Delayed: The Pace of Litigation in Urban Trial Courts 81 (1978) (concluding that "the most important and most difficult change to be made is in the long-term expectations and practices of the individual judges and attorneys practicing in the court").

"The purpose of our system is to resolve the disputes in litigation that the parties were not able to resolve outside of litigation. The object of litigation should be to define as efficiently as possible the issues in the case for resolution, and then to resolve them. Discovery should be there to find information to assist in settling the case or resolving the case through trial. The costs of discovery shouldn't be so large that it distorts this process for either side. This is the optimal system."

Hon. John Koeltl
District Judge, U.S. District Court, Southern District of New York

The Case for Change

IAALS and others have catalogued and documented the case for civil justice reform over the past ten years, and as part of that effort, have set out to gather empirical data, nationwide in scope, to better understand the civil justice system and ways to improve it.[15] Corina Gerety, Director of Research at IAALS, has summarized the results of multiple nationwide surveys of different individuals, conducted by different organizations, finding broad areas of substantial agreement among the diverse respondents: cost is too high and it affects court access; delay increases cost; and discovery is responsible for much of the unnecessary cost and delay.[16]

> Together, these studies suggest a plausible theory: cost inefficiencies in the civil justice process reduce court access, delay contributes to unnecessary cost, and discovery procedure is a key factor with respect to both cost and delay. The survey results provide a starting point for further research on such a theory and on how the process might be improved without affecting fairness. As stewards of the American civil justice system, legal professionals should support a consistent effort to better understand it, appropriately evolve it, and ultimately protect it.[17]

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15 *See* Corina Gerety, Inst. for the Advancement of the Am. Legal Sys., Trial Bench Views: Findings From a National Survey on Civil Procedure (2010); Inst. for the Advancement of the Am. Legal Sys., Civil Litigation Survey of Chief Legal Officers and General Counsel Belonging to the Association Of Corporate Counsel (2010); Inst. for the Advancement of the Am. Legal Sys., Civil Case Processing in the Federal District Courts: A 21st Century Analysis 7, 51 (2009); Kirsten Barrett et al., Mathematica Policy Research, ACTL Civil Litigation Survey: Final Report (2008) [hereinafter ACTL Fellows Survey]. *See also* Emery G. Lee III, Fed. Judicial Ctr., Early Stages of Litigation Attorney Survey: Report to the Judicial Conference Advisory Committee on Civil Rules (2012); Thomas E. Willging & Emery G. Lee III, Fed. Judicial Ctr., In Their Words: Attorney Views About Costs And Procedures In Federal Civil Litigation 27-29 (2010); Rebecca M. Hamburg & Matthew C. Koski, Nat'l Emp't Lawyers Ass'n, Summary of Results of Federal Judicial Center Survey of NELA Members, Fall 2009 (2010) [hereinafter NELA Survey]; Am. Bar Ass'n, ABA Section of Litigation Member Survey on Civil Practice: Full Report (2009) [hereinafter ABA Litigation Survey]. *See generally* Rebecca Love Kourlis & Brittany K.T. Kauffman, *The American Civil Justice System: From Recommendations to Reform in the 21st Century*, 61 U. Kan. L. Rev. 877 (2013).

16 Corina Gerety, Inst. Adv. of the Am. Legal Sys., Excess and Access: Consensus on the American Civil Justice Landscape 8 (2011).

17 *Id.* at 2.

The challenge in addressing these issues lies not only in crafting solutions—it is also overcoming lawyers' and judges' strong and well-documented resistance to change. Efforts to reduce cost and delay face inertia and attachment to the status quo.[18] In addition, anecdotal evidence clearly establishes that "a strong cultural bias limits the ability of individuals to look at an old problem in a new way."[19]

Thus, "culture change" is a shorthand way of identifying what needs to happen. The term also resonates with extensive research on the topic of culture change as part of the larger study of organizational management conducted over the last several decades. Past studies recognize that the impetus for culture change is often external challenges exerting pressure on the organization. In a business context, those challenges are largely economic: "Powerful macroeconomic forces are at work here, and these forces may grow even stronger over the next few decades. As a result, more and more organizations will be pushed to reduce costs, improve the quality of products and services, locate new opportunities for growth, and increase productivity."[20]

The legal system is certainly not immune from these forces. Civil caseloads are falling as people choose alternative means of resolving disputes, including new online dispute resolution methods. From a business perspective, courts are losing their market share. Court budgets are being cut; civil jury trials are almost non-existent; access to the civil courts is more and more expensive, and thus not feasible for a significant portion of the public; and, relatedly, public trust and confidence in the civil justice system are waning. Certainly, if not already upon us, a crisis is brewing.

However, change is never easy, and the legal system represents a long-established and mature organization, which makes it even more difficult to change.[21] For such mature organizations, many basic assumptions are strongly held, despite the fact that such assumptions can be increasingly out of line with the *actual* assumptions by which they operate.[22] Even where such assumptions are challenged, the legal community will want to hold on to the assumptions because they may justify the past and are a source of pride and self-esteem.[23] It is the strength of the culture itself, and the illusion that these values define how the system operates, that makes culture change so difficult.[24] For mature organizations, "[m]ost executives will say that nothing short of a 'burning platform,' some major crisis, will motivate a real assessment and change process."[25]

When such a crisis occurs, basic assumptions are brought to the surface, and the organization is faced with a choice between some type of "turnaround" or destruction of the organization and its culture through total reorganization.[26] Many have argued the civil justice system is the verge of such a crisis.[27] The question becomes whether we can achieve a turnaround before complete destruction and rebirth, and if so, whether that turnaround can be managed in a way that leads to positive change.

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18 *Cf.* Thomas W. Church, Jr., *Examining Local Legal Culture*, 1986 Am. B. Found. Res. J. 449, 508 (1986) (speaking of the same hurdles in the criminal context).
19 Sherwood & Clarke, *supra* note 6, at 214.
20 John P. Kotter, Leading Change 3 (2012).
21 Schein, *supra* note 4, at 289.
22 *Id.* at 290.
23 *Id.*
24 *Id.* at 291.
25 *Id.*
26 *Id.* at 293.
27 *See, e.g.,* Chief Justice John T. Broderick, Jr., Remarks to the National Association of Court Management, The Changing Face of Justice in a New Century: The Challenges It Poses to State Courts and Court Management 2 (March 10, 2009), *available at* http://www.courts.state.nh.us/press/2009/CJ-Brodericks-March-10-2009-speech-to-NACM.pdf ("In my view, it is imperative that we redouble our efforts, judges and court managers alike, to sustain and creatively adapt our state justice system to meet the real world needs of the 21st Century. Change will come even if we do nothing but it will not be the change we want. Time and current economic realities do not make our task easier, but they certainly provide powerful incentives for change. Change we create and manage.").

To achieve such positive success, we need to keep in mind the following eight important steps from John Kotter, a well-known thought leader on change:[28]

- **Establish a Sense of Urgency**

  Transformations will fail where complacency is high

- **Create a Guiding Coalition**

  It is essential that the head of the organization be an active supporter, but also that the effort go far beyond a single leader

- **Develop a Vision and Strategy**

  It must direct, align, and inspire action

- **Communicate the Change Vision**

  Communication is an essential step to create buy-in

- **Empower Broad-Based Action**

- **Generate Short-Term Wins**

  Real transformation takes time, which makes short-term goals and wins all the more important

- **Consolidate Gains to Produce Additional Change**

- **Anchor New Approaches in the Culture**

  Change needs to sink in over time to become "the way we do things around here"

In short form, we need to first establish urgency and motivation to change, then develop a vision and communicate it. Next, we must empower action. And, to achieve long term culture change, it is critical to anchor these changes by incorporating the new approach into our concept and identity as a legal culture: a reason to be proud of the new direction and a way to trace it to our roots as a system.[29] We must also be realistic about resistance to change. Behavior that has become dysfunctional may nevertheless be difficult to give up because it still serves other positive functions.[30]

One leading expert on culture change has posited a core belief that "[e]ither you will manage your culture, or it will manage you."[31] In our efforts to create the just speedy, and inexpensive courts of tomorrow, we cannot ignore the important role of legal culture in our system.

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28 Kotter, *supra* note 20, at 3-17.
29 Schein, *supra* note 4, at 300.
30 *Id.* at 301.
31 Roger Connors & Tom Smith, Change the Culture, Change the Game 1 (2011).

Change the Culture, Change the System: A Top 10

The research on culture change, and legal culture in particular, suggests that culture change for the legal system is an uphill battle. While we have a clear challenge ahead, that does not mean that it is impossible. We propose the following ten culture shifts for the purpose of promoting that national dialogue. We recognize some commentators may push back on this list as merely aspirational, impossible, or even a bit controversial. Yet we are of the view that the time for bold action has come.

1. Back to Our Professional Roots

Law needs to be a collegial and civil profession first and foremost.

Lawyers and judges are portrayed in many different ways in the media, in movies, on television, and in literature. We all have different visions of what a lawyer or judge represents in our society. That said, most lawyers cherish a vision of themselves as dedicated to fighting for a just and fair legal system for the benefit of their clients and of society more broadly. As a profession, we take pride in our work and believe that it is both essential to our democratic system and personally rewarding. The societal vision of the lawyer and judge in the mid-20th century reflected this role—the counselor, the statesman, the revered judge. Unfortunately, the vision of lawyer and judge in mainstream America has changed, and today it is just as likely that we think of Judge Judy or Lionel Hutz from The Simpsons.

It is clear there has been a turn for the worse in the perception of our judges, our system, and our profession.[32] If we still believe in past ideals of the profession and its place in society,[33] then we need to rethink this vision and the role of the profession in the modern world. How do we define the legal profession in America? While the formation of competent and committed professionals is an essential part of law school curriculum,[34] we also need to focus on the maintenance of this professional identity over the course of our careers.

> "When they have a common interest bigger than the case—the profession—it makes an impact on how people behave."
>
> Hon. Jack Zouhary
> *District Judge, U.S. District Court, Northern District of Ohio*

32 *See generally* Anthony T. Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession (1993).

33 For those who would argue that lawyers have always been a butt of societal disparagement, and who would cite Shakespeare for that thesis, remember that what Shakespeare actually meant was that the first step on the road to anarchy is to get rid of all of the lawyers.

34 *See* William M. Sullivan et al., The Carnegie Foundation for the Advancement of Teaching, Educating Lawyers: Preparation for the Profession of Law (2007).

Legal periodicals, business journals, and the internet are filled with articles discussing the "business of law." Law firms around the country are focused on how to make the business of law profitable. Partners are defined by it, and associates feel the pressure more than ever to bring in clients to make the case for their value to the firm. This is particularly challenging for mid-career lawyers who are striving to define themselves. At a time that is critical to their professional development, they are shifting away from involvement in the legal profession through bar associations, Inns of Court, and law firm collegiality to maximizing the number of billable hours to prove their worth.

The impact of this shift in focus is made all the more pronounced given changes in the practice of law and in technology. We have seen a dramatic decline in the number of jury trials.[35] We also have seen a significant decline in the time that most lawyers spend in the courthouse, and the time that judges spend on the bench.[36] New lawyers have taken the brunt of this change, with fewer and fewer opportunities for court appearances, leading to a significantly different legal career. At the same time, technology has resulted in an increase in the amount of information that is produced, thereby dramatically increasing the time and energy spent on discovery in civil litigation. Technology has also provided alternate means of communication, such that many lawyers can communicate with opposing counsel entirely by electronic means, without picking up the phone or meeting in person. The law has become a lone, time-intensive profession.

When lawyers regularly met in person—be it at the courthouse, across the table, or at a bar event—the result was a level of accountability and collegiality. The same is true for lawyers who regularly appeared before a particular judge or judges, and for judges who regularly appeared before lawyers. Repeat in-person interactions are important for relationship building and in creating a climate of cooperation. The term "cooperation" has received much attention over the last ten years, in large part because of The Sedona Conference®'s Cooperation Proclamation®. There has been debate about the extent to which cooperation is consistent with the adversarial nature of our system. If we step back from the recent focus on the term, however, and think about our profession 25 years ago, when lawyers would call opposing counsel as a matter of habit to resolve or clarify issues, or would chat with one another at the court house, cooperation was not a matter of debate, but rather a critical component of representing a client well.

Judge Paul M. Warner, a U.S. magistrate judge in the District of Utah, recently wrote *Ten Tips on Civility and Professionalism*.[37] He notes "It's a long road without a turn in it. Put another way, what goes around, comes around. This is the best reason for civility." He also suggests that incivility almost always results in wasted resources, in terms of both time and money—for lawyers, clients, and the court. Warner proposes a new Golden Rule of Civility:

> "Be courteous to everyone, even to those who are rude. Not because they are ladies or gentleman, but because you are one." It's not about an eye for an eye, a tooth for a tooth. It's not even about you. It is about doing what's best for your client. In conclusion, civility is the mark of a real professional and a true lawyer. It is not about quid pro quo. It is about having self-respect, respect for others, and the self-confidence to not respond in kind, and in the process, continuing to build your own character, credibility, and reputation.[38]

It is also about building the character, credibility, and reputation of the legal profession as a whole.

The nature of our practice has changed, and there is no way to put the genie back in the bottle. Lawyers do not get the same opportunities to meet each other in person and work across the aisle. But it is important that we do not lose our professional identity in the process. We are professionals, we are dedicated to the rule of law and to a fair system, and we must work together not only on a case-by-case basis, but also more broadly to achieve the common goal of a just, speedy, and inexpensive determination in every action.

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35 *See* Mark Galanter & Angela Frozena, Pound Civil Justice Inst., The Continuing Decline of Civil Trials in American Courts (2011)

36 Jordan M. Singer & Hon. William G. Young, *Measuring Bench Presence: Federal District Judges in the Courtroom*, 2008-2012, 118 Penn. St. L. Rev. 243, 244 (2013).

37 Hon. Paul M. Warner, *Ten Tips on Civility and Professionalism*, The Fed. Law. 42 (2015).

38 *Id.*

2. Guided by Justice

The focus should be on justice, not on winning.

Along the same lines, we need to get away from trial by combat, and return to a focus on the needs of the clients and the case. Lawyers tend to elevate winning over achieving a just outcome. This affects the entire process, but can be seen most prevalently in the area of discovery, where lawyers talk about "winning at discovery." For many, litigation has become about getting absolutely every document that exists and winning every discovery dispute. Referring back to Judge Paul Warner's *Ten Tips*, he notes that "[j]ust because the other side wants it, doesn't mean your automatic response should be to oppose it."[39] There is such a thing as a win-win, and lawyers should not be so concerned with winning the battle that they lose the war.[40] What gets lost in the process is the vision of our system as a whole.

The issue with the word "adversarial" is that for some lawyers it serves as an invitation to battle, rather than an invitation to implement a procedurally fair, measured system. As lawyers and officers of the court, we have an obligation to use the system in order to find the truth, seek justice, and achieve fair and efficient outcomes for our clients. Focusing on achieving justice, rather than "winning," can shift the representation and the goals to a positive effort that is more professional, more objective, and more consistent with the longer term good for the system. We need to train lawyers to be counselors to their clients, and problem solvers, first and foremost.

Achieving procedural fairness for clients is an essential component of this shift. Procedural fairness has been called "the organizing theory for which the 21st–century court reform has been waiting."[41] This theory is based on research illustrating that "how disputes are handled has an important influence on people's evaluation of their experiences in the court system."[42] In fact, researchers have shown that public attitudes regarding our justice system are driven more by how litigants are treated in the process rather than by the outcome. While this seems like a simple concept, lawyers do not incorporate it into their strategy and objectives. To the contrary, lawyers may employ every procedural device they can

39 *Id.*
40 *Id.*
41 Hon. Steve Leben, *The Procedural-Fairness Movement Comes of Age*, Trends in State Courts 59, 59 (2014).
42 *Id.*

"Lawyers—you have an independent duty to make the system just, speedy, and inexpensive. If you haven't thought about it, you need to."

Hon. Craig Shaffer
Magistrate Judge, U.S. District Court, District of Colorado

to stall the case, or to run up the costs; they may seek every document, every deposition whether or not they will be seminal to the case. Clients may, in fact, encourage these approaches: win by any means may be the marching orders the client gives. But, the clients and the system are ill-served by lawyers who act on those marching orders. Costs become exorbitant and may have little relationship to good outcomes. Lawyers may blame the system, the rules, the judge, and the court staff for unfairness, expense, and delay. Judges blame the rules, the lawyers, and the lack of staffing. That effort to shift blame is itself an indication of an unwillingness to take responsibility for making the system work in a cost-effective, procedurally fair way.

How the system functions is the result of how the actors within a particular case comport themselves. Those who are engaged in finger pointing are seldom visionary, innovative, and proactive. Both lawyers and judges need to remember that the system serves the litigants, who care little about the rules or case management principles; rather, they care about procedural fairness and cost-effectiveness. Lawyers and judges need to recognize the importance of procedural fairness for litigants and make it a guiding star throughout the process.

"All this goes back to how we think about the law. We are trained to be advocates and not problem solvers, within a particularly rule-bound system. If someone is coming to a lawyer with a life problem, what they are looking for is help with their life problems."

Hon. Jeremy Fogel
Federal Judicial Center

"A major change happened when winning became more important than justice. If it is only about winning, the cost to the system will be great. We need to focus on training lawyers about the difference."

John Barkett
Shook, Hardy, & Bacon LLP

3. Dig Deep, Earlier

Lawyers need to develop a deep understanding of their case early in the process.

In order to achieve justice for clients, lawyers need to understand the issues in their case and work with opposing counsel and the judge to tailor the process in a way that is designed to identify and resolve the real issues. Litigation has become something like the game of "gossip": litigants start with one idea and it morphs over the course of the process into something quite different. The complaint and the answer serve as just the first version of the case. With the continued growth of discovery, lawyers have gotten into the habit of seeking broad discovery that is neither tailored nor focused. Instead, lawyers ask for everything they can think of, putting off the difficult questions and analysis of the issues for later in the case. Lawyers also ask for more time than necessary to complete discovery because they haven't considered what is actually needed, or the time that it will take to complete the necessary discovery in the individual case. With regard to motions practice, lawyers file motions, including motions for summary judgment, without questioning whether to file the motion or to do so in a more tailored way. The result is increased expense for clients and wasted resources for courts.

Thus, it is often the norm that lawyers are unprepared at the initial stages of a case. For many lawyers, such an approach is purposeful: they are balancing numerous cases and need to focus on those that demand attention; early preparation comes at a cost to the client, which needs to be explained and justified; the reality is that many cases settle; and, doing the same thing in every case seems more efficient than reinventing the wheel. While these are all legitimate considerations, lawyers also need to recognize that to serve their clients, they need to stop and think about the issues in the case and the needs of the client.

In addition, the legal world is changing—for many reasons, including significant rule changes and technology. Doing things the "same old way" is not good enough. Just like judges, lawyers need to work smarter, not harder.[43] Showing up unprepared to a Rule 26(f) conference will result in a conference that falls far short of its intended purpose. When both sides are unprepared and neither is engaged, the result is what is often called a "drive-by conference." The consequence is cost and delay down the road. The same is true at the initial pretrial conference. Where the parties haven't focused on the needs of their specific case, the initial

43 Natalie Anne Knowlton & Richard P. Holme, Inst. for the Advancement of the Am. Legal Sys. & Am. Coll. of Trial Lawyers, Working Smarter, Not Harder: How Excellent Judges Manage Cases (2014).

pretrial conference likewise will not be as effective. The result is that lawyers often only get a handle on their case after discovery, when much time and money has already been expended. This can occur even when discovery has not unearthed anything new or revelatory, simply because lawyers have not prioritized crystallizing or simplifying the case at an earlier point in time.

Lawyers must focus on the case at the very beginning, identifying the issues in the case and then developing a pretrial plan focused on those specific issues. When this approach is employed, lawyers can determine the extent to which it would be more efficient to phase discovery, dispense with depositions or motions practice, or otherwise proceed in a way that gets to resolution for their clients. Understanding the case as much as possible as early in the process as possible allows a lawyer to design the process in a way that best serves the client and the system.

4. A New Approach to Discovery

| We need to change how we view discovery.

Discovery has taken on a much different role in civil litigation than it held 30 years ago. Today, the discovery phase of litigation can actually be the "end game." Cases are won and lost in discovery; it embraces procedural objectives beyond merely the search for the truth; and it has become grossly expensive for clients—and very profitable for lawyers. This presents challenges for change, because it goes against the economic incentives for lawyers and requires hard decisions about what is really needed. That said, an essential component of changing the system is changing the way we view discovery.

Technology has contributed to the expansion of discovery; there are more documents, more data, and more information to discover now than ever before. At the same time that the amount of information has grown, so too has our approach to discovery. There was a time when lawyers took a look at their case, took a few depositions, talked with opposing counsel, and then either settled or took the case to trial. The standard today is to spend time gathering broad information, and to turn over every stone. It has become an important part of our culture—a constant quest for the "smoking gun," for perfection in the search, and for complete risk assessment prior to settlement or trial. Technology is allowing us to see more and more the extent to which discovery is not perfect. And as risk-averse people, we want to perfectly quantify the risk at trial before we get there. Discovery helps both sides figure out how to proceed, but it comes at a cost. The whole approach has become so engrained in our system that we don't even consider alternative approaches.

We need to change this "discovery until the ends of the earth" mentality. It is costly for clients, it is costly for the system, and it has bloated our civil justice system in the United States to the point where many are simply not able to access the system at all. Surveyed lawyers have quoted $100,000 as the threshold amount in controversy below which it is not economically feasible for them to provide representation.[44] Anecdotal reports suggest that this threshold continues to rise. This is in large part a result of the cost of discovery in our system today. We need to get away from the notion that every stone must be turned over because of the possibility that something might be unknown and

"It comes down to how much money we are willing to spend to have an adversarial system. Can we continue to have a system where we aggressively pursue discovery and aggressively defend production? . . . As long as there is discovery out there to be 'won,' things won't change."

Daniel Girard
Girard Gibbs LLP

44 *See* Am. Bar Ass'n, ABA Litigation Survey, *supra* note 15, at 172-73; Hamburg & Koski, NELA Survey, *supra* note 15, at 45 (considering only those who work in a private law firm environment); Kirsten Barrett et al., ACTL Fellows Survey, *supra* note 15, at 83.

unquantified. The problem with casting a broad net over everything potentially relevant is the mass of documents that are swept into this net, and the resulting time and expense for all parties. This goes back to the need for lawyers to understand their case at an early point in the process and design discovery tactically to get the information they need.

There is a culture that supports objecting to everything, and turning over nothing. The culture supports deposing everyone without a hard look at whether the deposition is necessary or even helpful versus harmful. In addition, many take the approach to discovery of making the other side "earn it." This is particularly true with initial disclosures, where there is a culture of failing to provide initial disclosures, even if they are mandated. Counsel do not take the time to compile and review initial disclosures, but rather take refuge behind the assumption that if the other side really needs the information, they will ask for it. We need to get away from using litigation as a punishment in and of itself—a way of beating one's opponent over the brow through sheer process. Scorched earth litigation needs to be a thing of the past.

Instead, we need to shift to focused, efficient, "laser" discovery rather than flood light discovery. Lawyers need to use the rules in a creative way and think about how best to approach the case before them (rather than taking a rote approach in every case). We need to work toward trial—changing the orientation of the effort and focusing it back on the issues—even if most cases do not go to, or are not intended to be resolved by, trial. Instead of asking "What do I need to discover generally?" lawyers should be asking "What do I need to discover in order to prove my case?" Rather than beginning with a template set of interrogatories and requests for production, how about beginning with the jury instructions that specify what will be needed to prove the case—and work backward from there?

An important aspect of this culture change is that lawyers need to recognize and to apply appropriate limits in their own cases, and not just in the abstract. Lawyers often agree that limits on "discovery until the ends of the earth" are necessary, but then they push back vehemently when those limits are applied in their case. Moreover, to the extent clients call on lawyers to do everything possible up to the absolute limits of the rules, we need to remind them of our role as counselors.

We live in a very complex world, which makes change both challenging and increasingly important. We need a system where counsel and clients work through the fundamental issues early in the case, and then tailor discovery accordingly. As one lawyer puts it, we need to move from a smorgasbord of "all you can eat" to a menu where you get what you need.[45] This requires judgment, and for that reason it is challenging for those who are inexperienced. In addition, the lack of technical competence poses real challenges to lawyers facing rapidly evolving technology. Every case should represent an opportunity for innovative, case-specific application of the rules in way that is best designed to discover the facts and prepare the case for trial—or settlement on the merits.

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45 *See* Press Release, Inst. for the Advancement of the Am. Legal Sys., Creating Momentum for Change: IAALS' Final Evaluation of Colorado Court Rule Changes (Oct. 2, 2014), *available at* http://iaals.du.edu/blog/creating-momentum-change-iaals-final-evaluation-colorado-court-rule-changes (quoting Skip Netzorg).

"Zealous advocacy doesn't mean you have to turn over every stone. We need more professional judgment in the practice of law. For example, good doctors know which test to use. They don't recommend that we try every test. I would like to convince lawyers that more isn't always better."

Prof. Linda Simard
Suffolk University Law School

"Our American tradition of zealous advocacy needs to be balanced against the imperative of reasonableness when it comes to discovery. Proportional discovery offers one way to solve this dilemma."

Hon. Jeffrey Sutton
Judge, U.S. Court of Appeals, Sixth Circuit

"There is an economic case for reducing the burden. Cooperation and early disclosures help reduce that burden. Discovery should be exchanged and then the parties can argue the merits of the case."

William Butterfield
Hausfeld LLP

5. Engaged Judges

Judges need to be engaged, accessible, and guided by service.

Judges play a critical role in achieving change, as they are in a unique position to help recognize system-wide ideals and tip the scales in favor of those ideals.

Just as lawyers need to own their cases, ask the hard questions, and engage with their clients, so too do judges need to be accessible and available to hear and resolve disputes.[46] They need to be accountable for timely and efficient resolution. They need to pose the difficult questions to lawyers—particularly at the beginning of cases—and be available to resolve disputes knowledgeably. Lawyers do not necessarily behave in a manner that prioritizes the incentives or objectives of the system. For that reason, leaving ultimate responsibility for progress of the case to the lawyers often leads to cost and delay. In order to ensure that cases are managed efficiently and effectively, judges must take on the role of managing cases toward resolution.

Judges have a fierce allegiance to independence, and just as with lawyers, there is deep resistance to change. But just as technology has changed litigation for lawyers, so too has it changed litigation for our judges. More than ever, it is important for judges to understand the issues in the case and work with the parties to develop a proportional discovery plan for the case. In order to do this, judges need to engage with the parties on the issues in the case and the technical aspects of discovery. If the amount of proposed discovery is disproportionate to the case, the judge needs to recognize that fact early so as to prevent it from getting out of control. Judges need to be sufficiently engaged to see the problem and then take action to correct it.

Some judges have resisted these changes on the grounds that hands-on management is making their jobs more managerial. But, in fact, these changes go to the heart of judicial function: applying the law, serving the litigants, and ensuring justice. Judges also play a critical role in fostering and setting the tone for civility and cooperation. They are the stewards of our system, and the key in achieving culture change.

"We need to get beyond the directive for judges to 'rule faster' and get deeper into the issues in our system."

Hon. Lee Rosenthal
District Judge, U.S. District Court, Southern District of Texas, Houston Division

"Discoverable information today is unlimited. Discovery no longer can be. Justice, speed, and reasonable cost depend on an engaged judge—from the beginning of, and throughout, a case."

John Barkett
Shook, Hardy, & Bacon LLP

46 See generally Steven S. Gensler & Lee H. Rosenthal, The Reappearing Judge, 61 U. Kan. L. Rev. 849 (2013).

6. Courts Taking Ownership

The courts need to be accessible, relevant, available to serve, and responsible for every case.

Beyond individual judges, the courts as a whole play an equally important role in our civil justice system. As the system becomes more complex—including all the possible efficiencies and inefficiencies that can come with technology—it is critical that the courts are managed to be accessible, relevant, available to serve, and responsible for the cases that come before the court. This is different than individual judicial management, at the case level. This is about management by the court of the entire docket so as to ensure that the court itself is maximizing access and effectiveness.

Courts must recognize that cases are "public property" in the sense that they consume public resources and showcase the public dispute resolution system. It is in the system's best interest to move the case along, monitor expenditures, and work toward procedural fairness.

In addition, the make-up of the court's constituency is changing. Today, there are more self-represented litigants than ever before. And, society has become accustomed to technology and information. Society expects more from the court system than ever before, and it is clear litigants are willing to take their business elsewhere if the court cannot meet expectations.

7. Efficiency Up the Court Ladder

We need to utilize everyone within the court structure more effectively and efficiently.

A critical way in which courts can make a difference in the provision of court services is to rethink the court structure so as to utilize everyone in the most efficient and effective way. With the advent of electronic filing and electronic case management systems, there are different staff needs in our courthouses today than there were 20 years ago. The modern court must be staffed in a way that employs each person in the most efficient way possible.

Moreover, we need to rethink how we utilize the entire court infrastructure. Starting with judges, we need to recognize when a task requires a judge's deliberative function and when the task can be done by someone else. Judges have the most experience and education. They should be doing the work that requires that experience and education, and other tasks should be more efficiently allocated to others who can provide support for the judges—be it law clerks, staff lawyers, etc. Certain aspects of case processing can clearly be undertaken by non-judicial or quasi-judicial personnel. It is critical that everyone work as a team, recognizing the valuable roles that everyone plays at all levels. We should not be cabined by the traditional positions or responsibilities of court staff. We need to rethink how best to allocate the work of the court in this modern age. Just as law firms are being moved in this direction by the market, so too must courts adjust to the needs of modern society. We need to think with openness about the best way to do what court systems do.

"There needs to be a change in mindset about jobs and roles within the court system."

Hon. Thomas Balmer
Chief Justice, Oregon Supreme Court

8. Smart Use of Technology

We need to use technology for efficiency, effectiveness, and clarity—in the courts, in law practice, and in ensuring the legal system is accessible for non-lawyers.

Building on the use of people in the most efficient way possible, we also need to utilize technology to increase efficiency, effectiveness, and clarity. This is true for our courts, but it is equally true for law firms. The entire system needs to harness technology so as to create a system that is relevant in the 21st Century.

For much of the 20th Century, our role as lawyers was to provide information, counsel our clients, and guide them through the civil justice system toward resolution of their disputes. Lawyers still fill these roles, but it is also important to note that information is much more freely available and the number of companies that are delivering legal services is growing exponentially. LegalZoom, an online legal technology company, provides online legal document preparation services nationwide and was named by Forbes as "One of the 10 best digital tools for entrepreneurs in 2012." There is also RocketLawyer, providing online legal services for individuals and small- to medium-sized businesses; Avvo, an online legal services marketplace whose tagline is "Legal. Easier.;" and Axiom, which provides tech-enabled legal services and asks consumers to "[f]orget everything you thought you knew about legal services." The market for such legal services will only grow.

Even within more traditional lawyer roles, technology is having a profound impact. Electronically stored information is everywhere, and it is now a part of every case. The California State Bar recently issued a final opinion weighing in on the question of a lawyer's ethical duties in handling the discovery of electronically stored information.[47] This opinion highlights the instrumental and evolving role that technology now plays in our profession:

"Lawyers used to be the purveyors of information. Now technology has leveled the playing field and we need to think about how to add value differently."

Jonathan Redgrave
Redgrave LLP

47 *See* The State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2015-193 (2015), *available at* http://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL%202015-193%20%5B11-0004%5D%20%2806-30-15%29%20-%20FINAL.pdf.

> An attorney's obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law. Attorney competence related to litigation generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues related to e-discovery, including the discovery of electronically stored information ("ESI"). On a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a matter, and the nature of the ESI. Competency may require even a highly experienced attorney to seek assistance in some litigation matters involving ESI. An attorney lacking the required competence for e-discovery issues has three options: (1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation. Lack of competence in e-discovery issues also may lead to an ethical violation of an attorney's duty of confidentiality.[48]

The impact of technology is just as real for judges. Judicial competence in the area of electronically stored information is critical, particularly as judges take a more active role in working with the parties to ensure a fair and proportionate discovery process. And as technology influences our world more and more, it will likewise influence the law. Neither judges nor lawyers want to admit what they do not know. But in a world where technology will only become more important, not less, it is critical for judges and lawyers to remain relevant—and that requires in depth knowledge of technology.

Just as importantly, this cultural shift requires *utilization* of technology. Lawyers, judges, and the courts need to harness technology to better meet the needs of a "just, speedy, and inexpensive" determination in every case. We must not use technology just to paper over outdated systems, or just to pave the cow paths. We actually need to think about how the system could be better and then utilize technology to get there. With the rising numbers of self-represented litigants, we also need to think about how best to utilize technology to meet their needs and ensure that the legal system is accessible to all.

"There are huge changes in dialogue now related to security and privacy. The law needs to be adroit and flexible enough to respond to changes. If judges are just in wigs and robes and can't keep up with the times, then it will undermine the courts because they won't be a relevant place to resolve issues."

Hon. Paul Grimm
District Judge, U.S. District Court, District of Maryland

48 *Id.*

9. Valuing Our System

We need to value our court system, our judges, and our juries.

Courts all over the country have struggled over the last five years with budget cuts. This has created many challenges, as courts are forced to justify their budgets while struggling to provide more with less. While budget constraints can force efficiencies, they also come at a cost. It is essential that we have courts with open doors and available judges so that divorces are handled promptly in the best interests of the families, so that businesses can enter into contracts knowing that there is a system of civil justice in place to provide protections if there are issues, and so that individuals are ensured basic protections and fairness in the face of potentially devastating events in their lives or claims against them. Moreover, for our system of civil justice to remain relevant in the 21st Century, it is critical that funding be available to facilitate the use of technology and innovation, and support our courts through the transition.

While funding is critical, the issue is deeper than adequacy of funding for our civil justice system. It goes to the extent to which we value our court system and our judges. We need to recognize the important role that courts, judges, and juries play in our society and value them accordingly. As Chief Justice John Roberts stated in his 2006 Year-End Report on the Federal Judiciary, "Inadequate compensation directly threatens the viability of life tenure, and if tenure in office is made uncertain, the strength and independence judges need to uphold the rule of law—even when it is unpopular to do so—will be seriously eroded." He noted that some associates, fresh out of law school, earn more in their first year than the most experienced federal district court judges before whom they hope to practice. We need to compensate our judges with a salary that recognizes them as the executives they are.

The same is true for our courts—funding is essential for the courts to move into the 21st Century and meet the challenges of growing docket pressures, the needs of self-represented litigants, the competition from external dispute resolution services, and what will be a growing expectation that courts utilize technology to meet litigant needs. And, we cannot forget the jurors. We need to value them, and think of their needs when incorporating technology into the system and scheduling trials.

Much of this comes down to a lack of civic knowledge in our society, and a corresponding lack of understanding and value for our civil justice system and all of its components. The more society appreciates the important role our civil justice system plays, and the more individuals connect the system's value to their lives, the more likely it is that we will invest in that system and view it as essential.

10. Realign Incentives

We need to focus on the incentives driving lawyers and work to align them with our goals for improvement of the system as a whole.

There is a tension in our system between the adversarial model in which the parties are pursuing their own interests/client interests in individual cases and the good of the system as a whole. While there can be tension between individual and system interests, the two are not mutually exclusive, and good lawyers and judges recognize this is true. The more we can create a system that fosters and values these overlapping interests, the better. For example, in a small legal community where everyone knows each other and sees the same judges and colleagues case after case, it is in the interest of the lawyers and their clients to act cooperatively. They recognize that familiarity breeds accountability. There are many jurisdictions around the country where this is not the case, though. Most lawyers no longer practice in small legal communities—their practices are national and varied. We need to recognize the benefits of accountability and collegiality and work to recreate these climates for all lawyers, wherever they may practice.

In addition, we need to recognize that current economic incentives do not line up with the goals of our system. The current economic incentives tend to work against, rather than for, many of the changes discussed above. Instead, we need to align incentives at the individual case level with the overarching goals of system. We need to consider the actual incentives that motivate people to comply with change when changes are being adopted. This is an important take away from past research on local legal cultures, and it must be a central consideration in future reform efforts.[49]

"We need other work arounds in the short term, but in the long term we need to stop bailing out the sinking ship and repair the boat."

Kenneth Withers
Deputy Executive Director,
The Sedona Conference®

49 Grossman et al., *supra* note 10, at 93 ("[S]uccessful reform efforts must be based, in substantial part, on creating different kinds of incentives for the main actors in the system.").

Realizing Change

So how do we achieve these cultural shifts? It is particularly challenging given that, even within the legal culture, there are cultural variations across the country. With these variations in culture come challenges that are unique to each jurisdiction. And while we recognize that we need to value our system, including by assuring additional funding, the reality is that many of our courts around the country have a lack of resources and funding.

Rules changes provide an important avenue for change. Rules changes can change the "rules of the road" and can allow the process to evolve over time to meet the present day needs of our civil justice system, even reflecting empirical research and best practices. Rule changes create a window of opportunity where judges and lawyers are more receptive to education and culture change.

At the same time, for the culture to change as we propose, rule changes alone are inadequate. As Judge Craig Shaffer has said, without more, lawyers and judges can just overlay old behavior over the new rules, leading to few actual changes. This is because change cannot be imposed from above—an important reality that is true at the state and federal level.

In David R. Sherwood and Mark A. Clarke's article *Toward an Understanding of 'Local Legal Culture*,[50] the authors employ the example of an ordinary household thermostat to illustrate the challenges of change. When the weather outside changes, the thermostat's internal system kicks on and regulates the house back to the original temperature setting. No matter how radical the changes outside, the internal system self-regulates back to the original setting. This is the "bias" of the system, and any initial impact as a result of external temperature change is merely first order change with no long-term effects. What is needed is for the individuals who live in the house to deactivate the automatic controls, resulting in a change to the "bias" of the system and second order change. According to Sherwood and Clarke, "[t]his is a much more fundamental change than first order change because the bias in the system itself has been altered."[51]

So how do we change the temperature in our civil justice system? It cannot be based on imposed external change alone, or the system will simply readjust. We need to utilize the empirical research and experiences around the country to inform our aspirations. We need to

50 Sherwood & Clarke, *supra* note 6, at 200.

51 *Id.* at 212; *see also* Grossman et al., *supra* note 10, at 92 ("Reforms which do not alter the organizationally induced incentives will not result in real reform, but merely in compensating adjustment by workgroup members.").

"We need people who believe in change to get out and demonstrate and show that it works."

Gil Dickinson
Dickinson Prud'homme Adams LLP

"Change is coming. You can be ahead of the curve or behind it. If we make the changes ourselves, we have more control over the outcomes."

Hon. Thomas Balmer
Chief Justice, Oregon Supreme Court

"The culture is changing. There is growing recognition that lawyers need to be part of the solutions."

William Hubbard
Nelson Mullins Riley & Scarborough LLP

utilize advanced technology. And fundamentally, we need to change the bias in the system—we need meaningful change from within.

While such change cannot be solely from the top down, nevertheless, change does require champions. Such champions need to be highly regarded persons who can lead and manage the change from within, rather than forced from outside. Judges are in a natural position to be leaders and champions, because they set the tone in the cases before them. That said, the job cannot be left entirely to judges. For lawyers, while change needs to start in law school, we cannot focus solely on new lawyers. We need to focus on lawyers at every level.

As previously noted, we first need to establish urgency and motivation to change, develop a vision, and communicate it to those who are able and inspired to join and lead the effort. As lawyers and judges, we are trained to focus on the evidence. For this reason, empirical research and experience are important in making the case for change. Pilot projects can provide both, and they have been instrumental in recent civil justice reform efforts at the state and federal levels. We also need to walk in each other's shoes—as lawyers, clients, and judges. While that is often not possible, engaged dialogue between these stakeholders provides an important opportunity for sharing perspectives.

Finally, we must empower action. We need to support a strong and engaged local and national legal community, as this supports the positive changes proposed above. Whether it be through Inns of Court, bar associations, *pro bono* programs, or formal and informal mentors, the more that lawyers and judges engage in their community, the better. In Utah, for example, all judges are engaged in the greater work of the court through involvement in a committee or other activity. The judges are part of a community and aware of their role in the overall system. To the extent we can achieve the same involvement for every lawyer and judge in states across the country, we might just change the culture, and the system, such that we can all be proud of the system itself and of the role we play in it.

"Heretofore we haven't challenged judges and lawyers to use the rules in a creative way. We have simply overlaid the past mindset over the new rules. Nothing will change if we continue to do this. We need to encourage all to use these rules in a creative way. Use these new rules as opportunities for culture change."

Hon. Craig Shaffer
Magistrate Judge, U.S. District Court, District of Colorado

"Changing litigation norms for judges and lawyers alike is not easy. Rule changes offer one method for changing civil litigation. No less importantly, however, education and pilot projects provide an important supplement to those efforts."

Hon. Jeffrey Sutton
Judge, U.S. Court of Appeals, Sixth Circuit

Conclusion

In 1981, Sherwood and Clarke summed up the challenges of reform:

> To talk about how slow civil cases move, about the need to change the situation, about how difficult it is to effect change, to recount the long list of workshops, symposia and crash programs that have not produced permanent change—these become comfortable topics of conversation in much the same way that the weather provides a focus for empty discussion. Like the weather, everyone talks about civil case delay, but no one does anything about it. *To produce any real change, the system itself has to change. People's attitudes toward discovery, settlement, continuances, etc., have to change. More importantly, the behavior of individuals would also have to change dramatically.* These changes in behavior would be fairly profound; they would appear impolite, rash or irrational and would cause a great deal of discomfort to those affected. It is far easier merely to talk about the need for change.[52]

The same can be said about civil justice reform today. It is far easier merely to talk about the need for change than actually to change. Enough talk. Now is the time for each of us to take responsibility for changing our own approach and biases, and to join in a common mission to achieve a truly just, speedy, and inexpensive dispute resolution system.

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52 Sherwood & Clarke, *supra* note 6, at 213-14 (emphasis added).

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2015 Year-End Report on the Federal Judiciary

In 1838, John Lyde Wilson, a former governor of South Carolina, made a grim contribution to the literature of dispute resolution by publishing "*The Code of Honor; or Rules for the Government of Principals and Seconds in Duelling*." That 22-page booklet, sized to fit comfortably alongside a gentleman's matched pair of dueling pistols, specified the procedure for issuing a challenge, the duties of seconds, and the proper conduct of the duel itself. More detailed than its predecessors, the Irish and French dueling codes, Wilson's rulebook set out time limits, the form and methods of written communications, the obligation to attempt reconciliation without bloodshed, and—if attempts at mediation failed—how to pace off the field of battle. Wilson professed that he was not advocating that adversaries settle their disputes through duels, but he claimed that dueling was inevitable "where there is no tribunal to do justice to an oppressed and deeply wronged individual." He suggested that laying out practices and procedures to ensure that duels would be conducted fairly—including

provisions for resolving disputes through apology and compromise—would in fact save lives.

It may be that Wilson's code had exactly the opposite effect, glorifying and institutionalizing a barbarous practice that led to wanton death. Our Nation had lost Alexander Hamilton to a senseless duel in 1804. Abraham Lincoln and Mark Twain could have perished in duels if their seconds, in each instance, had not negotiated an amicable solution. But others were not so fortunate; one historian has calculated that, between 1798 and the Civil War, the United States Navy lost two-thirds as many officers to dueling as it did to more than 60 years of combat at sea.

Public opinion ultimately turned against dueling as a means of settling quarrels. By 1859, eighteen of the 33 States of the Union had outlawed duels. Following the Civil War, a public weary of bloodshed turned increasingly to other forums, including the courts, to settle disputes. But reminders of the practice persist. When Kentucky lawyers are admitted to the bar, they are required, by law, to swear that they have not participated in a duel.

Today, Wilson's pamphlet stands on the bookshelf as a largely forgotten relic of a happily bygone past. But it is also a stark reminder of government's responsibility to provide tribunals for the peaceful resolution

of all manner of disputes. Our Nation's courts are today's guarantors of justice. Those civil tribunals, far more than the inherently uncivilized dueling fields they supplanted, must be governed by sound rules of practice and procedure.

The Rules Enabling Act, 28 U.S.C. §§ 2071 *et seq.*, empowers the federal courts to prescribe rules for the conduct of their business. The Judicial Conference—the policy making body of the federal judiciary—has overall responsibility for formulating those rules. Consistent with that charge, Congress has directed the Conference to "carry on a continuous study of the operation and effect of the general rules of practice and procedure." 28 U.S.C. § 331. The primary work is done through the Conference's Committee on Rules of Practice and Procedure (known as the Standing Committee), which in turn enlists guidance from advisory committees that focus on the specialties of appellate, bankruptcy, civil, and criminal procedure, and the rules of evidence. Those committees solicit recommendations, conduct public hearings, draft proposed rules, and propose amendments for the Judicial Conference's consideration. If the Judicial Conference concurs, the proposed rules and amendments, together with a report on their promulgation, are submitted to the Supreme Court for its approval. If the Court approves, the rules are then laid before Congress,

by the annual deadline of May 1, for its examination. Unless Congress intervenes by December 1, the new rules take effect.

This process of judicial rule formulation, now more than 80 years old, is elaborate and time-consuming, but it ensures that federal court rules of practice and procedure are developed through meticulous consideration, with input from all facets of the legal community, including judges, lawyers, law professors, and the public at large. Many rules amendments are modest and technical, even persnickety, but the 2015 amendments to the Federal Rules of Civil Procedure are different. Those amendments are the product of five years of intense study, debate, and drafting to address the most serious impediments to just, speedy, and efficient resolution of civil disputes.

The project goes back to 2010, when the Advisory Committee on Civil Rules sponsored a symposium on civil litigation, which brought together federal and state judges, law professors, and plaintiff and defense lawyers, drawn from business, government, and public interest organizations. The symposium, which generated 40 papers and 25 data compilations, confirmed that, while the federal courts are fundamentally sound, in many cases civil litigation has become too expensive, time-consuming, and contentious, inhibiting effective access to the courts. The symposium specifically identified the need for procedural reforms that

would: (1) encourage greater cooperation among counsel; (2) focus discovery—the process of obtaining information within the control of the opposing party—on what is truly necessary to resolve the case; (3) engage judges in early and active case management; and (4) address serious new problems associated with vast amounts of electronically stored information.

The Advisory Committee on Civil Rules set to work on those problems. Over the next three years, the Committee drafted proposed amendments and published them for public comment. It received more than 2,300 written comments and held public hearings in Dallas, Phoenix, and Washington, D.C., eliciting input from more than 120 witnesses. The Committee then revised the amendments in response to the public recommendations. The proposed amendments received further scrutiny from the Standing Committee, the Judicial Conference, and the Supreme Court, before submission to Congress. The amended rules, which can be viewed at http://www.uscourts.gov/federal-rules-civil-procedure, went into effect one month ago, on December 1, 2015. They mark significant change, for both lawyers and judges, in the future conduct of civil trials.

The amendments may not look like a big deal at first glance, but they are. That is one reason I have chosen to highlight them in this report. For example, Rule 1 of the Federal Rules of Civil Procedure has been expanded

by a mere eight words, but those are words that judges and practitioners must take to heart. Rule 1 directs that the Federal Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." The underscored words make express the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation—an obligation given effect in the amendments that follow. The new passage highlights the point that lawyers—though representing adverse parties—have an affirmative duty to work together, and with the court, to achieve prompt and efficient resolutions of disputes.

Rule 26(b)(1) crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality:

> "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."

The amended rule states, as a fundamental principle, that lawyers must size and shape their discovery requests to the requisites of a case. Specifically, the pretrial process must provide parties with efficient access to what is needed to prove a claim or defense, but eliminate unnecessary or wasteful discovery. The key here is careful and realistic assessment of actual need. That assessment may, as a practical matter, require the active involvement of a neutral arbiter—the federal judge—to guide decisions respecting the scope of discovery.

The amended rules accordingly emphasize the crucial role of federal judges in engaging in early and effective case management. The prior rules—specifically Rule 16—already required that the judge meet with the lawyers after the complaint is filed, confer about the needs of the case, and develop a case management plan. The amended rules have shortened the deadline for that meeting and express a preference for a face-to-face encounter to enhance communication between the judge and lawyers. The amendments also identify techniques to expedite resolution of pretrial discovery disputes, including conferences with the judge before filing formal motions in aid of discovery. Such conferences can often obviate the need for a formal motion—a well-timed scowl from a trial judge can go a long way in moving things along crisply.

Recognizing the evolving role of information technology in virtually every detail of life, the amended rules specifically address the issue of "electronically stored information," which has given birth to a new acronym—"ESI." Rules 16 and 26(f) now require the parties to reach agreement on the preservation and discovery of ESI in their case management plan and discovery conferences. Amendments to Rule 37(e) effect a further refinement by specifying the consequences if a party fails to observe the generally recognized obligation to preserve ESI in the face of foreseeable litigation. If the failure to take reasonable precautions results in a loss of discoverable ESI, the courts must first focus on whether the information can be restored or replaced through alternative discovery efforts. If not, the courts may order additional measures "no greater than necessary" to cure the resulting prejudice. And if the loss of ESI is the result of one party's intent to deprive the other of the information's use in litigation, the court may impose prescribed sanctions, ranging from an adverse jury instruction to dismissal of the action or entry of a default judgment.

The rules amendments eliminate Rule 84, which referenced an appendix containing a number of civil litigation forms that were originally designed to provide lawyers and unrepresented litigants with examples of proper pleading. Over the years since their publication, many of those forms

have become antiquated or obsolete. The Administrative Office of the United States Courts assembled a group of experienced judges to replace those outdated forms with modern versions that reflect current practice and procedure. They have largely completed their work. The Administrative Office has already posted 12 revised forms on the federal judiciary's website, with three more to follow in the next month. See http://www.uscourts.gov/forms/pro-se-forms.

The 2015 civil rules amendments are a major stride toward a better federal court system. But they will achieve the goal of Rule 1—"the just, speedy, and inexpensive determination of every action and proceeding"—only if the entire legal community, including the bench, bar, and legal academy, step up to the challenge of making real change.

I think we are off to a good start. The Federal Judicial Center, which is the educational and research arm of the federal judiciary, has created a training program for federal judges to ensure they are prepared to introduce the procedural reforms in their courtrooms. Training is necessary for lawyers too, and the American Bar Association and many local bar organizations have initiated educational programs and workshops across the country. The practical implementation of the rules may require some adaptation and innovation. I encourage all to support the judiciary's plans to

test the workability of new case management and discovery practices through carefully conceived pilot programs. In addition, a wide variety of judicial, legal, and academic organizations have supplied key insights in the improvement of both federal and state rules of practice, and they are continuing to provide their perspectives and expertise on the rollout of the new rules. I am confident that the Advisory Committee on Civil Rules will continue to engage the full spectrum of those organizations in its ongoing work.

The success of the 2015 civil rules amendments will require more than organized educational efforts. It will also require a genuine commitment, by judges and lawyers alike, to ensure that our legal culture reflects the values we all ultimately share.

Judges must be willing to take on a stewardship role, managing their cases from the outset rather than allowing parties alone to dictate the scope of discovery and the pace of litigation. Faced with crushing dockets, judges can be tempted to postpone engagement in pretrial activities. Experience has shown, however, that judges who are knowledgeable, actively engaged, and accessible early in the process are far more effective in resolving cases fairly and efficiently, because they can identify the critical issues, determine

the appropriate breadth of discovery, and curtail dilatory tactics, gamesmanship, and procedural posturing.

As for the lawyers, most will readily agree—in the abstract—that they have an obligation to their clients, and to the justice system, to avoid antagonistic tactics, wasteful procedural maneuvers, and teetering brinksmanship. I cannot believe that many members of the bar went to law school because of a burning desire to spend their professional life wearing down opponents with creatively burdensome discovery requests or evading legitimate requests through dilatory tactics. The test for plaintiffs' and defendants' counsel alike is whether they will affirmatively search out cooperative solutions, chart a cost-effective course of litigation, and assume shared responsibility with opposing counsel to achieve just results.

I am hardly the first to urge that we must engineer a change in our legal culture that places a premium on the public's interest in speedy, fair, and efficient justice. But I am motivated to address the subject now because the 2015 civil rules amendments provide a concrete opportunity for actually getting something done.

In the nineteenth century, a change in culture left dueling by the wayside and left us with lessons learned. Joseph Conrad's novella "*The Duel*" tells the tale, taken from fact, of two gallant French cavalry

officers, D'Hubert and Feraud. Estranged by a trifling slight, they repeatedly duel over a 15-year period. According to newspapers of the era, the real-life antagonists, Dupont and Fournier, would cross swords and draw blood whenever their military service brought them near to one another. Conrad's characters, like the real ones, relentlessly persist in their personal feud through the rise, fall, reemergence, and ultimate exile of Napoleon, as the world transforms around them. In the end, these soldiers, who should have been comrades in a patriotic cause, spent much of their adult lives focused on a petty squabble that left them with nothing but scars. We should not miss the opportunity to help ensure that federal court litigation does not degenerate into wasteful clashes over matters that have little to do with achieving a just result.

Another year has quickly passed, and once again, I am privileged and honored to be in a position to thank all of the judges, court staff, and judicial personnel throughout the Nation for their continued excellence and dedication.

Best wishes to all in the New Year.

Appendix

Workload of the Courts

In the 12-month period ending September 30, 2015, caseloads decreased in the Supreme Court, the regional appellate courts, the district courts, the bankruptcy courts, and the pretrial services system. Growth occurred, however, in the number of persons under post-conviction supervision.

The Supreme Court of the United States

The total number of cases filed in the Supreme Court decreased by 4.65 percent from 7,376 filings in the 2013 Term to 7,033 filings in the 2014 Term. The number of cases filed in the Court's *in forma pauperis* docket decreased by 5.50 percent from 5,808 filings in the 2013 Term to 5,488 filings in the 2014 Term. The number of cases filed in the Court's paid docket decreased by 1.47 percent from 1,568 filings in the 2013 Term to 1,545 filings in the 2014 Term. During the 2014 Term, 75 cases were argued and 75 were disposed of in 66 signed opinions, compared with 79 cases argued and 77 disposed of in 67 signed opinions during the 2013 Term. The Court also issued eight per curiam decisions during the 2014 Term in cases that were not argued.

The Federal Courts of Appeals

In the regional courts of appeals, filings dropped four percent to 52,698. Appeals involving pro se litigants, which amounted to 51 percent of filings, fell four percent. Total civil appeals decreased seven percent. Criminal appeals rose three percent, as did appeals of administrative agency decisions, and bankruptcy appeals grew seven percent.

The Federal District Courts

Civil case filings in the U.S. district courts declined six percent to 279,036. Cases involving diversity of citizenship (i.e., disputes between citizens of different states) fell 14 percent, largely because of a reduction in personal injury/product liability filings. Cases with the United States as defendant dropped seven percent in response to fewer filings of prisoner petitions and Social Security cases. Cases with the United States as plaintiff went down 10 percent as filings of forfeiture and penalty cases and contract cases decreased.

Filings for criminal defendants (including those transferred from other districts) held relatively steady, declining one percent to 80,069. Defendants accused of immigration violations dropped five percent, with the southwestern border districts receiving 79 percent of national immigration defendant filings. Defendants charged with property offenses (including

fraud) fell six percent. Other reductions were reported for filings involving traffic offenses, general offenses, regulatory offenses, and justice system offenses. Drug crime defendants, who accounted for 32 percent of total filings, rose two percent. Increases also occurred in filings related to firearms and explosives, sex offenses, and violent crimes.

The Bankruptcy Courts

Bankruptcy petition filings decreased 11 percent to 860,182. Fewer petitions were filed in all bankruptcy courts but one—the Middle District of Alabama had three percent more filings this year. Consumer (i.e., nonbusiness) petitions dropped 11 percent, and business petitions fell 12 percent. Filings of petitions declined 14 percent under Chapter 7, eight percent under Chapter 11, and three percent under Chapter 13.

This year's total for bankruptcy petitions is the lowest since 2007, the first full year after the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 took effect. From 2007 to 2010, bankruptcy filings rose steadily, but they have fallen in each of the last five years.

The Federal Probation and Pretrial Services System

A total of 135,468 persons were under post-conviction supervision on September 30, 2015, an increase of two percent over the total one year earlier. Of that number, 114,961 persons were serving terms of supervised

release after leaving correctional institutions, a three percent increase from the prior year.

Cases activated in the pretrial services system, including pretrial diversion cases, fell five percent to 95,013.