Reforming the Iowa Civil Justice System

Report of the Iowa Civil Justice Reform Task Force

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January 30, 2012

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January 30, 2012

To the Chief Justice and Members of the Iowa Supreme Court:

Your Task Force for Civil Justice Reform is pleased to present the following report outlining potential reforms to keep Iowa's civil justice system vital and responsive in the 21st century.

The court's order appointing members of the steering committee for the project directed the Task Force to do several things: identify the strengths and weaknesses of the present processes for resolving non-domestic civil cases; examine innovative civil litigation procedures and programs used in other jurisdictions or recommended by other civil justice reform groups and identify those holding the most promise for Iowa litigants and the public-at-large; and develop a collection of proposals for new procedures and improvements to current procedures that will accomplish the mission of the Task Force.

The steering committee began by identifying the features of the current civil justice system that impede the prompt and affordable resolution of non-domestic civil cases. We concluded the Task Force could best achieve its mission by organizing its members into five substantive subcommittees: Discovery; Pre-Trial Procedures; Litigation Management; Court-Annexed Alternative Dispute Resolution; and Specialty Courts and Rules. The thorough research and deliberations of these subcommittees was augmented by data generated by a survey of all licensed Iowa lawyers and judicial officers. The report we submit today is the work product of a diverse group of Iowans from business, labor, medicine, industry, consumer organizations, the bench, and the bar from all geographic regions of the state. In this forward-looking document, we recommend certain civil justice reforms and describe others that, although lacking the support of a Task Force consensus, have been implemented successfully in other jurisdictions. Each of the reforms the Task Force outlines is calculated to match the services the judicial branch provides with the needs of Iowans in times of persistent economic and technological change. Matching public services with public needs, the prudent and timely reforms recommended in this report could improve access to prompt and affordable civil justice that is essential to a healthy social and economic order.

We extend our thanks to the court for giving us this opportunity to participate in a project of crucial importance. Our participation was greatly aided by organizations and individuals who, through their generous financial support, have affirmed their commitment to foster a vibrant and responsive system for dispute resolution.

Justice Daryl L. Hecht
Task Force Chair

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Some jurisdictions in Iowa have adopted one judge/one case and date certain for trial in certain cases. The assignment of one judge to each case for the life of the matter and the establishment of dates certain for civil trials could enhance Iowans' access to the courts, improve judicial management, promote consistency and adherence to deadlines, and reduce discovery excesses.

IV. Discovery Processes

Reforms addressing inefficient discovery processes will reduce delays in and costs of litigation. Such measures include adopting an aspirational purpose for discovery rules to "secure the just, speedy, and inexpensive determination of every action," holding discovery proportional to the size and nature of the case, requiring initial disclosures, limiting the number of expert witnesses, and enforcing existing rules.

V. Expert Witness Fees

The Task Force acknowledges the probable need to revisit the statutory additional daily compensation limit for expert witness fees. Leaving the compensation level to the discretion of the trial court is one potential solution.

VI. Jurors

Additions to the standard juror questionnaire would provide a better understanding of the potential jurors' backgrounds and suitability for jury service. The Task Force encourages adoption of more modern juror educational materials and video. Rehabilitation of prospective jurors who express an unwillingness or inability to be fair should include a presumption of dismissal.

VII. Video and Teleconferencing Options

When court resources are constrained both by limited numbers of personnel and budget cuts, it is logical to look to video and teleconferencing technology to streamline the court process and reduce costs. The judicial branch should embrace technological developments in ways that will not compromise the fairness, dignity, solemnity, and decorum of judicial proceedings.

VIII. Court-Annexed Alternative Dispute Resolution (ADR)

Litigants and practitioners in Iowa are generally satisfied with the current use of private, voluntary ADR for civil cases. There is concern, however, that maintaining the status quo may have steep future costs. Court-annexed ADR is an important aspect of any justice system reform effort, and the Task Force perceives benefits and detriments to reforming this aspect of the Iowa civil justice system.

IX. Relaxed Requirement of Findings of Fact and Conclusions of Law

A rule authorizing parties to waive findings of fact and conclusions of law could expedite resolution of nonjury civil cases.

X. Business (Specialty) Courts

Specialty business courts have achieved widespread support across the country. In addition, specialty courts provide excellent vehicles for implementing or piloting other court innovations that may be useful in a broader court system context. A business specialty court should be and could be piloted in Iowa within the existing court system framework of the Iowa Judicial Branch.

Introduction

While the United States' civil justice system has extraordinary strengths admired by many around the world, and the Iowa civil justice system is highly regarded within our country, there is room for improvement in both systems. High costs and delays impede Iowans' access to civil justice. Such impediments are not a new phenomenon in the American experience. As Roscoe Pound reminded us more than 100 years ago, "Dissatisfaction with the administration of justice is as old as law."[1] Pound's clarion call to reform the administration of justice remains to this day a powerful reminder of the perpetual need for greater efficiency, timely processes, and fair access to justice for all. The central importance of this need is expressed in the mission statement of the Iowa Judicial Branch:

> *The Iowa Judicial Branch dedicates itself to providing independent and accessible forums for the fair and prompt resolution of disputes, administering justice under law equally to all people.*

The Iowa Supreme Court strives, as manager of the Iowa Judicial Branch and the civil justice system, to maintain and promote access to justice for all Iowans. While Iowa enjoys a proud history of early landmark civil rights cases and modern reforms promoting access to the courts, the preservation and improvement of the justice system to better serve the people of Iowa is now a more compelling imperative than ever before. Times of economic difficulty, limited resources, rising costs, and increasing delays test the endurance and creativity of judicial branch employees as they strive to maintain the system and deliver justice. These stressful economic times and other challenges present obstacles, but also opportunities for innovative thinking and implementation of new processes that can strengthen our court system and make it more responsive to the needs of Iowans in the 21st century.

The preservation and improvement of the justice system to better serve the people of Iowa is now a more compelling imperative than ever before.

1 Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," presented at the annual convention of the American Bar Association (1906).

Recent examples of Iowa Judicial Branch efforts to assure delivery of justice under law equally to all people include the following:

- *Equality in the Courts Task Force (1993)*: The Supreme Court Equality in the Courts Commission gave Iowans an opportunity to share their views of bias in the courts. In 1993, after two years of work, the commission proposed a series of reforms aimed at eliminating any bias that might exist in Iowa courts.

- *Commission on Planning for the 21st Century (1996)*: After a year of in-depth study and discussion, the commission proposed 90 recommendations to enable the judicial branch to continue to deliver the highest quality of justice to the citizens of Iowa into the 21st century and beyond.

- *Technology (1987 to present)*: The Iowa Court Information System (ICIS)—a ten-year project to computerize the court system statewide—automated case scheduling and court data processing throughout the state. The Electronic Document Management System (EDMS) is now being phased in across the State of Iowa. EDMS will place the Iowa court system at the forefront of technological innovation in the nation's state courts, leading to a completely paperless court system from filing to final decision and helping to preserve the vitality of Iowa's ninety-nine-county court system.

In December 2009, the Iowa Supreme Court established the Civil Justice Reform Task Force with the following directive:

> [D]evelop a plan for a multi-option civil justice system [that] include[s] proposals for new court processes and improvements in current processes that will foster prompt, affordable and high-quality resolution of non-domestic civil cases. To accomplish its mission, the Task Force shall:
>
> - Identify the strengths and weaknesses of the present processes for resolving non-domestic civil cases.[2]
>
> - Examine innovative civil litigation procedures and programs used in other jurisdictions or recommended by other civil justice reform groups, and from these procedures and programs identify those that hold the most promise for Iowa litigants and the public-at-large.

2 Prior to creating the Civil Justice Reform Task Force, the supreme court considered whether family law procedures should be included in the Task Force's study. The court concluded family law procedures warrant a separate, specialized study. For this reason, family law procedures are not within the scope of the Task Force study.

> ➢ Develop a collection of proposals for new procedures and improvements to current procedures that will accomplish the mission of [the] Task Force.[3]

The court appointed a fourteen-person Task Force Steering Committee including judges, attorneys, and law professors. The steering committee met in March 2010 and identified five broad areas of study, including pre-trial procedures, discovery, litigation management, alternative dispute resolution, and specialty courts. Each steering committee member nominated twelve candidates for service on the Task Force, paying particular attention to geographic, gender, and professional balance. The steering committee recommended, and the supreme court appointed in August 2010, seventy-one Task Force members representing a broad array of key stakeholder groups.

The Task Force held its first plenary meeting on September 10, 2010, in Des Moines. The Honorable John Broderick, then Chief Justice of the New Hampshire Supreme Court, spoke to the group. Chief Justice Broderick emphasized that sweeping changes are clearly affecting civil justice systems in all fifty states, and the scope and pace of change is likely to continue unabated. Rebecca Love Kourlis, former Colorado Supreme Court Justice and current Executive Director of the Institute for the Advancement of the American Legal System (IAALS), discussed a "roadmap for reform" to achieve a "21st century civil justice system."

The Task Force began its work with the realization that Iowa does not have the option of maintaining the status quo. As the court stated in its order authorizing the Task Force:

> Each year, Iowa's trial courts typically handle approximately 150,000 non-domestic civil disputes. These lawsuits constitute nearly 46% of the state's trial court docket (not including scheduled violations). . . . For some cases, especially cases involving smaller to medium sized claims for damages, the civil justice system is unnecessarily complicated and slow. Also, the substantial costs of litigation . . . are a concern for all litigants . . . . In addition, the system's "one size fits all" approach may not be the most effective method for resolving certain types of cases . . . . These problems deter some litigants from pursuing valid claims and prompt others to settle claims of questionable merit. So in reality, the hassles, handicaps, and high cost of civil litigation impede access to justice.

3 Order, In the Matter of Appointments to the Task Force for Civil Justice Reform, Iowa Supreme Court (December 18, 2009).

A systematic re-engineering of our civil justice system is needed, not mere "tweaking" of the current system. The system must provide accessible, affordable, and understandable dispute resolution services; for if it fails to do so, the ever-increasing use of alternative dispute resolution (ADR) providers could marginalize the courts.

The Task Force established five subcommittees: Pre-Trial Procedures; Discovery; Litigation Management; Court-Annexed ADR; and Specialty Courts and Rules.

The Task Force established five subcommittees charged with studying and making reform recommendations in the five broad problem areas identified: Pre-Trial Procedures; Discovery; Litigation Management; Court-Annexed ADR; and Specialty Courts and Rules. Steering committee members chaired each subcommittee.

In April 2011 the entire Task Force held its second plenary session in Des Moines. Each subcommittee reported preliminary findings and recommendations and received important feedback from the larger group.

In June and July 2011 the subcommittees submitted final reports presenting research findings and offering recommendations. Using the subcommittee reports as source materials, the steering committee has assembled the findings and recommendations presented in this final Task Force report to the supreme court.

I. Survey

Summary

The Task Force conducted a wide-ranging survey of more than 9,000 licensed Iowa attorneys and judges to obtain their input on a variety of civil justice system topics. The survey results helped inform the Task Force of problem areas in Iowa's civil justice system.

To inform its work, the Task Force conducted the Iowa Civil Justice Reform Task Force Survey via the online service, Survey Monkey, during a three-week period from February 7 to February 28, 2011.

The Task Force designed the survey instrument in consultation with the Institute for the Advancement of the American Legal System (IAALS), Denver, Colorado. The purpose of the survey was to obtain input from Iowa lawyers and judges with civil litigation experience in Iowa courts about current court procedures used for non-domestic civil cases, as well as to gain feedback on a variety of ideas that might make the civil justice system more prompt, affordable, and user-friendly. The Task Force subcommittees used the survey results in evaluating existing civil procedures, practices and programs, and in formulating recommendations for improvements to Iowa's civil justice system.

An email invitation to participate in the survey was sent to 9,508 attorneys and judges licensed in Iowa for whom valid email addresses were available, regardless of legal experience or specialty. The survey explicitly informed potential participants that this was a study of non-domestic civil litigation in Iowa state courts. In total, 1,183 individuals answered at least a portion of the survey. While the size of the study population—those with non-domestic civil litigation experience in Iowa—is unknown, it is smaller than the total number to whom the survey was sent. Nevertheless, assuming that all individuals who received the invitation to participate have civil litigation experience in Iowa (and it is clear that they do not), a very

conservative estimate of the response rate is 12% (1,183/9,508). Using the same conservative figures, at a 95% confidence level, the overall margin of error is +/ – 2.67% (as respondents were not required to answer every portion of the survey, this number will vary by question). Of those who responded, more than half identified themselves as private practitioners. In addition, there was a nearly evenly balanced percentage of respondents who represent plaintiffs, defendants, or both.

The survey instrument is extensive, with seventy-six separate questions and scores of subparts to many questions. A number of questions are open-ended, calling for respondents to enter textual answers. The results comprise forty-five summary pages of responses to survey questions, followed by 339 pages listing each response to the survey's open-ended questions and those questions for which "Other" was an answer option. The survey questions and responses, excluding the open-ended responses, are set forth in Appendix B to this report.[4]

Results of the survey are referenced throughout this report. A summary intended as an objective overview of the results appears in this section. Additional references to the survey results appear throughout this report where relevant to the discussion of particular topics studied or recommendations for change are presented. Such references to the survey results are signaled by *italics* designating survey response categories. The survey used primarily two matrix scales for responses to questions: the respondents' choices along the "agreement scale" were *strongly agree*, *agree*, *neither agree nor disagree*, *disagree*, and *strongly disagree*; the respondents' choices on the "frequency scale" were *almost never*, *occasionally*, *about ½ time*, *often*, and *almost always*.

A. Respondents' Background and Legal Experience

More than half of respondents, 58.6%, indicated a current position as attorney in private practice. Corporate attorneys, government attorneys, and nonprofit attorneys made up 27.8% of respondents.

4 The entirety of the survey results are available on the Iowa Judicial Branch website at: http://www.iowacourts.gov/Advisory_Committees/Civil_Justice_Reform_Task_Force/Survey/.

Judicial officers—including administrative law judges, magistrates or part-time judges, district court judges, and appellate court judges made up 7.8% of respondents. Respondents who indicated retired or inactive status were 5.8% of the respondents. Nearly 70% of the respondents indicated their current practice included civil litigation, while 21.7% had past civil litigation experience.

The average number of years respondents practiced law or served as a judicial officer was 22.72 years. The average number of years of civil litigation experience was 20.26.

During the last five years the numbers of attorneys representing plaintiffs, defendants, or both was almost even: 28.2% of respondents primarily represented plaintiffs; 25.8% primarily represented defendants; and 32% represented plaintiffs and defendants about an equal amount of the time.

The most common areas of practice during the last five years included personal injury (35.9%), family law (34.0%), contracts (30%), torts (21.3%), and real property (20.1%).

Most respondents' (78.1%) civil litigation experience in the last five years was in state courts. The respondents with recent federal court litigation experience totaled 12.5%, although slightly more than 50% of all respondents indicated some federal court civil litigation experience.

B. The Iowa Civil Justice System

Eighty-five percent (85%) of respondents either *agreed* (49.2%) or *strongly agreed* (36.1%) that parties should be encouraged to enter into a pre-trial stipulation regarding issues such as liability, admission of evidence, and stipulated testimony, with just over 5% *disagreeing* (4.0%) or *strongly disagreeing* (1.3%).

Seventy-two percent (72%) of respondents favored replacing local rules with uniform statewide rules.

The survey also asked respondents whether local court rules should be replaced by uniform statewide rules. Respondents strongly favored uniform rules, with 34.9% *agreeing* and 37.1% *strongly agreeing*. Ninety-one percent (91%) of respondents *agreed* (48.1%) or *strongly agreed* (43.0%) that any rules unique to a judicial district should be incorporated into standard scheduling or pre-trial orders.

C. Iowa Rules of Civil Procedure

Respondents were about equally split when asked whether increased judicial oversight would improve the pre-trial process, with 31.3% *disagreeing*, 24.9% *neither agreeing nor disagreeing*, and 30.2% *agreeing*.

Respondents were also closely split on whether requiring clients to sign all requests for extensions or continuances would limit the number of those requests, with 36.1% *disagreeing*, 17.5% *neither agreeing nor disagreeing*, and 32.1% *agreeing* with the statement.

D. Pleadings

Respondents were asked how often notice pleading encourages extensive discovery in order to narrow claims and defenses. Nearly 40% responded *occasionally*, 17% said *about ½ time*, and just over 34% reported *often* (25.1%) or *almost always* (9.1%).

Respondents were also asked how often a plain and concise statement of the ultimate facts constituting the claim for relief at the pleading stage would narrow the litigated claims and defenses. Fifty percent (50%) reported *occasionally* (37.8%) or *almost never* (13.0%), while 44% reported *about ½ time* (18.5%) or *often* (25.8%). When asked how often a plain and concise statement of the ultimate facts constituting the claim for relief at the pleading stage would reduce the total cost of discovery, nearly 60% of respondents reported *occasionally* (38.3%) or *almost never* (21.1%), while 15.4% reported *about ½ time* and 20.0% reported *almost always*.

Almost 50% of respondents either *agreed* (33.3%) or *strongly agreed* (16.6%) that motions to dismiss should be an effective tool to narrow claims in the litigation, while 20.9% *neither agreed nor disagreed* and 20.9% *disagreed*.

E. Judicial Role in Litigation

Survey respondents also considered judicial involvement in settlement. Nearly one-half of the respondents (46%) believe that judges should do more to encourage parties to settle cases, while only 10.7% believe judges should do less. Forty-three percent (43%) of the respondents either *agreed* or *strongly agreed* that overcrowded court dockets and a shortage of court resources cause judges to pressure parties to settle pending cases, while about 30% either *disagreed* or *strongly disagreed.*

Respondents also generally reported positive effects of holding Rule 1.602 pre-trial conferences, including identifying the issues (52.2%), narrowing the issues (51.4%), informing the court of the issues in the case (66.7%), promoting settlement (53.7%), and improving the efficiency of the litigation process (50.8%). Only 2.4% of respondents stated that Rule 1.602 conferences lengthen the time to case resolution, and 4.5% of respondents stated the conferences increase the cost of resolving legal disputes by trial. Sixty-five percent (65%) of the respondents reported that such conferences are held only *occasionally* (32.8%) or *almost never* (32.2%). Only 14% of respondents either *disagreed* (12.4%) or *strongly disagreed* (1.8%) with the prospect of holding such conferences in all civil cases in district court.

A majority of respondents *do not favor* allowing the court to enter verdicts in cases with limited issues of liability (58.6%) or with limited amounts in controversy (57.4%) without making findings of fact and conclusions of law.

F. Costs and Settlement

The survey asked respondents to give their opinion on general statements about litigation costs and considerations involved with settlement of cases.

While 62% of respondents either *agreed* (38.1%) or *strongly agreed* (24.4%) that continuances increase the overall cost of litigation, nearly 20% *disagreed* (17.2%) or *strongly disagreed* (2.3%) with this statement. There was nearly unanimous agreement that when

all counsel are collaborative and professional, the case costs the client less, with 42.2% of respondents *agreeing* and 51.5% *strongly agreeing*.

Respondents were fairly evenly split when asked how often litigation costs are proportional to the value of the case, with 30.5% indicating *occasionally*, 30.5% *about ½ time*, and 25.2% answering *often*.[5]

Respondents were also fairly evenly split in identifying the primary cause of delay in the litigation process, with 23.8% identifying attorney requests for extensions of time and continuances, 20.4% identifying the time required to complete discovery, and 23.3% identifying lack of attorney collaboration on discovery issues and proceedings.[6]

Nearly one-third of respondents stated that *often* (29.0%) or *almost always* (3.4%) the cost of litigation causes parties to settle cases without regard to their factual or legal merits. Nearly one-half of respondents stated this occurred only *occasionally* (43.8%) or *almost never* (5.9%).

The survey asked respondents to consider how often categories of litigation costs are a determining factor in the decision to settle a case. The following were determining factors only *occasionally* or *almost never*:[7] expert witness costs (54.5%); deposition costs (62.6%); document production costs (78.8%); e-discovery costs (81.6%); legal research costs (83.5%); and motion practice costs (76.2%). Respondents rated trial costs and attorney fees, however, as determining factors in the decision to settle in more than half of their cases. Trial costs are *often* (36.8%) or *almost always* (14.4%) a determining factor in the decision to settle cases. Attorney fees are *often* (38.3%) or *almost always* (13.8%) a determining factor in the respondents' decisions to settle cases.

5 Survey, question 52 (Appendix B:27). Nearly 11% of respondents answered *almost never* and 3.1% answered *almost always*

6 Survey, question 53 (Appendix B:28). More than 11% of respondents identified court continuances of scheduled events and 7.7% identified delayed rulings on pending motions.

7 Percentage figures are combined for *occasionally* and *almost never* responses. *See* survey, question 55 (Appendix B:29).

The survey asked respondents to rate the unpredictability of juries and judges as determining factors in decisions to settle cases. Eighty-two percent (82%) of respondents identified the unpredictability of a jury's verdict as a determining factor in the decision to settle a case at least half the time or more often, with 46.3% rating it a determining factor *often*. On the other hand, 52.6% of respondents cited the unpredictability of judges as a determining factor to settle at least half the time or more often, but 39.7% identified it as a determining factor only *occasionally*.

G. Alternative Dispute Resolution

Nearly one-third of the survey respondents (31.2%) reported client concerns about the cost of attorney fees was *often* a factor prompting mediation in a case, while 28.8% cited this as *occasionally* a factor, and 22.4% said it was *almost never* a factor. Client concerns about the cost of discovery were only *occasionally* a factor for 35.7% of respondents and *almost never* a factor for 26.1% of respondents with mediated cases.

For more than one-half of respondents (52.1%) in mediated cases, client concerns about the length of time for resolution through the court litigation process were often (39.5%) or almost always (12.6%) a prompting factor in seeking mediation.

For more than one-half of respondents (52.1%) in mediated cases, however, client concerns about the length of time for resolution through the court litigation process were *often* (39.5%) or *almost always* (12.6%) a prompting factor in seeking mediation.

Client concerns about uncertainty of litigation outcomes were *often* a concern for 45.4% of respondents and *almost always* a concern for 18.0%. Similarly, client desire to avoid the stress of trial was *often* a factor for 43.5% of respondents and *almost always* a factor for 10.0% in determining whether to seek mediation.

When asked to assess the extent to which attorneys' circumstances affect the decision to seek mediation, respondents reported attorneys only *occasionally* or *almost never* factor the following considerations into the decision: attorney desire to avoid the stress of trial (26.7% and 58.1% respectively); attorney workload demands (29.1% and 57.5%); and attorney inexperience in trying cases (22.5% and 66.2%).

H. Comparisons to Federal Court

The survey asked respondents with experience in both state and federal courts in Iowa to identify the relative strengths of each. When asked to identify the advantages of litigating in Iowa state court as compared to the United States District Courts in Iowa, 41.8% of the respondents indicated litigation in Iowa state courts is less expensive, 21.4% noted quicker time for state court dispositions, 20.7% identified less hands-on management of cases by state judicial officers, and 35.4% noted the opportunity to voir dire prospective jurors in state court. Conversely, when respondents identified advantages of litigating in the United States District Courts of Iowa as compared to Iowa state court, 19% identified quicker disposition times, 41.2% noted more hands-on management of cases by federal judicial officers, 27.1% reported federal judicial officers are more available to resolve disputes, 38.0% indicated the quality of federal judicial officers as a factor, 35.2% pointed to the federal court's experience in resolving particular types of cases, 33.5% noted the federal procedures for consideration of dispositive motions, and 24.6% identified the applicable federal rules of civil procedure as a factor.

II. Two-Tier Justice System

Summary

The Task Force recommends a pilot program based on a two-tier civil justice system. A two-tier system would streamline litigation processes—including rules of evidence and discovery disclosures—and reduce litigation costs of certain cases falling below a threshold dollar value.

Introduction

Access to justice for all Iowans must be a primary goal of the Iowa Judicial Branch. The number of jury trials in Iowa has decreased in the past two decades. The increased cost of litigation dictates that many meritorious claims are never pursued simply because the costs of litigation substantially offset or outweigh any potential recovery.[8] Even if the anticipated cost is not an obstacle precluding judicial resolution of a dispute, the length of time consumed in litigated resolutions of disputes often is. Whether due to costs or delay, the negative consequences of these deterrents includes a diminution of public participation in the civil justice system and a dangerous marginalization of the courts.

A consensus developed that a two-tier structure in the Iowa civil justice system would contribute to processing smaller value cases more quickly and cost effectively.

A central question underlying much of the work of the Task Force is whether there should be a simpler, more expeditious civil litigation system for claims falling below a certain threshold value. With this in mind, several of the Task Force subcommittees considered the potential merits of a tiered civil litigation structure. A consensus developed that a two-tier structure in the Iowa civil justice system would contribute to processing smaller value cases more quickly and cost effectively. Under such a tiered structure, civil cases falling below a certain threshold dollar value, or cases of a particular legal category, would receive Tier 1 or Tier 2 classification.

8 Task Force member Steve Lawyer conducted a survey of members of the Iowa Association of Justice and the Iowa Defense Counsel Association to assess the degree to which attorneys are turning down cases because the costs of litigation outweigh the potential recovery. *See* Appendix C, Access to Courts Survey Results.

Many states have experience with tiered civil justice systems, and there are myriad ways to structure such a system. Common denominators of Tier 1 cases include the following: cases valued below a certain threshold amount; streamlined or limited discovery processes; limited motion practice;[9] simplified rules of evidence; accelerated pre-trial deadlines and earlier trial dates; possible mandatory ADR;[10] and cases presenting claims of personal injury, debt collection, breach of contract, breach of warranty, or property damage. Common denominators of Tier 2 cases include the following: higher dollar-value cases; cases that are not easily quantified monetarily, such as civil rights violation claims under 42 U.S.C. section 1983 and Iowa Code chapter 216; will contests, punitive damage claims, employment, environmental, constitutional, copyright or trademark infringement, and declaratory judgment actions; cases involving equitable remedies, even though the amount in controversy may be less than the threshold limit; and complex litigation matters.

A. Jurisdictional Amounts

The Task Force investigated the threshold dollar amount in different states separating the tiers and concluded $50,000 would be an appropriate jurisdictional limit for Tier 1 cases in Iowa.[11] Some consideration was given to a $75,000 threshold, but the consensus of the Task Force is that a lower number is preferable given the volume of such cases in Iowa.

The survey asked respondents about a streamlined, tiered civil justice process in Iowa. A large majority of respondents favored the concept. When asked whether a streamlined civil justice process should be created for cases valued below a certain dollar amount, 74.4% of the respondents either *agreed* (47.0%) or *strongly agreed* (27.4%), with only 8.7% either *disagreeing* (6.0%) or *strongly disagreeing* (2.7%). The average dollar-value threshold survey respondents suggested was just under $30,000. But, upon removing outlier responses to this

9 For example, summary judgment could be limited to jurisdictional issues or by leave of court.

10 The Task Force considered many facets of a tiered court system in conjunction with its study of potential court-annexed ADR recommendations for the Iowa court system. Jurisdictions with court-annexed ADR systems commonly prescribe ADR in either specific subject matter categories or dollar-value thresholds, or both.

11 The Task Force recommendations for establishment of business specialty courts also reference dollar-value thresholds.

open-ended question—those that listed a $1 million or $0 threshold amount—the average dollar-value limitation respondents suggested was approximately $50,000.[12]

B. Judicial Management of a Two-Tier System

1. Preliminary judicial management conferences

During a preliminary management conference the court would assign the case to either Tier 1 or Tier 2 status.

The Task Force recommends that a presiding judge should hold a preliminary management conference in all civil cases in which the amount in controversy exceeds the small claims jurisdictional limit[13] within sixty days of the last party's answer or after all automatic disclosures are due. The court at these conferences would assign the case to either Tier 1 or Tier 2 status. Court rules should require plaintiffs requesting Tier 1 classification to expressly note their request on the cover page of the pleading commencing the action. The rules should authorize courts to assign Tier 1 status in any case by agreement of the parties at the case management conference.

2. Tier 1 judicial management practices

a. Trial dates and motions for extension of time

The Task Force recommends Tier 1 trials be held within one year of filing or within one year following the initial judicial management conference.

Parties should file any motion to extend discovery deadlines no later than ten days in advance of any established deadline. Parties resisting motions to extend deadlines should respond within fourteen days of the motion. Courts should promptly rule on motions within ten days of the resistance.

12 A majority of the survey respondents also favored limitations on the scope and duration of discovery in cases that would fit within the Tier 1 category. Sixty-three percent of respondents favored such limitations, with 20% *strongly agreeing* and 43.3% *agreeing* with the concept. Nearly 22% of respondents either *disagreed* (17.7%) or *strongly disagreed* (4.2%) with imposing discovery limitations on lower value cases. Survey, question 14 (Appendix B:7).

13 The small claims court jurisdictional limit is currently $5,000 exclusive of interest and costs. *See* Iowa Code § 631.1(1).

b. Discovery deadlines and sanctions

Courts should strictly enforce discovery deadlines by imposing automatic monetary fines on the responsible person for failure to respond to discovery within established deadlines. The court should be authorized to rescind such penalty upon motion for good cause shown by the penalized party after response by affected parties. Imposition of penalties on pro se litigants should not be automatic and should be left to the discretion of the court.

c. Summary judgment

Parties should file summary judgment motions in Tier 1 cases no less than ninety days before trial, and courts must rule promptly on summary judgment motions.

Members of the Task Force disagreed whether summary judgment motions should be restricted in Tier 1 cases. Some believe summary judgment motions consume valuable time and waste resources that could be better spent adjudicating the case at trial. Others believe summary judgments are an efficient vehicle for resolving many smaller Tier 1 cases (e.g., collection cases). This split of opinion was reflected in the survey results. A majority of the respondents *disagreed* with the idea of prohibiting summary judgment in small value cases, with 36.9% *disagreeing* and 18% *strongly disagreeing*.

The survey asked respondents to rate the frequency of several aspects of summary judgment motions:

- Only *occasionally* (51.3%) or *almost never* (18.6%) are summary judgment motions used as a tool to leverage settlement, rather than in a good faith effort to narrow the issues.
- Only *occasionally* (39.1%) or *almost never* (23.0%) does summary judgment practice increase the cost of litigation without commensurate benefit to judicial economy.

- Only *occasionally* (35.9%) or *almost never* (30.7%) does summary judgment practice delay the course of litigation without commensurate benefit to judicial economy.

Seventy-three percent (73%) of respondents reported that judges rule on summary judgment motions promptly *about ½ time* (31.2%) or less frequently, with 29.1% of respondents reporting timely rulings *occasionally* and 12.8% of respondents reporting timely rulings are *almost never* received.

Most respondents (61.1%) report that judges grant summary judgment when appropriate *about ½ time* (25.6%) or more frequently, with 28% reporting *often* and 7.5% *almost always*. Conversely, 39% reported that judges grant summary judgment when appropriate less frequently than one-half the time with 29.8% reporting *occasionally* and 9.2% *almost never.*

More than half of the survey respondents (55.5%) reported that judges only *occasionally* (37.8%) or *almost never* (17.7%) decline to grant summary judgment motions when it is warranted.

A large percentage of the respondents (78.6%) believe attorneys rarely file summary judgment motions without regard for the likelihood of success because of malpractice concerns, with 48.8% reporting this happens *almost never* and 31.9% only *occasionally*.

3. Tier 2 judicial management practices

The Task Force urges adoption of the following judicial management practices in Tier 2 cases.

a. Firm trial date

In Tier 2 cases the court should set a firm trial date at an initial trial management conference pursuant to current supreme court scheduling standards and Iowa Rule of Civil Procedure 1.944—the rule for dismissal for want of prosecution.

b. Motions for extension of time

Parties should file any motion to extend discovery deadlines no later than ten days in advance of any established deadline. Parties resisting motions to extend deadlines should respond within fourteen days of the motion. Courts should promptly rule on motions within ten days of the resistance.

c. Judicial management conferences

Courts should automatically schedule and hold judicial management conferences every six months in Tier 2 cases to address outstanding discovery issues, assess adherence to established pre-trial schedules, determine trial readiness, and consider sanctions for discovery violations.

d. Summary judgment motions

Parties should file any motion for summary judgment no less than 120 days before trial in Tier 2 cases. Courts should rule promptly on summary judgment motions.

C. Discovery Limitations in a Two-Tier System

1. Tier 1 discovery limitations

a. Interrogatories

Interrogatories and requests for admissions should be limited to fifteen per party in Tier 1 cases.

Interrogatories should be limited to fifteen per party, including discrete subparts in the absence of leave of court or agreement of the parties permitting a greater number. Without differentiating between Tier 1 and Tier II cases, 56.3% of the survey respondents *agreed* (42.0%) or *strongly agreed* (14.3%) with the notion of placing limitations on the number of interrogatories.[14]

14 Survey, question 30b (Appendix B:15). Conversely, 29.4% of respondents either *disagreed* (19.5%) or *strongly disagreed* (9.9%) with limitations on interrogatories.

b. Admissions

Requests for admissions should be limited to fifteen per party without leave of court or a contrary agreement of the parties. Although survey respondents were not asked to differentiate between Tier I and Tier II cases, respondents were equally split on whether requests for admissions should be limited.[15]

c. Discovery supplementation

All parties should be permitted to rely upon and enforce written discovery supplementation requirements within the existing rules for any party's discovery responses. Such rules would reduce the exchange of unnecessary and cumulative discovery by multiple parties.

d. Depositions

Each party should be allowed to take two depositions without leave of court unless the parties agree otherwise.

e. Expert witnesses

The 2009 ACTL/IAALS Report,[16] set forth in Appendix D, recommends "[e]xcept in extraordinary cases, only one expert witness per party should be permitted for any given issue."[17] In Arizona, unless the court orders otherwise upon a showing of good cause, each side is limited to one independent expert witness per issue. Ariz. R. Civ. P. 26(b)(4)(D). Multiple parties on the same side of litigation must agree on that one expert, or the court will designate the expert. *Id.*

Task Force members disagreed whether limitations should be placed on the number of expert witnesses,

15 Survey, question 30a (Appendix B:15). Forty-two percent of respondents *agreed* (30.8%) or *strongly agreed* (11.7%) with limiting requests for admissions, while 40.9% either *disagreed* (23.5%) or *strongly disagreed* (17.4%).

16 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, March 11, 2009.

17 *Id.* at 17.

even in Tier 1 cases. Task Force members most closely scrutinizing the two-tier court structure recommend a limitation of one expert per liability issue per party (not per side),[18] with a limitation of two liability experts testifying per party in any Tier 1 case without leave of court unless the parties agree otherwise. There was no consensus, however, whether to limit the number of expert witnesses addressing damages in Tier 1 cases.

Limiting the number of expert witnesses, even in Tier 1 cases, is not necessarily a straightforward proposition. The term "issue" is broadly encompassing and must be defined. In addition, multiple experts may be necessary for different aspects of damages (e.g., economic damages, mental and physical injuries, etc.). Finally, multiple parties on the same side of a lawsuit may have divergent interests, rendering it problematic to utilize the same expert on behalf of all co-parties. For these reasons, the Task Force does not recommend limiting the number of expert witnesses in suits other than Tier 1 cases. In Tier 1 cases, the court could permit additional experts for good cause shown.

f. Expert opinions

Parties should disclose expert opinions, and the reasons for them, in signed answers to interrogatories or by report within the deadlines prescribed in the pre-trial scheduling order. Expert testimony should be strictly limited to the content of an expert's interrogatory answer or report.

g. Expert depositions

Task Force members disagreed on restricting litigants from taking expert depositions in Tier 1 cases. Some members would presumptively prohibit expert depositions, subject to a party seeking leave of court

18 This is consistent with the recommendation of the 2009 ACTL/IAALS Report, *supra* n.16, at 17 (Appendix D:22).

for good cause shown. Other members believe that while parties might forgo a deposition in such cases, Iowa procedure should permit expert depositions as of right. Given the lack of consensus within the Task Force, it recommends against eliminating expert depositions altogether even in Tier 1 cases.

h. Expert designations

Plaintiffs should be required to designate any expert(s) within five months after filing a petition. The designation should include a preliminary report or signed interrogatory answer. Defendant's expert designation should be due within two months following plaintiff's designation, with a preliminary report or signed interrogatory answer provided thirty days after designation.

2. Tier 2 discovery limitations

a. Interrogatories

Interrogatories and requests for admissions should be limited to twenty per party in Tier 2 cases.

Interrogatories should be limited to twenty per party, including discrete subparts, in the absence of leave of court or agreement of the parties authorizing a greater number.

b. Admissions

Requests for admissions should be limited to twenty per party in the absence of leave of court or agreement of the parties authorizing a greater number.

c. Discovery supplementation

All parties should be permitted to rely upon and enforce written discovery supplementation requirements within the existing rules for any party's discovery responses. Such rules would reduce the exchange of unnecessary and cumulative discovery by multiple parties.

d. Expert witnesses

Plaintiffs should be required to designate any expert within six months of filing a petition. The designation shall include the expert's report or a signed interrogatory answer. Defendant's expert designation should be due within two months following plaintiff's designation, and the expert's preliminary report or signed interrogatory answer should be provided within thirty days after designation.

The Task Force considered restricting the length of experts' depositions in all cases similar to Federal Rule of Civil Procedure 30(d)(1) (depositions limited to one day of seven hours). This reform does not appear warranted in Iowa at this time.

III. One Judge/One Case and Date Certain for Trial

Summary

Some jurisdictions in Iowa have adopted one judge/one case and date certain for trial in certain cases. The assignment of one judge to each case for the life of the matter and the establishment of dates certain for civil trials could enhance Iowans' access to the courts, improve judicial management, promote consistency and adherence to deadlines, and reduce discovery excesses.

Introduction

The Task Force recommends assignment of a specific judge to a case with a firm trial date in all judicial districts. Efficiency increases when a case is assigned to a single judge from start to finish, because multiple judges must be serially informed of the facts and circumstances of the case during its pendency. Firm trial dates provide more certainty to the parties and keep cases moving through the pre-trial stage of litigation.

The two concepts of one judge/one case and dates certain for trial work best in concert.

The two concepts of one judge/one case and dates certain for trial work best in concert. The Third and Fifth Judicial Districts in Iowa assign judges to a specific case with firm trial dates, and the process works well in promoting resolution of cases. The Second Judicial District discourages continuances and in a sub-district will assign judges on a case-by-case basis if requested. The one judge/one case process reportedly works well in the districts currently employing it, especially in larger or more complex cases.

Seventy percent of the survey respondents favored the one judge/one case concept with 34% *strongly agreeing* and 36.1% *agreeing* with the concept.[19]

19 Survey, question 14a (Appendix B:7). Only 11% *disagreed* (9.1%) or *strongly disagreed* (2.0%) with the one judge/one case concept.

One benefit of the one judge/one case practice is that judicial involvement is more active and better informed during the pre-trial or discovery stage of litigation. The survey asked respondents to consider the frequency of judicial involvement in the discovery stage of litigation. Most respondents indicated judges are *almost never* (60.1%) involved early in case proceedings, and 34.4% reported judges are only *occasionally* involved early in case proceedings. A solid majority *agreed* or *strongly agreed* that the judge who will try the case should handle all pretrial matters.[20]

Nearly 78% of the survey respondents favored a date certain for trial concept with 28.3% *strongly agreeing* and 49.5% *agreeing*.[21] And, when asked whether parties should be given a date certain for trial even if cases are not assigned to a specific judge, 73.7% *strongly agreed* (20.8%) or *agreed* (52.9%) with the statement.

A. One Judge/One Case

The Iowa Rules of Civil Procedure currently allow the chief judge of each judicial district some discretion in scheduling cases. *See* Iowa Court Rule 22.5, 22.7, 22.8. The chief judge may assign and monitor cases within the district and may delegate to the district court administrator certain authority on a case-by-case basis.

In most Iowa judicial districts, several judges make a series of decisions in a single case between the date of filing and the date of final resolution in the district court.

Most districts rely upon the district court administrator to conduct administrative functions related to case management, including scheduling hearings on pre-trial motions, pre-trial scheduling conferences, and the like. With few exceptions, judges rotate through a judicial district to which they are assigned, hearing and deciding motions and presiding over trials as the matters appear on their docket. In most Iowa judicial districts, several judges make a series of decisions in a single case between the date of filing and the date of final resolution in the district court.

The Second and Third Judicial Districts of Iowa have implemented individual case assignments, at least in part. The second district process is limited to one sub-district and is informal, with court administration staff managing the case assignments. The

20 Only 6.8% *disagreed* and 0.7% *strongly disagreed*.
21 Survey, question 38e (Appendix B:20). Only 6.5% *disagreed* (5.8%) or *strongly disagreed* (1.7%) with the date certain for trial concept.

third district has developed a more comprehensive protocol for implementing individual case assignments.

By Administrative Order in October 2009, the Third Judicial District implemented an "individual assignment calendar system" to enhance management of court caseloads and equalize case assignments. The system applies to matters scheduled for trial: civil jury and non-jury cases, domestic cases, Class A felonies, and contested probate proceedings.[22] Under this system, the district court administrator assigns a judge on a rotating basis to improve equalization of case assignments among the district's judicial officers. Judges may not reset any trials "without conferring with court administration concerning the availability of jury pools and courtrooms."[23]

The third district reviewed the effectiveness of the individual assignment system in May 2011. Comparing 2009 to 2010, 33% fewer cases reached trial or settlement under the individual assignment system than before. There was also a 34% decrease, however, in the number of cases continued or not reached. The average length of time to reach case disposition fell from 413 days to 395. The certainty of trial dates improved, with the 2009 average number of trial dates set per case falling from 2.13 to 1.74. The Third Judicial District experience to date has thus shown a slight increase in the length of time consumed in the resolution of cases, but also a decrease in the uncertainty of trial dates. It is believed, however, that the individual assignment system within the district has enhanced the quality and efficiency of the civil justice system because judges are more familiar with their cases. As they generally follow from start to finish only those cases that are individually assigned to them, judges spend less time familiarizing themselves with a larger group of court files that they have not seen before and, because of geographic assignment, may never see again.

Advancing technological developments will likely facilitate one judge/one case scheduling practices.

Advancing technological developments will likely facilitate one judge/one case scheduling practices. Videoconferencing will likely contribute to the viability of the practice, permitting a judge assigned to hear a matter in one county to hear and resolve an urgent pre-trial matter in a case pending in another county when necessary. Implementation of EDMS will allow judges and attorneys full access to documents at

22 *See* Administrative Order 2009 - 19, Third Judicial District.
23 *Id.*

all times from any accessible location and enhance the efficiencies resulting from a transition to a one judge/one case protocol.

The Task Force recommends the adoption of a one judge/one case assignment protocol in all judicial districts. Factors impacting a statewide transition to this approach include the following: judicial branch leadership; open communication between the judicial branch and the bar; equitable distribution of cases to judges; and "buy-in" from judicial officers, court staff, administrative staff, and the bar. Within judicial districts, factors that may impact efficient transition to one judge/one case include geography, budgeting issues, physical resources, personnel resources, and local legal culture and practices.

EDMS will allow judges and attorneys full access to documents at all times from any accessible location and enhance the efficiencies resulting from a transition to a one judge/ one case protocol.

B. Date Certain for Trial

Firm trial dates provide more certainty to the parties and keep cases moving through the pre-trial stage of litigation. The survey results suggest strong support among attorneys and judges for reforms calculated to increase the certainty of trial dates in civil cases.[24] Most respondents *agreed* (49.5%) or *strongly agreed* (28.3%) that parties should be given a date certain for trial, and according to 66% of the respondents trial dates should be set early in the case.

Nearly 70% of the respondents *agreed* (49.7%) or *strongly agreed* (19.6%) that parties should be given a date certain for trial even if it means a trial date more than fourteen months in the future. More than 70% *agreed* (52.9%) or *strongly agreed* (20.8%) that parties should be given a date certain for trial even if cases are not assigned to a specific judge.

Studies have indicated that achieving trial date certainty is one of the fundamental elements of a good case-flow management system.[25] Achieving an efficient system of trial-date certainty is dependent on a number of factors, including the following: court enforcement of a strict continuance policy; allowing continuances only for good

24 *See* survey, question 38e (Appendix B:20). Of all survey respondents, 77.8% *agreed* or *strongly agreed* and the percentage among current attorneys and judges was nearly identical.

25 *See* Maureen Solomon and Douglas Somerlot, "Caseflow Management in the Trial Court: Now and in the Future" (1987), *Chicago: American Bar Association, Division for Judicial Services, Lawyers Conference Task Force on Reduction of Litigation Cost and Delay*, published by the American Bar Association.

cause (not stipulation by counsel or the parties alone); willingness of courts to enforce pre-trial scheduling orders; and, in some locations, changes in the legal culture.

Some studies suggest there is not necessarily a direct correlation between efficient processing of cases and the resources available to the court system.[26] Those courts with the most resources may not necessarily be the fastest in processing cases. Such studies suggest that "local legal culture" and courts' willingness to enforce a strict continuance policy rather than allowing attorneys to control the pace of litigation are the most reliable predictors of efficient case processing and achievement of trial date certainty.

Limited court resources remain a substantial issue in Iowa, however. Budgetary constraints and resulting personnel cuts over the past twenty years have forced the courts to triage cases. The judicial branch has consequently adopted strict priorities for case processing with criminal cases, juvenile cases, and child custody cases having priority over civil cases. This forced prioritization delays the hearing of civil cases in favor of cases enjoying higher scheduling priority that demand an ever greater portion of limited judicial branch resources. These circumstances have caused a troublesome cycle in which civil cases assigned a lower priority—often cases of great complexity with very substantial economic consequences—are scheduled for trial only to be "bumped" repeatedly from the trial schedule by cases assigned a higher priority. This bumping phenomenon is a very serious problem in several judicial districts across the state. It severely impairs the access of many litigants to the courts and renders the judicial forum unattractive and unacceptable for the resolution of complex commercial matters.

Limited court resources remain a substantial issue in Iowa. Budgetary constraints and resulting personnel cuts over the past twenty years have forced the courts to triage cases.

The survey queried respondents about trial dates and priority given to criminal trials and family law matters. While almost half of respondents, 47.4%, *agreed* (35.7%) or *strongly agreed* (11.7%) that parties should be given a date certain for trial subject to priority for criminal trials, 30% of respondents either *disagreed* (23.3%) or *strongly disagreed* (6.7%) with the priority for criminal trials.

26 *See* A. Carlson, T. Church, Jr., Jo-Lynne Lee, Teresa Tanchantry, "Justice Delayed: The Pace of Litigation in Urban Trial Courts" (1978), National Criminal Justice Reference Service, *available at* https://www.ncjrs.gov/App/publications/Abstract.aspx?id=51949.

Comparatively, just under 33% of respondents *agreed* (25.2%) or *strongly agreed* (7.7%) with the proposition that family law proceedings should receive priority over other civil cases in setting trial dates. More than 40% of respondents *disagreed* (32.9%) or *strongly disagreed* (8.9%) with any allocation of trial scheduling priority for domestic matters.

An anticipated benefit of adopting the one judge/one case assignment protocol is the enhancement of trial date certainty in civil cases.

An anticipated benefit of adopting the one judge/one case assignment protocol is the enhancement of trial date certainty in civil cases. If the court closely monitors the pace of a particular case from filing to disposition, including strict enforcement of continuance policies, the system will create expectations among attorneys and litigants that the trial will commence on the date scheduled.[27] For civil jury trials, however, the certainty of trial dates will likely continue to be compromised if budgetary constraints deny the judicial branch adequate resources to timely process all cases—not just those receiving priority—when they are ready for submission, rather than at some later unknown date when resources might be available.

A number of factors will influence the successful implementation of a statewide effort to make systemic changes enhancing the certainty of civil trial dates, including the following:

- The effectiveness of each district's "caseflow management system," including the extent to which the court enforces clear continuance policies;
- The "local legal culture," including the extent to which local attorneys abide by scheduled trial dates or are willing and able to undercut strict continuance policies through stipulations;
- The need of judges to "overschedule" or stack their civil cases for trial in consideration of the "fall-out factor" (the fact that most cases will fall out along the way) and in view of limited court resources and support personnel;
- The case processing priorities the court has placed on criminal, custody, and juvenile matters over civil cases; and
- The judicial resources available in the particular district.

27 *See id.*

IV. Discovery Processes

Summary

Reforms addressing inefficient discovery processes will reduce delays in and costs of litigation. Such measures include adopting an aspirational purpose for discovery rules to "secure the just, speedy, and inexpensive determination of every action," holding discovery proportional to the size and nature of the case, requiring initial disclosures, limiting the number of expert witnesses, and enforcing existing rules.

Introduction and Guiding Principles

Task Force recommendations addressing the broad subject of discovery touch on a variety of aspects of the civil justice system. The recommendations range from broad aspiration-based approaches to discovery to fundamental changes in the structure of the civil justice system, and they include targeted measures to help reduce the costs and increase the efficiency of the system.

Systematic changes, including the one judge/one case construct, the two-tier court system, and the initial disclosures requirement, are well-vetted innovations that have proven successful in other jurisdictions.

The Task Force implicitly recognizes that efficiencies and reduced costs will more likely be achieved if participants in the system—lawyers, judges, parties—have more options, more flexibility, and more autonomy in conducting discovery. The Task Force recommends amending Iowa Rule of Civil Procedure 1.501(2) to include the aspirational goal that discovery rules be administered in a way that assures "just, speedy, and inexpensive" resolution of legal disputes.

Systematic changes, including the one judge/one case construct, the two-tier court system, and the initial disclosures requirement, are well-vetted innovations that have proven successful in other jurisdictions. Enacting such measures with a focus on enforcement of existing rules, encouragement of party cooperation, and an overall sensitivity to ensuring proportionality and scope of discovery relevant to each matter should result in positive improvements in the Iowa civil justice system.

Current Iowa discovery practice differs significantly from federal practice in that Iowa does not require automatic disclosure of relevant information absent a discovery request. In contrast, the federal rules impose on parties a duty to disclose certain basic information that the disclosing party may use to support its claims or defenses, without a formal discovery request. *See* Fed. R. Civ. P. 26(a)(1)(A). Under federal practice, these initial disclosures occur very early in the case before formal discovery commences. Fed. R. Civ. P. 26(d).

Iowa does not require automatic disclosure of relevant information absent a discovery request.

The Task Force urges adoption of the following reforms to counter unnecessary and inefficient discovery practices and the resulting problems of delay and increasingly costly litigation:

- **Amend Iowa Rule of Civil Procedure 1.501(2)**

  Iowa Rule of Civil Procedure 1.501(2) should incorporate the aspirational purpose of Rule 1 of the Federal Rules of Civil Procedure[28] and read as follows (suggested language in italics):

  > The rules providing for discovery and inspection shall be liberally construed and shall be enforced to provide the parties with access to all relevant facts, *and shall be administered to secure the just, speedy, and inexpensive determination of every action and proceeding.* Discovery shall be conducted in good faith, and responses to discovery requests, however made, shall fairly address and meet the substance of the request.

- **One judge/one case**

  One judge assigned to each case for the life of the matter will enhance judicial management, promote consistency and adherence to deadlines, and reduce discovery excesses.

Discovery should be proportional to the size and nature of the case.

- **Proportionality and relevant scope**

  Discovery should be proportional to the size and nature of the case. Overly broad and irrelevant discovery requests should not be countenanced.

28 Rule 1 of the Fed. R. of Civ. Proc. provides in its entirety as follows: "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 to secure the just, speedy, and inexpensive determination of every action and proceeding."

- **Tier 1 and Tier 2 cases**

  Cases should be classified into one of two categories: "Tier 1" cases involving less than $50,000 in controversy and "Tier 2" cases involving more than $50,000.

- **Initial disclosures**

  Many recommendations for case management and discovery limitations presume discovery reforms requiring basic information disclosure in all cases at the outset of litigation without the necessity of discovery requests from a party.

- **Expert witness limitations**

  Discovery relating to expert witnesses is believed to be a significant factor contributing to the cost and delay of civil litigation. Reasonable limitations on expert discovery are warranted in Tier 1 cases, while existing rules on expert discovery are perceived to be sufficient in Tier 2.

- **Party agreements**

  Discovery, to the extent possible, should proceed pursuant to an agreement of the parties.

- **Enforcement of existing rules**

  Courts should enforce existing rules more regularly and consistently to promote just, speedy, and inexpensive determination of every action and proceeding.[29]

29 *See* survey, open-response question 33: "If there were one aspect of discovery that you could change in order to achieve a more timely and cost-effective court process for litigants, what would it be and why?" Over 75% of the survey respondents said current discovery-related sanctions were seldom or only occasionally imposed. Stricter enforcement of existing discovery procedures and imposition of sanctions for discovery abuses were common suggestions from the respondents when asked to identify aspects of Iowa discovery practices they would change to achieve a better, more efficient discovery system. *Available at*: http://www.iowacourts.gov/Advisory_Committees/Civil_Justice_Reform_Task_Force/Survey/.

A. Initial Disclosures

The Task Force examined the following aspects of initial disclosures: whether the Iowa Rules of Civil Procedure should require automatic initial disclosures in most civil cases; the appropriate scope and content of such initial disclosures; the timing and procedure for making such initial disclosures; and possible sanctions for failure to make initial disclosures.

1. Require mandatory initial disclosures

A major purpose of initial disclosures in the federal system "is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information." Fed. R. Civ. P. 26(a) advisory committee note to 1993 amendments. Implementation of an automatic initial disclosures requirement in the Iowa system could reduce the amount and cost of discovery that parties would otherwise incur during a case.

The survey data supports this conclusion: 50.7% of respondents with federal court experience *agreed* that initial disclosures at least *occasionally* (38.9%) or *about half the time* (11.8%) reduce the amount of discovery, with 27.5% *agreeing* initial disclosures reduce the amount of discovery *often* (23.6%) or *almost always* (3.9%). Slightly fewer respondents *agreed* that initial disclosures reduced the cost of discovery (*occasionally*—35.1%; *about half the time*—8.6%). More than 28% of respondents, however, *agreed* that initial disclosures reduced the cost of discovery *often* (24.7%) or *almost always* (3.9%). A majority of respondents (57.4%) *agreed* (43.7%) or *strongly agreed* (13.7%) that Iowa should implement an initial disclosure requirement, with only 16.2% *disagreeing* and 7.6% *strongly disagreeing*.

An automatic initial disclosures requirement in the Iowa system could reduce the amount and cost of discovery that parties would otherwise incur during a case.

a. Exempted cases

The federal rules specifically exempt certain categories of cases from the initial disclosure obligation. *See* Fed.

R. Civ. P. 26(a)(1)(B).[30] The Task Force acknowledges there might be certain categories of cases in state court in which initial disclosures might likewise be inappropriate or cost-prohibitive.

b. Case-specific stipulations and court orders

The federal rules permit litigants to forgo disclosures by stipulation. Additionally, litigants have the right to object to the disclosure requirement in particular cases, and the court, through case-specific court orders, can modify the duty to disclose. *See* Fed. R. Civ. P. 26(a)(1)(A) ("Except . . . as otherwise stipulated or ordered by the court, a party must . . . ."). The Task Force recommends similar phrasing for any initial disclosure rule in Iowa to permit case-specific court orders and party stipulations that can eliminate or modify the disclosure obligation in appropriate cases.

2. Scope of initial disclosures

In 2000, the federal discovery rules were amended to limit the scope of initial disclosures to discoverable information "that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment." *See* Fed. R. Civ. P. 26(a)(1)(A)(i) and (ii). Thus, under federal practice, a party need not automatically disclose adverse information or other information that the disclosing party does not plan on using to support its claims or defenses. This information might still be discoverable, but a party need only disclose it in response to a legitimate discovery request.

Some states require a broader scope of automatic initial disclosures than is required under the federal rule. In Arizona, for example, civil litigants must automatically disclose all relevant information known by or available to the parties and their lawyers. *See* Ariz. R. Civ. P. 26.1. In September,

30 Cases exempted from the initial disclosure requirement include, in part, administrative reviews, habeas corpus petitions and other challenges to criminal conviction or sentence, pro se prisoner complaints, U.S. government actions to recover benefit payments or to collect on student loans, and actions to enforce arbitration awards. *See* Fed. R. Civ. P. 26(a)(1)(B).

2009, the Institute for the Advancement of the American Legal System (IAALS) surveyed Arizona judges and lawyers for insight on how well certain 1992 amendments to Arizona's rules of civil procedure were working. The survey revealed strong consensus that Rule 26.1 disclosures helped "reveal the pertinent facts early in the case," helped "narrow the issues early in the case," and "facilitate[d] agreement on the scope and timing of discovery."[31] There was no consensus in Arizona, however, "concerning whether disclosures ultimately reduce the total volume of discovery (49% *agreed*; 48% *disagreed*) or reduce the total time required to conduct discovery (46% *agreed*; 50% *disagreed*).

The Task Force decided against recommending wholesale expansion of the scope of initial disclosures in Iowa beyond the scope imposed under the federal rule but does recommend expanding disclosure requirements in certain respects. This recommendation finds some support in the survey responses. More than 300 survey respondents (322) indicated sufficient civil litigation experience in federal court to respond to questions pertaining to the subject of initial disclosures. More than one-half of respondents *agreed* that Iowa state courts should require Rule 26(a)(1) initial disclosures, with 43.7% *agreeing* and 13.7% *strongly agreeing*; 23% either *disagreed* (16.2%) or *strongly disagreed* (7.6%). Respondents were substantially split, however, as to whether Iowa should require broader disclosures of all relevant information than current federal practice. Of the respondents with civil litigation experience in federal court, 46% *agreed* (35.5%) or *strongly agreed* (10.5%) with the proposition that broader disclosures should be required; 34% *disagreed* (24.6%) or *strongly disagreed* (9.4%); and 20% (19.9%) *neither agreed nor disagreed*.[32]

31 *Survey of the Arizona Bench & Bar on the Arizona Rules of Civil Procedure*, at 19, Institute for the Advancement of the American Legal System (2010).
32 *See* survey, question 71c (Appendix B:37).

3. Content of disclosures

a. Identity of witnesses, documents, insurance

The Task Force considered what information litigants should be required to disclose initially before a formal discovery request. The Task Force concluded that like the federal rules, an Iowa rule should require parties, at a minimum, to disclose:

- The identity of "each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment." Fed. R. Civ. P. 26(a)(1)(A)(i);
- "A copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment." Fed. R. Civ. P. 26(a)(1)(A)(ii); and
- Any insurance agreement that might be available to satisfy a possible judgment. *See* Fed. R. Civ. P. 26(a)(1)(A)(iv).

b. Production of documents

The Task Force agrees with the recommendation of the 2009 ACTL/IAALS Report to broaden the disclosure obligation for relevant documents. The federal rule currently only requires a disclosing party to describe such documents by category and location. The 2009 ACTL/IAALS Report proposes that the disclosing party actually "produce" such documents, at least to the extent that they are "reasonably available nonprivileged, non-work product." According to the 2009 ACTL/IAALS Report, this proposal "is intended to achieve a more meaningful and effective exchange of documents in the early stages of the litigation," and "facilitate [earlier]

narrowing of the issues and, where appropriate, settlement."[33]

c. Tailoring disclosures in specific types of cases

There are categories of cases in which parties routinely disclose certain information or documents during the discovery process. Requests for waivers, releases, and medical reports are just a few examples of standard discovery requests in many cases. Efficiencies could result by requiring disclosure of particular discoverable information beyond the constructs of Federal Rule 26(a)(1)(A) without formal discovery requests. Similarly, a list of basic information subject to automatic disclosure could be developed for particular kinds of litigation, for example, employment litigation and personal injury litigation. Several Iowa judicial districts already order such disclosures in family law matters.

The Task Force suggests the following additional information may also be appropriate for automatic initial disclosure:

- Each party's identifying information;
- Identification of witnesses;
- Case-appropriate executed waivers (medical, employment, school);
- Applicable contracts and related documents;
- Social Security disability claim status, etc.;
- Subrogation information;
- Workers' compensation payments received; and
- The amount of liquidated damages and the method of computation for each category of damages claimed for amounts owed along with available documentary evidence of these amounts. *See* Fed. R. Civ. P. 26(a)(1).

33 2009 ACTL/IAALS Report, *supra* n.16, at 7-8 (Appendix D:12-13).

The Task Force further recommends consulting specialty sections of the bar regarding potential categories of automatic disclosures in other areas.

Among the survey respondents a notable complaint is that too often discovery requests are boilerplate documents that are not specific to the nature of the dispute at hand.

Among the survey respondents a notable complaint is that too often discovery requests are boilerplate documents that are not specific to the nature of the dispute at hand. For example, discovery requests sometimes seek information regarding the "accident" when the case does not involve an accident or personal injury.[34] A related complaint is that instructions accompanying discovery requests are unreasonably prolix, too broad, and often not relevant to the case in which the discovery is propounded. If the scope of the required initial disclosures were linked to specific types of case, some of these sources of inefficiency and frustration in the discovery process might be reduced.

d. Damages

The federal rules also require parties to provide a

> computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered.

Fed. R. Civ. P. 26(a)(1)(A)(iii).

Damages discovery arguably differs from discovery relating to other issues, and the Task Force considered the usefulness of requiring automatic disclosure of this information at the inception of discovery when damages can be difficult to compute. Task Force members could not reach consensus on the utility of requiring automatic damages disclosures at the inception of discovery compared to relying on formal, more traditional, discovery processes.

34 *See* survey, open-response question 33. *Available at*: http://www.iowacourts.gov/Advisory_Committees/Civil_Justice_Reform_Task_Force/Survey/.

The 2009 ACTL/IAALS Report likewise acknowledged that "damages discovery often comes very late in the process" and recommended that discovery rules should reflect the "reality of the timing of damages discovery." Absent automatic disclosure, damages discovery could be left to existing or traditional formal discovery processes, party stipulations, or court-ordered pretrial deadlines. The 2009 ACTL/IAALS Report states "[t]he party with the burden of proof should, at some point, specifically and separately identify its damage claims and the calculations supporting those claims. Accordingly, the other party's discovery with respect to damages should be more targeted."[35]

An alternative approach favored by some Task Force members would require initial automatic disclosure of known damages, the method of computation, and available supporting documentary evidence, subject to the continuing duty to supplement the disclosure when more detailed information and damages computations become available.

4. Timing and procedure of disclosures

The Task Force recommends that any Iowa disclosure provision should, to the extent possible and for the sake of uniformity, follow the federal rules of civil procedure on aspects of timing and procedure of initial disclosures. The federal rules provide that disclosures "must be made at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order . . . ." *See* Fed. R. Civ. P. 26(a)(1)(C) and 26(d)(1). The federal rules provide that initial disclosures occur before other formal discovery is sought. Fed. R. Civ. P. 26(d). The federal rules also provide that discovery methods "may be used in any sequence," *id.* at 26(d)(2)(A), be signed, in writing, and served, *id.* at 26(a)(4) and (g), and be subject to the duty to supplement, *see id.* at 26(e).

35 2009 ACTL/IAALS Report, *supra* n.16, at 12 (Appendix D:17).

5. Sanctions

To ensure compliance with any new initial disclosure reforms, the rules governing discovery sanctions should be modified to address a party's failure to initially disclose or to supplement a disclosure. *See* Fed. R. Civ. P. 37(c)(1). The federal rule provides that unless the failure to disclose was substantially justified or is harmless, "the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial." *Id.*

B. Expert Discovery

Discovery relating to expert witnesses contributes to the cost and delay of civil litigation. It is less clear, however, whether cost and delay arising from expert witnesses is such a significant problem in a sufficiently substantial number of Iowa cases as would justify revision of Iowa's expert discovery rules. Iowa's existing discovery rules may adequately address disclosure of information relating to expert witnesses, as well as the cost of such discovery. *See* Iowa R. Civ. P. 1.508.

The Task Force survey similarly fails to evidence clearly the need or popular support for expert discovery reform in Iowa. For instance, while 43.6% of respondents favored limiting depositions of expert witnesses, 39.3% *disagreed* with such limits.[36] A majority of respondents viewed expert depositions as a cost-effective tool for litigants at least one-half of the time, regardless of whether expert testimony is limited to the expert report.[37] Expert witness costs, other trial costs, and attorney's fees are among the determining factors leading to settlement of Iowa cases.[38]

The Task Force discussed several potential reforms of expert discovery rules. Limitation of the number of expert witnesses, restriction of experts' testimony to the contents of their reports, and acceleration of disclosure requirements were thoughtfully considered. In the end, the members reached no consensus in support of such

36 Survey, question 30 (Appendix B:15).
37 Survey, question 29 (Appendix B:14).
38 Survey, question 55 (Appendix B:29).

changes because of the perceived risk that the changes would unreasonably restrict litigants' ability to develop their claims and defenses. Accordingly, with one exception discussed below, the Task Force reached no clear consensus concerning limitations on expert discovery in Tier 2 cases. The Task Force did conclude, however, that some limitations on expert discovery would advance the prompt, inexpensive, and effective disposition or resolution of smaller Tier 1 cases.

1. Discovery of draft expert reports and expert-attorney communications

Iowa should adopt the December 2010 amendment to the federal rules providing work product protection to the discovery of draft reports by testifying expert witnesses and some categories of attorney-expert communications. *See* Fed. R. Civ. P. 26(b)(4)(B) and (C). The federal amendments are calculated to prevent significant "artificial and wasteful" problems created when "lawyers and experts take elaborate steps to avoid creating any discoverable record and at the same time take elaborate steps to attempt to discover the other side's drafts and communications." Fed. R. Civ. P. 26 advisory committee notes to Dec. 2010 amendments. The change has broad support among lawyers and bar associations—including the American Bar Association, the American College of Trial Lawyers, and the American Association of Justice. The Task Force recommends adoption of this provision for all Iowa civil cases.

2. Expert disclosures and depositions

The Task Force compared the federal approach to disclosure of expert witnesses with the current Iowa procedure but was unable to reach a consensus on possible changes to Iowa's procedure for expert witness opinion disclosure or the taking of expert depositions.

Federal Rule of Civil Procedure 26(a)(2)(D)(i) requires parties to disclose the identity of testifying experts in a written report no later than ninety days before trial. For experts "retained or specially employed to provide expert testimony in the case," the

disclosure must include a detailed signed expert report that contains: "a complete statement of all opinions the witness will express and the basis and reasons for them"; "the facts or data considered by the witness in forming" the opinions; "any exhibits that will be used to summarize or support" the opinions; "the witness's qualifications" and publications during the last ten years; a list of cases in the last four years in which the expert has given testimony; and a statement of the expert's compensation. Fed. R. Civ. P. 26(a)(2)(B)(i)-(vi). For testifying experts who have not been "specially retained" to provide expert testimony (for example, treating physicians), a party need only describe the subject matter of the expert testimony and "a summary of the facts and opinions to which the witness is expected to testify." Fed. R. Civ. P. 26(a)(2)(C)(ii).

The 2009 ACTL/IAALS Report urges state courts to similarly require that experts "furnish a written report setting forth their opinions, and the reasons for them," and further recommends "their trial testimony should be strictly limited to the contents of their report."[39] Such a detailed report "should obviate the need for a deposition in most cases."[40]

Under existing Iowa procedure, parties can obtain much the same information regarding expert witnesses, but must do so through interrogatories or other discovery devices. *See* Iowa R. Civ. P. 1.508. The Iowa rule provides that the expert's trial testimony

> may not be inconsistent with or go beyond the fair scope of the expert's testimony in the discovery proceedings as set forth in the expert's deposition, answer to interrogatories, separate report, or supplement thereto. However, the expert shall not be prevented from testifying as to facts or mental impressions and opinions on matters with respect to which the expert has not been interrogated in the discovery proceedings.

Iowa R. Civ. P. 1.508(4). The Task Force believes current Iowa practice works well in most civil cases and thus does not recommend the expert disclosure and report procedure

39 2009 ACTL/IAALS Report, *supra* n.16, at 17 (Appendix D:22).
40 *Id.*

followed in federal practice or recommended in the ACTL/IAALS Report.

C. Discovery Limitations and Judicial Management

The Task Force studied a number of discovery limitations and judicial management procedures intended to reduce litigation expense, promote speedier trials, and eliminate discovery abuses. Some of these limitations and procedures are discussed elsewhere in this report.

1. Discovery abuse

Discovery abuse occurs when the discovery process is used to increase the costs of or to delay litigation. It takes many forms, including failing to respond timely to proper discovery without communication or explanation for the delay, which then prompts frequent attorney follow up, motions to compel, court hearings, and court orders. Too often discovery responses are untimely even after court intervention. When answers to discovery are made, they are too often evasive or non-responsive. Interrogatories are sometimes served in numbers or complexity disproportional to the size or nature of the case. Legitimate discovery requests met with reflexive and non-meritorious objections generate unnecessary follow up, delay, and even court intervention. Failure to invest good faith efforts to resolve discovery disputes also causes delay, increases costs, and wastes court resources.[41] Whatever its form, discovery abuse slows the progress of litigation and increases expense for litigants.

2. Survey responses

The Task Force survey asked respondents to gauge the availability of judges to resolve discovery disputes. When asked how often judges are available to resolve discovery disputes on a timely basis, 34.3% of respondents

41 According to the survey, 20.4% of respondents identified "time to complete discovery" as the primary cause of delay in civil litigation, and 23.3% of respondents identified "lack of attorney collaboration on discovery issues and proceedings" as the primary cause of delay. *See* survey, question 53 (Appendix B:28).

answered *occasionally* and 11.1% indicated *almost never*, while nearly 30% said *often*. More than half of respondents (55.3%) said judges should be more available to resolve discovery disputes, with 17.4% *disagreeing* with that statement. When filtered for judge responses, only 44.4% of judges *agreed* they should be more available to resolve discovery disputes, and 35.2% of judges *disagreed*.

Survey respondents gave a strong indication that sanctions the discovery rules allow are infrequently imposed even when warranted, with 39.6% indicating warranted sanctions are imposed only *occasionally*, and 36.1% stating warranted discovery sanctions are *almost never* imposed.

Nearly 95% of the respondents indicated that judges rarely invoke Rule 1.504(1)(b) discovery limitations on their own initiative, with 74.4% of respondents saying this *almost never* occurs and 20.1% saying *occasionally*.

The survey asked respondents a series of questions on potential causes of excessive discovery relative to the size of case or scope of issues. Forty-four percent (44%) of the respondents indicated that counsel conducting discovery for the purpose of leveraging settlement was *often* (35.1%) or *almost always* (9.2%) the cause of excessive discovery. One-third of the respondents stated leveraging settlement was *occasionally* a cause of excessive discovery. Slightly more than one-third (35.9%) indicated a desire to engage in fishing expeditions was *often* a cause of excessive discovery and just under one-third (32.4%) said fishing expeditions were *occasionally* a cause.

Most respondents do not consider involvement of self-represented parties to be a significant cause of excessive discovery in their cases with one or more pro se parties, with 59.8% answering *almost never* and 19.7% answering *occasionally*.

More than half of respondents (56.3%) either *agreed* (42%) or *strongly agreed* (14.3%) that limitations could be placed on the number, frequency, timing, or duration of interrogatories

without jeopardizing the fairness of the litigation process, while nearly 30% *disagreed* (19.5%) or *strongly disagreed* (9.9%). One-half of respondents either *agreed* (37.6%) or *strongly agreed* (13%) that limitations could be placed on requests for production of documents without jeopardizing the fairness of the litigation process, while 35% *disagreed* (24.4%) or *strongly disagreed* (11.7%) with the proposition.

More than 93% of respondents reported that Rule 1.507 discovery conferences *almost never* (70.2%) or only *occasionally* (23.2%) occur in their cases. Also, more than 80% of respondents reported that when Rule 1.507 discovery conferences do occur, they do not often promote overall efficiency in the discovery process for the course of litigation: *almost never* (29%), *occasionally* (42.9%), and *about ½ time* (9.9%).

D. Electronic Discovery

The Task Force examined whether the Iowa Rules of Civil Procedure should be amended specifically to address preservation and discovery of electronically stored information.

1. Survey results

Forty-one percent (41%) of respondents reported experience with electronic discovery (e-discovery) in their civil litigation cases. Most of the questions on e-discovery elicited a relatively high—about one-third or higher—*neither agree nor disagree* reply from respondents.

Forty-five percent (45%) of respondents either *agreed* (28.7%) or *strongly agreed* (17.9%) that e-discovery causes a disproportionate increase in discovery costs as a share of total litigation costs, while one-quarter of respondents (25.9%) *disagreed*.

A majority of respondents (53.6%) believe courts should be more active in managing e-discovery, with 38.7% *agreeing* and 14.9% *strongly agreeing*, while only 10.5% *disagreed* and 0.8% *strongly disagreed*.

The survey asked respondents about potential causes of e-discovery perceived as excessive when compared to the value of the case or the scope of the issues. One of the most frequently cited causes included counsel with limited experience conducting or responding to e-discovery, with 42.6% *agreeing* and 10.4% *strongly agreeing*; only 15.3% either *disagreed* (14.2%) or *strongly disagreed* (1.1%).[42] Another frequently cited cause of excessive e-discovery was the inability of opposing counsel to agree on scope or timing of e-discovery, with 50% of respondents *agreeing* and 11.3% *strongly agreeing*, and with only 8.1% *disagreeing*.[43] A third frequently cited cause of excessive e-discovery was counsel conducting e-discovery for the purpose of leveraging settlement, with 45.5% of respondents *agreeing* that this was a cause and 13.4% *strongly agreeing*, and only 10.2% *disagreeing*.[44]

2. Iowa Rules of Civil Procedure

The Task Force concludes the existing Iowa Rules of Civil Procedure pertaining to electronic discovery provide courts with the flexibility to handle electronic discovery issues and the rapidly changing advances made in information technology.

3. Commentary to Iowa Rule of Civil Procedure 1.507

The Task Force recommends adding a comment section to Iowa Rule of Civil Procedure 1.507 to reflect recommendations several federal circuit courts and study groups have offered

42 A majority of respondents (55.6%) asked generally about the frequency of excessive discovery, as opposed to e-discovery specifically, indicated that counsel's limited experience conducting or responding to discovery was only *occasionally* a cause. Survey, question 26g (Appendix B:13).

43 A majority of respondents (53.5%) asked generally about the frequency of excessive discovery, as opposed to e-discovery specifically, stated the inability of counsel to agree on the scope or timing of discovery was only *occasionally* (41.4%) or *almost never* (12.1%) a cause. Survey, question 26a (Appendix B:13).

44 Just over one-third of respondents (35.1%) reported that counsel conducting discovery for the purpose of leveraging settlement was *often* a cause of excessive discovery, while one-third (33.4%) reported this as an *occasional* cause. Survey, question 26c (Appendix B:13).

on electronic discovery issues.[45] The official comment to Rule 1.507 should include the following:

> Counsel should be encouraged to meet and discuss at an early stage of litigation, issues pertaining to electronically stored information (ESI), including but not limited to: (1) identification of relevant and discoverable ESI; (2) the scope of discoverable ESI the parties are to preserve; (3) the format for preservation and production of ESI; (4) the potential for conducting discovery in phases or stages as a method for reducing costs and burdens; (5) the procedures for handling inadvertent production of privileged information and other privilege waiver issues; and (6) the necessity, if any, of appointment of third-party consultants to assist counsel and the court with technical aspects of e-discovery.

4. Develop Best Practices for Electronic Discovery

The Task Force recommends that the bar, through the Iowa State Bar Association, develop a best practices manual for electronic discovery in civil litigation. This could address the issues of identification, scope, and preservation of electronically stored information likely to be involved in specific types of civil cases.

45 Iowa R. Civ. P. 1.507 sets forth parameters for pre-trial discovery conferences. Iowa R. Civ. P. 1.507(1)(d) includes "Any issues relating to the discovery and preservation of electronically stored information, including the form in which it should be produced" as a subject parties may raise in a Rule 1.507 discovery conference.

V. Expert Witness Fees

Summary

The Task Force acknowledges the probable need to revisit the statutory additional daily compensation limit for expert witness fees. Leaving the compensation level to the discretion of the trial court is one potential solution.

Iowa's current expert witness fee statute caps additional compensation for testimony at $150 per day. Iowa Code section 622.72 provides as follows:

> Witnesses called to testify only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional examinations and state the result thereof, shall receive additional compensation, to be fixed by the court, with reference to the value of the time employed and the degree of learning or skill required; but such additional compensation shall not exceed one hundred fifty dollars per day while so employed.

Although $150 is a very small percentage of the cost of producing expert testimony and an ever smaller share of the total costs incurred in civil litigation, Task Force members studying this issue could not agree upon a more suitable amount. Concerns about potential abuses of expert fees, and the possibility that access to courts would be diminished if a higher amount could be taxed for witness fees, were obstacles to consensus on this issue.

Taxing as costs a more realistic amount for expert fees would seemingly promote access to justice, especially in Tier 1 cases.

Iowa could consider allocating discretion to the district court to tax as costs a fair and reasonable amount for expert fees. The court could, in the exercise of such discretion, tax costs in an amount that more closely approximates the actual cost of producing the witness for trial. Taxing a more realistic amount of costs would seemingly promote access to justice, especially in Tier 1 cases. For example, consider a case in which the plaintiff's potential recovery is $50,000. An attorney might advise the plaintiff that the case is not worth taking in part because a proper presentation of the case

would require an investment of $15,000 for the presentation of the testimony of three expert witnesses. The prospect of recouping only $450 of the investment for expert evidence in the event of a successful result makes the case more risky and otherwise unattractive. A rule that would permit a more complete recovery of the cost of the expert evidence could improve access to justice for plaintiffs with such claims. Trial courts are well suited to determine the fair and reasonable cost of producing expert evidence and exercise such discretion.

VI. Jurors

Summary

Additions to the standard juror questionnaire would provide a better understanding of the potential jurors' backgrounds and suitability for jury service. The Task Force encourages adoption of more modern juror educational materials and video. Rehabilitation of prospective jurors who express an unwillingness or inability to be fair should include a presumption of dismissal.

The Task Force studied a number of aspects of the existing Iowa jury system.

A. Uniform Juror Questionnaire

The Task Force reviewed the juror questionnaire currently in use statewide. The Task Force concludes a revised uniform jury questionnaire could be developed to provide civil litigants more useful information about the role of potential jurors. It must be remembered, however, that juror questionnaires are public records, unless a court orders them sealed for security or privacy reasons.[46] Clerks are to preserve records relating to juror service and selection for four years.[47] Thus, substantial revisions to the uniform questionnaire beyond its present form must be undertaken with care.

The prevailing practice of the judicial districts across the state is to mail the uniform questionnaire to prospective jurors with instructions to either fill out the paper form and mail it back to the clerk of court or to complete the online version of the summons through the "eJuror" function on the Iowa Judicial Branch website.

46 Iowa Code section 607A.47 permits the court to seal or partially seal a completed juror questionnaire if "necessary to protect the safety or privacy of a juror or a family member of a juror."
47 Iowa Code section 607A.26.

The uniform questionnaire mailed to prospective jurors in Iowa is included in Appendix E (E:2-3) to the report. This form varies slightly from the form posted on the judicial branch website. The eJuror summons and questionnaire, accessible with the prospective juror's birth date and a "Juror ID Number" provided by the clerk of court, allows access to the online questionnaire.

The Task Force recommends additions to the uniform questionnaire, also set forth in Appendix E (E:4).

The Task Force recommends submission of any proposed revisions of the questionnaire to the bench and bar for review and comment prior to adoption.

Some clerks of court circulate completed juror questionnaires to parties prior to trial based on local practice or requests of counsel, but others do not. The Task Force recommends a uniform, statewide practice—to the extent that is possible—for providing potential jurors' answers to questionnaires to litigants and their attorneys before the first day of trial.

The Task Force recommends a uniform, statewide practice—to the extent that is possible—for providing potential jurors' answers to questionnaires to litigants and their attorneys before the first day of trial.

B. Juror Education Process

The Task Force reviewed juror education procedures used in various Iowa judicial districts and procedures from other states. The subcommittee recommends the information provided to prospective jurors on the Iowa Judicial Branch website be expanded significantly.

The website should retain current links to information from each county, providing county-specific logistical information about jury service. The website should offer expanded general information and FAQ sections to provide more comprehensive information about the importance and mechanics of jury service. There are numerous examples available from other states that could serve as a starting point.[48] The juror summons should include information directing prospective jurors to review the information available on the Iowa Judicial Branch website for answers to questions they may have about jury service.

48 *See, e.g.*, Wisconsin State Court System website; multiple examples available on Am.Jur. website: http://www.insd.uscourts.gov/faq/jury_faq.htm.

The prevailing practice in Iowa's judicial districts is to show prospective jurors an informational video when they first report for jury service. There are a handful of counties that do not show the video on a regular basis, if at all. Most clerks' office personnel familiar with the current video agree that it is quite dated and needs to be redone.[49] The Iowa State Bar Association, however, has produced a new juror informational video. Once the new video is released, the court should review the video and, if it is satisfactory, encourage each judicial district to use it in all jury cases.

All prospective jurors in every county, when reporting for jury service, should be shown an informational video before jury selection. The video should address the role and responsibilities of jury members, including information about the use of the internet and social media during jury selection and jury service. The video should be uniform throughout the state. A comprehensive and informative web page and video should reduce the amount of time judicial branch employees spend working with jurors, shorten the time consumed by voir dire, and, importantly, result in better-informed jurors.

C. Rehabilitation of Jurors

A primary goal of the civil justice system is to provide a fair trial for every litigant. During the jury selection process, jurors often respond with answers that would support a challenge for cause pursuant to Iowa R. Civ. P. 1.915(6)(j). This rule provides a party may challenge a juror when it appears the juror has formed or expressed an unqualified opinion on the merits of the controversy, or shows a state of mind that will prevent the juror from rendering a just verdict. The trial court has substantial, but limited, discretion in allowing or disallowing challenges for cause in criminal cases. *State v. Beckwith*, 242 Iowa 228, 232, 46 N.W.2d 20, 23 (1951); *see State v. Rhodes*, 227 Iowa 332, 288 N.W. 98 (1940); *State v. Reed*, 205 Iowa 858, 216 N.W. 759 (1928). When addressing a challenge for cause, the court should handle the rehabilitation of a prospective juror with the utmost caution.

49 The Task Force understands the video, "Our Part for Justice," was an Iowa State Bar Association project dating to the 1970s.

As noted in the Iowa District Court Bench Book:

> Particular care should be taken if the court undertakes to rehabilitate the juror because of the juror's likely retreat from his/her position under the court's questioning. For example, see *State v. Beckwith*, 242 Iowa 228, 46 N.W.2d 20 (1951). Therefore, the better rule would be to sustain the challenge when there appears to be an open question.

Iowa District Court Bench Book, Ch. 7 – Jury Procedures, 5th ed. (2001).

The Task Force recommends that the supreme court enact a rule—or in the alternative, amend the Bench Book to instruct the trial court—that any issue of doubt or possible bias or prejudice should be resolved in favor of excusing the juror rather than leaving doubt as to his or her impartiality. The Task Force further recommends that any reform in this area be published for comment to the bench and bar prior to adoption.

VII. Video and Teleconferencing Options

Summary

When court resources are constrained both by limited numbers of personnel and budget cuts, it is logical to look to video and teleconferencing technology to streamline the court process and reduce costs. The judicial branch should embrace technological developments in ways that will not compromise the fairness, dignity, solemnity, and decorum of judicial proceedings.

Expanded use of technology in our everyday lives means that most justice system stakeholders are comfortable using and interacting with developments in video and teleconferencing options. Civil justice stakeholders and consumers of justice system services expect the judicial branch to use technology to its full potential.

Despite substantial advances in technology, the Iowa Court Rules only specifically authorize telephone conference calls in limited circumstances. Iowa Rule of Civil Procedure 1.431(9) authorizes—upon agreement of the parties, or upon the court's own motion—telephone conference call hearings if there will be no oral testimony offered.[50] Although parties conduct scheduling conferences pursuant to Iowa Rule of Civil Procedure 1.602 and civil trial-setting conferences pursuant to Rule 1.906 routinely by telephone, there appears to be no specific court rule authorizing such practice. Moreover, the Iowa Court Rules do not specifically authorize videoconferencing or other internet-based mechanisms for civil pre-trial or trial proceedings.

50 *See* Iowa R. Civ. P. 1.431(9), which provides in part: "The court upon its own motion or by the agreement of the parties shall arrange for the submission of motions under these rules by telephone conference call unless oral testimony may be offered."

Two-thirds (66%) of the survey respondents favored amending the Iowa rules to allow video conferencing for pre-trial matters.[51]

Other states have authorized the use of such technologies. A Wisconsin codified court rule provides as follows:

885.50. Statement of intent

> (1) It is the intent of the Supreme Court that videoconferencing technology be available for use in the circuit courts of Wisconsin to the greatest extent possible consistent with the limitations of the technology, the rights of litigants and other participants in matters before the courts, and the need to preserve the fairness, dignity, solemnity, and decorum of court proceedings. Further, it is the intent of the Supreme Court that circuit court judges be vested with the discretion to determine the manner and extent of the use of videoconferencing technology, except as specifically set forth in this subchapter.
>
> (2) In declaring this intent, the Supreme Court finds that careful use of this evolving technology can make proceedings in the circuit courts more efficient and less expensive to the public and the participants without compromising the fairness, dignity, solemnity, and decorum of these proceedings. The Supreme Court further finds that an open-ended approach to the incorporation of this technology into the court system under the supervision and control of judges, subject to the limitations and guidance set forth in this subchapter, will most rapidly realize the benefits of videoconferencing for all concerned.
>
> (3) In declaring this intent, the Supreme Court further finds that improper use of videoconferencing technology, or use in situations in which the technical and operational standards set forth in this subchapter are not met, can result in abridgement of fundamental rights of litigants, crime victims, and the public, unfair shifting of costs, and loss of the fairness, dignity, solemnity, and decorum of court proceedings that is essential to the proper administration of justice.

Wis. Stat. Sec. 885.50 (Sup. Ct. Order No. 07-12, 2008 WI 37, 305 Wis. 2d xli). Commentary to the Wisconsin rule states as follows:

> Section 885.50 is intended to recognize and summarize the larger debate concerning the use of videoconferencing technology in the courts, and to provide a clear statement

51 *See* survey, question 48. Nearly 17% of respondents were not in favor of amending the Iowa rules pertaining to the use of video equipment and nearly 18% expressed no opinion.

> of the Supreme Court's intent concerning such use, which should be helpful guidance to litigants, counsel, and circuit and appellate courts in interpreting and applying these rules.

Michigan has approved the use of interactive video technology (IVT) for delinquency and child protective proceedings and has encouraged all courts, including juvenile courts, to expand the use of such technology. *See* MCR 3.904 (adopting in February 2007 use of "two-way interactive video technology" in delinquency and child protective proceedings). Michigan has long allowed the use of telephone testimony.[52] In Administrative Order 2007-1 the Michigan Supreme Court stated

> this Court encourages courts in appropriate circumstances to expand the use of IVT in those proceedings and matters to hearings not enumerated in the new rules by seeking permission from the State Court Administrative Office. The goal of the expanded use of IVT is to promote efficiency for the court and accessibility for the parties while ensuring that each party's rights are not compromised.

The 2007 Administrative Order directed courts must coordinate with the State Court Administrative Office when seeking to expand the use of IVT to uses beyond those specifically set forth.[53]

The Federal Rules of Civil Procedure allow a court, for good cause, to permit "testimony in open court by contemporaneous transmission from a different location." *See* Fed. R. Civ. P. 43(a). Advisory Committee Notes on the 1996 rule amendments illustrate cautionary considerations supporting a requirement of good cause based on compelling circumstances for substituting video testimony for live testimony, and provide in part as follows:

> Contemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling

52 Michigan Court Rule 2.402(B) provides in part as follows: "A court may, on its own initiative or on the written request of a party, direct that communication equipment be used for a motion hearing, pretrial conference, scheduling conference, or status conference." MCR 2.402(A) defines "communication equipment" as "a conference telephone or other electronic device that permits all those appearing or participating to hear and speak to each other."

53 Michigan Administrative Order 2007-1 further states: "The State Court Administrative Office shall assist courts in implementing the expanded use of IVT, and shall report to this Court regarding its assessment of any expanded IVT programs. Those courts approved for an expanded program of IVT use shall provide statistics and otherwise cooperate with the State Court Administrative Office in monitoring the expanded-use programs."

> circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.
>
> The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other--and perhaps more important--witnesses might not be available at a later time.
>
> Other possible justifications for remote transmission must be approached cautiously. Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses. Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying. An unforeseen need for the testimony of a remote witness that arises during trial, however, may establish good cause and compelling circumstances. Justification is particularly likely if the need arises from the interjection of new issues during trial or from the unexpected inability to present testimony as planned from a different witness.

Allowing courts to conduct ministerial hearings, such as pretrial conferences, by way of telephone or videoconferencing, and other hearings for which testimony of witnesses is not anticipated, would create efficiencies in Iowa's court system, especially if statewide rules implement a one case/one judge process in certain circumstances. Allowing hearings that involve taking testimony to be conducted by such technologies may be more difficult and more controversial. Although the Iowa Rules of Civil Procedure do not specifically address the issue of whether testimony may be taken from witnesses not appearing in court in person, an Iowa statute and the supreme court's interpretation of it have disapproved of such practice. *See* Iowa Code Section 624.1 (stating "ordinary actions shall be tried upon oral evidence in open court"). The court has held the use of telephone

testimony over a party's objection is not allowed in actions either at law or in equity. *Estate of Rutter*, 633 N.W.2d 740, 746 (Iowa 2001).

There are numerous exceptions to the rule mandating live testimony by witnesses in Iowa courts. The Uniform Child Custody and Enforcement Act, Iowa Code Section 598B.1, *et seq.*, is intended to promote the efficient resolution of interstate disputes about child custody by permitting the court to allow a witness to testify "by telephone, audiovisual means, or other electronic means." Iowa Code section 598B.111(2) (2011); s*ee also Marriage of Coulter*, 2002 WL 31528589 (Iowa Ct. App. 2002). Other exceptions include: protecting minor witnesses in certain cases, *see* Iowa Code section 915.38; allowing in cases involving the modification of child custody or visitation the presentation of testimony by parents serving in active military duty, *see* Iowa Code sections 598.41C(1)(c) and 598.41D(2)(b); and authorizing the presentation of evidence in involuntary commitment proceedings, *see* Iowa Court Rules 12.19 and 13.19.

South Dakota provisions prescribe the use of interactive audiovisual devices in court proceedings. *See generally* S.D. R. Civ. Proc. 15-5A-1 et seq. Section 15-5A-1 provides in part as follows:

> General provisions. Whenever a proceeding in civil or criminal court is permitted under these rules to be conducted by interactive audiovisual device, the device shall enable a judge or magistrate to see and converse simultaneously with the parties, their counsel or other persons including witnesses. The interactive audiovisual signal shall be transmitted live and shall be secure from interception through lawful means by anyone other than the persons participating in the proceedings.
>
> . . . .
>
> If a party and their counsel are at different locations, arrangements must be made so that they can communicate privately. Facilities must be available so that any documents filed or referred to during the interactive audiovisual communication, or required to be provided to a defendant prior to or during the proceeding, may be transmitted electronically, including, but not limited to, facsimile, personal computers, other terminal devices, and local, state, and national data networks. . . .

South Dakota law expressly prohibits use of interactive audiovisual devices in certain matters:

> Where not permitted. Use of interactive audiovisual device will not be permitted to conduct any felony plea hearings, any stage of trial, felony sentencing, or probation revocation hearing unless all parties to the proceeding stipulate to the use of the interactive audiovisual device for one of the aforementioned purposes. The judge presiding over the matter always retains the discretion not to allow an appearance by interactive audiovisual device if the judge believes that to do so would prejudice any party to the proceeding.

S.D. R. Civ. Proc. 15-5A-9. The South Dakota rules also provide that "[u]nless prohibited by any other law, all other proceedings where the court and parties agree may be conducted by interactive audiovisual device." S.D. R. Civ. Proc. 15-5A-10.

Careful use of evolving technology could make proceedings in the district courts more efficient and less expensive without compromising the fairness, dignity, solemnity, and decorum of the proceedings.

As in Wisconsin and South Dakota, careful use of evolving technology could make proceedings in the district courts of Iowa more efficient and less expensive for the public and the participants without compromising the fairness, dignity, solemnity, and decorum of the proceedings. The Task Force recommends amending Iowa rules and statutes to authorize expressly district courts to use at their discretion telephone and videoconferencing options for court hearings. The Task Force further recommends amending the Iowa Court Rules to authorize specifically use of videoconferencing or telephone technology for hearings involving the taking of testimony, provided that the identity of the testifying witness is assured, the oath is properly administered, the testimony is adequately reported, and reliable equipment permitting the court to assess the physical demeanor of the witness is available for such purposes.

VIII. Court-Annexed Alternative Dispute Resolution (ADR)

Summary

Litigants and practitioners in Iowa are generally satisfied with the current use of private, voluntary ADR for civil cases. There is concern, however, that maintaining the status quo may have steep future costs. Court-annexed ADR is an important aspect of any justice system reform effort, and the Task Force perceives benefits and detriments to reforming this aspect of the Iowa civil justice system.

Introduction

The Task Force encountered significant objections to the prospect of changing the current use of private, voluntary ADR for civil cases. The current system works well. It appears litigants and practitioners are generally well satisfied with the existing delivery system for ADR services. The primary concern expressed by some, however, is that continuing with the status quo may have steep costs in the future.

The Task Force, therefore, presents broad considerations and models of reform for the supreme court's consideration. Among them are:

- Let the use of ADR continue as it is now, without a formal connection to the courts.
- Reform Model 1 would allow a connection to the courts for cases of probable jury verdicts under a set dollar amount. A $50,000 to $75,000 range would be reasonable for the limit of that dollar value. Illinois has had generally favorable results with its system described below. One possible significant advantage of this model would be that attorneys might find it easier to take cases of this type if simplified ADR were readily available, and thus access to justice could be improved.

- Reform Model 2 focuses upon the ADR system now in place in Minnesota. This approach fully annexes ADR to the courts for most civil cases. The Task Force includes in Appendix F to this report a comparison of various state ADR programs—Arizona, Colorado, Florida, Nebraska, North Carolina, and Oregon. Further study of the ADR programs in other states would be valuable if a decision were made to fully annex ADR to the courts in Iowa.
- If Iowa courts were asked to be more fully engaged in selecting or providing neutrals for ADR, it would be necessary to establish a reliable roster of trained and certified neutrals.

Court-annexed ADR is clearly an important aspect of any program of reform to be considered for the Iowa civil justice system. Competing needs for judicial branch resources, however, may dictate that a higher priority must be assigned to other types of civil justice reform at this time. If so, Iowa could continue functioning with its current fully private and voluntary system for some time to come. If the judgment is made that the potential long range costs of continuing with the current system are too great to ignore, and that major benefit could be derived from establishing the courts as a more central and formal part of ADR, then the Task Force believes the models discussed in this report could be useful prototypes for the development of a formal ADR program for this state. No matter what course is chosen, an ongoing colloquy between Iowa lawyers and the other interest groups affected by the civil justice system is essential to maintaining and improving ADR as a key element in the delivery of civil justice in Iowa.

A. Should the Judicial Branch Promote ADR?

Currently Iowa has no formal court-annexed structure for the use of alternative dispute resolution (ADR) alternatives in nonfamily law civil cases. The Iowa Rules of Civil Procedure refer only obliquely to

ADR in rule 1.602.[54] Iowa Code chapter 679 provides a statutory framework for voluntary informal dispute resolution programs and procedures that "one or more governmental subdivisions or nonprofit organizations" may organize. Iowa Code chapter 679A provides the statutory framework governing arbitration procedures. Iowa adopted the Uniform Mediation Act in 2005.[55] Several judicial districts in Iowa have some form of mandatory mediation or ADR applicable to family law matters, and several districts and counties have established ADR programs for small claims matters.[56]

Some Iowa trial courts have relied on rule 1.602 to direct parties to employ ADR in particular cases. Most instances of arbitration or mediation in Iowa, however, occur on a completely independent basis, without any formal trial court involvement. In general, this "informal" use of ADR in Iowa appears to have greatly expanded in recent years. There is widespread sentiment within Iowa's legal community that the present system of ADR is working well and that there is no real need to reform it.[57]

Task Force members did not reach consensus on recommending changes to the current Iowa ADR culture. Those who oppose a court-

54 Rule 1.602 Pretrial conferences; scheduling; management.
1.602(1) *Pretrial conferences; objectives.* In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as:
a. Expediting the disposition of the action.
b. Establishing early and continuing control so that the case will not be protracted because of lack of management.
c. Discouraging wasteful pretrial activities.
d. Improving the quality of the trial through more thorough preparation.
e. Facilitating the settlement of the case.
. . . .
1.602(3) *Subjects to be discussed at pretrial conferences.* The court at any conference under this rule may consider and take action with respect to the following:
. . . .
g. The possibility of settlement and imposition of a settlement deadline or the use of extrajudicial procedures to resolve the dispute.

55 *See* Iowa Code chapter 679C.

56 The Iowa Association of Mediators website lists the following "Judicial District Mediation Programs": Mediation Services of Eastern Iowa—6th Judicial District Family Mediation Program & Johnson County Small Claims Court Mediation Program; 8th Judicial District Small Claims Program; District Court/ISBA Statewide Mediation Program; Linn County Small Claims Mediation Program; Iowa Court Improvement Project—Child Welfare Mediation; and Mediation Center of the Quad Cities.

57 Survey respondents report that just over half (55.49%) of their mediated cases are resolved through the mediation process. Survey, question 67 (Appendix B:34).

annexed ADR program contend the current voluntary ADR system functions well in Iowa. Attorneys for both plaintiffs and defendants have experience with alternatives to litigation and frequently choose an ADR option. Attorneys and their clients now have substantial autonomy in managing and resolving their cases. On occasion, they submit their cases to mediation well before the statute of limitations necessitates the filing of a petition, thus avoiding entirely any judicial branch involvement. If a case does not settle before trial is commenced, the parties can still employ mediation up to the point at which settlement is reached or some impasse develops and litigation is commenced. The trial is and will remain the backstop of our civil justice system.

Those who oppose reform of the current voluntary ADR practices point to a culture of litigation in Iowa in which a high degree of trust often exists between opposing counsel and the neutral mutually chosen to conduct ADR. Establishment of a formal connection between the court and the ADR system would, they contend, impose an unnecessary layer of judicial administration upon a process that is functioning well and does not need reform. Opponents of ADR reform also posit that the real problems in the civil justice system are the burdensome rules, crowded courts, out-of–control discovery, and other similar sources of delay and costs—problems ADR reforms would not address. Further, while they believe establishing a relationship between the judicial branch and ADR might be worth considering in the abstract, opponents of reform believe the judicial branch should first apply scarce monetary and personnel resources to heavy caseloads on the criminal, family, and juvenile dockets, not to civil case ADR reforms.

Court involvement can level the ADR playing field by shielding those without substantial resources from conditions placed on participation by those with greater resources.

Proponents of court annexation of ADR point to other jurisdictions that instituted annexation long ago. Proponents believe court annexation of ADR would maintain the essential role of the courts as the focal point of the civil justice system and the primary institution to which the public can turn for resolution of civil disputes and access to justice. Advocates of annexation note that court involvement can level the ADR playing field by shielding those without substantial resources from conditions placed on participation by those with greater resources. For instance, a party with greater financial resources can condition its participation in the current voluntary

ADR system on the use of a particular neutral. Often, parties agree to ADR settlements only if kept confidential, and most of the confidentiality conditions are defense driven. Proponents of a court-annexed mandatory ADR system believe parties would settle more cases at an earlier stage under such a system and preserve precious judicial resources consumed in the litigation process.

Parties benefit from the existing ADR arrangement based on ample judicial precedent and the talents of a satisfactory supply of experienced trial lawyers serving as neutrals.

Task Force committee members vigorously debated the merits of the current voluntary ADR arrangement and the potential consequences of expanding ADR through reforms. A fundamental concern is that the current popularity of voluntary ADR in Iowa originates with the ease by which parties access the existing body of precedent and legal expertise, sidestepping courts perceived as slow, burdensome, and expensive. Parties benefit from the existing ADR arrangement based on ample judicial precedent and the talents of a satisfactory supply of experienced trial lawyers serving as neutrals. Yet, if ADR continues to develop essentially as a private industry without connection to the courts, and is used to resolve an ever-increasing percentage of civil cases, will it "hollow out" the civil justice system upon which Iowa lawyers and the public have historically relied?

Notwithstanding the benefits of ADR, which can provide a timely and cost-effective resolution of civil disputes, the Task Force acknowledges ADR could have negative effects on the civil justice system in the long term. Among the potential negative effects is the diminution of judicial precedents and lawyers qualified by experience to conduct civil jury trials that could result from the ever-increasing percentage of civil disputes resolved by ADR modalities. In the end, will these potential costs of increasing ADR utilization come at a price too dear? Will increasing reliance upon ADR deplete the ranks of experienced judges qualified to preside over trials of complex civil cases, further weakening the civil justice system over time? Will the increasing reliance on ADR for dispute resolution deprive citizens of their opportunity for civic involvement through jury service? If these are valid concerns, how might the imposition of court-annexed ADR help to remedy them?

Task Force members could not reach a definitive consensus on these questions. The disparate views of committee members are illustrated by their answers to this question: "What will ADR look like in ten or

twenty years?" The answers ranged from "ADR will evolve with our society, and as long as it remains a viable option to the courts, it will serve the public well," to "In ten years we will have gutted the civil justice system and laid the foundation for the termination of the right to civil trial by jury."

While many committee members do not favor recommending changes to current voluntary Iowa ADR practices, others believe ADR systems used in other states are worthy models for consideration in Iowa. Readers of this report are encouraged to view this divergence of opinions as a strength of the Task Force project, not a weakness. The outcome of the Task Force's exploration of ADR is more fairly presented as a continuum, ranging from the view that Iowa should leave good enough alone and not change the manner in which ADR now functions in the civil justice system, to the view that it would be beneficial if the Iowa Supreme Court considered certain significant reforms. To aid the supreme court in its consideration of this subject and the range of potential reform options, the Task Force submits the following information summarizing several ADR models implemented in other jurisdictions.

B. Mandatory ADR

Iowa lawyers and their clients now have a high degree of autonomy in deciding whether to pursue ADR and in selecting a neutral. They control whether to use ADR, the method of ADR used, the choice of a neutral, and when to stop the ADR process if they feel it is not likely to yield acceptable results. During the Task Force's discussions, the use of terms like "mandatory" or "mandated" consistently met spirited resistance. Such resistance was consistent with Task Force survey responses in which more than half (57%) of respondents indicated ADR should not be mandatory. A recurring theme expressed in opposition to the prospect of abandoning the current voluntary ADR regime is: "Everyone agrees that our current voluntary ADR process is working, so are we just considering a solution in search of a problem?"

Iowa lawyers and their clients now have a high degree of autonomy in deciding whether to pursue ADR and in selecting a neutral.

While resistance to any change of the current voluntary system is anticipated from those in the legal community who oppose any changes, it should be noted that the Illinois smaller-case program

discussed below is operated as a mandatory (but nonbinding) program for cases in which the amount in controversy does not exceed $50,000. Minnesota has also instituted a limited mandatory ADR program for essentially all civil cases. In both programs, there were sound reasons for including a mandatory component to support their effective operation.

In Illinois, court-annexed arbitration is mandatory for all claims of $50,000 or less.[58] The arbitration is nonbinding with fines imposed for rejecting the award: $200 for awards of $30,000 or less; $500 for awards greater than $30,000. Arbitrators are authorized to swear witnesses and rule on objections. The rules require parties to participate in good faith or risk waiver of their right to reject the arbitration award. Hearings are limited to two hours and determinations are made immediately.

The rules of evidence in the Illinois arbitration system are relaxed, with documents presumed admissible following mandatory early disclosure in the proceeding. For example, physician reports, and other opinion witness reports, are deemed admitted if disclosed thirty days prior to the hearing. The parties are under a continuing duty to supplement initial disclosures of witness lists, factual bases for claims, damages, and supporting documents. Evidentiary depositions are permitted only upon a good cause showing.

Minnesota courts have recognized the effectiveness of ADR processes for providing more efficient, cost-effective resolutions of disputes. Now an accepted feature of the state's legal culture, the Minnesota protocol established in 1994 requires courts to provide litigants with ADR information, including the efficacy and availability of ADR processes. *See* Minnesota General Rules of Practice for the District Courts, Rule 114.03 Implementation Committee Comments—1993. Rule 114.03(b) imposes a duty on attorneys to advise clients of available ADR processes. If the parties cannot agree on the form of ADR or the choice of a neutral, the court may order the parties to attend a nonbinding ADR process. Although parties are not required to settle their disputes through ADR, they must at least discuss them with a neutral and attempt to resolve them prior to a trial. The Minnesota model creates a formal link between the trial court and

58 The Illinois system is modeled after the Pennsylvania system.

litigants in cases in which parties desire ADR, or in which the court chooses to encourage ADR.

1. Value of case limitation

A majority of survey respondents (57%) were not in favor of a mandatory mediation requirement "in civil cases before a party can have access to a trial."[59] If Iowa were to adopt a mandatory ADR requirement for some cases, however, half (49.5%) of the survey respondents would approve of a value-of-the-case dollar limitation below which mediation would be required.[60] A mandatory ADR system for smaller cases might improve access to justice for litigants by making it more economically feasible for lawyers to handle such cases.

If a mandatory ADR requirement were adopted for any category of cases, the Task Force recommends the amount in controversy limitation should be in the $50,000 to $75,000 range.

When asked to choose a case value threshold, the mean survey response was $71,388. But, upon removing "outlier" responses to this open-ended question—those, for example in this case, that listed a $1 million or $0 threshold amount—the average dollar-value limitation respondents suggested was $53,767. If a mandatory ADR requirement were adopted for any category of cases, the Task Force recommends the amount in controversy limitation should be in the $50,000 to $75,000 range.

2. Certification of neutrals

The Task Force studied whether Iowa should adopt a certification requirement for ADR neutrals. At present, the choice of a neutral in Iowa civil cases is an informal and entirely "market driven" process. Trial lawyers usually know several well-respected neutrals who might be available for a particular case. Two-thirds of the survey respondents perceive most Iowa mediators are well qualified in addressing the substantive issues involved in mediations.

Early in the life of cases in which a substantial amount is in controversy, experienced counsel are likely to discuss the

59 *See* survey, question 59 (Appendix B:31). Nearly 35% favored a mandatory mediation requirement and 8.4% expressed no opinion.

60 *See* survey, question 60 (Appendix B:31). Thirty-five percent (35%) of respondents would not approve of a case value limitation, and 15.7% expressed no opinion.

possibility that some form of ADR, often mediation, would be beneficial and in the best interest of all parties and would avoid the expense and delay of a formal trial. Rules of a court-annexed ADR process could preserve the freedom to agree on the choice of a mediator. Rules directing cases into ADR at an early stage of proceedings could call for the court to assign a neutral if the parties are unable to choose or afford one.

Rules of a court-annexed ADR process could preserve the freedom to agree on the choice of a mediator.

If the current private voluntary ADR process is reformed to increase the court's involvement in the recommendation or selection of the neutral, the Task Force concludes the court must have a means of assuring the roster of available neutrals includes only trained and competent persons.

Nearly 80% of the survey respondents favored certification of mediators if mediation is mandatory or court ordered, and a similar percentage of respondents identified forty hours of training for certification of mediators as appropriate.[61]

3. Model ADR programs

If it is decided that Iowa should institute a mandatory ADR requirement for some or all cases, policy makers could look to models already in place in five other jurisdictions. A summary of each of these models is provided below.

a. Model No. 1: The Illinois mandatory nonbinding arbitration program

Illinois has established court-annexed arbitration as a mandatory, but nonbinding, form of alternative dispute resolution. The program was conceived by the state's judiciary, legislature, bar, and public to reduce the length and cost of litigation in Illinois.

The Illinois Mandatory Arbitration Act authorizes the Illinois Supreme Court to promulgate rules and adopt procedures to establish mandatory arbitration. The arbitration act provides in part as follows:

61 *See* survey, questions 62 and 63 (Appendix B:32).

> § 2-1001A. Authorization. The Supreme Court of Illinois, by rule, may provide for mandatory arbitration of such civil actions as the Court deems appropriate in order to expedite in a less costly manner any litigation wherein a party asserts a claim not exceeding $50,000 or any lesser amount as authorized by the Supreme Court for a particular Circuit, or a judge of the circuit court, at a pretrial conference, determines that no greater amount than that authorized for the Circuit appears to be genuinely in controversy.
>
> § 2-1002A. Implementation by Supreme Court Rules. The Supreme Court shall by rule adopt procedures adapted to each judicial circuit to implement mandatory arbitration under this Act.

IL ST CH 735 § 5/2-1002A.

The Illinois Supreme Court implemented the mandatory arbitration subsystem through Supreme Court Rules 86 through 95. Illinois Supreme Court Rule 86(a) allows judicial districts to elect to implement arbitration proceedings with approval of the supreme court, or the court may direct judicial districts to undertake mandatory arbitration proceedings.[62] Some, but not all, Illinois Judicial Circuits have implemented mandatory arbitration. The following discussion is based primarily on the program in one Illinois circuit, the 14th Judicial Circuit, which includes Rock Island County.

The program applies to all civil cases seeking money damages greater than $10,000 (the jurisdictional limit for small claims in Illinois) and less than the jurisdictional limit approved for that particular circuit by the Illinois Supreme Court, which in many circuits is $50,000.

In all mandatory arbitration cases, parties present their cases to a panel of three attorneys, or arbitrators,

62 Illinois Supreme Court Rule 86(a) provides as follows: "Applicability to Circuits. Mandatory arbitration proceedings shall be undertaken and conducted in those judicial circuits which, with the approval of the Supreme Court, elect to utilize this procedure and in such other circuits as may be directed by the Supreme Court."

in a hearing resembling a traditional bench trial. Each party makes a concise presentation of its case to the panel of arbitrators who then deliberate on the issues and make an award on the same day as the hearing. The panel makes no written findings of facts, but instead issues a simple award naming the prevailing party and setting the amount of the award.

The parties to the dispute must decide whether to accept the arbitrators' award within thirty days. A party may reject the award by paying a rejection fee (between $200 and $500) and by filing a Notice of Rejection with the Clerk of Circuit Court. Following a rejection by either party, the parties may proceed to trial as though the arbitration hearing had never occurred. *See* Illinois Supreme Court Rule 93.

Illinois counties with mandatory arbitration programs report substantial savings in court time and speedier resolutions of small civil lawsuits.

Illinois counties with mandatory arbitration programs report substantial savings in court time and speedier resolutions of small civil lawsuits. The parties accept the majority of arbitration awards, and, generally, litigants express satisfaction with the arbitration program.[63]

i. Specifics of the Illinois program

Although each Illinois circuit may implement its own local rules to comply with the Mandatory Arbitration Act and Supreme Court Rules 86 through 95, generally, the systems in the several districts operate similarly.

i. Arbitration facilities. Most circuits have their own arbitration centers, with a reception area, small hearing rooms, and conference rooms for parties to use.

ii. Types of arbitration cases. All civil cases seeking money damages greater than $10,000

63 *See generally,* Administrative Office of the Illinois Courts, *Court-Annexed Mandatory Arbitration: State Fiscal Year 2008 Annual Report to the Illinois General Assembly.*

and less than the jurisdictional limit the Illinois Supreme Court sets for the circuit—which generally is $50,000, exclusive of costs and interest—must be arbitrated. Attorney fee claims are included in the calculation of the jurisdictional limit. Cases are transferrable to the arbitration calendar from other calls or divisions upon the motion of the court or any party. Generally, arbitration will not be available for forcible entry and detainer, ejectment, confessions of judgment, replevin, detinue, trover, or registrations of foreign judgments.[64]

iii. Arbitrators. A panel of three arbitrators hears the case. The Arbitration Center chooses the arbitrators from a list of prequalified individuals approved by the Supervising Judge for Arbitration and the Arbitration Center, generally those who have completed a court-approved training seminar on arbitration practices and procedures, and have engaged in the practice of law for a minimum of one year.

iv. Discovery. Illinois Supreme Court Rule 90(c) provides that items such as hospital reports, doctor's reports, drug bills and other medical bills, as well as bills for property damages, estimates of repair, earnings reports, expert opinions, and depositions of witnesses are admissible without the maker being present. A party must send written notice of reliance upon rule 90(c) with copies of the documents to the other parties at least thirty days prior to the scheduled arbitration hearing date. Although the documents for which timely notice is given under the rule are still subject to objection, they are presumed admissible. Under rule 90(c),

64 *Id.* ("In most instances, cases are assigned to mandatory arbitration calendars either as initially filed or by court transfer. In an initial filing, litigants may file their case with the office of the clerk of the circuit court as an arbitration case.")

litigants can utilize subpoenas to require individuals to testify at the arbitration hearing and to demand the production of documents.

v. Arbitration hearing. In the majority of cases arbitrated, the evidence is presented in two hours or less. If more than two hours is required, leave for additional time must be granted before the arbitration hearing. A hearing is held 90 to 120 days after commencement of the case.

vi. Arbitration award and judgment on the award. The arbitration panel makes an award promptly upon conclusion of the hearing. The award disposes of all claims, including attorney's fees, costs, and interest. Any party may file with the clerk a written notice of rejection of the award within thirty days after the arbitration award is filed with the clerk of court. The party rejecting the award will be assessed a rejection fee (between $200 and $500).

ii. Illinois' Fourteenth Judicial Circuit mandatory arbitration program—Rock Island County

The 14th Judicial Circuit launched its mandatory arbitration program in 2001. Like all Illinois Mandatory Arbitration Programs, it is governed by Illinois Supreme Court Rules 86-95, and also local court rules, Part 24: Mandatory Arbitration. A Supervising Judge for Arbitration and an Arbitration Administrator supervise the program. An average of 653 cases per year have been referred to, or were pending in, Rock Island arbitration between 2005 and 2010.[65]

65 The 2008 Illinois Report states "From 2004 through 2008, an annual average of 877 cases have been referred to arbitration." Effective January 1, 2006, Illinois raised its small claims jurisdiction amount from $5,000 to 10,000, which may have contributed to a decreasing number of cases referred to arbitration. *See* Appendix G for summaries of individual years.

b. Model No. 2: The Minnesota alternative dispute resolution scheme

Minnesota Code Section 484.74—Alternative Dispute Resolution, provides in Subdivision 1 that "[i]n litigation involving an amount in excess of $7,500 in controversy, the presiding judge may, by order, direct the parties to enter nonbinding alternative dispute resolution." Subdivision 2a of Section 484.74 provides in part: "in cases where the amount in controversy exceeds $50,000, and with consent of all the parties, the presiding judge may submit to the parties a list of retired judges or qualified attorneys who are available to serve as special magistrates for binding proceedings under this subdivision."

Minn. Code Section 484.76(1) provides:

> The Supreme Court shall establish a statewide alternative dispute resolution program for the resolution of civil cases filed with the courts. The Supreme Court shall adopt rules governing practice, procedure, and jurisdiction for alternative dispute resolution programs established under this section. Except for matters involving family law the rules shall require the use of nonbinding alternative dispute resolution processes in all civil cases, except for good cause shown by the presiding judge, and must provide an equitable means for the payment of fees and expenses for the use of alternative dispute resolution processes.

Rule 114 of the Minnesota Rules of General Practice sets forth the alternative dispute resolution scheme:

> Rule 114.01 Applicability
>
> All civil cases are subject to Alternative Dispute Resolution (ADR) processes, except for those actions enumerated in Minnesota Statutes, section 484.76 and Rules 111.01 and 310.01 of these rules.
>
> . . . .
>
> Rule 114.04 Selection of ADR Process

> (a) Conference. After service of a complaint or petition, the parties shall promptly confer regarding case management issues, including the selection and timing of the ADR process. Following this conference ADR information shall be included in the informational statement required by Rule 111.02 and 304.02.
>
> . . . .
>
> (b) Court Involvement. If the parties cannot agree on the appropriate ADR process, the timing of the process, or the selection of neutral, or if the court does not approve the parties' agreement, the courts shall . . . schedule a telephone or in-court conference of the attorneys and any unrepresented parties within thirty days after the due date for filing informational statements pursuant to Rule 111.02 or 304.02 to discuss ADR and other scheduling and case management issues.
>
> Except as otherwise provided . . . the court, at its discretion, may order the parties to utilize one of the non-binding processes, or may find that ADR is not appropriate; provided that no ADR process shall be approved if the court finds that ADR is not appropriate or if it amounts to a sanction on a non-moving party.

The Minnesota model acknowledges that "ADR works best when the parties agree to its use and as many details about its use as possible." Rule 114.04, Advisory Committee Comment—1996 Amendment. If early in the litigation process the parties cannot agree on the use of ADR, which ADR process to use, the timing of the process, or the selection of a neutral, or if the court does not approve the parties' ADR arrangements, the court must schedule a conference to address the disagreement on ADR and other case management issues. Rule 114.04. The court has discretion to order the parties to engage in a nonbinding ADR process, or to find the dispute is not suitable for ADR.

The Minnesota process vests the court with the ultimate authority to compel submission of a dispute to

nonbinding ADR after consultation with the parties and attorneys. In some cases, the court's involvement might lead to the use of ADR in matters in which the parties might initially have resisted it or been unaware of the ADR alternatives available to them.

The trial court also has input on the selection of the neutral in those cases in which the parties were unable to agree on a neutral. Otherwise, the court defers to the parties' choice of a neutral, particularly when the parties have chosen from a statewide roster of qualified neutrals. In Minnesota the roster of trained and qualified individuals provides the court and parties a high degree of assurance that the neutral will provide a quality service in helping the parties resolve their dispute or narrow any unresolved issues.

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Minnesota Rule 114 also provides the evidentiary framework for arbitration proceedings. It calls for admission of "evidence that the arbitrator deems necessary to understand and determine the dispute." Rule 114.09(b)(2). The arbitrator is to liberally construe the relevancy of evidence and may consider written medical and hospital reports, medical bills, documentary evidence of loss of income, property damage, repair bills or estimates, and police reports concerning an accident which gave rise to the case, if delivered at least ten days prior to hearing, Rule 114.09(b)(2)(i). Similarly, the arbitrator will liberally receive written reports, including reports of expert witnesses, and depositions and affidavits. *See* Rule 114.09(b)(2)(ii), (iii), and (iv).

The Minnesota model calls for the neutral to file a decision with the court no later than ten days after the conclusion of the hearing or receipt of a final post-hearing memorandum. Rule 114.09(e)(1). If no party has filed a request for a trial within twenty days after the arbitrator filed the award, the court administrator enters the decision as a judgment. Rule 114.09(e)(2). Within that same twenty days, however, any party may

request a trial. If a party requests a trial, the arbitrator's decision is sealed and placed in the court file, and the court conducts a trial de novo. Rule 114.09(f)(1)-(4).

An evaluation of the Minnesota program included an attorney survey. The Minnesota survey data suggests the Minnesota ADR program established in 1994 is widely accepted and on solid footing, but a majority of the survey respondents reported "no change" in the timing or the volume of discovery and pre-trial preparation.[66]

c. Model No. 3: New Hampshire alternative dispute resolution

New Hampshire offers multiple ADR programs designed to save time and money for litigants and the court system.

i. Alternative dispute resolution

Rule 170 of the Rules of the Superior Court of the State of New Hampshire (N.H. Rule 170) sets forth New Hampshire's ADR program. In New Hampshire most civil cases "shall be assigned to ADR" with certain exceptions.[67] "Promptly" after the filing of an answer or appearance, the parties are required to confer and select an ADR process—mediation, neutral evaluation, binding arbitration, or any other method of dispute resolution the parties agree upon—and a neutral third party to conduct the ADR.

"Promptly" after the filing of an answer or appearance, New Hampshire parties are required to confer and select an ADR process and a neutral third party to conduct the ADR.

New Hampshire's program contains a mandatory element: if the parties cannot agree on an ADR process, "they will be required to submit to mediation." N.H. Rule 170(B)(2). Early in the proceedings, the parties must file a

66 *See* Barbara McAdoo, "A Report to the Minnesota Supreme Court: the Impact of Rule 114 on Civil Litigation Practice in Minnesota," 25 Hamline L. Rev. 401, 430-433 (2002).

67 Civil and equity actions are exempt from ADR if by joint motion the parties represent previous engagement in formal ADR, or by court action pursuant to motion and for good cause. N.H. Rule 170(A)(2)(a) and (b).

comprehensive stipulation covering case scheduling issues, an agreed upon ADR method, selection of a neutral, and a schedule for completion of the ADR process, including filing of case statements and completion of necessary discovery. N.H. Rule 170(C). The ADR process is to be completed "within the shortest possible time" after filing of the stipulation, but in any event not more than eight months after the date of the stipulation. N.H. Rule 170(C)(1)(c).

The New Hampshire scheme requires all parties and counsel to attend scheduled ADR sessions. The court, upon good cause, may excuse a person's participation or allow participation by "speaker telephone." Plaintiff or plaintiff's counsel, except in binding arbitration proceedings, must, within fifteen days of the conclusion of the ADR proceedings, submit in writing to the court the results of the process. N.H. Rule 170(C)(4). If the ADR process does not completely resolve the dispute, the action proceeds pursuant to any agreement reached during the process or as the court orders. N.H. Rule 170(C)(5).

ii. Arbitration by agreement

Rule 170-A of the Rules of the Superior Court of the State of New Hampshire governs non-criminal disputes assigned to arbitration by party agreement or as mandated by a written contractual provision. Prior to commencement of a suit, parties to a dispute may consent to arbitration by request to the New Hampshire Administrator of the Office of Mediation and Arbitration. Each party is subject to a $250 administrative fee. After commencement of suit, the parties may file a written request for

arbitration with the New Hampshire Superior Court. A written request for arbitration causes a stay of the litigation pending completion of the arbitration. N.H. Rule 170-A(B).

For cases assigned under Rule 170-A, the parties must select either a single neutral or a panel of three neutrals from the court's approved list. If the parties cannot agree to a different arrangement, single neutrals hear cases with claims below $100,000, and three-member panels hear cases valued above $100,000. If the parties agree to a neutral or panel of neutrals, they may select neutrals who are not on the court's approved list.

Strict conformity to New Hampshire Rules of Evidence is not required in arbitration proceedings, "with the exception that the panel shall apply applicable New Hampshire law relating to privileges and work product." N.H. Rule 170-A(O)(5). The neutral or panel of neutrals shall consider relevant and material evidence, "giving the evidence such weight as is appropriate," and may exclude unduly repetitive evidence. *Id.* The panel must file a Report of Award within twenty days of the conclusion of the hearing that includes "sufficient findings of fact and conclusions of law to establish a basis for the decision." N.H. Rule 170-A(R).

iii. Judge-conducted intensive mediation

New Hampshire allows for "judge-conducted intensive mediation" of "complex cases." N.H. Rule 170-B. Upon the parties' agreement, the presiding judicial officer may assign a complex case for intensive mediation. Such assignment does not delay pre-trial proceedings unless the court so orders. Mediators for intensive mediations "shall be . . . active, senior active or

retired superior court justice(s)," who have completed an approved mediation training program. N.H. Rule 170-B(C).

iv. Office of Mediation and Arbitration

Effective July 1, 2007, New Hampshire established the Office of Mediation and Arbitration (OMA) designed for managing, developing, and overseeing the court system's ADR programs. The law establishing the OMA authorized the New Hampshire Judicial Branch to develop programs with the following aims:

- Increasing citizen satisfaction with the legal system;
- Providing affordable justice;
- Reducing protracted and repetitive litigation;
- Empowering participants to make decisions affecting their future;
- Enhancing court efficiency; and
- Instituting dispute resolution processes.

OMA duties include guiding development of ADR programs across the state, promoting ADR solutions, serving as a resource to the courts and ADR professionals, and supporting the administration of ADR programs in all courts. The OMA coordinates ADR programs with the New Hampshire Judicial Branch, sets qualifications for ADR professionals, and monitors the quality of ADR programs.

The OMA opened with an initial one-year legislative appropriation of $137,500. By year two, the office was self-funded through a system of fee surcharges paid by participating parties and rostering fees paid by ADR providers.

d. Model No. 4: Arizona court-affiliated ADR

Arizona Rule of Civil Procedure 16(g) states that all parties to civil disputes have a duty to consider ADR, confer with one another about using some form of ADR, and report the outcome of their conference to the court. Arizona attorneys and parties are "jointly responsible" for attempting in good faith to settle or agree on an ADR process and to report to the court on the form of ADR agreed to and the date set for completion of ADR. If the parties report they are unable to agree on ADR or feel it is inappropriate for their case, the court conducts a conference with the parties to consider ADR. The court may direct the parties to discuss their dispute with an "ADR specialist" appointed by the court to determine whether ADR is appropriate and which ADR process might be most beneficial.

Arizona attorneys and parties are "jointly responsible" for attempting in good faith to settle or agree on an ADR process and to report to the court on the form of ADR agreed to and the date set for completion of ADR.

Arizona's civil litigation ADR system offers both mandatory arbitration and discretionary court-ordered mediation formats. Arizona utilizes mediation of appellate matters pending before the Arizona Court of Appeals but not the Supreme Court. Mediation, "short trials" or summary jury trials,[68] settlement conferences, binding arbitration, and early neutral evaluations are available to litigants at the civil trial level. Domestic and family law courts use arbitration, conciliation, mediation, and settlement conferences.

The Treasurer of the State of Arizona administers a statewide dispute resolution fund. The fund is supported with 0.35% of all filing fees collected in Arizona's Superior Court Clerks' offices (the equivalent of the Iowa District Court), 0.35% of the Notary Bond Fees deposited in the Superior Court, and 1.85-2.05% of fees collected by Justice of the Peace Courts.

68 "Short trials" or summary jury trials are a binding ADR alternative that parties can choose in Arizona. Short trials last one day and allow each party two hours to present the party's case to four jurors. Verdicts are reached by agreement of three of the four jurors. Attorneys appointed as judges pro tempore preside over short trials.

The board of supervisors of each county may establish a fee for supporting court-provided ADR services. The treasurer of each county superior court administers the local alternative dispute resolution fund.

i. Arbitration of claims

Arizona Revised Statute Section 12-133 requires each Arizona superior court to establish jurisdictional limits, not to exceed $65,000, for the submission of civil disputes to mandatory arbitration. Arbitration is mandatory in all cases in which either the court finds, or the parties agree, that the amount in controversy does not exceed the jurisdictional limit. Section 12-133(B) allows the court to waive the arbitration requirement on a showing of good cause if all parties file a written stipulation.

The court maintains a list of qualified persons "who have agreed to serve as arbitrators." If the parties fail to agree on the form of ADR, the court assigns the case at its discretion to arbitration before a single neutral or a panel of three arbitrators.

The Arizona scheme allows an abbreviated case procedure:

> Regardless of whether or not suit has been filed, any case may be referred to arbitration by an agreement of reference signed by the parties or their respective counsel for both sides in the case. The agreement of reference shall define the issues involved for determination in the arbitration proceeding and may also contain stipulations with respect to agreed facts, issues or defenses. In such cases, the agreement of reference shall take the place of the pleadings in the case and shall be filed of record.

Arizona Revised Statutes 12-133(D).

A majority of the arbitrators must sign a written arbitration award, which is filed with the court. The award has the effect of a judgment unless reversed on appeal. "Any party to the arbitration proceeding may appeal from the arbitration award to the court in which the award is entered by filing, within the time limited by rule of court, a demand for trial de novo on law and fact." Arizona Revised Statutes 12-133(H).

ii. Mediation

The trial court may refer any case to mediation or other alternative dispute resolution procedures to promote disposition of cases filed in the superior court. Arizona Revised Statutes 12-134(A). The board of supervisors of each county establishes a reasonable fee for alternative dispute resolution services. Arizona Revised Statutes 12-134(B).

e. Model No. 5: Florida ADR programs

Mandatory and court-ordered mediation and arbitration are both used extensively in Florida. Mediation is available in child protection and dependency, bankruptcy, and appellate matters. Both arbitration and mediation are available in general civil matters. Mediation is available in virtually all other civil matters, including, for example, family, foreclosure, juvenile, and small claims cases.

The Florida Dispute Resolution Center (DRC) administers Florida ADR programs.[69] The DRC office is located in the Supreme Court Building in Tallahassee, Florida. The DRC provides staff assistance to four supreme court mediation boards and committees, certifies mediators and mediation training programs, sponsors an annual conference for mediators and

69 Former Florida Chief Justice Joseph Boyd and Florida State University College of Law Dean Talbot "Sandy" D'Alemberte established the DRC in 1986 as the first statewide center for education, training, and research in the ADR field.

arbitrators, publishes a newsletter and annual statistics, provides basic and advanced mediation training to volunteers, and assists local court systems throughout the state as needed.

A fee of $1 assessed on all proceedings filed in the circuit or county courts funds court-affiliated mediation and arbitration programs. The fees are deposited in the state court's Mediation and Arbitration Trust Fund, which Florida's Department of Revenue administers. An additional $60 - $120 per person may be collected in family mediation matters. Each clerk of court submits a quarterly report to the state court administrator specifying the amount of funds collected and remitted to the Trust Fund.

Under Florida Supreme Court rules, the trial court is required, if a party requests, to refer to mediation any filed civil action for monetary damages if a requesting party is willing and able to pay the cost of the mediation or if the parties agree to equitably divide the cost. There are eight statutorily prescribed exceptions to this:

1. The action is a landlord and tenant dispute that does not include a claim for personal injury.
2. The action is filed for the purpose of collecting a debt.
3. The action is a claim of medical malpractice.
4. The action is governed by the Florida Small Claims Rules.
5. The court determines that the action is proper for referral to nonbinding arbitration under this chapter.
6. The parties have agreed to binding arbitration.

7. The parties have agreed to an expedited trial pursuant to s. 45.075.[70]

8. The parties have agreed to voluntary trial resolution pursuant to s. 44.104.[71]

2011 Fla. Stat. 44.102(2)(a).

The court may refer any contested civil action to nonbinding arbitration. Arbitrators are compensated pursuant to supreme court rules. In no event is an arbitrator allowed to charge more than $1,500 per diem, unless the parties agree to a higher figure. Otherwise, two or more opposing parties involved in a civil dispute may agree in writing to submit their controversy to voluntary binding arbitration or voluntary trial resolution, in lieu of litigation. In that event, the parties compensate the arbitrator or trial resolution judge according to their agreement.

The Florida Supreme Court establishes minimum standards and procedures for the qualifications, certification, professional conduct, discipline, and training for both mediators and arbitrators who are court appointed.

The Florida Supreme Court establishes minimum standards and procedures for the qualifications, certification, professional conduct, discipline, and training for both mediators and arbitrators who are court appointed. Florida's ADR act authorizes the Chief Judge of a Judicial Circuit, in consultation with the Board of County Commissioners and with the approval of the Chief Justice of the Florida Supreme Court, to establish a Citizen Dispute Settlement Center. A seven-person council appointed for each dispute settlement center formulates and implements a plan creating an informal forum for the mediation and settlement of disputes. The ADR act prescribes procedural guidelines.

70 Expedited trials under section 45.075 include an accelerated discovery period with an early one-day trial date, one hour for jury selection, the parties each have three hours to present their cases, plain language jury instructions are encouraged, and expert testimony can be submitted by verified report in lieu of appearing at trial. 2011 Fla. Stat. 45.075.

71 "Voluntary trial resolution" refers to Florida's procedure for "private trials" conducted with "private judges" appointed from "member[s] of the Florida Bar in good standing for more than 5 years . . . ." *See* 2011 Fla. Stat. 44.104.

The Florida Supreme Court has established rules prescribing the minimum qualifications of certified and court appointed mediators. Certified mediators must meet minimum standards of general education, mediation education, experience, and mentorship. They must adhere to the standards of professional conduct prescribed by the court. Although membership in the Florida Bar is required to serve as an arbitrator, no certification is mandated.

C. Developing a Court-Annexed ADR Program in Iowa

As noted above, some members of the subcommittee strongly believe the current, informal, lawyer-litigant driven approach is the best system of ADR for Iowa. If a decision is made, however, to reform the state's existing ADR system, several alternative models could provide guidance for policy makers.

1. Program buy-in

Strong buy-in from trial judges, attorneys, and members of the public is essential to successful adoption and implementation of a court-annexed ADR program. Buy-in is easier to obtain if judges and attorneys are convinced the program will clearly benefit the civil justice system and not merely impose an unnecessary level of supervision and administration of a new or different court process. The program must provide tangible benefits to litigants by way of quicker resolution of legal disputes at lower costs than the traditional trial system typically allows.

Strong buy-in from trial judges, attorneys, and members of the public is essential to successful adoption and implementation of a court-annexed ADR program.

Gaining broad buy-in from judges, lawyers, and the public for implementation of a court-annexed ADR program would be a multi-faceted enterprise. The literature suggests acceptance of such programs is maximized when clear goals are identified, constituencies are harmonized, alternative ADR options are provided, qualified neutrals are available, and adequate funding for the program is ensured.[72]

72 *See generally*, McAdoo and Welsh, "Court-Connected General Civil ADR Programs: Aiming for Institutionalization, Efficient Resolution, and the Experience of Justice," p. 45, *ADR Handbook for Judges*.

2. Identify clear goals

A strength of Iowa's judicial system is the degree to which judges and attorneys work together.

The absence of a loud hue and cry from stakeholders demanding changes to current ADR practices emphasizes the need to articulate specific reasons for any reforms undertaken. Is any proposed change expected to achieve cost savings, faster resolution of cases, more satisfying outcomes for parties, better access to justice, overall efficiency, or a combination of these and other benefits? There is no guarantee that a court-annexed ADR scheme will improve civil justice system efficiencies. Improvement may lie, however, in procedural justice for Iowa citizens.

3. Harmonize constituencies

Strong support from judges and attorneys is vital to the success of any court-annexed ADR program. Task Force discussions exposed a wide range of views and highlighted the need for further in-depth discussion, argument, and debate among stakeholders, especially judges and attorneys. A strength of Iowa's judicial system is the degree to which judges and attorneys work together. These constituencies are familiar with the current use of ADR in civil cases—both its strengths and weaknesses—and it is likely they would provide frank, knowledgeable, and useful input informing policy makers considering any proposed reforms.

An ADR program could offer an array of alternatives from which the parties, or the court, could choose the particular form of ADR most suitable to the case.

4. Allow for Options

While mediation is the form of court-annexed ADR most often used, nonbinding arbitration, summary jury trial, and early neutral evaluation are other forms of ADR. An ADR program could offer an array of alternatives from which the parties, or the court, could choose the particular form of ADR most suitable to the case.

5. Ensure qualified neutrals

Any formal court-annexed ADR program must include court rules setting forth requirements assuring the competence and accountability of neutrals, including adherence to accepted ethical standards. The extensive experience of

other states is a good resource for such rule development. Professor Gittler's report "Court-Connected General Civil Mediation Programs: Issues and Options with Respect to Mediators," provides in-depth analysis of credentialing, screening, monitoring, and evaluating mediators in court-annexed programs. Professor Gittler's report is set forth in Appendix H.

Any formal court-annexed ADR program must include court rules assuring the competence and accountability of neutrals.

While more than one-half of survey respondents (57%) did not agree that Iowa should require mandatory mediation in civil cases before a party can have access to a trial, a large majority of respondents (77.7%) favored certification for mediators if mediation is mandatory or court ordered. Seventy-six percent (76%) of respondents *agreed* that forty hours of training for certification of mediators would be appropriate for Iowa. Even so, two-thirds of the respondents perceive most current providers of ADR services are well-qualified to address the substantive issues involved in mediations.

6. Funding

State funding mechanisms vary widely for court-annexed ADR systems. The Resolution Systems Institute and Center for Conflict Resolution (RSI)[73] suggests litigant-paid "party fees" typically provide funding for court-annexed ADR programs. For example, as noted above, Illinois imposes a fee if a party rejects an arbitration award. Some states charge neutrals an annual fee to maintain their names on the courts' rosters.

ADR program costs and funding sources are highly dependent on program design and operation.[74] For example, in some states the central administrative office for court-annexed ADR may only consist of a website and one or two administrative personnel, while in others a larger staff may assist parties in ADR or provide expert consultation when needed.

Funding considerations include whether administration of the program is centralized at the state level or decentralized to

73 Website address: http://www.aboutrsi.org/index.php.
74 McAdoo and Welsh, *supra*, n.72 at 45-46.

judicial districts or individual courts, and the level of staffing at either level. Meaningful oversight and evaluation of the program requires staffing and other resources. Severe long-lasting and current restrictions on judicial system budgets present funding challenges for ADR programs in the near term. Iowa's current voluntary private ADR system suggests litigants expect to pay for ADR services. With current levels of public funding for the judicial branch and existing staffing levels, the judicial branch is not equipped to administer, monitor, or manage a court-annexed ADR system.

With current levels of public funding for the judicial branch and existing staffing levels, the judicial branch is not equipped to manage a court-annexed ADR system.

McAdoo and Welsh identify a number of potential funding sources for ADR programs, including:

- Line items within the judiciary operating budget;
- Direct state or local appropriations;
- State or local bar funding (short term pilots or longer term options);
- Grants (often useful for start-up or evaluation, but rarely available longer term);
- User funding through uniform filing fees including an ADR program surtax, payment for ADR services (in which a state administrative office receives part of the fee), and administrative fees for cases in which parties choose ADR;
- Mediator payments for training or re-certification;
- Pledge drives supported by local law firms; and
- Contracts with agencies (e.g., USPS or USDA) to provide ADR services.[75]

Another concern, particularly with an underfunded judicial branch, is ensuring fair access to the system for indigent parties. Can volunteer mediators be expected to reliably fill any funding gap between the total cost of the ADR program and funds generated by user fees, court filing fees, and legislative appropriations? How much volunteer work can a newly-formed, court-annexed ADR program reasonably expect? Will the general assembly provide public funding of ADR

75 McAdoo and Welsh, *supra*, n.72 at 45.

services for low-income litigants? Should certified or registered neutrals be required to provide pro bono services?[76]

76 Survey respondents are almost equally split on the question of whether certified mediators should be required to provide a certain number of pro bono hours of mediation, with 37.6% reporting *yes* and 34.9% reporting *no*. Survey, question 65 (Appendix B:33). Fifty-five percent (55%) of respondents, however, *agreed* that if mediation is mandated, the state should fund free mediation services for the indigent. Survey, question 66 (Appendix B:34).

IX. Relaxed Requirement of Findings of Fact and Conclusions of Law

Summary

A rule authorizing parties to waive findings of fact and conclusions of law could expedite resolution of nonjury civil cases.

The Iowa Rules of Civil Procedure require a judge, trying a case without a jury, to issue written findings of fact and conclusions of law, and to direct entry of an appropriate judgment. Iowa R. Civ. P. 1.904(1) (formerly Rule 179). The federal analogue to Rule 1.904 is Federal Rule of Civil Procedure 52. A similar rule applies in Iowa criminal trials. *See* Iowa R. Crim. P. 2.17(2) ("In a case tried without a jury, the court shall find the facts specially and on the record, separately stating its conclusions of law and rendering an appropriate verdict"). As the current rule requires Iowa district courts to issue written findings of fact and conclusions of law, even in cases involving simple facts, litigants and lawyers sometimes wait for weeks or months for a decision.[77] The Task Force considered whether clients and lawyers should be able to choose a nonjury trial for civil cases and forgo detailed findings of fact and conclusions of law.

Findings of fact and conclusions of law historically have been required because they inform the litigants and the appellate courts of the trial court's basis for decision "in order that counsel may direct his attack upon specific adverse findings or rulings in the event of an appeal." *Berger v. Amana Society,* 120 N.W.2d 465, 467 (Iowa 1963). Similar public policy justifications underlie Rule 52 of the Federal Rules. *See, e.g.*, *Ramirez v. Hofheinz,* 619 F.2d 442, 445 (5th Cir. 1980). The current Iowa rule requires findings and conclusions in

77 Prior to adoption of the rule, courts were required to issue findings of fact only upon a party's request. *See* Iowa R. Civ. P. 1.904 (official comment).

all nonjury trials, regardless of whether a party requests them. If a trial court fails to issue written findings of fact or fails to comply with Rule 1.904(a), a party may file a motion to enlarge pursuant to Rule 1.904(b). In the absence of such motion, appellate courts generally assume as fact any unstated finding that is necessary to support the judgment. *See United States Cellular Corp. v. Bd. of Adjustment of City of Des Moines,* 589 N.W.2d 712, 720 (Iowa 1999).

Iowa's existing rule allows meaningful appellate review. Federal courts have acknowledged the importance of findings to appellate review, but have found that oral findings serve this purpose. *See* Fed. R. Civ. P. 52; s*ee also Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1212 (3rd Cir. 1993). In a jury trial, the appellate court has the benefit of jury instructions and the trial transcript in determining whether the district court properly applied the law. Although there are no jury instructions available to the appellate court in a nonjury case, trial briefs and less formal communications of authorities provide input to the court as to the applicable law.

The Task Force identified two possible rule changes for relaxing the requirement of findings of facts and conclusions of law in cases tried to the bench: 1) addition of a third paragraph to Rule 1.904 allowing parties to stipulate to a waiver of findings of fact and conclusions of law and 2) a proposed amendment of rule 1.904(1) requiring the court to deliberate immediately upon the close of evidence and render its decision, as is the current practice in cases tried to juries.

Parties could make whatever record they deem appropriate with respect to the applicable law before the record is closed and the case is submitted for decision.

The contemplated rule authorizing the waiver of findings and conclusions in civil cases upon the agreement of all parties would, of course, be applicable only where no party requests trial by jury. The rule could allow parties to make whatever record they deem appropriate with respect to the applicable law before the record is closed and the case is submitted for decision. Pre-trial briefs would provide a complete record for appellate review of the law the court applied. This procedure would put the onus upon trial counsel to make an adequate record, similar to expectations of trial counsel when submitting jury instructions.

The survey findings do not indicate strong support for a rule authorizing the parties to waive findings of fact and conclusions of law. The Task Force believes, however, that if the bench and bar are

provided a clear understanding of the proposed changes to Rule 1.904 authorizing a waiver and the potential for expediting the resolution of some nonjury civil cases, a more substantial demand for the option would be expressed because of the opportunity to obtain a more prompt judicial decision. The Task Force has encountered anecdotal evidence suggesting attorneys and judges who receive details of this reform idea approve the concept and the resulting potential efficiencies.

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X. Business (Specialty) Courts

Summary

Specialty business courts have achieved widespread support across the country. In addition, specialty courts provide excellent vehicles for implementing or piloting other court innovations that may be useful in a broader court system context. A specialty business court should be and could be piloted in Iowa within the existing court system framework of the Iowa Judicial Branch.

Introduction

Judicial districts across the country have turned to specialty courts as a proven way to gain efficiencies in the administration of justice and improve the quality of justice in discrete areas of the law. Specialty courts, also known as problem solving courts in the criminal arena,[78] have been developed for many kinds of legal matters, including drug courts, OWI courts, veterans' courts, teen or peer courts, housing courts, mental health courts, family courts, and domestic violence courts. Several states have turned to business or commercial courts for handling complex commercial litigation or business litigation. For reasons detailed below, the Task Force focused its study and recommendations on business courts.

"Business courts" or "commercial courts" are not typically separate courts set apart from ordinary courts hearing civil cases. They are instead programs or tracks or dockets within existing civil divisions in state trial courts. There are various models of business specialty courts, discussed in more detail below.

Proponents of business courts identify a number of advantages for businesses involved in litigation, including the following: (a) the assignment of cases to judges with particular interest and expertise in

78 Specialty courts, or problem solving courts, in the criminal arena focus on treatment and rehabilitation of offenders as a means to reduce recidivism of offenders without institutionalization.

business litigation enhances consistency, predictability, and accuracy of decisions on business law issues; (b) special rules allow more efficient handling of cases; (c) publication of business court decisions promotes certainty and predictability, which are of great value to commercial enterprises; (d) early, pro-active case management; (e) early exploration of various forms of business-oriented ADR; and (f) enhanced efficiency resulting from use of technology.

Objectives of business courts include: development of judicial expertise, enhanced reliability, efficiency in resolution of business-to-business and intra-corporate disputes, economic development and business retention, and decrease in court backlogs.

The chief objectives of specialized business court programs are the development of judicial expertise, enhanced reliability, efficiency in the resolution of business-to-business disputes and intra-corporate disputes, economic development and business retention, and a decrease in court backlogs.

A. National and Local Support

Specialized business courts enjoy broad support from legal communities and notable legal organizations. Many business courts have expanded because of continued success and support.[79] Twenty states have established business courts and at least three more are in the process of doing so.[80]

The ABA Section of Business Law endorsed creation of specialized business courts fifteen years ago. In 1997, the section's Ad Hoc Committee on Business Courts recommended "that courts which hear a substantial number of corporate and commercial disputes establish specialized court divisions to provide the expertise needed to improve substantially the quality of decision making and the efficiency of the courts with respect to such business cases."[81]

79 The Task Force is aware of only two business courts which were created and successfully implemented, but which were eventually discontinued. Rhode Island created a business calendar in 2001. Because of a general backlog of cases, the business court calendar was suspended in 2009. New Jersey established a pilot program, but the legislature refused to make it permanent. The New Jersey program is still in effect but is rarely used according to court officials. In 2010, however, legislators introduced a bill in the New Jersey General Assembly to create a business court. Opponents to the legislation contended the current court system was satisfactory. *Journal of Business & Technology Law*, *available at* http://www.law.umaryland.edu/academics/journals/jbtl/bus_tech_res.html#aNew Jersey.

80 *See* Appendix I for an abbreviated reporting of how various states have addressed the issue of business courts.

81 ABA Ad Hoc Committee on Business Courts, *Business Courts: Towards a More Efficient Judiciary*, 52 Bus. Law. 947, 957 (1997).

The Conference of Chief Justices adopted a resolution in February 2007 encouraging "states to study and, where appropriate, establish business courts or their equivalents for the effective management of complex corporate, commercial and business cases."[82]

While most state chambers of commerce representatives the Task Force contacted had little awareness of specialized courts, California's chamber executive was well aware of business courts in that state.[83] The California business docket is vigorous and supported by the business community.

When asked their opinion, 49.3% of Task Force survey respondents *agreed* or *strongly agreed* that it would be "beneficial to develop specialty courts for specific kinds of disputes."[84] Twenty-seven percent (27%) of those respondents believed it would be beneficial to develop a business court.[85] Even though the survey instrument instructed respondents not to consider juvenile law or family matters,[86] 65% of respondents approving the concept of specialty courts said Iowa should create a specialty court for family law.

The primary areas the remaining 8% of survey respondents identified as potential subjects for specialty courts included administrative appeals, workers' compensation, medical malpractice, probate, personal injury, and tort claims.

B. Advantages of Business Courts

Jurisdictions that have implemented specialty courts report a number of advantages.

82 Resolution 6, "In Support of Case Management of Complex Business, Corporate and Commercial Litigation," Conference of Chief Justices (February 7, 2007).

83 Chamber executives from North Carolina, Ohio, Oregon, Indiana, and West Virginia either did not know much about their state's business courts or were not aware of the courts' existence. With the exception of North Carolina, however, all of the other referenced states had only recently established pilot programs or are in the process of doing so.

84 *See* survey, question 16 (Appendix B:8). Thirty-one percent expressed no opinion and 14% *disagreed* that it would be beneficial to develop specialty courts in Iowa.

85 *See* survey, question 17. This open-ended question asked respondents to identify specific areas in which they believed specialty courts would be beneficial. *Available at*: http://www.iowacourts.gov/Advisory_Committees/Civil_Justice_Reform_Task_Force/Survey/.

86 As the Civil Justice Reform Task Force did not address matters involving family law, the Task Force focused on whether a business court should be established.

1. Judicial expertise and consistent opinions

In Colorado, the Governor's Task Force on Civil Justice Reform, Committee on Business Courts, found that among trial judges a lack of expertise or familiarity with the law applicable to commercial cases caused inconsistent decisions.[87] Specialization allowed judges to perform judicial functions more proficiently, gain greater experience with particular kinds of cases, and develop expertise. As a result, the quality and consistency of decisions improved.

Specialization allowed judges to perform judicial functions more proficiently, gain greater experience with particular kinds of cases, and develop expertise. As a result, the quality and consistency of decisions improved.

Other states reported similar dissatisfaction with their civil justice systems before the establishment of a business court. For example, before the creation of Pennsylvania's Commerce Court, the "controlling mindset" among the state's lawyers was that the "bench did not have the experience, knowledge or time to deal with cases centered on business and commercial disputes."[88]

After Pennsylvania developed its Commerce Court, it found judges assigned to the court demonstrated expertise in business law matters, as well as expertise in case management and ADR techniques unique to business litigation.[89] In South Carolina, according to Business Court Judge John Miller, the business courts helped develop consistent case law regarding litigated business matters. In Arizona, business court judges, with prior complex litigation experience as practicing attorneys, stay on the business court bench for at least five years, enhancing their level of expertise.

Many business organizations prefer Delaware law in part because of the trial level expertise of Delaware courts. Business frustrations increase when the development of entirely new forms of legal entities—the limited liability company and the limited liability partnership are two good examples—demands courts flesh out the meaning of statutory wording. Likewise, the internet creates new relationships between businesses and

87 *See Final Report of Governor's Task Force on Civil Justice Reform, available at* http://www.state.co.us/cjrtf/report/report.htm.
88 L. Applebaum, "The Commerce Court's First Decade," The Philadelphia Lawyer, Spring 2009.
89 *Id.*

demands that courts define the rights and duties of those who use it. A dearth of published judicial decisions in litigated commercial cases as a consequence of the increasing use of private ADR alternatives generates uncertainty in the business community. Business courts offer a way to alleviate such uncertainty through the published resolution of disputes.

2. Body of common law for commercial cases

Another frustration for businesses and their attorneys in making decisions is the lack of a significant body of common law business decisions from courts. It has long been thought that business courts address this concern by enhancing the consistency, and therefore the predictability, of commercial cases. Business courts provide an opportunity to develop a more complete body of current common law for commercial cases. Publication of a business court's decisions assists businesses and their attorneys in conducting and advising on commercial activities.

Business courts provide an opportunity to develop a more complete body of current common law for commercial cases.

The Pennsylvania Commerce Court publishes most of its opinions, providing lawyers and litigants a consistent and accessible body of business law. Because cases are assigned from the start to an individual judge in the Pennsylvania court, cases "receive individual and expert attention that achieves a just result more efficiently and more economically."[90] North Carolina and Maryland both report similar results from their business court systems.

Organizers of an Ohio pilot program initiated in 2009 hope the allocation of business cases to a limited number of judges will result in more knowledgeable rulings and promote consistency of decisions.

Delaware found the trend toward resolving commercial cases outside the judicial system has exacerbated the problems created by a scarcity of decisional precedent. Associations such as the American Arbitration Association now process thousands of business disputes entirely outside the judicial system. When parties divert cases from the judicial system,

90 *See id.*

development of the common law suffers because privately resolved cases do not create binding precedent so essential to the predictability and stability of the law.

Privately resolved cases do not create binding precedent so essential to the predictability and stability of the law.

Further, private resolution of disputes by arbitration is not necessarily a better dispute resolution mechanism for businesses, for it too can present substantial expense and risk to the participants. Arbitration may require high docket fees, time-consuming and expensive motions, and lengthy discovery similar to complex court litigation. Moreover, arbitration typically allows only limited opportunities for appeal, even if the award is legally or factually incorrect or arbitrary and capricious.

3. Quicker resolution

South Carolina Business Court Judge John Miller reported that the advantages of the business court there are that "each case is handled by a single judge. Each case is allowed wide latitude in scheduling for discovery, motion hearings, and trial." Moreover, Judge Miller reports that cases assigned to the business court "are not subject to time and scheduling rules and constraints imposed on other cases on the regular docket and they are quite often given precedence in scheduling matters, thereby allowing faster resolution of issues."[91]

Judge Miller's characterization of his state's business court model appears consistent with the objectives other states have pursued with existing business courts. For example, in New York, cases are processed more efficiently and quickly and discovery rules are more consistently enforced. New York business court judges have developed expertise, their decisions are published, and they use vigorous and efficient case management practices and cutting edge technology. Attorneys with experience before the court report a high level of satisfaction with it.

Oregon established the Oregon Complex Litigation Court (OCLC) in 2010 after a four-year pilot program. The specialty

91 *See Journal of Business & Technology Law, available at* http://www.law.umaryland.edu/academics/journals/jbtl/bus_tech_res.html#aSouth Carolina.

court "is available for circuit court civil cases across the state that are complex due to a variety of factors, including subject matter, number of parties, factual issues, legal issues, discovery issues, and length of trial."[92] The OCLC pilot program was designed "to handle complex litigation cases from out of county that would have been burdensome to a court's normal docket." The OCLC provides efficiency in court services and "statewide sharing of judicial resources."[93]

4. Greater efficiency

In New York, the court system realized efficiencies through judicial specialization. The state created a commercial division in the state's trial courts and assigned certain justices to hear commercial cases. Implementation of this business court led to a 35% increase in the disposition of commercial cases. In simple terms, specialized business judges could dispose of more commercial cases than generalist judges in a given amount of time. New York obtained these results without using any additional judicial resources. Rather than maintaining a separate court, New York integrated the commercial division into the state's trial level courts of general jurisdiction. Existing judges became the initial contingent of business judges. Those judges used the same courtroom staff and administrative resources they would have used before specializing in business cases. The business judges, however, became more efficient after specializing, and were able to handle more commercial cases, freeing up other judicial resources to be used in other areas of the court of general jurisdiction.

Alabama reported a similar outcome as business courts in that state offered business interests greater efficiency and greater predictability in assessing the likely outcome of potential litigation. North Carolina reported improved case management, increased speed and efficiency in the resolution of business disputes, and advanced use of courtroom technology, encouraging business development in that state.

92 "Oregon Complex Litigation Court History and Description," *available at* http://courts.oregon.gov/OJD/courts/circuit/complex_litigation_court.page.

93 *Id.*

Orange County, California, reported a new business court improved the effective administration of justice by reducing the time and expense normally associated with litigation of complex civil cases. The new court established there also reported earlier resolution of disputes through mediation and settlement and achieved greater use of technology facilitating the trial of complex cases.

New Hampshire has reported that its business courts facilitate prompt and cost-effective resolution of trade secret disputes, breach of contract claims, and conflicts arising from business purchase agreements.

In Arizona, only those judges interested in complex litigation are assigned to the business court. More intense judicial management of cases, regular status conferences, and the appointment of special masters to handle discovery disputes help make the Arizona business court more efficient.

In Maine, the business court serves two goals: improving the state's business climate by creating a fair and efficient court and avoiding the detrimental effect that complex cases have on other matters before the courts. Both business and consumer groups have praised the Maine business court's fairness. Attorneys have a favorable opinion of the court largely because of its ability to manage and dispose of extremely complex matters.

5. Laboratory for entire court system

Most states have created special rules governing their business courts. These rules allow the courts to be innovative with discovery rules and creative in using technology.

In Arizona, the business court initiated e-filing. Because the practice was so successful there, the entire Arizona court system now uses e-filing. Other states reported similar findings, as innovations such as one case/one judge initially deployed in business courts were adapted for use in all civil cases.

C. Concerns with Business Courts

Two primary concerns with business courts include: (1) the business court judges could become too "business friendly"; and (2) the creation of a "special" judicial system, in which business litigants take priority, could disadvantage other cases awaiting resolution in the court system. Some Task Force members expressed a concern voiced by some in North Carolina: that business courts create a perception of "elitism" and are special courts providing "better" justice for the wealthy than for others.

In many states, legislatures have not sufficiently funded the new business courts, limiting their reach and effectiveness.

In many states, legislatures have not sufficiently funded the new business courts, limiting their reach and effectiveness. In Oregon, for example, stakeholders would like to explore the possibility of expanding the scale of the business court, but the appropriation of funds necessary to accomplish this has not been forthcoming from the legislature. Similarly, New Hampshire reports the cost of administering the business court has been a challenge. A related concern in New Hampshire is that business court cases could consume a disproportionate amount of limited court resources

Arizona business court judges (who also handle cases from the general civil docket) report that they work longer hours than their colleagues who are not assigned to the business court. Some business court judges have expressed a degree of dissatisfaction attributed to specialization and the resulting decrease in stimulation occasioned by the variety of cases on the general court docket.

In Pennsylvania, the Commerce Court has strict and relatively high jurisdictional limits relating to the amount at stake. There is concern that some cases topically appropriate for the Commerce Court, such as intra-corporate disputes and small-scale commercial litigation, are excluded from the court as a consequence of the jurisdictional limit.

D. Business Litigation in Iowa

A threshold question in determining whether a special business court is feasible and warranted in Iowa, is whether there is enough business litigation to justify establishing a separate, dedicated docket. Although the Iowa State Court Administrator does not keep statistics

allowing a reliable assessment of the total number of "business" cases or "complex civil litigation" cases, a September 6, 2010, report shows that 1,229 cases filed in Iowa courts in 2009 (the most recent year available) were contract or commercial cases. Roughly 10% of those, or 122 cases, would fall in the category of "complex civil litigation" according to the Judicial Caseload Assessment Committee, which served as the steering committee for the National Center for State Court's study of judicial work-time.[94]

The United States District Courts for the Northern and Southern Districts of Iowa also do not keep "business" case statistics. According to a 2010 breakdown of federal cases in Iowa, however:

35 involved insurance contract disputes;

1 involved a dispute among stock holders;

75 involved "other" contract disputes;

15 involved property;

11 involved anti-trust matters;

1 involved banks or banking; and

4 involved a securities/commodities exchange.

Thus, 142 cases filed in Iowa federal courts last year involved business disputes of some nature.[95]

According to the American Arbitration Association (AAA), there were thirty cases filed in Iowa in 2009 that were arbitrated or mediated, including twenty-nine construction cases and one real estate dispute.[96]

Although these numbers are relatively small compared with the overall caseload of Iowa courts, many business courts across the country have started with a relatively small caseload. For example, in Georgia, which established a business docket in 2006, the business

94 *See* Appendix J for statistics on civil filings in the Iowa District Courts.
95 *See* Appendix K for statistics on filings in federal court.
96 AAA is a not-for-profit, public service organization that offers a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, families, communities, and all levels of government. Businesses that insert a standard arbitration clause in their contracts often use the AAA's services, which are available through offices located in major cities throughout the United States.

court heard twelve cases in its first year. That amount doubled to twenty-four in 2007 and doubled again to fifty in 2008. In 2010, the court handled sixty-four cases.[97] Georgia Supreme Court Chief Justice Carol Hunstein stated in the 2011 Georgia State of the Judiciary Address that the Fulton County Superior Court Judges decided in 2010 to make the county's business court—approved in 2005—a permanent division of the court because it has proved to be effective and efficient. The growth noted in the volume of cases handled by new business courts in other jurisdictions lends credence to the observation of former Chief Justice Broderick who quipped, "If you build it, they will come!"

Many business courts across the country have started with a relatively small caseload.

E. Recommended Business Court Pilot Project

1. General parameters

The Task Force recommends that Iowa implement a pilot project to study establishment of a specialty business court to handle commercial litigation and complex litigation. The pilot program would last for an initial period of three years.

The Task Force recommends that Iowa implement a pilot project to study establishment of a specialty business court.

The Task Force concludes that any system for assigning cases to the business court docket must be flexible. The business court docket should be reserved for cases in which there is a substantial amount in controversy. This will typically include significant money damages, but should also include cases in which a claim of potential future economic loss will occur if injunctive or declaratory relief is not granted.

The business court docket should be limited primarily to cases involving business entities, including claims asserted by sole proprietors and actions brought by partners against partnerships. As access to the business court should not be limited to corporate parties, individuals should be permitted to take advantage of the benefits of the business court docket when they are involved in appropriate cases.

97 *See* Fulton County Superior Court, "Business Court Status Report: Celebrating Five Years of Service," Oct. 2010, *available at* http://www.fultoncourt.org/sca200807/offices/business-court.html.

2. Structure of pilot program

a. Judges

The Task Force recommends that one to three district court judges be selected to serve as business court judges in the pilot program.

i. All interested judges should be invited to apply.

ii. The Iowa Supreme Court, with advice from chief judges of all judicial districts, should select the business court judge(s).

b. Types of cases

The following types of civil cases would be assigned to the business court docket:[98]

i. Only cases in which compensatory damages totaling $50,000 or more are alleged, or claims seeking primarily injunctive or declaratory relief, will be eligible for assignment to the business court docket providing the other criteria identified below are met.

ii. Disputes arising out of technology licensing agreements, including software and biotechnology licensing agreements, or any agreement involving the licensing of any intellectual property rights, including patent rights.

iii. Actions relating to the internal affairs of businesses (i.e., corporations, general partnerships, limited liability partnerships, sole proprietorships, professional associations, real estate investment trusts, and joint ventures), including the rights or obligations between or among shareholders, partners, and members, or

98 Most states that have created business or specialty courts have identified categories of cases that are presumptively included and presumptively excluded from specialty courts' jurisdiction. The Task Force recommends following the same approach in an Iowa pilot program.

the liability or indemnity of officers, directors, managers, trustees, or partners.

iv. Actions claiming breach of contract, fraud, misrepresentation, or statutory violations between businesses arising out of business transactions or relationships.

v. Shareholder derivative and commercial class actions.

vi. Actions arising out of commercial bank transactions.

vii. Actions relating to trade secret, non-compete, non-solicitation, and confidentiality agreements.

viii. Commercial real property disputes other than residential landlord/tenant disputes and foreclosures.

ix. Trade secrets.

x. Antitrust.

xi. Securities litigation.

xii. Breach of business contract.

xiii. Business torts between or among two or more business entities or individuals as to their business or investment activities relating to contracts, transactions, or relationships between or among them.

c. Excluded matters

Actions in which the principal claims involve the following matters should be presumptively excluded from the business court docket:

i. Personal injury or wrongful death matters.

ii. Medical malpractice matters.

iii. Residential landlord/tenant matters.

iv. Professional fee disputes.

v. Professional malpractice claims, other than those brought in connection with the rendering of professional services to a business enterprise.

vi. Employee/employer disputes, other than those relating to matters otherwise assigned to the docket under the criteria stated above.

vii. Administrative agency, tax, zoning, and other appeals.

viii. Criminal matters, including computer-related crimes.

ix. Proceedings to enforce judgments of any type.

x. Residential foreclosure actions.

d. Opt in cases

A party in any other case involving complex commercial litigation not meeting the above criteria should be allowed to request transfer of the case to the business court docket. A judge of the business court should have the discretion to decide whether the transfer is allowed.

e. Rules

The supreme court should appoint a committee consisting of the judges selected as business court judges and lawyers who routinely represent clients in litigated matters of the type within the business court's jurisdiction to recommend special rules for the business court including:

i. Initial disclosures.

ii. Electronic discovery rules.

iii. Case management rules including but not limited to pretrial conferences and the like.

f. Location of trials

The Task Force did not reach agreement on whether business court trials should be held in the county where the suit was originally filed or in a centralized location. If the case is tried in a location other than the county where originally filed, a legislative change may be necessary. The research of the Task Force revealed that court filings in Polk County and in the U.S. Southern District of Iowa show the majority of business litigation originated in the central Iowa, Polk County area. Therefore, if a centralized location were chosen, it would be logical to have that site located in Polk County.

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B. Iowa Civil Justice Reform Task Force Survey

Iowa Task Force for Civil Justice Reform Survey

SurveyMonkey

1. Which of the following best describes your current position?

	Response Percent	Response Count
Attorney, private practice	**58.6%**	**690**
Attorney, corporate	7.5%	88
Attorney, government	16.0%	188
Attorney, non-profit	4.3%	51
Administrative Law Judge	0.9%	11
Magistrate or part-time judge	2.0%	24
District court judge	4.2%	49
Appellate judge	0.7%	8
Retired or inactive	5.8%	68
	answered question	**1,177**
	skipped question	**6**

2. Which of the following best describes your experience in civil litigation?

	Response Percent	Response Count
My current practice involves civil litigation.	**69.1%**	**813**
My current practice does not involve civil litigation, but I have past experience in civil litigation.	21.7%	255
I do not have experience in civil litigation.	9.3%	109
answered question		**1,177**
skipped question		**6**

3. Please provide the Iowa judicial district, county, and estimated population of municipality in which your civil litigation experience primarily takes place. (E.g., 8A, Davis, 2600.)

	Response Percent	Response Count
Judicial District (#)	96.1%	748
County	**97.0%**	**755**
Municipality population (#)	85.6%	666
answered question		**778**
skipped question		**405**

4. If you are in private practice, how many attorneys are in your firm, including attorneys who practice full- or part-time, or are located in satellite offices?

	Response Average	Response Total	Response Count
# of attorneys:	**13.55**	**8,198**	605
answered question			**605**
skipped question			**578**

5. How many years have you practiced law, including years serving as a judicial officer?			
	Response Average	Response Total	Response Count
# of years:	22.72	18,036	794
		answered question	794
		skipped question	389

6. How many years of experience do you have in civil litigation, including years serving as a judicial officer?			
	Response Average	Response Total	Response Count
# of years:	20.26	16,125	796
		answered question	796
		skipped question	387

7. To the best of your ability, please estimate the number of civil JURY TRIALS in which you SERVED AS ATTORNEY OF RECORD or PRESIDED OVER AS A JUDICIAL OFFICER in the last five (5) years.			
	Response Average	Response Total	Response Count
# of cases:	11.38	8,794	773
		answered question	773
		skipped question	410

8. To the best of your ability, please estimate the number of civil JURY TRIALS in which you HAVE BEEN INVOLOVED AS ATTORNEY in the last five (5) years.			
	Response Average	Response Total	Response Count
# of cases:	4.71	3,582	760
		answered question	760
		skipped question	423

9. To the best of your ability, please estimate the number of civil cases TRIED TO THE COURT (bench trials without a jury) in which you served as ATTORNEY OF RECORD or PRESIDED OVER AS JUDICIAL OFFICER in the last five (5) years.

	Response Average	Response Total	Response Count
# of cases:	**40.86**	**31,138**	762
		answered question	**762**
		skipped question	**421**

10. To the best of your ability, please estimate the number of civil cases TRIED TO THE COURT (bench trials without a jury) in which you HAVE BEEN INVOLVED AS ATTORNEY in the last five (5) years.

	Response Average	Response Total	Response Count
# of cases:	**23.11**	**17,497**	757
		answered question	**757**
		skipped question	**426**

11. In the civil cases in which you have participated AS ATTORNEY within the last five (5) years, have you primarily represented plaintiffs, defendants, or about an equal number of each?

	Response Percent	Response Count
Plaintiff representation primarily	28.2%	213
Defendant representation primarily	25.8%	195
About an equal amount of plaintiff and defendant representation	**32.0%**	**242**
Not applicable--judicial officer	7.1%	54
Not applicable--retired or inactive	6.9%	52
	answered question	**756**
	skipped question	**427**

12. In what types of civil cases have you most often been involved AS ATTORNEY in the last five (5) years? If your litigation experience is in more than one substantive area, please select the three areas in which you most often litigate.

	Response Percent	Response Count
Not applicable	7.8%	58
Administrative Law	12.1%	90
Civil Rights	8.9%	66
Construction	9.6%	71
Family Law	34.6%	257
ERISA	1.6%	12
Intellectual Property	1.5%	11
Personal Injury	**35.9%**	**267**
Product Liability	4.4%	33
Securities	0.8%	6
Mass Torts	0.7%	5
Bankruptcy	5.5%	41
Complex Commercial Disputes	8.9%	66
Contracts	30.0%	223
Employment Discrimination	11.7%	87
Insurance	7.8%	58
Labor Law	4.0%	30
Professional Malpractice	7.9%	59
Real Property	20.1%	149
Torts (generally)	21.3%	158
Other (please specify)	13.5%	100
	answered question	**743**
	skipped question	**440**

13. In which forum during the last five (5) years has most of your civil litigation experience taken place?			
		Response Percent	Response Count
State court		**78.1%**	**586**
Federal court		3.3%	25
Roughly equal split of state and federal courts		9.2%	69
Roughly equal split of courts and arbitration panels		1.2%	9
Arbitration panels		0.3%	2
Tribal court		0.0%	0
Administrative agencies		5.7%	43
Other (please specify)		2.1%	16
		answered question	**750**
		skipped question	**433**

14. Below is a list of statements describing potential changes to the civil justice system. For each, please indicate your level of agreement with the statement.						
	Strongly agree	**Agree**	**Neither agree nor disagree**	**Disagree**	**Strongly disagree**	**Response Count**
a. One judge should be assigned to each civil case and handle the matter from beginning to end.	34.0% (255)	**36.1% (271)**	18.8% (141)	9.1% (68)	2.0% (15)	750
b. Iowa should establish regional courthouses to gain efficiencies in the use of court resources.	25.5% (191)	**28.2% (211)**	18.2% (136)	14.6% (109)	13.5% (101)	748
c. A streamlined civil justice process should be created for cases valued below a certain dollar amount.	27.4% (204)	**47.0% (350)**	16.9% (126)	6.0% (45)	2.7% (20)	745
d. A streamlined process for cases valued below a certain dollar amount should replace notice pleadings with fact pleadings.	11.3% (84)	27.5% (205)	**29.1% (217)**	23.4% (174)	8.7% (65)	745
e. A streamlined process for cases valued below a certain dollar amount should impose limitations on the scope and duration of discovery.	20.0% (149)	**43.3% (323)**	14.9% (111)	17.7% (132)	4.2% (31)	746
f. A streamlined process for cases valued below a certain dollar amount should prohibit a summary judgment option.	8.7% (65)	16.0% (119)	20.5% (153)	**36.9% (275)**	18.0% (134)	746
g. Parties should be encouraged to enter into a pre-trial stipulation regarding issues such as liability, admission of evidence, and stipulated testimony.	36.1% (271)	**49.2% (369)**	9.3% (70)	4.0% (30)	1.3% (10)	750
h. The expert witness fee of $150.00 per day found in Iowa Code section 622.72 should be increased.	23.6% (177)	**32.8% (246)**	30.0% (225)	9.5% (71)	4.0% (30)	749
i. Jurors should be allowed to ask questions during trials.	9.3% (69)	21.0% (156)	19.2% (143)	**29.0% (216)**	21.5% (160)	744
j. Statewide rules should be created to address the ability and extent to which the trial judge can rehabilitate jurors.	13.5% (101)	36.0% (269)	**37.3% (279)**	9.5% (71)	3.6% (27)	747
					answered question	**753**
					skipped question	**430**

15. If Iowa were to implement a separate civil justice system to streamline the process for cases valued at a certain dollar amount and below, what should be the dollar value limitation?

	Response Average	Response Total	Response Count
Value limitation $:	**29,850.60**	**19,880,500**	666
		answered question	**666**
		skipped question	**517**

16. It would be beneficial to develop specialty courts for specific kinds of disputes.

	Response Percent	Response Count
Strongly agree	17.7%	133
Agree	**31.6%**	**237**
Neither agree nor disagree	31.4%	236
Disagree	14.1%	106
Strongly disagree	5.2%	39
	answered question	**751**
	skipped question	**432**

17. If you believe it would be beneficial for Iowa to develop specialty courts in specific areas, please identify those areas below.

	Response Count
	352
answered question	**352**
skipped question	**831**

18. For each statement please indicate your level of agreement.						
	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree	Response Count
a. Increased judicial oversight would improve the pretrial process.	9.9% (72)	30.2% (220)	24.9% (181)	**31.3% (228)**	3.7% (27)	728
b. Increased judicial oversight would create unnecessary "busywork."	10.0% (73)	**39.0% (284)**	22.4% (163)	26.4% (192)	2.2% (16)	728
c. Courts should diverge from the Iowa Rules of Civil Procedure if all parties request them to do so.	5.5% (40)	26.9% (195)	20.4% (148)	**35.7% (259)**	11.4% (83)	725
d. Requiring clients to sign all requests for extensions or continuances would limit the number of those requests.	4.1% (30)	32.1% (233)	17.5% (127)	**36.1% (262)**	10.2% (74)	726
					answered question	**732**
					skipped question	**451**

19. For each of the following statements please give your opinion.						
	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree	Response Count
a. I am familiar with the local rules of the districts in which I practice.	24.1% (174)	**56.8% (411)**	10.4% (75)	7.6% (55)	1.1% (8)	723
b. I am readily able to locate the local rules of the judicial districts in which I have pending cases.	26.3% (188)	**41.1% (294)**	13.0% (93)	15.8% (113)	3.9% (28)	716
c. All local rules should be eliminated by adopting statewide uniform rules.	**37.1% (271)**	34.9% (255)	15.2% (111)	10.4% (76)	2.5% (18)	731
d. Any rules unique to a judicial district should be incorporated into standard scheduling or pre-trial orders.	43.0% (310)	**48.1% (347)**	5.1% (37)	2.5% (18)	1.2% (9)	721
					answered question	**732**
					skipped question	**451**

20. How often during the last five (5) years have you consulted the local rules of any given judicial district in the State of Iowa?

	Response Percent	Response Count
Almost never	25.2%	180
Occasionally	**45.3%**	**324**
About 1/2 time	6.2%	44
Often	16.9%	121
Almost always	6.4%	46
answered question		**715**
skipped question		**468**

21. If you could change any one rule of the Iowa Rules of Civil Procedure in order to achieve a more timely and cost-effective court process for litigants, what would it be and why?

	Response Count
	255
answered question	**255**
skipped question	**928**

22. The Following are statements about pleadings. For each, please give your opinion.						
	Almost never	Occasionally	About 1/2 time	Often	Almost always	Response Count
a. Notice pleading encourages extensive discovery in order to narrow the claims and defenses.	9.1% (62)	**39.8% (271)**	16.9% (115)	25.1% (171)	9.1% (62)	681
b. A plain and concise statement of the ultimate facts constituting the claim for relief at the pleading stage would narrow the claims and defenses of the case.	13.0% (89)	**37.6% (258)**	18.5% (127)	25.8% (177)	5.1% (35)	686
c. A plain and concise statement of the ultimate facts constituting the claim for relief at the pleading stage would reduce the total cost of discovery.	21.1% (144)	**38.3% (262)**	15.4% (105)	20.0% (137)	5.3% (36)	684
					answered question	**687**
					skipped question	**496**

23. A motion to dismiss should be an effective tool to narrow claims in the litigation.			
		Response Percent	Response Count
Strongly agree		16.6%	115
Agree		**33.3%**	**231**
Neither agree nor disagree		20.9%	145
Disagree		20.9%	145
Strongly disagree		8.4%	58
		answered question	**694**
		skipped question	**489**

24. The following are general statements about discovery. For each statement, please give your opinion.

	Almost never	Occasionally	About 1/2 time	Often	Almost always	Response Count
a. Judges are available to resolve discovery disputes on a timely basis.	11.1% (68)	**34.3% (209)**	19.0% (116)	29.3% (179)	6.2% (38)	610
b. Sanctions allowed by the discovery rules are imposed upon motion when warranted.	36.1% (221)	**39.6% (243)**	11.7% (72)	10.6% (65)	2.0% (12)	613
c. Conferring with opposing counsel before filing a discovery motion resolves the discovery dispute.	8.4% (52)	29.7% (184)	22.4% (139)	**32.1% (199)**	7.4% (46)	620
d. Attorneys request limitations on discovery under Rule 1.504(1)(b)(3) (burden or expense outweighs the likely benefit, etc.).	34.2% (204)	**45.1% (269)**	10.1% (60)	9.2% (55)	1.5% (9)	597
e. Judges invoke Rule 1.504(1)(b) limitations on their own initiative.	**74.4% (436)**	20.1% (118)	3.4% (20)	1.2% (7)	0.9% (5)	586
f. Discovery is used more to develop evidence for or in opposition to summary judgment than it is used to understand the other party's claims and defenses for trial.	6.1% (37)	**38.7% (233)**	26.1% (157)	22.1% (133)	7.0% (42)	602
					answered question	**628**
					skipped question	**555**

25. Should judges be more available to resolve discovery disputes?

		Response Percent	Response Count
Yes		**55.3%**	**349**
No		17.4%	110
No opinion		27.3%	172
		answered question	**631**
		skipped question	**552**

26. When discovery that is excessive relative to the size of case or scope of issues occurs, how frequently is each of the following the primary cause?						
	Almost never	Occasionally	About 1/2 time	Often	Almost always	Response Count
a. Inability of opposing counsel to agree on scope or timing of discovery.	12.1% (72)	**41.4% (247)**	15.9% (95)	25.5% (152)	5.2% (31)	597
b. Desire to delay proceedings.	15.5% (93)	**42.3% (254)**	9.8% (59)	25.8% (155)	6.7% (40)	601
c. Counsel conducting discovery for the purpose of leveraging settlement.	6.7% (40)	33.4% (200)	15.7% (94)	**35.1% (210)**	9.2% (55)	599
d. Counsel or client desire to engage in fishing expeditions.	6.8% (41)	32.4% (194)	16.0% (96)	**35.9% (215)**	8.8% (53)	599
e. Mistrust between counsel on opposing sides of the case.	10.3% (62)	**41.9% (252)**	18.1% (109)	24.1% (145)	5.5% (33)	601
f. Counsel fear of malpractice claims.	28.1% (167)	**39.7% (236)**	11.8% (70)	17.2% (102)	3.2% (19)	594
g. Counsel with limited experience conducting or responding to discovery.	8.7% (52)	**55.6% (331)**	13.6% (81)	19.3% (115)	2.7% (16)	595
					answered question	**604**
					skipped question	**579**

29. Please indicate how often in your experience each of the following discovery mechanisms is a cost-effective tool for litigants (i.e., the cost is proportionate to the relevant information obtained).						
	Almost never	**Occasionally**	**About 1/2 time**	**Often**	**Almost always**	**Response Count**
a. Request for admission.	16.4% (100)	**30.7% (187)**	13.1% (80)	27.4% (167)	12.5% (76)	610
b. Interrogatories.	5.9% (36)	19.6% (120)	21.4% (131)	**38.0% (232)**	15.1% (92)	611
c. Request for production of documents.	1.6% (10)	10.7% (65)	20.0% (122)	**47.7% (291)**	20.0% (122)	610
d. Depositions of fact witnesses.	3.2% (19)	16.8% (101)	17.8% (107)	**41.9% (252)**	20.4% (123)	602
e. Depositions of expert witnesses where expert testimony is limited to the expert report.	11.2% (66)	**28.2% (166)**	23.6% (139)	27.9% (164)	9.0% (53)	588
f. Depositions of expert witnesses where expert testimony beyond the expert report is permitted.	7.8% (46)	25.0% (147)	19.2% (113)	**32.0% (188)**	16.0% (94)	588
					answered question	**614**
					skipped question	**569**

30. Limitations could be placed on the number, frequency, timing, or duration of the following discovery devices without jeopardizing the fairness of the litigation process:						
	Strongly agree	**Agree**	**Neither agree nor disagree**	**Disagree**	**Strongly disagree**	**Response Count**
a. Request for admission.	11.7% (71)	**30.8% (187)**	16.6% (101)	23.5% (143)	17.4% (106)	608
b. Interrogatories.	14.3% (87)	**42.0% (256)**	14.3% (87)	19.5% (119)	9.9% (60)	609
c. Requests for production of documents.	13.0% (79)	**37.6% (228)**	13.3% (81)	24.4% (148)	11.7% (71)	607
d. Depositions of parties.	9.4% (57)	**30.7% (186)**	17.3% (105)	28.9% (175)	13.7% (83)	606
e. Depositions of non-party fact witnesses.	10.4% (63)	**35.4% (215)**	18.3% (111)	27.0% (164)	8.9% (54)	607
f. Depositions of expert witnesses.	9.8% (59)	**33.8% (203)**	17.1% (103)	29.0% (174)	10.3% (62)	601
					answered question	**609**
					skipped question	**574**

31. In your cases, how often do Rule 1.507 discovery conferences occur?			
		Response Percent	**Response Count**
Almost never		**70.2%**	**403**
Occasionally		23.2%	133
About 1/2 time		4.2%	24
Often		2.1%	12
Almost always		0.3%	2
		answered question	**574**
		skipped question	**609**

32. In your experience, when Rule 1.507 discovery conferences occur, how often do they promote overall efficiency in the discovery process for the course of litigation?

	Response Percent	Response Count
Almost never	29.0%	142
Occasionally	**42.9%**	**210**
About 1/2 time	9.8%	48
Often	14.9%	73
Almost always	3.3%	16
answered question		**489**
skipped question		**694**

33. If there were one aspect of discovery that you could change in order to achieve a more timely and cost-effective court process for litigants, what would it be and why?

	Response Count
	262
answered question	**262**
skipped question	**921**

34. Have you had experience with electronic discovery (e-discovery)?

	Response Percent	Response Count
Yes	41.0%	270
No	**59.0%**	**388**
answered question		**658**
skipped question		**525**

35. Pease give your opinion for each statement regarding e-discovery.						
	Strongly agree	**Agree**	**Neither agree nor disagree**	**Disagree**	**Strongly disagree**	**Response Count**
a. When properly managed in a case, discovery of electronic records can reduce the overall cost of discovery in the case.	14.7% (37)	**32.9% (83)**	18.7% (47)	25.4% (64)	8.3% (21)	252
b. E-discovery causes a disproportionate increase in discovery costs (i.e., increase in cost compared to amount or value of relevant information obtained), as a share of total litigation costs.	17.9% (45)	**28.7% (72)**	23.5% (59)	25.9% (65)	4.0% (10)	251
c. The costs of outside vendors have increased the costs of e-discovery without commensurate value to the client.	16.9% (42)	33.3% (83)	**38.6% (96)**	9.6% (24)	1.6% (4)	249
d. Courts should be more active in managing e-discovery.	14.9% (37)	**38.7% (96)**	35.1% (87)	10.5% (26)	0.8% (2)	248
					answered question	**252**
					skipped question	**931**

36. If you have experience with e-discovery that was excessive relative to the value of the case or scope of issues, please give your opinion regarding whether each of the following was a significant cause:

	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree	Response Count
a. Clients demanding counsel conduct unnecessary e-discovery.	8.6% (16)	26.7% (50)	**33.7% (63)**	23.5% (44)	7.5% (14)	187
b. Counsel fear of malpractice claims.	4.9% (9)	26.9% (49)	**34.1% (62)**	28.6% (52)	5.5% (10)	182
c. Counsel with limited trial experience.	6.0% (11)	33.9% (62)	**36.1% (66)**	21.3% (39)	2.7% (5)	183
d. Counsel with limited experience conducting or responding to e-discovery.	10.4% (19)	**42.6% (78)**	31.7% (58)	14.2% (26)	1.1% (2)	183
e. Inability of opposing counsel to agree on scope or timing of e-discovery.	11.3% (21)	**50.0% (93)**	30.6% (57)	8.1% (15)	0.0% (0)	186
f. Desire to delay proceedings.	4.4% (8)	22.4% (41)	**49.2% (90)**	22.4% (41)	1.6% (3)	183
g. Counsel conducting e-discovery for the purpose of leveraging settlement.	13.4% (25)	**45.5% (85)**	31.0% (58)	10.2% (19)	0.0% (0)	187
h. Courts' lack of understanding of how e-discovery works.	12.0% (22)	35.3% (65)	**37.5% (69)**	14.7% (27)	0.5% (1)	184
i. The presence of pro se litigants.	7.1% (13)	9.9% (18)	**48.4% (88)**	23.6% (43)	11.0% (20)	182
					answered question	**189**
					skipped question	**994**

37. The following are general statements about summary judgment motions. For each, please give your opinion.						
	Almost never	Occasionally	About 1/2 time	Often	Almost always	Response Count
a. Summary Judgment motions are used as a tool to leverage settlement, rather than in a good faith effort to narrow the issues.	18.6% (111)	**51.3% (306)**	10.2% (61)	15.9% (95)	3.9% (23)	596
b. Summary judgment practice increases the cost of litigation without commensurate benefit to judicial economy.	23.0% (137)	**39.1% (233)**	12.2% (73)	17.3% (103)	8.4% (50)	596
c. Summary judgment practice delays the course of litigation without commensurate benefit to judicial economy.	30.7% (182)	**35.5% (210)**	12.0% (71)	14.7% (87)	7.1% (42)	592
d. Judges rule on summary judgment motions promptly.	12.8% (75)	29.1% (171)	**31.2% (183)**	22.1% (130)	4.8% (28)	587
e. Judges are granting summary judgment when appropriate.	9.2% (54)	**29.8% (176)**	25.6% (151)	28.0% (165)	7.5% (44)	590
f. Judges decline to grant summary judgment motions even when warranted.	17.7% (103)	**37.8% (220)**	17.5% (102)	22.2% (129)	4.8% (28)	582
g. Attorneys file summary judgment motions without regard for likelihood of success because of malpractice concerns.	**46.8% (269)**	31.8% (183)	7.8% (45)	9.6% (55)	4.0% (23)	575
					answered question	**600**
					skipped question	**583**

38. The following are statements related to trial dates. For each, please give your opinion.						
	Strongly agree	**Agree**	**Neither agree nor disagree**	**Disagree**	**Strongly disagree**	**Response Count**
a. Trial dates should be set early in the case.	26.7% (160)	**39.7% (238)**	14.0% (84)	17.0% (102)	2.5% (15)	599
b. Trial dates should be set after discovery is completed.	8.1% (48)	25.6% (152)	14.8% (88)	**43.0% (255)**	8.4% (50)	593
c. Trial dates should be continued or vacated only under rare circumstances.	14.7% (88)	**32.7% (196)**	16.5% (99)	31.3% (188)	4.8% (29)	600
d. It is too easy for attorneys to obtain extensions of trial dates already set.	11.8% (71)	23.8% (143)	23.5% (141)	**35.1% (211)**	5.8% (35)	601
e. Parties should be given a date certain for trial.	28.3% (170)	**49.5% (297)**	14.7% (88)	5.8% (35)	1.7% (10)	600
f. Parties should be given a date certain for trial subject to priority for criminal trials.	11.7% (70)	**35.7% (213)**	22.5% (134)	23.3% (139)	6.7% (40)	596
g. Parties should be given a date certain for trial subject to priority for domestic matters.	7.7% (46)	25.2% (150)	25.2% (150)	**32.9% (196)**	8.9% (53)	595
h. Parties should be given a date certain for trial even if it means a trial date more than 14 months in the future.	19.6% (117)	**49.7% (297)**	14.1% (84)	13.1% (78)	3.5% (21)	597
i. Parties should be given a date certain for trial even if cases are not assigned to a specific judge.	20.8% (124)	**52.9% (315)**	13.6% (81)	10.2% (61)	2.5% (15)	596
					answered question	**605**
					skipped question	**578**

39. The following are statements about judicial role in the discovery stage of litigation. Please consider how often the following occur.	Almost never	Occasionally	About 1/2 time	Often	Almost always	Response Count
a. Judges are involved early in case proceedings.	**60.1% (342)**	34.4% (196)	3.5% (20)	1.6% (9)	0.4% (2)	569
b. Involvement by judges early in the case helps to narrow the issues.	23.0% (128)	**39.9% (222)**	15.8% (88)	18.3% (102)	2.9% (16)	556
c. Involvement by judges early in a case helps to narrow discovery to the information necessary for case resolution.	26.5% (147)	**41.4% (230)**	12.1% (67)	17.8% (99)	2.2% (12)	555
					answered question	**572**
					skipped question	**611**

40. The following are statements about judicial role in litigation. For each please give your opinion.	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree	Response Count
a. When a judge is involved early in a case and stays involved until completion, clients are more satisfied with the litigation process.	6.5% (37)	35.1% (200)	**50.3% (286)**	7.2% (41)	0.9% (5)	569
d. One judge should handle a case from start to finish.	24.9% (144)	**44.3% (256)**	15.6% (90)	13.1% (76)	2.1% (12)	578
e. The judge who is going to try the case should handle all pre-trial matters.	32.5% (187)	**46.4% (267)**	13.6% (78)	6.8% (39)	0.7% (4)	575
f. It is more important that pre-trial matters are handled promptly than whether the trial judge or another judicial officer handles the matters.	10.1% (58)	**37.5% (215)**	21.8% (125)	28.1% (161)	2.4% (14)	573
g. Judges with expertise in certain types of cases should be assigned to those types of cases.	21.6% (124)	**44.2% (253)**	21.6% (124)	10.1% (58)	2.4% (14)	573
					answered question	**581**
					skipped question	**602**

41. The following are statements relating to judicial involvement in settlement. Please give your opinion for each.

	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree	Response Count
a. Judges pressure parties to settle cases.	8.3% (48)	**37.2% (215)**	25.1% (145)	24.7% (143)	4.7% (27)	578
b. Judges pressure parties to settle cases because they do not want to preside over trials.	7.5% (43)	19.5% (112)	23.2% (133)	**39.0% (224)**	10.8% (62)	574
c. Judges pressure parties to settle cases because of overcrowded court dockets.	7.8% (45)	**35.2% (203)**	25.3% (146)	26.2% (151)	5.5% (32)	577
d. Judges pressure parties to settle cases because of a shortage of court resources.	7.7% (44)	**35.3% (202)**	26.2% (150)	25.3% (145)	5.4% (31)	572
					answered question	**580**
					skipped question	**603**

42. Iowa judges should do more or less to encourage parties to settle cases.

	Response Percent	Response Count
More	**46.0%**	**267**
Less	10.7%	62
No opinion	43.3%	251
	answered question	**580**
	skipped question	**603**

43. In your experience, how often are Rule 1.602 pretrial conferences held?		
	Response Percent	Response Count
Almost never	32.2%	171
Occasionally	**32.8%**	**174**
About 1/2 time	14.5%	77
Often	13.6%	72
Almost always	7.0%	37
	answered question	**531**
	skipped question	**652**

44. Rule 1.602 pretrial conferences should be held--						
	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree	Response Count
in all civil cases in district court.	21.4% (116)	**39.9% (216)**	24.5% (133)	12.4% (67)	1.8% (10)	542
in all civil cases in disrict court valued below a certain dollar amount.	17.4% (90)	28.2% (146)	**34.9% (181)**	15.4% (80)	4.1% (21)	518
					answered question	**545**
					skipped question	**638**

45. What effect does holding a Rule 1.602 pretrial conference have on a case? Select all that apply.

	Response Percent	Response Count
Holding a Rule 1.602 conference has no effect on a case	10.4%	51
Identifies the issues	52.2%	256
Narrows the issues	51.4%	252
Informs the court of the issues in the case	**66.7%**	**327**
Promotes settlement	53.7%	263
Shortens the time to case resolution	26.9%	132
Lengthens the time to case resolution	2.4%	12
Improves efficiency of the litigation process	50.8%	249
Lowers cost of resolving legal disputes by trial	31.0%	152
Increases cost of resolving legal disputes by trial	4.5%	22
Other (please specify)	4.9%	24
	answered question	**490**
	skipped question	**693**

46. With which of the following statements do you most agree?			
		Response Percent	Response Count
Rule 1.604 pretrial orders are modified only when necessary to prevent manifest injustice.		**48.1%**	**211**
Rule 1.604 pretrial orders are modified too often for less than compelling reasons.		32.6%	143
Rule 1.604 pretrial orders are modified less often than necessary to prevent manifest injustice.		19.4%	85
		answered question	**439**
		skipped question	**744**

47. In the last five (5) years in what percentage of civil cases in which you were involved were pretrial conferences or hearings held by telephone, video conferencing, or in person?			
	Response Average	Response Total	Response Count
Telephone %:	39.34	17,704	450
Video conferencing %:	0.17	54	324
In person %:	**56.84**	**25,920**	456
		answered question	**485**
		skipped question	**698**

48. Do you favor amending the Iowa rules to allow video conferencing for pretrial matters?

	Response Percent	Response Count
Yes	**66.0%**	**376**
No	16.5%	94
No opinion	17.5%	100
	answered question	**570**
	skipped question	**613**

49. When there are LIMITED ISSUES OF LIABILITY, do you favor allowing the court to enter a verdict similar to a jury verdict and/or judgment without making findings of fact and conclusions of law?

	Response Percent	Response Count
Yes	28.1%	160
No	**58.6%**	**334**
No opinion	13.3%	76
	answered question	**570**
	skipped question	**613**

50. In cases involving LIMITED AMOUNTS IN CONTROVERSY, do you favor allowing the court to enter a verdict and/or judgment without making findings of fact and conclusions of law?

	Response Percent	Response Count
Yes	32.7%	187
No	**57.4%**	**328**
No opinion	9.8%	56
	answered question	**571**
	skipped question	**612**

51. The following are general statements about litigation costs. For each, please give your opinion.						
	Strongly agree	**Agree**	**Neither agree nor disagree**	**Disagree**	**Strongly disagree**	**Response Count**
a. Continuances increase the overall cost of litigation.	24.4% (139)	**38.1% (217)**	18.1% (103)	17.2% (98)	2.3% (13)	570
b. Expediting cases increases the overall cost of litigation.	3.0% (17)	13.6% (77)	29.2% (165)	**48.3% (273)**	5.8% (33)	565
c. When all counsel are collaborative and professional, the case costs the client less.	**51.5% (294)**	42.2% (241)	3.9% (22)	0.5% (3)	1.9% (11)	571
					answered question	**574**
					skipped question	**609**

52. In your experience how often are litigation costs proportional to the value of the case?			
		Response Percent	**Response Count**
Almost never		10.8%	60
Occasionally		**30.5%**	**169**
About 1/2 time		**30.5%**	**169**
Often		25.2%	140
Almost always		3.1%	17
		answered question	**555**
		skipped question	**628**

53. The primary cause of delay in the litigation process is:		
	Response Percent	Response Count
Delayed rulings on pending motions.	7.7%	43
Court continuances of scheduled events.	11.4%	64
Attorney requests for extensions of time and continuances.	**23.8%**	**133**
The time required to complete discovery.	20.4%	114
Lack of attorney collaboration on discovery issues and proceedings.	23.3%	130
Other (please specify)	13.4%	75
	answered question	**559**
	skipped question	**624**

54. How often does the cost of litigation force cases to settle that should not settle based on the merits?		
	Response Percent	Response Count
Almost never	5.9%	33
Occasionally	**43.8%**	**245**
About 1/2 time	17.9%	100
Often	29.0%	162
Almost always	3.4%	19
	answered question	**559**
	skipped question	**624**

55. How often is each of the following a determining factor in the decision to settle a case?						
	Almost never	Occasionally	About 1/2 time	Often	Almost always	Response Count
a. Expert witness costs	8.1% (44)	**46.4% (251)**	9.1% (49)	31.6% (171)	4.8% (26)	541
b. Deposition costs	15.7% (85)	**46.9% (254)**	13.8% (75)	21.0% (114)	2.6% (14)	542
c. Document production costs	36.8% (200)	**42.0% (228)**	9.4% (51)	10.7% (58)	1.1% (6)	543
d. E-discovery costs	**46.8% (238)**	34.8% (177)	6.9% (35)	10.0% (51)	1.6% (8)	509
e. Trial costs	8.3% (45)	26.5% (144)	14.0% (76)	**36.8% (200)**	14.4% (78)	543
f. Legal research costs	**49.1% (264)**	34.4% (185)	8.4% (45)	6.9% (37)	1.3% (7)	538
g. Motion practice costs	34.6% (186)	**41.6% (224)**	12.1% (65)	10.0% (54)	1.7% (9)	538
h. Attorney fees	7.2% (39)	26.3% (143)	14.4% (78)	**38.3% (208)**	13.8% (75)	543
					answered question	**550**
					skipped question	**633**

56. How often is the unpredictability of a jury's verdict a determining factor in the decision to settle a case?		
	Response Percent	Response Count
Almost never	1.9%	10
Occasionally	16.9%	91
About 1/2 time	22.0%	119
Often	**46.3%**	**250**
Almost always	14.1%	76
answered question		**540**
skipped question		**643**

57. How often is the unpredictability of the judge a determining factor in the decision to settle a case tried to the court?		
	Response Percent	Response Count
Almost never	8.1%	45
Occasionally	**39.7%**	**221**
About 1/2 time	19.6%	109
Often	28.7%	160
Almost always	4.3%	24
answered question		**557**
skipped question		**626**

58. If you bill clients for your time, what is your usual hourly rate? Please round to the nearest whole dollar.			
	Response Average	Response Total	Response Count
Hourly rate $	188.39	77,807	413
		answered question	413
		skipped question	770

59. Should Iowa require mandatory mediation in civil cases before a party can have access to a trial?			
		Response Percent	Response Count
Yes		34.7%	199
No		**57.0%**	**327**
No opinion		8.4%	48
		answered question	574
		skipped question	609

60. If Iowa were to require mandatory mediation for some cases, would you approve a value-of-the-case dollar limitation below which mediation would be required?			
		Response Percent	Response Count
Yes		**49.5%**	**281**
No		34.9%	198
No opinion		15.7%	89
		answered question	568
		skipped question	615

61. If Iowa were to require mandatory mediation for cases valued at a certain dollar amount and below, what should be the dollar limitation?

	Response Average	Response Total	Response Count
Value limitation $	71,387.79	28,055,402	393
		answered question	393
		skipped question	790

62. If mediation is mandatory or court ordered, should mediators be certified?

	Response Percent	Response Count
Yes	77.7%	445
No	16.2%	93
No opinion	6.1%	35
	answered question	573
	skipped question	610

63. States requiring mediators to be certified generally require 40 hours of training. Do you believe this would be appropriate for Iowa?

	Response Percent	Response Count
Yes	76.0%	425
No	16.3%	91
Other (please specify)	7.7%	43
	answered question	559
	skipped question	624

64. Do you perceive most mediators to be well-qualified in terms of the substantive issues involved in mediations?

	Response Percent	Response Count
Yes	**66.7%**	**376**
No	14.0%	79
No opinion	19.3%	109
	answered question	**564**
	skipped question	**619**

65. If mediators are certified, should they be required to provide a number of hours of pro bono mediation for the indigent or for cases that are too small, such as small claims, to retain a mediator?

	Response Percent	Response Count
Yes	**37.6%**	**211**
No	34.9%	196
No opinion	25.5%	143
Other	2.0%	11
	Other (please specify)	17
	answered question	**561**
	skipped question	**622**

66. If mediation is mandated, should the state provide free mediation services for the indigent?			
		Response Percent	Response Count
Yes		**55.2%**	**313**
No		28.2%	160
No opinion		16.6%	94
		answered question	**567**
		skipped question	**616**

67. What percentage of your mediated cases are resolved through the mediation process?			
	Response Average	Response Total	Response Count
Cases resolved through mediation: %	**55.49**	**27,080**	488
		answered question	**488**
		skipped question	**695**

68. What factors prompt you to seek or acquiesce to mediation processes in a case?						
	Almost never	Occasionally	About 1/2 time	Often	Almost always	Response Count
a. Client concerns about cost of attorney fees.	22.4% (113)	28.8% (145)	11.7% (59)	**31.2% (157)**	6.0% (30)	504
b. Client concerns about cost of discovery.	26.1% (131)	**35.7% (179)**	11.4% (57)	23.9% (120)	3.0% (15)	502
c. Client concerns about expert witness costs.	21.9% (110)	**35.3% (177)**	10.2% (51)	27.3% (137)	5.4% (27)	502
d. Client concerns about the length of time for resolution through court litigation process.	9.9% (50)	24.9% (126)	13.0% (66)	**39.5% (200)**	12.6% (64)	506
e. Client inability to pay or pro bono status.	**50.2% (247)**	26.8% (132)	5.7% (28)	14.2% (70)	3.0% (15)	492
f. Uncertainty of outcome in court.	3.3% (17)	16.4% (84)	16.8% (86)	**45.4% (232)**	18.0% (92)	511
g. Client desire to avoid the stress of trial.	9.0% (45)	20.6% (103)	17.0% (85)	**43.5% (218)**	10.0% (50)	501
h. Attorney desire to avoid the stress of trial.	**58.1% (291)**	26.7% (134)	7.2% (36)	7.0% (35)	1.0% (5)	501
i. Attorney workload demands.	**57.5% (288)**	29.1% (146)	5.4% (27)	7.6% (38)	0.4% (2)	501
j. Attorney inexperience in trying cases.	**66.2% (329)**	22.5% (112)	4.8% (24)	5.6% (28)	0.8% (4)	497
k. Case is weaker on the merits than opponent's case.	11.8% (59)	**39.4% (197)**	17.8% (89)	26.2% (131)	4.8% (24)	500
l. Case is stronger on the merits than opponent's case.	29.2% (145)	**41.2% (205)**	14.7% (73)	13.5% (67)	1.4% (7)	497
					answered question	**516**
					skipped question	**667**

69. Do you have civil litigation experience in federal court?		
	Response Percent	Response Count
Yes	**53.7%**	**322**
No	46.3%	278
	answered question	**600**
	skipped question	**583**

70. Please consider Federal Rule 26(a)(1) initial disclosures and how often the following occur:						
	Almost never	Occasionally	About 1/2 time	Often	Almost always	Response Count
a. Rule 26(a)(1) on initial disclosures reduces the amount of discovery that would otherwise be conducted in the case.	21.8% (61)	**38.9% (109)**	11.8% (33)	23.6% (66)	3.9% (11)	280
b. Rule 26(a)(1) on initial disclosures reduces the cost of discovery that would otherwise be incurred during the case.	27.6% (77)	**35.1% (98)**	8.6% (24)	24.7% (69)	3.9% (11)	279
c. Litigants substantially comply with the initial disclosure requirements of Fed. R. Civ. P. 26 (a)(1).	3.2% (9)	23.1% (64)	27.1% (75)	**35.7% (99)**	10.8% (30)	277
					answered question	**280**
					skipped question	**903**

71. Please give your opinion regarding each of the following statements about Federal Rule 26(a)(1) on initial disclosures.

	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree	Response Count
a. Fed. R. Civ. P. 26 (a)(1) on initial disclosures should be broadened to require disclosure of all relevant information known by or available to the parties and lawyers.	7.9% (22)	**33.8% (94)**	18.0% (50)	32.7% (91)	7.6% (21)	278
b. Iowa state courts should require Rule 26 (a)(1) initial disclosures.	13.7% (38)	**43.7% (121)**	18.8% (52)	16.2% (45)	7.6% (21)	277
c. Iowa state courts should require broader disclosures of all relevant information known by or available to the parties and attorneys.	10.5% (29)	**35.5% (98)**	19.9% (55)	24.6% (68)	9.4% (26)	276
					answered question	**278**
					skipped question	**905**

72. What percentage of your federal court cases require further discovery after Fed. R. Civ. P. 26(a)(1) initial disclosures?

	Response Average	Response Total	Response Count
% of cases:	**83.45**	**21,698**	260
		answered question	**260**
		skipped question	**923**

73. How could Fed. R. Civ. P. 26(a)(1) initial disclosure requirements better reduce further discovery after initial disclosure?

	Response Count
	81
answered question	**81**
skipped question	**1,102**

74. If you have experience in both state and federal court, what are the advantages of litigating in Iowa state court, as compared to the United States District Court for the Northern and Southern Districts of Iowa? Select all that apply.

	Response Percent	Response Count
Not applicable	3.2%	9
I do not do enough litigation to have an opinion on this issue	13.0%	37
There are no advantages to litigating in state court, as compared to federal court	18.2%	52
Less expensive	**41.8%**	**119**
Quicker time to disposition	21.4%	61
Less hands-on management of cases by judicial officers	20.7%	59
More hands-on management of cases by judicial officers	2.1%	6
Judicial officers are more available to resolve disputes	6.7%	19
The quality of judicial officers involved in the case	6.0%	17
The court's experience with the type of case	6.7%	19
Geographical area from which the jury is drawn	20.0%	57
Procedures for consideration of dispositive motions	7.7%	22
The applicable rules of civil procedure	13.7%	39
The opportunity to voir dire prospective jurors	35.4%	101
Other (please specify)	11.2%	32
	answered question	**285**
	skipped question	**898**

75. If you have experience in both state and federal court, what are the advantages of litigating in the United States District Court for the Northern and Southern Districts of Iowa, as compared to Iowa state court? Select all that apply.

	Response Percent	Response Count
Not applicable	3.2%	9
I do not do enough litigation to have an opinion on this issue	14.8%	42
There are no advantages to litigating in federal court, as compared to state court	10.6%	30
Less expensive	2.8%	8
Quicker time to disposition	19.0%	54
Less hands-on management of cases by judicial officers	0.0%	0
More hands-on management of cases by judicial officers	**41.2%**	**117**
Judicial officers are more available to resolve disputes	27.1%	77
The quality of judicial officer involved in the case	38.0%	108
The court's experience with the type of case	35.2%	100
Geographical area from which the jury is drawn	20.1%	57
Procedures for consideration of dispositive motions	33.5%	95
The applicable rules of civil procedure	24.6%	70
Court-directed voir dire proceedings	7.0%	20
Other (please specify)	7.4%	21
	answered question	**284**
	skipped question	**899**

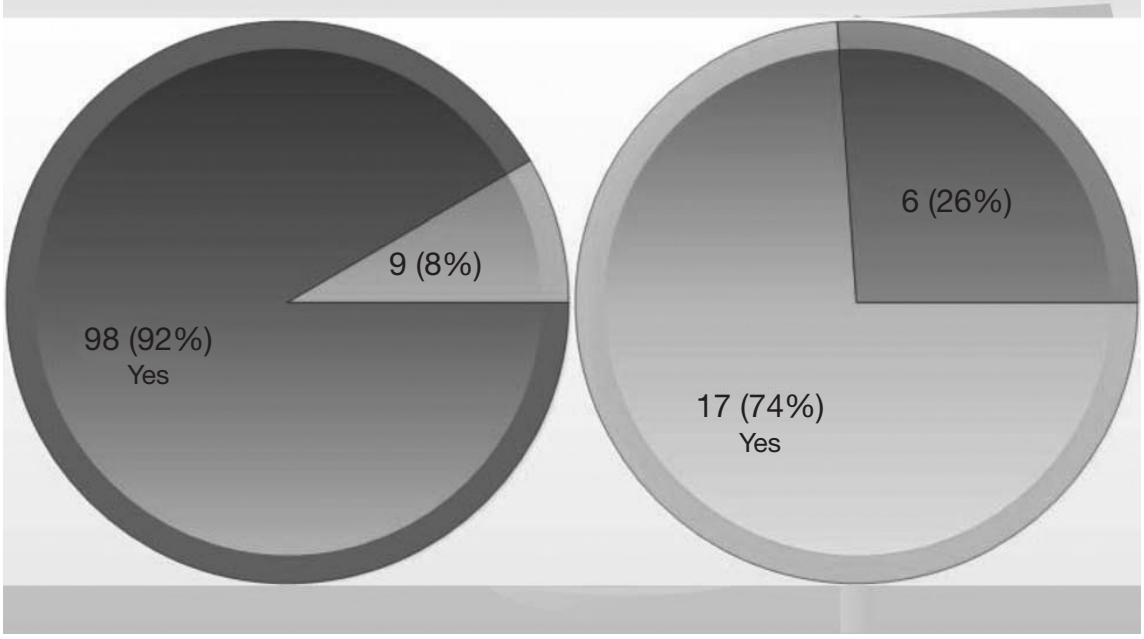
76. Please add any additional comments you may have regarding efforts to achieve a more timely and cost effective process for litigants in Iowa courts.	
	Response Count
	151
answered question	151
skipped question	1,032

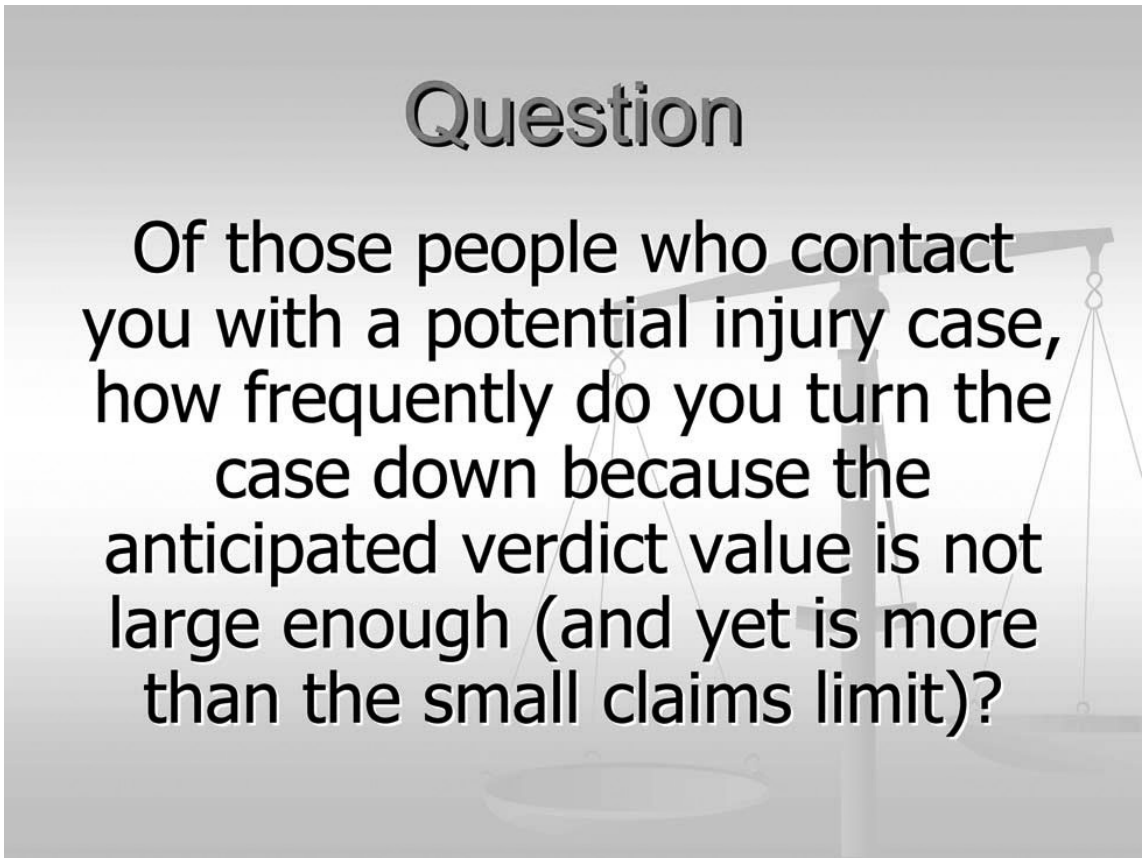
C. Access to Courts Survey Results

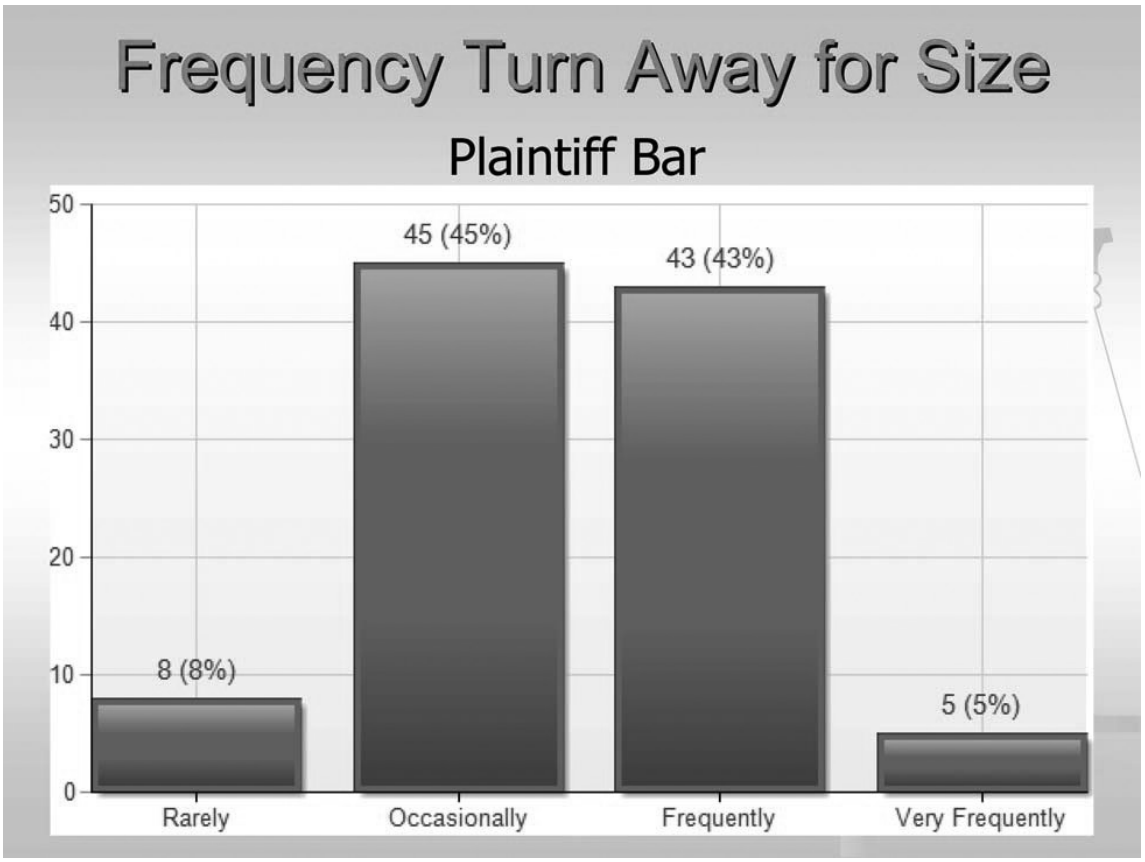
Question

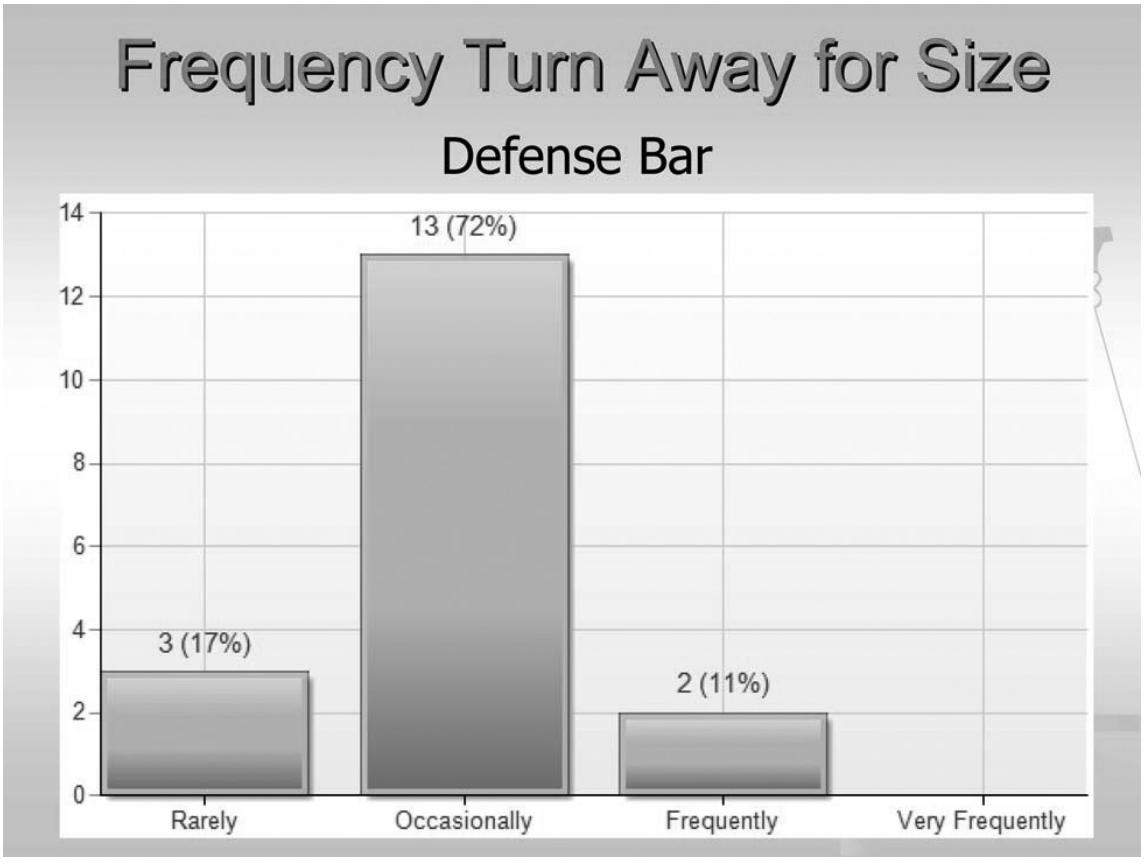
Have you turned away a case because the anticipated verdict value was not large enough and yet was more than the small claims limit ($5000)?

Turned Away a Case




Question
Of those people who contact you with a potential injury case, how frequently do you turn the case down because the anticipated verdict value is not large enough (and yet is more than the small claims limit)?

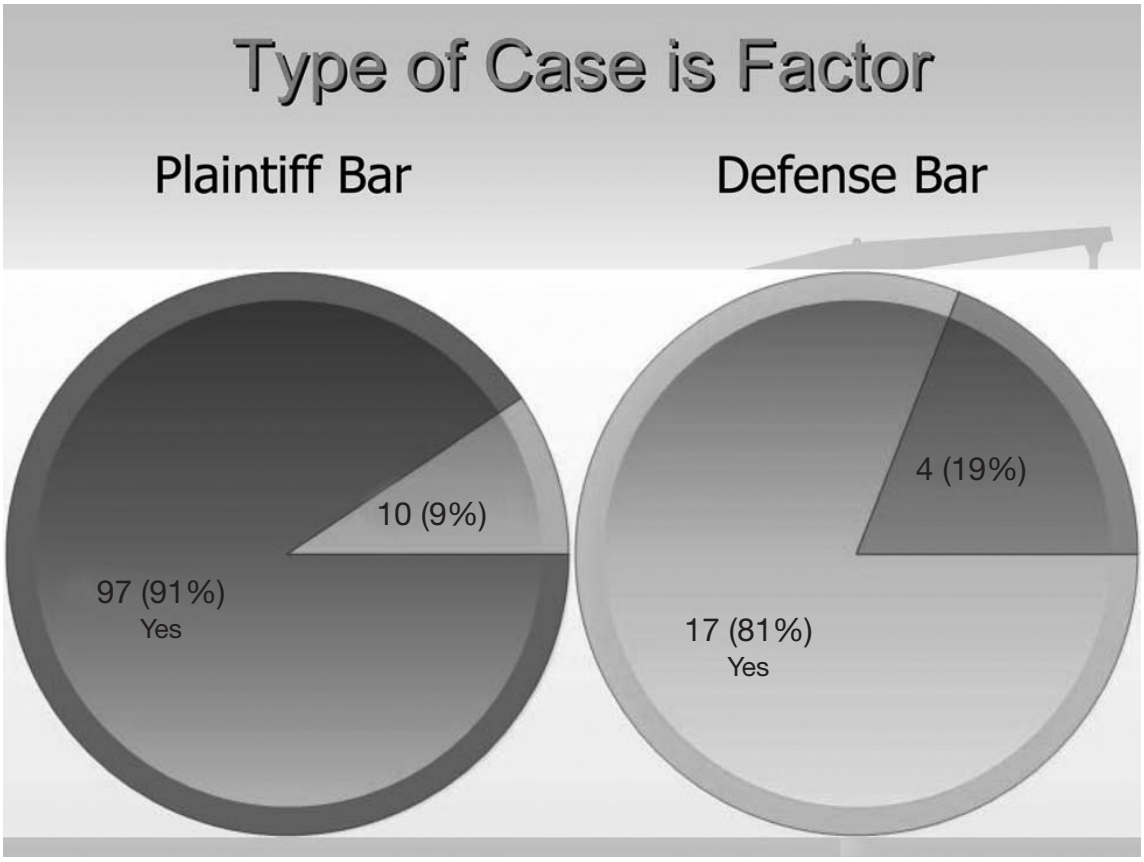

Frequency Turn Away for Size
Plaintiff Bar
50
40
30
20
10
0
45 (45%)
43 (43%)
8 (8%)
5 (5%)
Rarely
Occasionally
Frequently
Very Frequently


Frequency Turn Away for Size
Defense Bar
14
12
10
8
6
4
2
0
13 (72%)
3 (17%)
2 (11%)
Rarely
Occasionally
Frequently
Very Frequently

Question

Is the type of case (motor vehicle, premise liability, medical malpractice, etc.) a factor in your determination to turn down a case because of the anticipated verdict value?

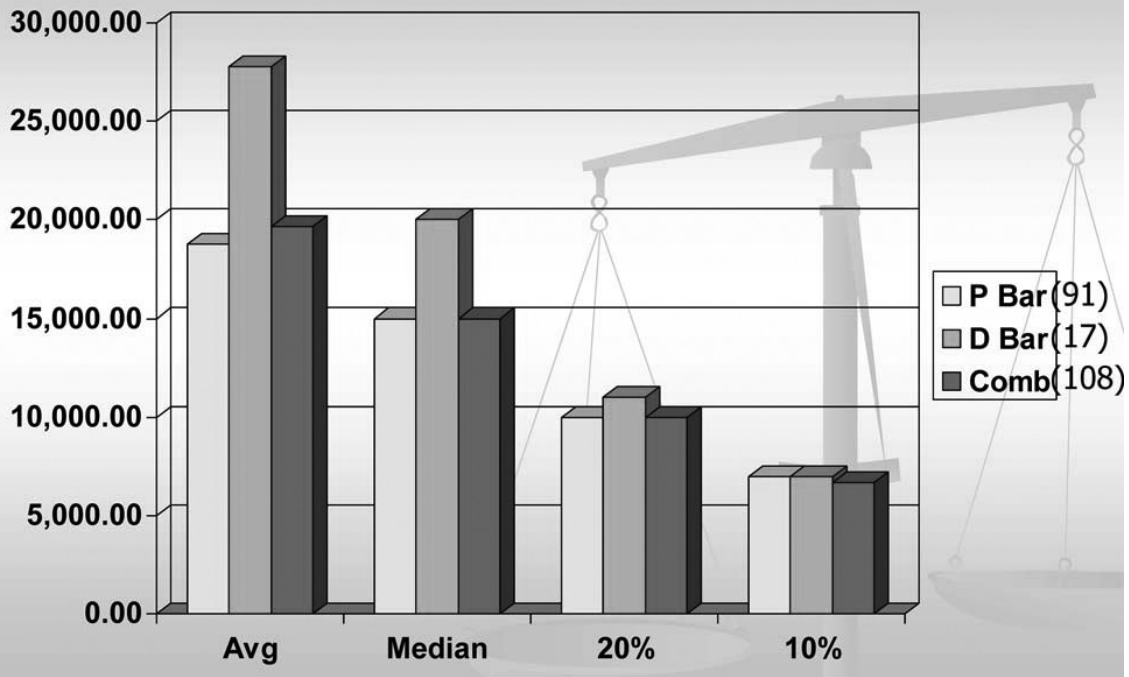
Type of Case is Factor

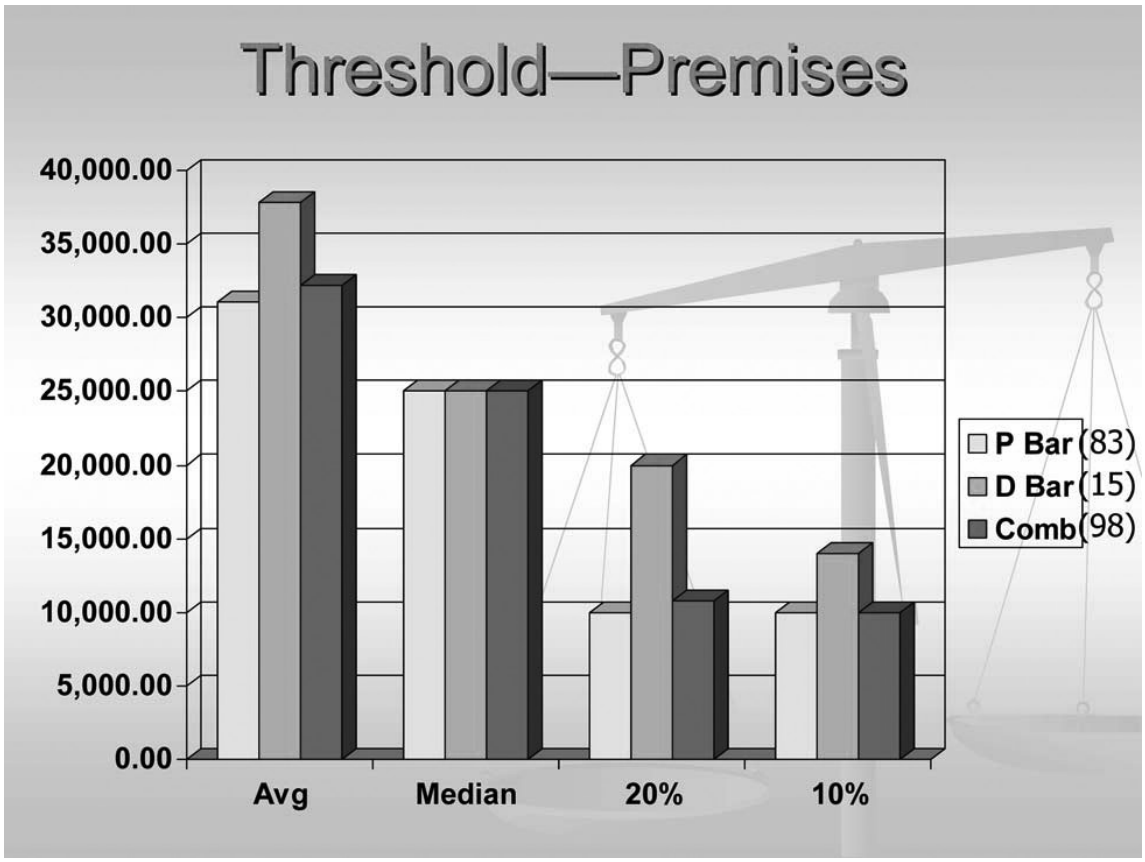


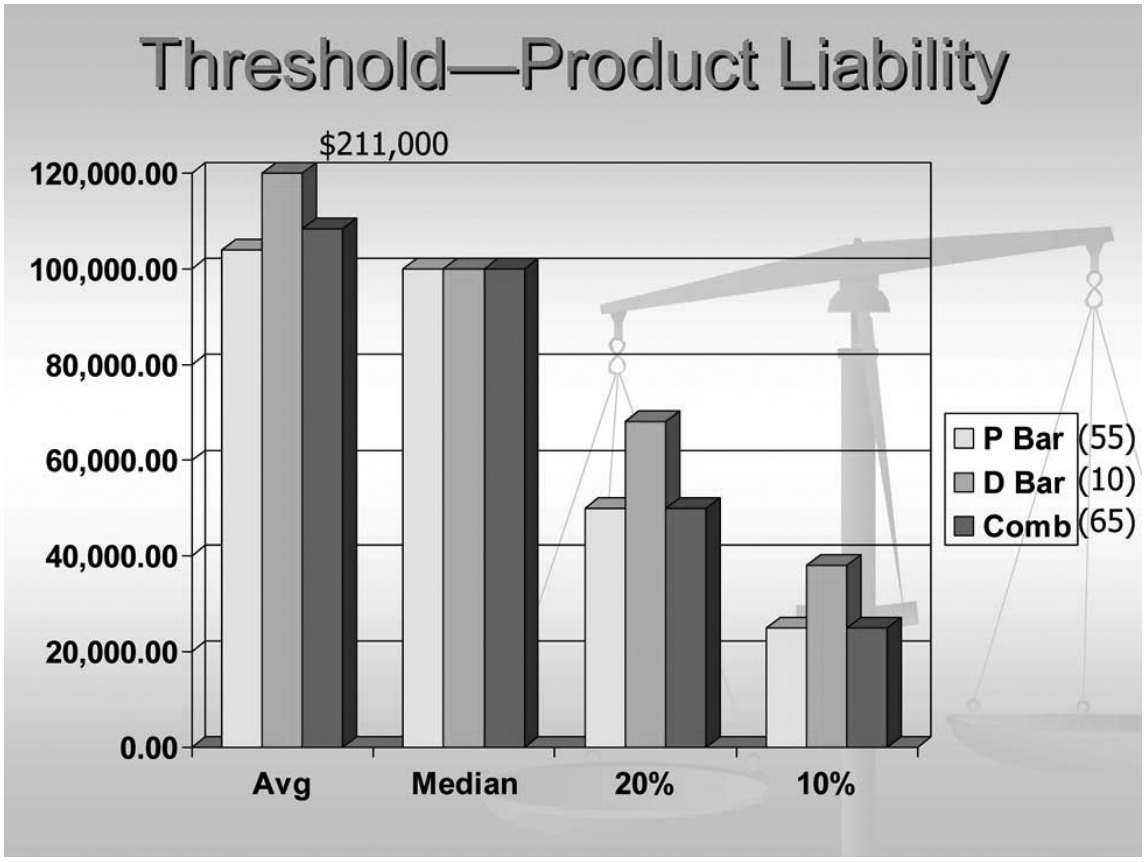
Question

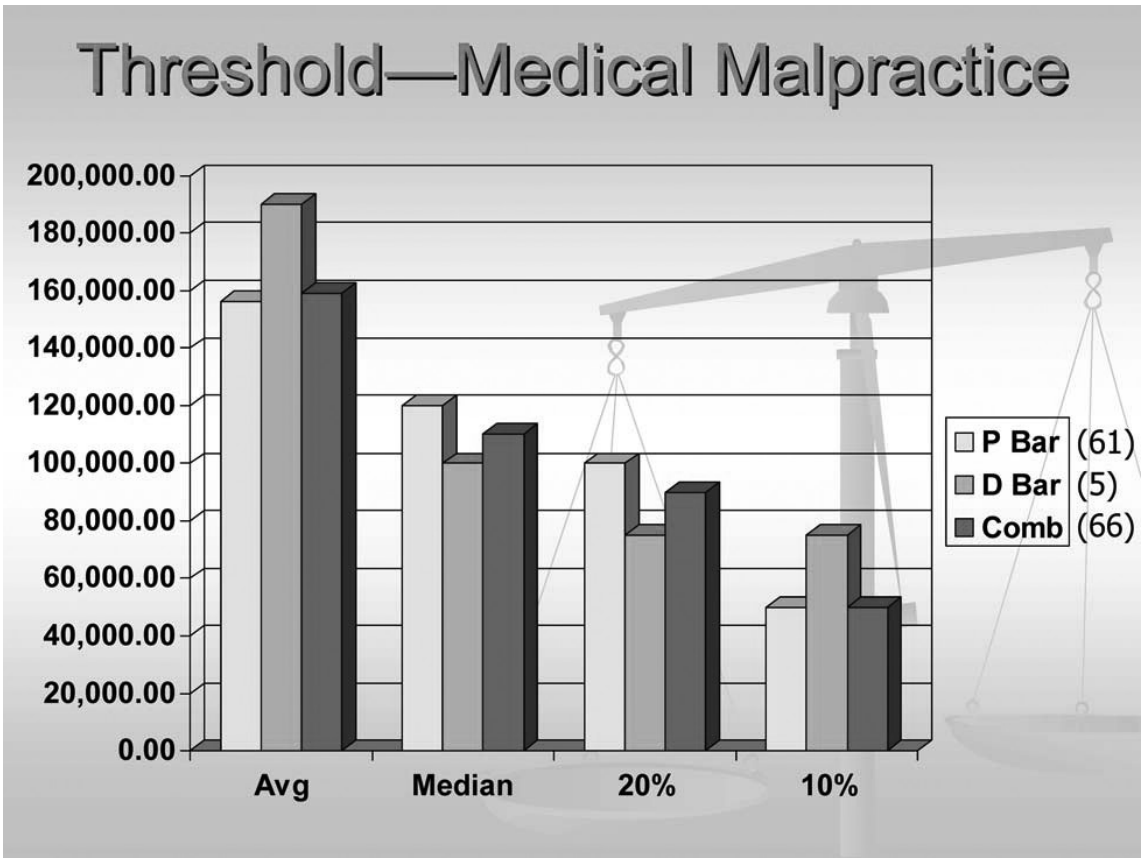
Set forth the approximate anticipated verdict value below which you generally will turn down a case for each of the following types of cases that you handle.

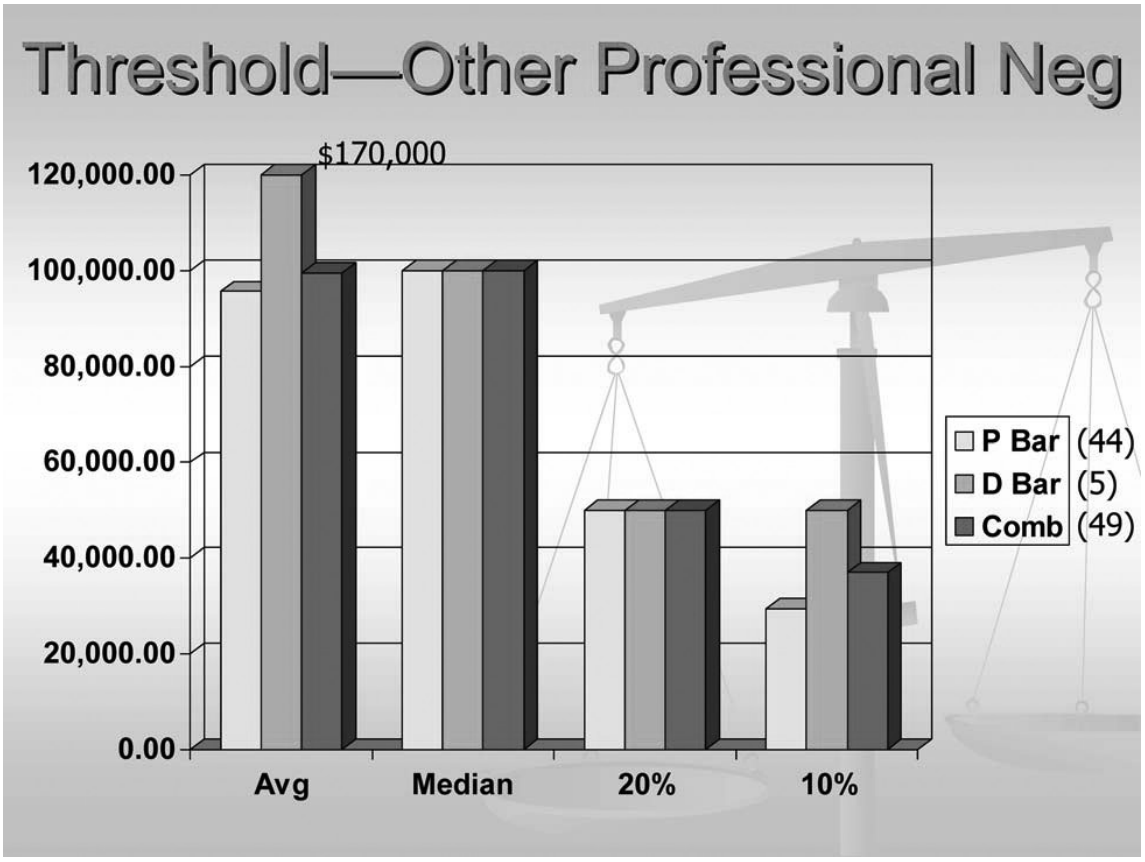
Threshold—Motor Vehicle

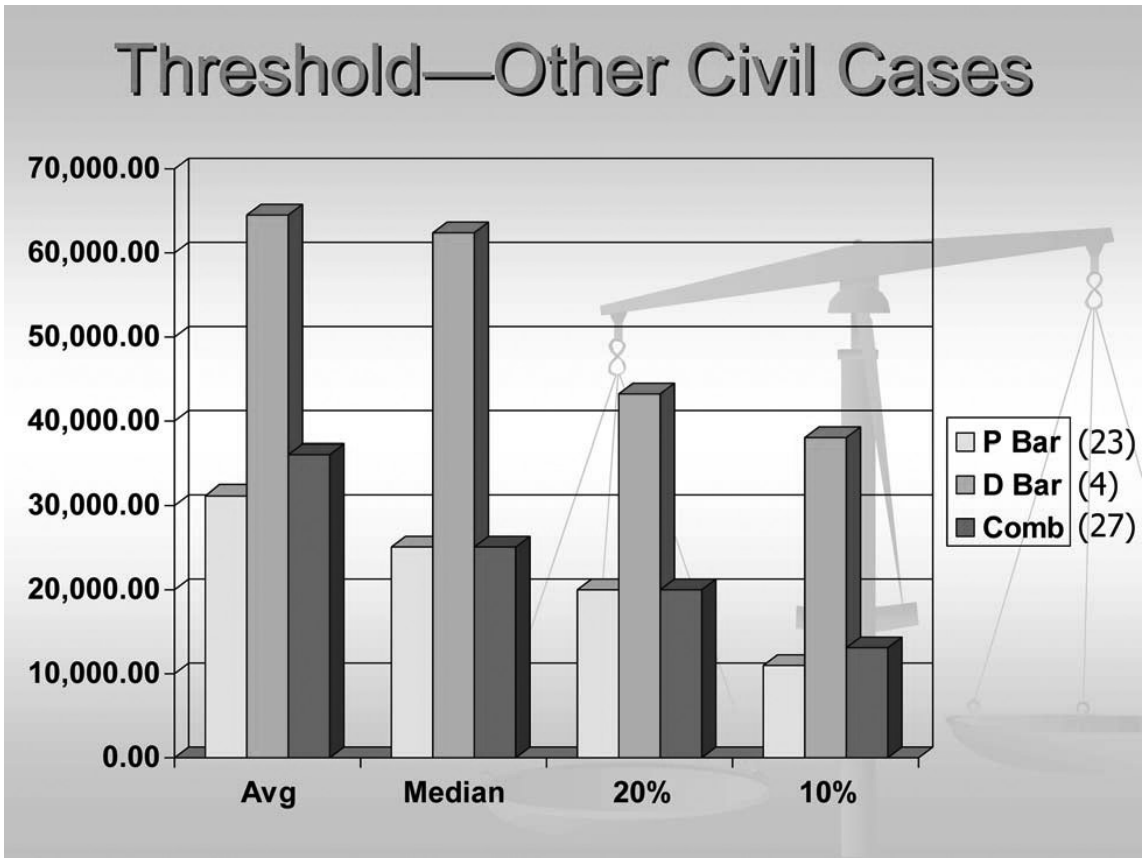


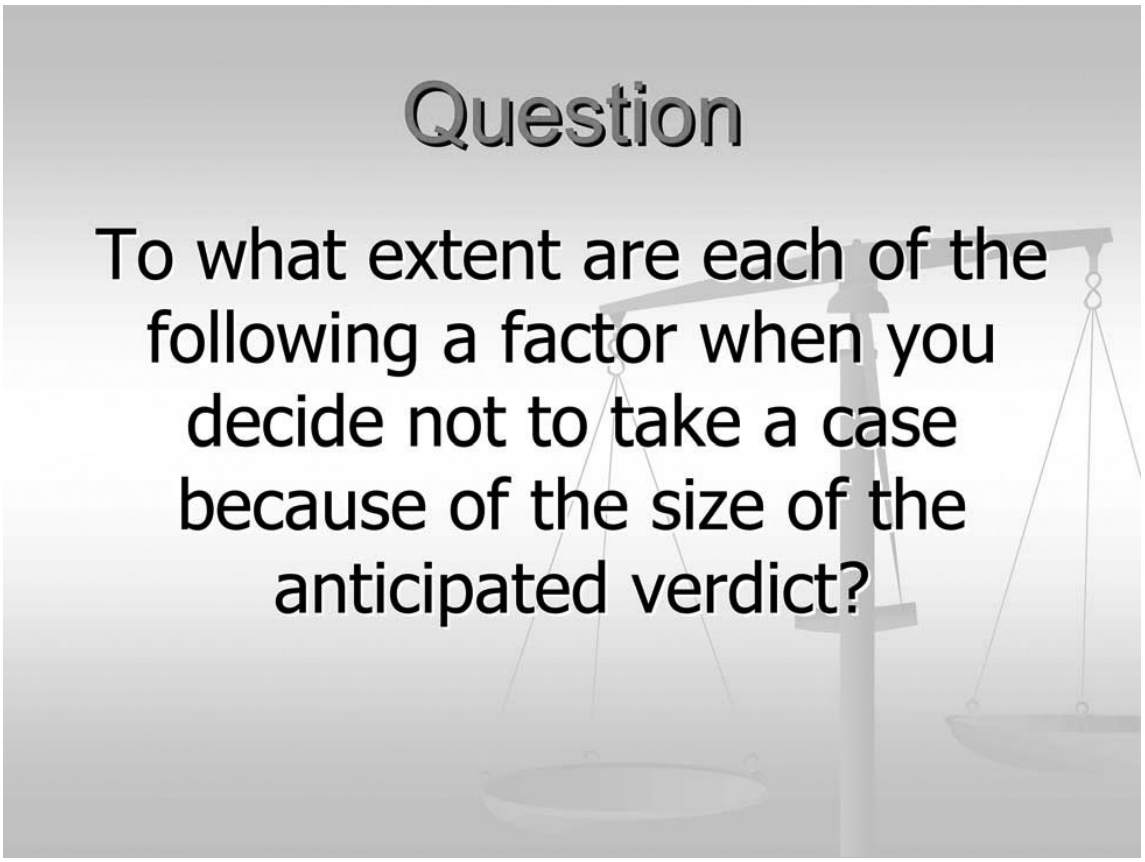

Threshold—Premises
40,000.00
35,000.00
30,000.00
25,000.00
20,000.00
15,000.00
10,000.00
5,000.00
0.00
Avg
Median
20%
10%
P Bar (83)
D Bar (15)
Comb (98)

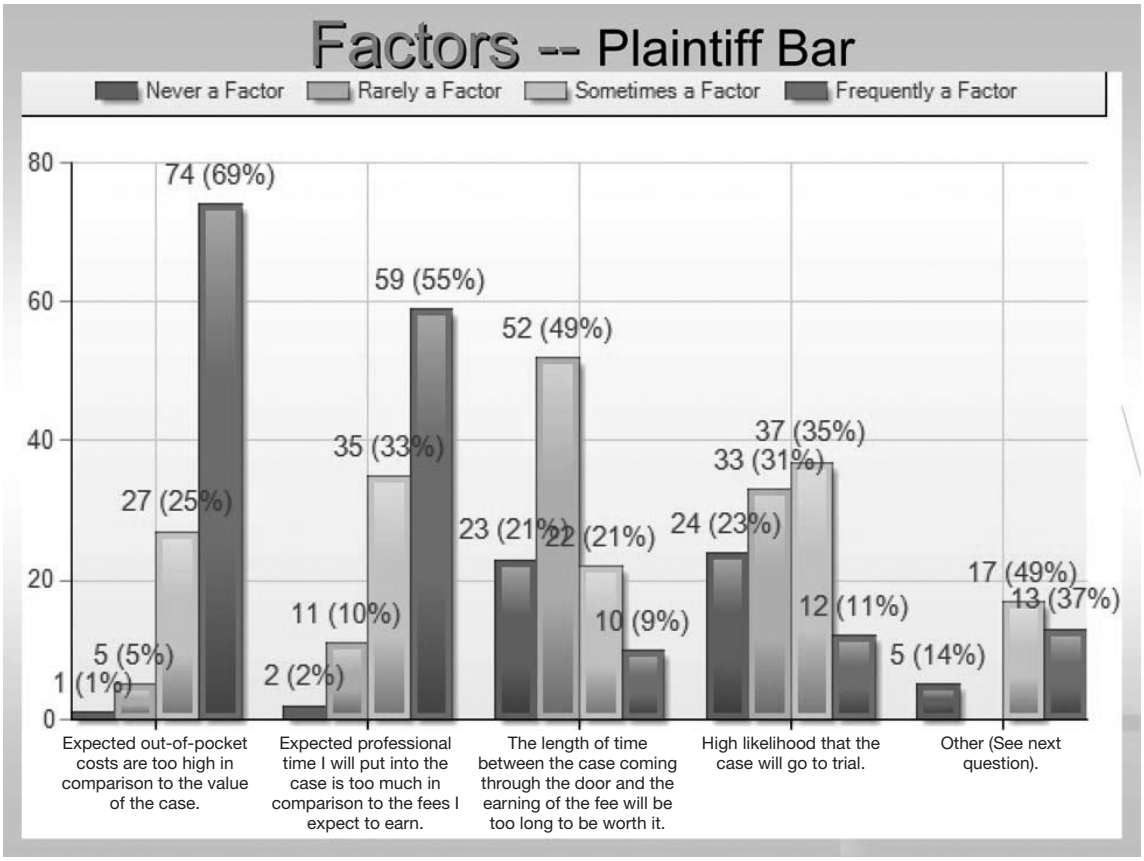

Threshold—Product Liability
$211,000
120,000.00
100,000.00
80,000.00
60,000.00
40,000.00
20,000.00
0.00
Avg
Median
20%
10%
P Bar (55)
D Bar (10)
Comb (65)

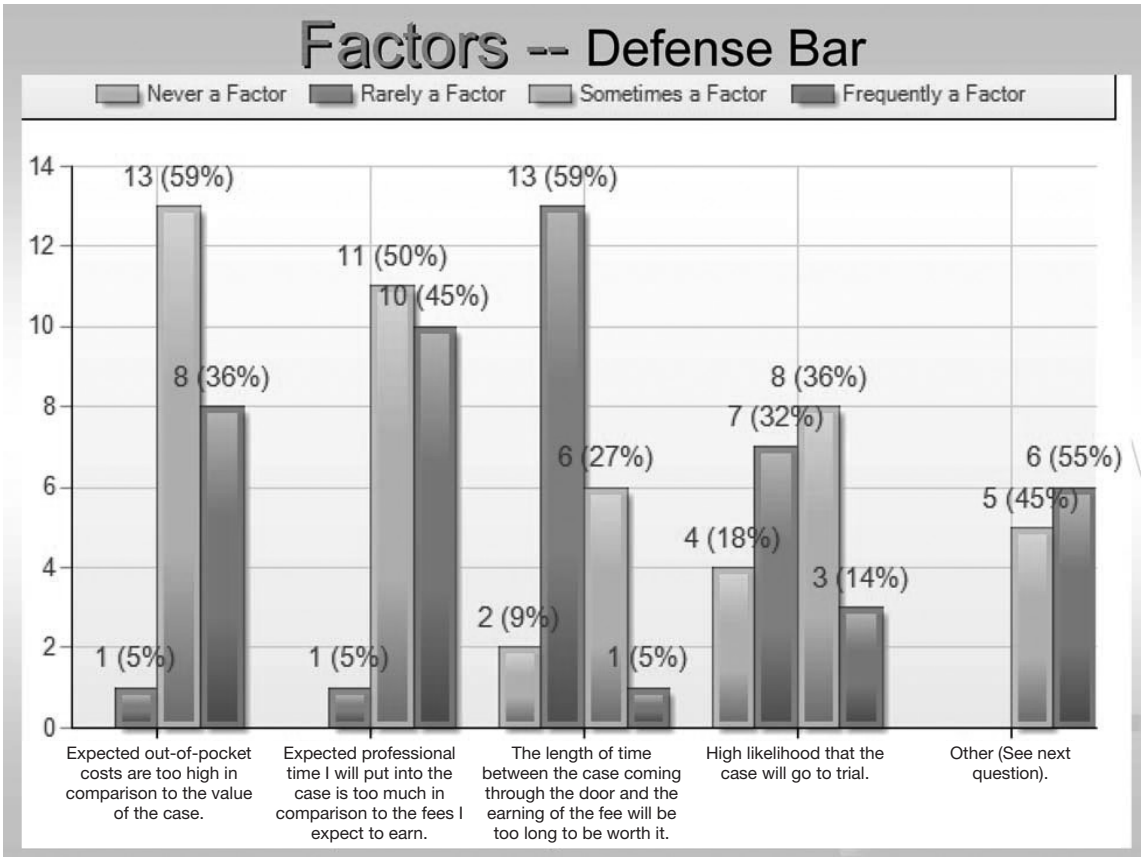

Threshold—Medical Malpractice
200,000.00
180,000.00
160,000.00
140,000.00
120,000.00
100,000.00
80,000.00
60,000.00
40,000.00
20,000.00
0.00
Avg
Median
20%
10%
P Bar (61)
D Bar (5)
Comb (66)


Threshold—Other Professional Neg
$170,000
120,000.00
100,000.00
80,000.00
60,000.00
40,000.00
20,000.00
0.00
Avg
Median
20%
10%
P Bar (44)
D Bar (5)
Comb (49)


Threshold—Other Civil Cases
70,000.00
60,000.00
50,000.00
40,000.00
30,000.00
20,000.00
10,000.00
0.00
Avg
Median
20%
10%
P Bar (23)
D Bar (4)
Comb (27)


Question
To what extent are each of the following a factor when you decide not to take a case because of the size of the anticipated verdict?


Factors -- Plaintiff Bar
Never a Factor
Rarely a Factor
Sometimes a Factor
Frequently a Factor
80
60
40
20
0
74 (69%)
27 (25%)
5 (5%)
1 (1%)
59 (55%)
35 (33%)
11 (10%)
2 (2%)
52 (49%)
23 (21%)
22 (21%)
10 (9%)
37 (35%)
33 (31%)
24 (23%)
12 (11%)
5 (14%)
17 (49%)
13 (37%)
Expected out-of-pocket costs are too high in comparison to the value of the case.
Expected professional time I will put into the case is too much in comparison to the fees I expect to earn.
The length of time between the case coming through the door and the earning of the fee will be too long to be worth it.
High likelihood that the case will go to trial.
Other (See next question).


Factors -- Defense Bar
Never a Factor
Rarely a Factor
Sometimes a Factor
Frequently a Factor
14
12
10
8
6
4
2
0
13 (59%)
8 (36%)
1 (5%)
11 (50%)
10 (45%)
1 (5%)
13 (59%)
6 (27%)
2 (9%)
1 (5%)
8 (36%)
7 (32%)
4 (18%)
3 (14%)
6 (55%)
5 (45%)
Expected out-of-pocket costs are too high in comparison to the value of the case.
Expected professional time I will put into the case is too much in comparison to the fees I expect to earn.
The length of time between the case coming through the door and the earning of the fee will be too long to be worth it.
High likelihood that the case will go to trial.
Other (See next question).

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D. 2009 ACTL/IAALS REPORT

INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM
UNIVERSITY OF DENVER

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

March 11, 2009

Revised April 15, 2009

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INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM

The Institute for the Advancement of the American Legal System (IAALS) at the University of Denver was the brainchild of the University's Chancellor Emeritus Daniel Ritchie, Denver attorney and Bar leader John Moye and United States District Court Judge Richard Matsch. IAALS Executive Director Rebecca Love Kourlis is also a founding member and previously served for almost twenty years as a Colorado Supreme Court Justice and trial court judge.

IAALS staff is comprised of an experienced and dedicated group of men and women who have achieved recognition in their former roles as judges, lawyers, academics and journalists. It is a national non-partisan organization dedicated to improving the process and culture of the civil justice system. IAALS provides principled leadership, conducts comprehensive and objective research, and develops innovative and practical solutions. IAALS' mission is to participate in the achievement of a transparent, fair and cost-effective civil justice system that is accountable t and trusted by those it serves.

In the civil justice reform area, IAALS is studying the relationship between existing Rules of Civil Procedure and cost and delay in the civil justice system. To this end, it has examined alternative approaches in place in other countries and even in the United States in certain jurisdictions.

The Institute benefits from gifts donated to the University for the use of IAALS. None of those gifts have conditions or requirements, other than accounting and fiduciary responsibility.

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JOINT PROJECT
OF THE
THE AMERICAN COLLEGE OF TRIAL LAWYERS
TASK FORCE ON DISCOVERY
AND
THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM

FINAL REPORT[1]

The American College of Trial Lawyers Task Force on Discovery ("Task Force") and the Institute for the Advancement of the American Legal System ("IAALS") at the University of Denver have, beginning in mid-2007, engaged in a joint project to examine the role of discovery in perceived problems in the United States civil justice system and to make recommendations fc reform, if appropriate. The project was conceived as an outgrowth of increasing concerns that problems in the civil justice system, especially those relating to discovery, have resulted in unacceptable delays and prohibitive expense. Although originally intended to focus primarily o discovery, the mandate of the project was broadened to examine other parts of the civil justice system that relate to and have a potential impact on discovery. The goal of the project is to provide Proposed Principles that will ultimately result in a civil justice system that better serves the needs of its users.

THE PROCESS

The participants have held seven two-day meetings and participated in additional lengthy conference calls over the past 18 months. They began by studying the history of the Federal Rules of Civil Procedure, past attempts at reforms, prior cost studies, academic literature commenting on and proposing changes to the rules and media coverage about the cost of litigation.

The first goal of the project was to determine whether a problem really exists and, if so, to determine its dimensions. As a starting point, therefore, the Task Force and IAALS worked wit an outside consultant to design and conduct a survey of the Fellows of the American College of Trial Lawyers ("ACTL") to create a database from which to work. IAALS contracted with Mathematica Policy Research, Inc. to manage the survey and bore its full cost. Mathematica then compiled the results of the survey and issued an 87-page report.

[1] Accepted and approved by the Board of Regents of the American College of Trial Lawyers on February 25, 2009.

The survey was administered over a four-week period beginning April 23, 2008. It was sent to the 3,812 Fellows of the ACTL, excluding judicial, emeritus and Canadian Fellows, who could be reached electronically. Of those, 1,494 responded. Responses of 112 not currently engaged in civil litigation were not considered. The response rate was a remarkably high 42 percent.

On average, the respondents had practiced law for 38 years. Twenty-four percent represent plaintiffs exclusively, 31 percent represent defendants exclusively and 44 percent represent both but primarily defendants. About 40 percent of the respondents litigate complex commercial disputes, but fewer than 20 percent litigate primarily in federal court (although nearly a third spl their time equally between federal and state courts). Although there were some exceptions, such as with respect to summary judgment, for the most part there was no substantial difference between the responses of those who represent primarily plaintiffs and those who represent primarily defendants, at least with respect to differences relating to the action recommended in this report.

SURVEY RESULTS

Three major themes emerged from the Survey:

1. Although the civil justice system is not broken, it is in serious need of repair. In many jurisdictions, today's system takes too long and costs too much. Some deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test while some other cases of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them.

2. The existing rules structure does not always lead to early identification of the contested issue to be litigated, which often leads to a lack of focus in discovery. As a result, discovery can cost far too much and can become an end in itself. As one respondent noted: "The discovery rules in particular are impractical in that they promote full discovery as a value above almost everything else." Electronic discovery, in particular, needs a serious overhaul. It was described by one respondent as a "morass." Another respondent stated: "The new rules are a nightmare. The bigger the case the more the abuse and the bigger the nightmare."

3. Judges should have a more active role at the beginning of a case in designing the scope of discovery and the direction and timing of the case all the way to trial. Where abuses occur, judges are perceived not to enforce the rules effectively. According to one Fellow, "Judges neec to actively manage each case from the outset to contain costs; nothing else will work."

In short, the survey revealed widely-held opinions that there are serious problems in the civil justice system generally. Judges increasingly must serve as referees in acrimonious discovery disputes, rather than deciding cases on their merits. From the outside, the system is often perceived as cumbersome and inefficient. The emergence of various forms of alternative dispute resolution emphasizes the point.

On September 8, 2008, the Task Force and IAALS published a joint Interim Report, describing the results of the survey in much greater detail. It can be found on the websites of both the American College of Trial Lawyers, www.actl.com, and IAALS, www.du.edu/legalinstitute. That report has since attracted wide attention in the media, the bar and the judiciary.

The results of the survey reflect the fact that circumstances under which civil litigation is conducted have changed dramatically over the past seventy years since the currently prevailing civil procedures were adopted.

The objective of the civil justice system is described in Rule 1 of the Federal Rules of Civil Procedure as "the just, speedy, and inexpensive determination of every action and proceeding." Too often that objective is now not being met. *Trials, especially jury trials, are vital to fosterin the respect of the public in the civil justice system. Trials do not represent a failure of the system. They are the cornerstone of the civil justice system.* Unfortunately, because of expense and delay, both civil bench trials and civil jury trials are disappearing.

PROPOSED PRINCIPLES

Recognizing the need for serious consideration of change in light of the survey results, the Task Force and IAALS continued to study ways of addressing the problems they highlighted. They have had the benefit of participants who practice under various civil procedure systems in the United States and Canada, including both notice pleading and code pleading systems. They hav examined in detail civil justice systems in Canada, Australia, New Zealand and Europe, as well as arbitration procedures and criminal procedure and have compared them to our existing civil justice system.[2]

After careful study and many days of deliberation, the Task Force and IAALS have agreed on a proposed set of Principles that would shape solutions to the problems they have identified. The Principles are being released for the purpose of promoting nationwide discussion. These Principles were developed to work in tandem with one another and should be evaluated in their entirety.

RECOMMENDED ACTION

The Task Force and IAALS unanimously recommend that the Proposed Principles set forth in this report, which can be applied to both state and federal civil justice systems, be made the subject of public comment, discussion, debate and refinement. That process should include all the stakeholders with an interest in a viable civil justice system, including state and federal judiciaries, the academy, practitioners, bar organizations, clients and the public at large.

[2] IAALS's review of civil procedural reforms in certain foreign jurisdictions and States in the United States is attached as Appendix A.

Some of the Principles may be controversial in some respects. We encourage lively and informed debate among interested parties to achieve the common goal of a fair and, we hope, more efficient, system of justice. We are optimistic that the ensuing dialogue will lead to their future implementation by those responsible for drafting and revising rules of civil practice and procedure in jurisdictions throughout the United States.

PRINCIPLES

The Purpose of Procedural Rules: 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, reasonably affordable resolution.

1. GENERAL

- **The "one size fits all" approach of the current federal and most state rules is useful in many cases but 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.**

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 distric 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.

It is time that the rules generally reflect the reality of practice. This Principle supports a single system of civil procedure rules designed for the majority of cases while recognizing 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 patent and medical malpractice cases. Congress also perceived the need for different rules by enacting the Private Securities Litigation Reform Act for securities cases.[3]

[3] Another example is specific rules that have been developed to process cases of a lower dollar amount, for example Rule 16.1 in Colorado which requires the setting of an early trial date, early, full and detailed disclosure, and presumptively prohibits depositions, interrogatories, document requests or requests for admission in civil actio where the amount in controversy is $100,000 or less.

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.

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 a 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 the exception but they should be permitted.

2. 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 cas to trial or other resolution.

- **Notice pleading should be replaced by fact-based pleading. Pleading should set forth with particularity all of the material facts that are known to the pleading party to establish the pleading party's claims or affirmative defenses.**

One of the principal reforms made in the Federal Rules of Civil Procedure was tc permit notice pleading. For many years after the federal rules were adopted, ther were efforts to require specific, fact-based pleading in certain cases. Some of those efforts were led by certain federal judges, who attempted to make those changes by local rules; however, the Supreme Court resolved the issue in 1957 b holding, in *Conley v. Gibson*, 355 U.S. 45 (1957), that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. States that adopted the federal-type rules have generally followed suit.

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. In our survey, 61 percent of the respondents said that notice pleading led to more discovery in order to narrow the claims and 64 percent said that fact pleading can narrow the scope of discovery. Forty-eight percent of our respondents said that frivolous claims and defenses are more prevalent than they were five years ago.

Some pleading rules make an exception for pleading fraud and mistake, as to which the pleading party must state "with particularity" the circumstances

constituting fraud or mistake. We believe that a rule with similar specificity requirements should be applied to all cases and throughout all pleadings.

This Principle replaces notice pleading with fact-based pleading. We would require the parties to plead, at least in complaints, counterclaims and affirmative defenses, all material facts that are known to the pleading party to support the elements of a claim for relief or an affirmative defense.

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 i controversy if the system of pleading fails to identify them.[4]

- **A new summary procedure should be developed by which parties can submit applications for determination of enumerated matters (such a rights that are dependent on the interpretation of a contract) on pleadings and affidavits or other evidentiary materials without triggering an automatic right to discovery or trial or any of the other provisions of the current procedural rules.**

The Task Force recommends that consideration be given the development of alternate procedures for resolution of some disputes where full discovery and a full trial are not required. Contract interpretations, declaratory orders and statutory remedies are examples of matters that can be dealt with efficiently in such a proceeding. In a number of Canadian Provinces, the use of a similar procedure, called an Application, serves this purpose. In Canada, the Notice of Application must set out the precise grounds of relief, the grounds to be argued including reference to rules and statutes and the documentary evidence to be relied on. The contextual facts and documents are contained in an affidavit. The respondents serve and file their responsive pleadings. Depositions may be taken but are limited to what is contained in the affidavits. At or before the oral hearing, the presiding judge can direct a trial of all or part of the application on terms that he or she may direct if satisfied that live testimony is necessary. The time from commencement to completion is most often substantially shorter and less costly than a normal action.

Such an action is similar to but sufficiently different from a declaratory judgment action that it deserves consideration. It is similar to state statutes such as Delaware Corporation Law § 220 (permitting a stockholder to sue to examine the books and records of a corporation). The purpose, obviously, is to streamline the

[4] Some members of the Task Force believe that the fact-based pleading requirement should be extended to denials that are contained in answers but a majority of the Task Force disagrees.

civil justice system for disputes that do not require the full panoply of procedural devices now found in most systems.

3. DISCOVERY

The Purpose of Discovery: Discovery should enable a party to procure in admissible form through the most efficient, nonredundant, cost-effective method reasonably available, evidence directly relevant to 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.

- **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 o the full range of discovery options offered by the rules. They believe that zealou advocacy (or fear 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.

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 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 insure that discovery related to potentially dispositive issues is taken first so that those issues can be isolated and timely adjudicated.

- **Shortly after the commencement of litigation, each party should produce all reasonably available nonprivileged, non-work product documents and things that may be used to support that party's claims, counterclaims or defenses.**

Only 34 percent of the respondents said that the current initial disclosure rules reduce discovery and only 28 percent said they save the clients money. The initial-disclosure rules need to be revised.

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 slightly broader. Whereas the current Rule permits description of documents by category and location, we

would require production. This Principle is intended to achieve a more meaningful and effective exchange of documents in the early stages of the litigation.

The rationale for this Principle is simple: each party should produce, without delay and without a formal request, documents that are readily available and may be used to support that party's claims, counterclaims or defenses. This Principle, together with fact-based pleadings, ought to facilitate narrowing of the issues and where appropriate, settlement.

To those charged with applying such a Principle, we suggest that the plaintiff could be required to produce such documents 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.

There should be an ongoing duty to supplement this disclosure. A sanction for failure to comply, absent cause or excusable neglect, could be an order precluding use of such evidence at trial.

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

- **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 rules permit discovery of all documents and information relevant to a claim or defense of any party. As a result, 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.

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 so as 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 intended to allow the system to operate extrajudicially but the result was to afford virtually no protection at all to those parties. 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 proved to be flawed. Discovery has become broa to the point of being limitless. This Principle would require courts and parties to focus on what is important to fair, expeditious and inexpensive resolution of civil litigation.

- **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 current federal rule that requires the identification of persons who have information that may be used at trial (Rule 26(a)(1)(A)(i)) probably comes too early in most cases and often leads to responses that are useless.

- **After the initial disclosures are made, only limited additional discovery should be permitted. Once that limited discovery is completed, no more should be allowed absent agreement or a court order, which should be made only upon a showing of good cause and proportionality.**

This is a radical proposal. It is our most significant proposal. It challenges 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 changes the default. Up to now, the default is that each party may take virtually unlimited discovery unless a cour says otherwise. We would reverse the default.

Our discovery system is broken. Fewer than half of the respondents thought that our discovery system works well and 71 percent thought that discovery is 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 report in 1977 recommending 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 about a quarte 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; 44 percent disagreed and an additional 12 percent strongly disagreed.

Efforts to limit discovery must begin with 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. 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.

This Principle changes the default while still permitting a search, within reason, for the "smoking gun". Today, the default is that there will be discovery unless it is blocked. *This Principle permits 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 initial disclosures that the Principles also require. Whereas the initial disclosures would be of documents that may be used to support the producing party's claims or defenses, the limited discovery described in this Principle would be of documents that support the requesting party's claims or defenses. This Principle also applies to electronic discovery.

We suggest the following possible areas of limitation for further consideration:

(1) limitations on scope of discovery (i.e., changes in the definition of relevance);

(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);

(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); and

(9) discovery budgets that are approved by the clients and the court.

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 the discovery defaults. For example, in employment cases, the standard practice is that personnel files are produced and the immediate decisionmaker 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.

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 would 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 that each party forthwith should produce at the beginning of litigation documents that may be used to support that party's claims or defenses. We expect that the limited discovery contemplated by this Principle and the initial-disclosure Principle would be swift, useful and virtually automatic.

We reiterate that there should be a continuing duty to supplement disclosures and discovery responses.

- **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 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 b

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 an expectation in the client 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.

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

Discovery should be a mechanism by which a party discovers evidence to suppor or defeat a valid claim or defense.[5] 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 allowed to embark on expensive discovery that may never be used.

- **Discovery relating to damages should be treated differently.**

Damages discovery is significantly different from discovery relating to other issues and may call for different discovery procedures relating to timing and content. The party with the burden of proof should, at some point, specifically and separately identify its damage claims and the calculations supporting those claims. Accordingly, the other party's discovery with respect to damages should be more targeted. Because damages discovery often comes very late in the process, the rules should reflect the reality of the timing of damages discovery.

- **Promptly after litigation is commenced, the parties should discuss the preservation of electronic documents and attempt to reach agreemen about preservation. The parties should discuss the manner in which electronic documents are stored and preserved. If the parties cannot agree, the court should make an order governing electronic discovery as soon as possible. That order should specify which electronic information should be preserved and should address the scope of allowable proportional electronic discovery and the allocation of its cost among the parties.**

Electronic information is fundamentally different from other types of discovery i the following respects: it is everywhere, it is often hard to gain access to and it is typically and routinely erased. Under judicial interpretations, once a complaint i served, or perhaps even earlier, the parties have an obligation to preserve all

[5] We recognize that discovery need not be limited to admissible evidence, but if the discovery does not ultimately lead to evidence that can be used at trial, it serves very little purpose.

material that may prove relevant during a civil action, including electronic information. That is very difficult, if not impossible, 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 electronic information, the initial pretrial 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 electronic-information preservation and many local rules require such cooperation. Absent agreement o counsel, this Principle requires prompt judicial involvement in the identification and preservation of electronic evidence. We call on courts to hold an initial conference promptly after a complaint is served, for the purpose of making an order with respect to the preservation of electronic information. In this regard, w refer to Principle 5 of the Sedona United States *Principles for Electronic Document Production*.[6]

We are aware of cases in which, shortly after a complaint is filed, a motion is made for the preservation of certain electronic documents that otherwise would b destroyed in the ordinary course. See, e.g., *Keir v. Unumprovident Corp.*, No. 02 Civ. 8781, 2003 WL 21997747 (S.D.N.Y. Aug. 22, 2003) (counsel told court tha 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).

This Principle would mandate electronic-information conferences, both with counsel and the court, absent agreement. Before such a conference, there should

[6] The Sedona Conference is a nonprofit law and policy think tank based in Sedona, Arizona. It has published principles relating to electronic document production. Sedona Canada was formed in 2006 out of a recognition that electronic discovery was "quickly becoming a factor in all Canadian civil litigation, large and small." An overview of the Principles developed by Working Group 1 and Working Group 7 ("Sedona Canada") are in Appendix B. Th complete publications of both Working Groups are *The Sedona Principles, Second Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production (The Sedona Conference® Workin Group Series, 2007)* and *The Sedona Canada Principles Addressing Electronic Discovery (A Project of The Sedona Conference® Working Group 7, Sedona Canada, January 2008*), and the full text of each document may be downloaded free of charge for personal use from www.thesedonaconference.org.

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 electronic discovery; rather the issue is what must be preserved before the scope of permissible electronic discovery can be determined. It is the preservation of electronic materials at the outset of litigation that engenders expensive retention efforts, made largely to avoid collateral litigation about evidence spoliation. Litigating electronic evidence 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 do not adequately address this issue.

- **Electronic discovery should be limited by proportionality, taking into account the nature and scope of the case, relevance, importance to the court's adjudication, expense and burdens.**

Our respondents told us that electronic discovery is a nightmare and a morass. These Principles require early judicial involvement so that the burden of electronic discovery is limited by principles of proportionality. Although the Advisory Committee on Civil Rules attempted to deal with the issues in new Rule 26(b)(2), many of our respondents thought that the Rule was inadequate. The Rule, in conjunction with the potential for sanctions under rule 37(e), exposes litigants to a series of legal tests that are not self-explanatory and are difficult to execute in the world of modern information technology. The interplay among "undue cost and burden," "reasonably accessible," "routine good faith operation," and "good cause," all of which concepts are found in that rule, presents traps for even the most well-intentioned litigant.

We understand that more than 50 district courts have detailed local rules for electronic discovery. The best of those provisions should be adopted nationwide.

We are well aware that this area of civil procedure continues to develop and we applaud efforts such as new Federal Rule of Evidence 502 seeking to address the critical issue of attorney-client privilege waiver in the production of documents, including electronic records. It remains to be seen, however, whether a nonwaiver rule will reduce expenses or limit the pre-production expense of discovery of electronic information.

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

- **Absent a showing of need and relevance, a party should not be required to restore deleted or residual electronically-stored information, including backup tapes.**

- **Sanctions should be imposed for failure to make electronic discovery only upon a showing of intent to destroy evidence or recklessness.**

- **The cost of preserving, collecting and reviewing electronically-stored material should generally be borne by the party producing it but courts should not hesitate to arrive at a different allocation of expenses in appropriate cases.**

The above Principles are taken from the *Sedona Principles for Addressing Electronic Document Production* (June 2007) and the *Sedona Canada Principles Addressing Electronic Discovery* (January 2008). They are meant to provide a framework for developing rules of reasonableness and proportionality. They do not replace or modify the other Principles relating to the limitation of discovery. They are merely supplemental.

By way of explanation, we can do no better than to quote from two Canadian practitioners who have studied the subject extensively and who bring a refreshin viewpoint to the subject:

> The proliferation in recent years of guidelines, formal and informal rules, articles, conferences and expert service providers all dealing with e-discovery may, at times, have obscured the reality that e-discovery must be merely a means to an end and not an end unto itself. E-discovery is a tool which, used properly, can assist with the just resolution of many disputes; however, used improperly, e-discovery can frustrate the cost-effective, speedy and just determination of almost every dispute.
>
> E-discovery has had, and it will continue to have, a growing importance in litigation just as technology has a growing importance in society and commerce. It is up to counsel and the judiciary to ensure that e-discovery does not place the courtroom out of the reach of parties seeking a fair adjudication of their disputes.
>
> B. Sells & TJ Adhihetty, *E-discovery, you can't always get what you want*, International Litigation News, Sept. 2008, pp. 35-36.

- **In order to contain the expense of electronic discovery and to carry out the Principle of Proportionality, judges should have access to, and attorneys practicing civil litigation should be encouraged to attend, technical workshops where they can obtain a full understanding of the complexity of the electronic storage and retrieval of documents.**

Although electronic discovery is becoming extraordinarily important in civil litigation, it is proving to be enormously expensive and burdensome. The vast majority (75 percent) of our respondents confirmed the fact that electronic discovery has resulted in a disproportionate increase in the expense of discovery and thus an increase in total litigation expense. Electronic discovery, however, is a fact of life that is here to stay. We favor an intensive study to determine how best to cope with discovery of this information in an efficient, cost-effective way to ensure expenses that are proportional to the value of the case.

Unfortunately, the rules as now written do not give courts any guidance about how to deal with electronic discovery. Moreover, 76 percent of the respondents said that courts do not understand the difficulties parties face in providing electronic discovery. Likewise, trial counsel are often uninformed about the technical facets of electronic discovery and are ill-equipped to assist trial courts in dealing with the issues that arise. Some courts have imposed obligations on counsel to ensure that their clients fully comply with electronic discovery requests; litigation about compliance with electronic discovery requests has become commonplace. We express no opinion about the legitimacy or desirability of such orders.

It does appear, however, that some courts do not fully understand the complexity of the technical issues involved and that the enormous scope and practical unworkability of the obligations they impose on trial counsel are often impossible to meet despite extensive (and expensive) good-faith efforts.

At a minimum, courts making decisions about electronic 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 electronic 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 electronic discovery. Such education is essential because without it, counsel increasingly will be constrained to rely on third-party providers of electronic-discovery services who include judgments about responsiveness and privilege among the services they provide, a trend we view with alarm.

- **Requests for admissions and contention interrogatories should be limited by the Principle of proportionality. They should be used sparingly, if at all.**

Requests for admission can be abused, particularly when they are used in large numbers to elicit admissions about immaterial or trivial matters. Used properly, they can focus the scope of discovery by eliminating matters that are not at issue, presumably shortening depositions, eliminating substantial searches for documentary proof and shortening the trial. We recommend meaningful limits on the use of this discovery tool to ensure that it is used for its intended purposes. For example, it could be limited to authentication of documents or numerical and statistical calculations.

Even greater abuse seems to arise with the use of contention interrogatories. They often seek to compel an adversary to summarize its legal theories and then itemize evidence in support of those theories. Just as frequently, they draw lengthy objections that they are premature, seek the revelation of work-product and invite attorney-crafted answers so opaque that they do little to advance the efficient resolution of the litigation. This device should be used rarely and narrowly.

4. EXPERTS

- **Experts should be required to furnish a written report setting forth their opinions, and the reasons for them, and their trial testimony should be strictly limited to the contents of their report. Except in extraordinary cases, only one expert witness per party should be permitted for any given issue.**

The federal rules and many state rules require written expert reports and we urge that the requirement should be followed by all courts. The requirement of an expert report from an expert should obviate the need for a deposition in most cases. In fact, some Task Force members believe that it should obviate altogether the need for a deposition of experts.

We also endorse the proposed amendment to Federal Rule of Civil Procedure 26(b)(4)(B) and (C) and recommend comparable state rules that would prohibit discovery of draft expert reports and some communications between experts and counsel.

5. DISPOSITIVE MOTIONS

The Purpose of Dispositive Motions: Dispositive motions before trial identify an dispose of any issues that can be disposed of without unreasonable delay or expense before, or i lieu of, trial.

Although we do not recommend any Principle relating to summary judgment motions, we report that there was a disparity of views in the Task Force, just as there was a disparity of views among the respondents. For example, nearly 64 percent of respondents who represent primarily plaintiffs said that summary judgment motions were used as a tactical tool rather than in a good-faith effort to narrow issues. By contrast, nearly 69 percent of respondents who represent primarily defendants said that judges decline to grant summary judgment motions even when they are warranted. This subject deserves further careful consideratio and discussion.

6. JUDICIAL MANAGEMENT

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

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

In many federal districts, the normal practice is to assign each new case to a singl 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 try the case. Judges who are going to try cases are in the best position to make pretrial rulings on evidentiary and discovery matters and dispositive motions.

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, bring to the system of justice.

We are also cognizant of the fact that in some courts, the scarcity of judicial resources will not allow for the assignment of every case to a single judge, but in those cases, we recommend an increase in judicial resources so that this Principle can be consistently followed.

- **Initial pretrial conferences should be held as soon as possible in all cases and subsequent status conferences should be held when necessary, either on the request of a party or on the court's own initiative.**

In most systems, initial pretrial conferences are permissible but not mandatory. This Principle would require such conferences in all cases. Sixty-seven percent o our respondents thought that such conferences inform the court about the issues i the case and 53 percent thought that such conferences identified and, more important, narrowed the issues. More than 20 percent of the respondents reporte that such conferences are not regularly held.

Pretrial conferences are a useful 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.

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. The goal is the just, cost-effective and expeditious resolution of disputes.

Seventy-four percent of the Fellows in the 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 said that early and frequent involvement of a judicial officer leads to results that are more satisfactory to the client.

We believe that pretrial conferences 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.

- **At the first pretrial conference, the court should set a realistic date fo completion of discovery and a realistic trial date and should stick to them, absent extraordinary circumstances.**

There has been a good deal of debate about the benefits of the early setting of a trial date.

In 1990, the Federal Judicial Center 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". R. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 Tulane J. of Int'l & Comp Law 153, 179 (1999).

A majority of our respondents (60 percent) thought that the trial date should be se early in the case.

There can be significant benefits to setting a trial date early in the case. For example, the sooner a case gets to trial, the more the claims tend to narrow, the more the evidence is streamlined and the more efficient the process becomes. 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 th 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 can be mor focused.

A new 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. *See* Institute for the Advancement of the American Legal System, *Civil Case Processing in the Federal Courts: A Twenty-First Century Analysis* (forthcoming January 2009).

We also believe that the trial date should not be adjourned except under extraordinary circumstances. The IAALS study found that trial dates are routinely adjourned. Over 92 percent of motions to adjourn 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 adjourned, 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 where trial dates are expected to be held firm, the parties seek trial adjournments at a much lower rate and only under truly extraordinary circumstances.

- **Parties should be required to confer early and often about discovery and, especially in complex cases, to make periodic reports of those conferences to the court.**

Discovery conferences work well and should be continued. Over half (59 percent) of our 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.

Cooperation of counsel is critical to the speedy, effective and inexpensive resolution of disputes in our civil justice system. Ninety-seven percent of our respondents said that when all counsel are collaborative and professional, the cas costs the client less. Unfortunately, cooperation does not often occur. In fact, it i 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. S. Landsman, ABA Section of Litigation, *Readings on Adversarial Justice: The American Approach to Adjudication*, 2 (1988).

However, Chief Magistrate Judge Paul W. Grimm of the United States District Court for the District of Maryland, referring specifically to Professor Landsman's comment, responded that

> 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. *Mancia v. Mayflower Textile Servs. Co. et al.*, Civ. No. 1:08-CV-00273-CCB, Oct. 15, 2008, p. 20.

Involvement of the court is key to effective cooperation and to a productive discovery conference. Even where the parties agree, the court should review the results of the agreement carefully in order to ensure that the results are conducive to a just, speedy and inexpensive resolution of the dispute. Unlike earlier studies and literature, the survey revealed that experienced trial lawyers increasingly see the role of the judge as a "monitor" whose involvement can critically impact the cost and time to resolution of disputes.

- **Courts are encouraged to raise the possibility of mediation or other form of alternative dispute resolution early in appropriate cases. Courts should have the power to order it in appropriate cases at the appropriate time, unless all parties agree otherwise. Mediation of issues (as opposed to the entire case) may also be appropriate.**

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

Over half (55 percent) of the respondents said that alternative dispute resolution was a positive development. A surprisingly high 82 percent said that court-ordered alternative 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 t which alternative dispute resolution has become efficient and effective. Second, it could be a reflection of how slow and inefficient the normal judicial process ha become. Third, it could be a reflection of the fact that ADR 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 ADR. 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 alternative 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.

- **The parties and the courts should give greater priority to the resolution of motions that will advance the case more quickly to trial or resolution.**

Judicial delay in deciding motions is a cause ─ perhaps a major cause ─ of delay in our civil justice system.[7] We recognize that our judges often are overworked and without adequate resources. Judicial delay in deciding certain motions that would materially advance the litigation has a materially adverse impact on the

[7] One of our respondents described a case in which it took the court two years to decide a summary judgment motion. Such a delay is unacceptable and greatly increases the cost of litigation.

ultimate resolution of litigation.[8] In this respect, we endorse Section 11.34 of the Manual For Complex Litigation (Fourth) 2004:

> It is important to decide [summary judgment] motions promptly; deferring rulings on summary judgment motions until the final pretrial conference defeats their purpose of expediting the disposition of issues.

It would be appropriate to discuss such motions at a Rule 16 conference so that the court could be alerted to the importance of a prompt resolution of such motions, since delay in deciding such motions almost certainly adds to the expense of litigation.

- **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 and 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 Manua For Complex Litigation (Fourth), Section 11.3, "The process of identifying, defining, and resolving issues begins at the initial pretrial 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 descriptio of the form that such statement of issues should take.[9]

- **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 favored by the College. Judicial resources are limited and need to be increased.

- **Trial judges should be familiar with trial practice by experience, judicial education or training and more training programs should be made available to judges.**

[8] At present, the Civil Justice Reform Act and current Judicial Conference policy require each federal district court to report on (1) motions and certain other matters pending for over six months and (2) cases pending for over three years, broken out by judicial officer. These reports are available for a fee only on the PACER Service Center web site. We strongly encourage that CJRA reports be made available at no cost on the United States Courts offici web site (www.uscourts.gov), as well as on each district court's individual web site within a reasonable time period after the reports are completed. We also encourage state court systems to provide similar information if they are no already doing so.

[9] Section 11.33 of the Manual For Complex Litigation (Fourth) 2004, identifies six possible actions that can help identify, define and resolve issues.

Knowledge of the trial process is critical for judges responsible for conducting th trial process. We urge that consideration of trial experience should be an important part of the judicial selection process. Judges who have trial or at least significant case management experience are better able to manage their dockets and to 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 57 percent thought that judges did not like taking cases to trial. Accordingly, we believe that more training programs should be made available so that judges will be able more efficiently to manage cases so that they can be tried effectively and expeditiously.

NEXT STEPS

There is much more work to be done. We hope that this joint report will inspire substantive discussion among practicing lawyers, the judiciary, the academy, legislators and, most importantly, clients and the public. In the words of Task Force member The Honourable Mr. Justice Colin L. Campbell 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, the members of the Task Force and the IAALS staf have applied their experience to a year-and-a-half-long process in which they collectively invested hundreds of hours in analyzing the apparent problems, studying the history of previous reform attempts and in debating and developing a set of Proposed Principles. The participants believe that these Principles may 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.

These men and women whose collective knowledge of these issues may be critical to future reform efforts and the organizations they represent, are committed to participating in discussion and activities engendered by the release of this Report.

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. At present, the system is captive to cost, delay, and in many instances, gamesmanship. As a profession, we must apply our experience, our differing perspectives and our commitment to justice in order to devise meaningful reforms that will reinstate a trustworth civil justice system in America.

APPENDIX A

IAALS REVIEW OF PROCEDURAL REFORMS IN FOREIGN JURISDICTIONS AND IN SOME STATES IN THE UNITED STATES

The Principles set forth in this report were not developed in a vacuum. Many are part of routine civil practice and procedure in a wide variety of civil law and common law jurisdictions around the world. While some have recently been developed in foreign jurisdictions in response to concerns about cost and delay, others have had a long and successful history of minimizing thos concerns. The Principles have been developed in recognition of these practices and procedures. We summarize below the application of both the Principles and the march toward comprehensiv reform in several foreign and state jurisdictions.

The Nature of Reform in Foreign Jurisdictions

There is a growing trend in foreign jurisdictions toward fact pleading, limited discovery and active case management. Where recent reforms have been adopted, they have been systemic an sweeping—not nibbles around the edges. Some of the jurisdictions have measured their reforms and our Principles build on that information as well.

In 1997, England and Wales undertook a complete overhaul of the civil justice system, resulting in a rewrite of the rules of civil procedure. The new rules instituted a number of pre-action protocols, a more detailed pleading requirement, defined limits on disclosure and discovery, strict limits on expert witnesses and a track system in which cases are treated with different procedures depending on complexity and amount in controversy. To ensure the success of the new rules in practice, the English reforms granted courts broad case management powers and encouraged judges to play an active role in the progression of a case.

In 2007, a review of the Scottish civil justice system began with a commitment to considering widespread reform proposals, however radical. In the area of judicial management, Scotland ha already been experimenting with the use of a single judicial officer to handle a case from filing to disposition—a practice that users have hailed as increasing consistency and facilitating agreement.

More recently, Spain has made significant reforms to its code of civil procedure that established greater judicial control and limits on the parties' use and presentation of evidence. Germany is presently engaged in a second round of procedural reforms, also employing increased case management powers and a focus on simplifying procedure.

Canada, too, is taking a new look at its civil justice system. Drafts of revised civil procedure rules are currently under consideration in the Canadian provinces of Alberta, British Columbia and Ontario. Alberta's standard of relevance in the context of discovery has already been narrowed and the draft rules in Ontario and British Columbia would do the same. A comprehensive reform proposal was recently released in New Zealand, part of which also proposes to narrow the standard of relevance.

Practices and Procedures in Foreign Jurisdictions

Specialized Rules. In recognition of the fact that trans-substantive rules are not necessarily the most effective approach, many foreign jurisdictions have developed specialized rules and procedures to deal with specific types of cases. Special procedures and case management practices for commercial cases have been developed in England and Wales, Scotland, New Zealand, and Toronto, Canada. In Scotland, practices and procedures have also been developed in the area of personal injury litigation.

Fact-Based Pleading. Outside of the United States, fact pleading is largely the standard practice Foreign jurisdictions differ in the level of detail required by the pleadings; however, even in common law countries like Canada, Australia and the United Kingdom, pleadings must at the very least give a summary of the material facts. Many civil law countries have more stringent pleading requirements. For example, Spain requires a complete narrative of the claim's factual background and German complaints must contain a definite statement of the factual subject matter of the claim. French and Dutch pleadings must contain all the relevant facts and Dutch rules further require that plaintiffs articulate anticipated defenses. The Transnational Principles and Rules of Civil Procedure—drafted in part by the American Law Institute—specifically reject notice pleading, opting instead for a fact-based pleading standard that applies to the claim, denials, affirmative defenses, counterclaims and third-party claims.

Initial Disclosures. In most foreign countries, the initial disclosure requirements are closely related to the pleading standard. The jurisdictions with the strictest pleading standards also usually require parties to supplement the pleadings with documents or evidence that propose an appropriate means of proof for the factual assertions made in the pleadings. This is the practice in The Netherlands, Spain, Germany, France and Scotland and under the Transnational Principles. In the jurisdictions with more lax fact-pleading standards—generally common law countries—parties are usually not required to supplement the pleadings with documentary evidence; however, initial disclosures must be made at a specified time shortly after the close of the pleadings.

Discovery. Unbridled discovery is almost solely a hallmark of the United States civil justice system. Many civil law countries do not have discovery at all as we understand it in the United States, and even foreign common law jurisdictions have defined limits on the practice and tools of discovery. In Australia, New Zealand, England, Wales and Scotland and under the Transnational Principles, depositions are allowed only in limited circumstances or with court approval. Scotland similarly limits interrogatories to specific circumstances, as does Australia with the further restriction that interrogatories must relate to a matter in question. Recent rule changes in Nova Scotia place presumptive limits on depositions where the amount in controvers is under $100,000 and a draft proposal in Ontario would allow the court to develop a discovery plan in accordance with the principle of proportionality.

The scope of permissible discovery in many jurisdictions is directly tied to the issues set forth in the pleadings. "Relevant documents" in England and Wales are those that obviously support or undermine a case; specifically excluded are documents that may be relevant as background information or serve as "train of enquiry". Courts in New South Wales, Australia, and the Transnational Principles similarly reject the "train of enquiry" approach. Courts in Queensland

and South Australia employ a "directly relevant" standard under which the fact proved by the document must establish the existence or nonexistence of facts alleged in the pleading. In Queensland, this approach has been recognized as having substantially reduced the expense of discovery.

Related Civil Justice Reforms in the United States. Some state jurisdictions in the United States have also moved, or are moving, in a similar direction. State rules of civil procedure in Oregon, Texas and Arizona—the last of which traditionally modeled state rules on their federal counterparts—show that practices like fact pleading, early initial disclosures and presumptive limits on discovery are not inconsistent with the style of civil justice in the United States. At the federal level, the Private Securities Litigation Reform Act and recent Supreme Court decisions also illustrate the perceived shortcomings of notice pleading in today's complex litigation environment.

Specialized rules and procedures have also been developed in United States courts for certain case types, including commercial, patent and medical malpractice cases. Some state jurisdictions have simplified procedures for claims under a certain amount in controversy or in which the parties elect a more streamlined process—e.g., Rule 16.1 in Colorado.

APPENDIX B

The Sedona Principles for Electronic Document Production
Second Edition

1. Electronically stored information is potentially discoverable under Fed. R. Civ. P. 34 or its state equivalents. Organizations must properly preserve electronically stored information that can reasonably be anticipated to be relevant to litigation.

2. When balancing the cost, burden, and need for electronically stored information, courts and parties should apply the proportionality standard embodied in Fed. R. Civ. P. 26(b)(2)(C) and its state equivalents, which require consideration of the technological feasibility and realistic costs of preserving, retrieving, reviewing, and producing electronically stored information, as well as the nature of the litigation and the amount in controversy.

3. Parties should confer early in discovery regarding the preservation and production of electronically stored information when these matters are at issue in the litigation and seek to agree on the scope of each party's rights and responsibilities.

4. Discovery requests for electronically stored information should be as clear as possible, while responses and objections to discovery should disclose the scope and limits of the production.

5. The obligation to preserve electronically stored information requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant electronically stored information.

6. Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.

7. The requesting party has the burden on a motion to compel to show that the responding party's steps to preserve and produce relevant electronically stored information were inadequate.

8. The primary source of electronically stored information for production should be active data and information. Resort to disaster recovery backup tapes and other sources of electronically stored information that are not reasonably accessible requires the requesting party to demonstrate need and relevance that outweigh the costs and burdens of retrieving and processing the electronically stored information from such sources, including the disruption of business and information management activities.

9. Absent a showing of special need and relevance, a responding party should not be required to preserve, review, or produce deleted, shadowed, fragmented, or residual electronically stored information.

10. A responding party should follow reasonable procedures to protect privileges and objections in connection with the production of electronically stored information.

11. A responding party may satisfy its good faith obligation to preserve and produce relevant electronically stored information by using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify data reasonably likely to contain relevant information.

12. Absent party agreement or court order specifying the form or forms of production, production should be made in the form or forms in which the information is ordinarily maintained or in a reasonably usable form, taking into account the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party where appropriate or necessary in light of the nature of the information and the needs of the case.

13. Absent a specific objection, party agreement or court order, the reasonable costs of retrieving and reviewing electronically stored information should be borne by the responding party, unless the information sought is not reasonably available to the responding party in the ordinary course of business. If the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the costs of retrieving and reviewing such electronic information may be shared by or shifted to the requesting party.

14. Sanctions, including spoliation findings, should be considered by the court only if it finds that there was a clear duty to preserve, a culpable failure to preserve and produce relevant electronically stored information, and a reasonable probability that the loss of the evidence has materially prejudiced the adverse party.

The Sedona Canada Principles

Addressing Electronic Discovery

Principle 1: Electronically stored information is discoverable.

Principle 2: In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account (i) the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at stake; (ii) the relevance of the available electronically stored information; (iii) its importance to the court's adjudication in a given case; and (iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information.

Principle 3: As soon as litigation is reasonably anticipated, parties must consider their obligation to take reasonable and good faith steps to preserve potentially relevant electronically stored information.

Principle 4: Counsel and parties should meet and confer as soon as practicable, and on an ongoing basis, regarding the identification, preservation, collection, review and production of electronically stored information.

Principle 5: The parties should be prepared to produce relevant electronically stored information that is reasonably accessible in terms of cost and burden.

Principle 6: A party should not be required, absent agreement or a court order based on demonstrated need and relevance, to search for or collect deleted or residual electronically stored information.

Principle 7: A party may satisfy its obligation to preserve, collect, review and produce electronically stored information in good faith by using electronic tools and processes such as data sampling, searching or by using selection criteria to collect potentially relevant electronically stored information.

Principle 8: Parties should agree as early as possible in the litigation process on the format in which electronically stored information will be produced. Parties should also agree on the format, content and organization of information to be exchanged in any required list of documents as part of the discovery process.

Principle 9: During the discovery process parties should agree to or, if necessary, seek judicial direction on measures to protect privileges, privacy, trade secrets and other confidential information relating to the production of electronic documents and data.

Principle 10: During the discovery process, parties should anticipate and respect the rules of the forum in which the litigation takes place, while appreciating the impact any decisions may have in related actions in other forums.

Principle 11: Sanctions should be considered by the court where a party will be materially prejudiced by another party's failure to meet any obligation to preserve, collect, review or produce electronically stored information. The party in default may avoid sanctions if it demonstrates the failure was not intentional or reckless.

Principle 12: The reasonable costs of preserving, collecting and reviewing electronically stored information will generally be borne by the party producing it. In limited circumstances, it may be appropriate for the parties to arrive at a different allocation of costs on an interim basis, by either agreement or court order.

E. Uniform Jury Summons and Questionaire

JURY SUMMONS

DO NOT DISCARD!

PLEASE NOTE:

1. **YOU MUST CALL OUR VOICE MAIL AT 589-4419 (JURORS CALLING FROM OUTSIDE THE CITY OF DUBUQUE MAY CALL TOLL FREE AT 866-282-5816) AFTER 5:00 P.M. ON EACH SUNDAY OF YOUR TWO-WEEK TERM OF SERVICE TO DETERMINE IF YOUR APPEARANCE DATE OR TIME HAS CHANGED OR IF ATTENDANCE IS STILL REQUIRED FOR EACH WEEK!**

2. **PLEASE READ ALL INFORMATION ON THE REVERSE OF THIS JURY SUMMONS BEFORE COMPLETING THE QUESTIONNAIRE BELOW.**

COMPLETE THE QUESTIONNAIRE BELOW, DETACH ALONG DOTTED LINE, FOLD IN HALF, AND MAIL IT USING THE ENCLOSED ENVELOPE OR SEE REVERSE FOR AN ONLINE REPLY OPTION.
BRING THIS REMAINING PORTION WITH YOU WHEN YOU REPORT FOR JURY DUTY.

Pursuant to Iowa Code chapter 607A: You have been randomly selected to appear as a juror in the
You are required to appear at the

JUROR

Group Number	Juror Badge Number

Term of Service	TIME & DATE TO REPORT!
TWO WEEKS SEE "JURY TERM" ON REVERSE SIDE	**8:30 A.M.**

Complete questionnaire, detach, fold in half, and mail (in envelope provided) within 7 calendar days of receipt, or you may respond online at https://ejuror.iowa.gov/ejuror/ Please see reverse for details.

NAME (IF INCORRECT)_____

DATE OF BIRTH: MAILING ADDRESS (IF INCORRECT)_____

HOME PHONE:_____ E-MAIL ADDRESS:_____ RESIDENT OF _____COUNTY

WORK PHONE:_____ CELL PHONE:_____ `___ NUMBER OF MILES **(ROUNDTRIP)** FROM HOME TO THE COURTHOUSE: _____

QUESTIONNAIRE **(If you need additional space, please use additional paper and attach it to this form before mailing.)**

1. ARE YOU A UNITED STATES CITIZEN? YES NO
2. ARE YOU ABLE TO UNDERSTAND THE ENGLISH LANGUAGE IN A WRITTEN, SPOKEN OR MANUALLY SIGNED MODE? YES NO
3. ARE YOU ABLE TO RECEIVE AND EVALUATE INFORMATION TO ACCOMPLISH SATISFACTORY JURY SERVICE? YES NO
4. HAVE YOU EVER BEEN CONVICTED OF A CRIME OTHER THAN A TRAFFIC OFFENSE? YES NO
   IF YES, PLEASE EXPLAIN:_____
5. HAVE YOU OR ANY CLOSE FRIEND OR RELATIVE BEEN A PARTY OR WITNESS IN A COURT CASE OTHER THAN A DIVORCE PROCEEDING? YES NO
   IF YES, PLEASE EXPLAIN:_____
6. DO YOU HAVE A CLOSE FRIEND OR RELATIVE EMPLOYED AS A LAW ENFORCEMENT OFFICER? YES NO
   IF YES, PLEASE EXPLAIN:_____
7. HAVE YOU OR ANY CLOSE FRIEND OR RELATIVE BEEN A VICTIM OF A SERIOUS CRIME? YES NO
   IF YES, PLEASE EXPLAIN:_____

HAVE YOU SERVED AS A JUROR BEFORE? YES NO

LEVEL OF EDUCATION:_____

OCCUPATION:_____

EMPLOYER:_____

MARITAL STATUS:_____

NUMBER OF CHILDREN:_____ AGES OF CHILDREN:_____

SPOUSE'S NAME:_____

SPOUSE'S OCCUPATION:_____

SPOUSE'S EMPLOYER:_____

THE FOLLOWING IS OPTIONAL: PLEASE HELP DETERMINE WHETHER OUR JURIES REPRESENT A CROSS SECTION OF THE TOTAL POPULATION BY INDICATING WHICH OF THE FOLLOWING APPLIES TO YOU:

RACE: CAUCASIAN AFRICAN AMERICAN
NATIVE AMERICAN HISPANIC AMERICAN
ASIAN OTHER

GENDER: MALE FEMALE

Automatic exemptions are not allowed for reasons of inconvenience, hardship, or public necessity. Documentation from a physician or a health care provider is required if you wish to be excused for reasons of mental or physical disability. Juror service may be deferred to a different term for reasons of good cause.
DEFERRAL/EXCUSAL/DISQUALIFICATION REQUEST:

_____
_____
_____

I CERTIFY THAT THE FOREGOING INFORMATION IS TRUE AND CORRECT: _____
Your Signature

TIME AND DATE TO REPORT - You must call our voice mail at 589-4419 after 5:00 p.m. on the SUNDAY IMMEDIATELY BEFORE YOUR INITIAL TIME AND DATE TO REPORT AND AGAIN ON THE FOLLOWING SUNDAY for a message that will indicate if your appearance date or time has been changed or if your attendance is still required each week of your TWO-WEEK JURY TERM (see JURY TERM below)! Payment for jury service will not be made for reporting on days when your jury service has been canceled via our voicemail message. You will need to refer to the **JUROR ID NUMBER** on your **JURY SUMMONS** while listening to the VOICE MAIL message. (If this is a toll call you may use our toll free number: 866-282-5816. Please do NOT use the toll free number if you are calling from Dubuque or toll free surrounding exchanges.)

COURTHOUSE SECURITY – The Dubuque County Courthouse has a security system consisting of metal detectors and x-ray machines. Anything considered to be a weapon or is deemed to be unacceptable will be confiscated and/or dealt with accordingly. No knives, chemical control agents (such as pepper spray), firearms, or other dangerous weapons are allowed. **PLEASE ENTER THE BUILDING VIA THE CENTRAL AVENUE DOOR AND ALLOW EXTRA TIME WHEN PLANNING YOUR ARRIVAL FOR JURY SERVICE. THE SCREENING PROCESS MAY TAKE A FEW EXTRA MINUTES.** Also, smoking or use of any tobacco product is prohibited at the Dubuque county Courthouse and on all public grounds used in connection with the courthouse, including sidewalks, sitting or standing areas, courtyards and parking lots.

JURY TERM – A two-week jury term is in use in this county. This means that you are only required to appear for jury selection for the trials scheduled to begin during the two consecutive work weeks that begin with the **DATE TO REPORT** listed on your **JURY SUMMONS.** If all trials are canceled for both weeks you are summoned, you will be dismissed without reporting and your jury service will be complete. If you are required to report and are not selected as a juror after all juries necessary for the two weeks have been selected you will be dismissed and your jury service will be complete. If you are selected as a juror you will be dismissed and your service will be complete at the conclusion of the trial unless you are told you are needed for trials scheduled later in your term.

PLEASE NOTE: If assistance of auxiliary aids or services is required to participate in court due to a disability such as hearing impaired, call the Americans with Disabilities coordinator at 319-833-3332. If you are in need of dual party telephone relay services, call Relay Iowa TTY at 1-800-735-2942.

PARKING – When you report for jury service, please park your vehicle in the **IOWA STREET PARKING RAMP**. Park only on the shaded areas indicated in the diagram below. Bring your "time-in" ticket to the court attendant or the Clerk of Court's office for validation. If this ramp is full, proceed south on Iowa Street, past the Holiday Inn Parking Ramp and park anywhere in the **4TH STREET PARKING RAMP**. There is no attendant at the 4th Street Ramp, so you will need to pay to get out and bring us your receipt so that you can be reimbursed.

--DISABLED DRIVERS WHO ARE UNABLE TO TRAVEL FROM THE PARKING RAMP TO THE COURTHOUSE – Please park in any available public parking space in the vicinity of the courthouse within your movement range and pay the parking meter. If your meter expires while serving and you receive a citation PLEASE PAY the citation immediately. Within one week of your service, provide a written statement of your expenses to clerk of court staff (include copies of any citations). **PARKING OTHER THAN IN APPROVED LOCATIONS MAY BE AT YOUR OWN EXPENSE!**

COMPENSATION, REIMBURSEMENT, AND WAIVER - Iowa Code and Iowa Court Rules mandate that jurors shall be compensated at the rate of $30 per day, for the first seven days of service on a case, or $50 per day for the eighth and subsequent days of service on a case. In addition, Iowa Code and Iowa Court Rules mandate that jurors shall be reimbursed for mileage expense for each day traveled from their residence to the courthouse at a rate of $0.35 per mile. (If jurors carpool, only the driver may receive reimbursement for mileage. If you ride with another juror, please so indicate to the court attendant or at the Clerk of Court's office.)

Iowa Code allows jurors to choose to waive the juror compensation, the juror mileage reimbursement, or both.

If you choose to waive your juror compensation please sign your name here: _____

If you choose to waive your juror mileage reimbursement, please sign your name here: _____

ALTERNATE TRANSPORTATION REIMBURSEMENT FOR PERSONS WITH A DISABILITY - If you are a person with a disability you may receive reimbursement for the costs of alternate transportation from your residence to the courthouse.

If you are disabled and wish to be reimbursed for alternate transportation please sign your name on the line below. (If so, please bring an invoice or receipt to the court attendant of Clerk of Court's office indicating the amount of the alternate transportation.)

_____

ONLINE EJUROR SERVICE - An online service of the Iowa Judicial Branch enables citizens summoned for jury service in the Iowa District Court to use the internet to obtain information about serving on a jury in the Iowa District Court and/or perform a number of jury-related tasks, such as to:

- complete a juror questionnaire
- update your personal information
- confirm your juror status
- request to be excused or disqualified from jury service
- request a one-time option to reschedule your jury service
- contact the court regarding your jury service

All of this can be done from the Iowa Judicial Branch ejuror website: **https://ejuror.iowa.gov/ejuror/**

When you access the ejuror website you will need to enter your 9-digit Juror ID Number, found directly under the bar code on your Jury Summons, and your date of birth. All of your responses, requests, and questions will be electronically directed to the office of the Clerk of District Court for Dubuque County, where they will be recorded, forwarded to the court, and/or responded to as appropriate.

If you have any questions or suggestions regarding ejuror or your jury service, please contact the Clerk of District Court for Dubuque County at 563-589-4419.

S:D131Dubuque/juryforms/jurysummonsBACK2AMEND1(8-12-10)

The information given in this questionnaire is only to assist with jury selection in this case.

JUROR NAME: _____ AGE: _____ JUROR #: _____

What is the highest grade that you completed in school? If college, please list any degrees received:	Where do you work and what is your job title? What jobs have you held in the past? Where does your spouse or significant other work and what is their job title? What jobs has your spouse or significant other held in the past?	Circle any of the following in which you have received training or education: Business Law Engineering Psychology Health/Medicine Statistics Insurance Teaching
What are your feelings or opinions about people who bring personal injury lawsuits? Do you or a family member have a CDL? _____ Yes _____ No	If you were seriously hurt or injured by the fault of another, would you sue? Please explain your answer.	If supported by the evidence, could you consider awarding money damages for: a. Pain and suffering __Yes __No b. Mental anguish __Yes __No c. Disfigurement __ Yes __No d. Future medical bills __Yes __No If you answered NO to any of the above, please explain:
Do you use any types of social media like Facebook, twitter, blobbing, or others? If yes, please explain.	Have you ever been the plaintiff (the party suing) or a defendant (the party being sued) in a lawsuit? _____ Yes _____No If YES, please explain:	Have you ever served as a juror? _____ Yes _____No If YES, what type of case was it? What was the verdict in the case? Were you the foreperson? _____Yes _____No
What are your 3 favorite TV shows? 1. 2. 3. What newspaper, magazines, or journals do you read regularly?	What groups or organizations, including unions or religious groups, do you belong to?	List 3 character traits you admire the most: 1. 2. 3. List 3 character traits you admire the least: 1. 2. 3
Which of the following words would you use to describe yourself? Please check all that apply: __Analytical __Old-fashioned __Care __Open-minded __Compassionate __ Pro-business __Detail-oriented __Pro-consumer __Emotional __Sensitive __Frugal __Skeptical __Generous __Suspicious __Impulsive __Visual __Judgmental __Worrier	What do you enjoy doing in your spare time? Do you consider yourself to be: __Conservative __Moderate __Liberal Who makes the financial decisions in your home? Who writes the checks or pays the bills in your home?	Do you want to serve as a juror in this case? ___Yes ___No If No, please explain: Add any comments you wish to make:

I hereby swear or affirm that all the answers contained in this juror questionnaire are true and correct.

_____

Juror's signature Date

F. Court-Affiliated ADR State Comparison

CIVIL JUSTICE TASK FORCE

Court-Affiliated ADR

Arizona, Colorado, Florida, Nebraska, North Carolina And Oregon

For purposes of this analysis, the court-affiliated family law, criminal law, and other specialty law ADR provisions have not been reviewed or analyzed in detail. This annotation will make reference to the existence of these ADR modes in each state. In all states there is extensive use of ADR in all aspects of family and juvenile matters. Generally, discussion is limited to general civil litigation ADR options.

ARIZONA

1. Court or State Office of Court ADR. Arizona does not have such an office available.

2. Court-Affiliated ADR Processes Used. Civil litigation has both mandatory arbitration and discretionary court ordered mediation available. Arizona utilizes mediation of appellate matters that are under the jurisdiction of the Arizona Court of Appeals, but not the Supreme Court. Mini trials, settlement conferences, and summary jury trials are all available at the civil trial level. Arbitration, conciliation, mediation, and settlement conferences are used in the domestic and family law courts.

3. Funding. There is a statewide dispute resolution fund administered by the Treasurer of the State of Arizona. It is funded with 0.35% of all filing fees collected in Arizona's Superior Court Clerks' offices, i.e. the equivalent of the Iowa District Court, and 0.35% of the Notary Bond Fees that are deposited in the Superior Court. Justice of the Peace Courts participate to the extent of 1.85-2.05%, depending on the size of their respective counties.

   The Board of Supervisors of each county may establish a fee for alternative dispute resolution services provided by the

court in that county. This local alternative dispute resolution fund is handled by the respective county Treasurers of each Superior Court.

4. Principal Statutes/Court Rules. Arizona Revised Statutes 12-133-12-135.01, inclusive, establish the parameters of the court affiliated arbitration and mediation ADR. Pursuant to these provisions:

   a. Arbitration. The Superior Court in each county is to establish jurisdictional limits, not to exceed $65,000, for the submission of civil disputes to mandatory arbitration. Arbitration is mandatory in all cases in which either the court finds or the parties agree that the amount in controversy does not exceed the jurisdictional limit.

   The court maintains a list of qualified persons "who have agreed to serve as arbitrators." The Clerk of the Superior Court assigns arbitration cases to a panel of three arbitrators, or one at the clerk's discretion.

   Prior to suit, by an Agreement of Reference may proceed to arbitration. The agreement of reference takes the place of pleadings and is filed with the Clerk of Court.

   The arbitrators are to be paid a reasonable fee, not to exceed $140 per day, by the county clerk. An appeal, trial de novo may be pursued in the Circuit Court. If the appellant's position is not bettered by 23% there are punitive costs assessed against the appellant.

   b. Mediation. The trial court may refer any case to mediation or other alternative dispute resolution procedures to promote disposition of cases filed in the superior court. In such instances, the Board of Supervisors of each county establishes what a reasonable fee for alternative dispute resolution services is. It appears there is little other restriction on mediation.

COLORADO

1. Court or State Office of Court ADR. Colorado has an Office of Dispute Resolution which has been very active since the enactment Colorado's Dispute Resolution Act passed in 1983. This office oversees the implementation of the ADR Act. It contracts with mediators and establishes their fees. Parties are not compelled to use the mediators contracted with the Office

of Dispute Resolution. However, it presently has over sixty mediators under contract.

2. Court-Affiliated ADR Processes Used. Mediation appears to be the preferred method for alternative dispute resolution in the Colorado Judicial System. In addition to civil suits of all types, court ordered or party requested mediation is made available to resolve appellate matters, attorney/client fee disputes, bankruptcy, child custody and visitation, and child protection in dependency matters.

3. Funding. Virtually all of the ADR in Colorado is paid by the parties. No state or local funds have been established. However, grants are from time to time obtained. If the matter is mediated through the Colorado Office of Dispute Resolution, fees are set or established. They range from $75 per hour per party in a District Court civil matter to $30 per hour per party in a Small Claims matter.

4. Principal Statutes/Court Rules. The Dispute Resolution Act is found in Colorado Revised Statute 13-22-301, et seq. Generally, it is provided that the head of the Office of Dispute Resolution is appointed by the Chief Justice of the Colorado Supreme Court. The director of ADR is an employee of the Judicial Department.

   This ADR act establishes that reference of a case for mediation services or dispute resolution programs is at the discretion of the court. The court has discretion to refer a case to any ancillary form of alternative dispute resolution and is not limited to mediation. The parties ordered to mediation are allowed to select the mediator regardless if the mediator is contracted with the Office of Dispute Resolution. Upon completion of mediation, the mediator is to verify or certify that they have met. If the mediator and parties agree and inform the court that they are engaging in good faith mediation, any pending hearing in the action is continued to a date certain.

   There is appended to this document a form of order used in Colorado ordering the matter be referred to mediation.

   Another section of the Colorado Revised Statute Section 13-3-111, commonly referred to as a private trial or trial by appointment act provides that, upon the agreement of all parties to a civil action, a retired or resigned Justice of the Supreme Court or Judge of the court assigned to hear the action may be assigned to try it. The prerequisites are that the parties agree to pay the salary of the selected Justice or Judge, along with all other salaries and expenses incurred in the trial. Whether a Judge is so assigned is entirely within the discretion of the Chief Justice of the Supreme Court. The orders, decrees, verdicts, and judgments rendered have the

same force and effect as those of a hearing or trial presided over by a regularly serving Judge, and may be appealed in the same manner.

FLORIDA

1. Court or State Office of Court ADR. The ADR programs in the State of Florida are administered through the Florida Dispute Resolution Center with its offices in the Supreme Court Building in Tallahassee, Florida. The Florida Dispute Resolution Center was established in 1986 by the then Chief Justice of the Florida Supreme Court in conjunction with the Florida State University College of Law Dean. It was the first statewide center for education, training, and research in the field of ADR.

   The Department of the Dispute Resolution Center provides staff assistance to four Supreme Court of Florida Mediation Boards and Committees; certifies mediators and mediation training programs; sponsors an annual conference for mediators and arbitrators; publishes a newsletter and an annual compendium; and provides basic and advanced mediation training to volunteers and assists the local court systems throughout the state as needed.

   There is a Florida Supreme Court Committee on ADR Rules and Policies. It has also established a mediator qualifications board, a mediator ethics advisory committee, mediation training and review board and has an experienced staff.

2. Court-Affiliated ADR Processes Used. Mandatory and court discretionary mediation and arbitration are both used extensively in Florida. Mediation is available in child protection and dependency, bankruptcy and appellate matters. Both arbitration and mediation are available in general civil matters. Otherwise, mediation is available in virtually all other civil matters, i.e., family, foreclosure, juvenile, and small claims.

3. Funding. Court-affiliated mediation and arbitration programs are funded by a filing fee of $1 levied on all proceedings filed in the Circuit or County Courts. The fees collected are deposited in the state court's Mediation and Arbitration Trust Fund, administered by Florida's Department of Revenue. In addition, in family law mediation an additional $60 - $120 per person may be collected in family mediation matters. Each Clerk of Court submits a quarterly report specifying the amount of funds collected and remitted to the Trust Fund and identifying the total aggregate collections and remissions from all

statutory sources. This report is submitted to the Office of the State's Court Administrator.

4. Principal Statutes/Court Rules. The ADR statute in Florida is Ch. 44 of Florida Statutes: Mediation Alternatives to Judicial Action. Under rules adopted by the Florida Supreme Court, if requested by a party, the trial court is required to refer to mediation any filed civil action for monetary damages if a requesting party is willing and able to pay the cost of the mediation or the cost can be equitably divided between the parties. There are eight statutorily prescribed exceptions to this. Otherwise the court has discretion to refer any filed dispute to mediation.

   Similarly, the court may refer any contested civil action to non-binding arbitration. Arbitrators are compensated in accordance with the Supreme Court Rules. In no event is an arbitrator allowed to charge more than $1,500 per diem, unless the parties agree otherwise.

   Otherwise, two or more opposing parties involved in a civil dispute may agree in writing to submit their controversy to voluntary binding arbitration or voluntary trial resolution, in lieu of litigation. In that event, the arbitrator or trial resolution Judge is compensated by the parties according to their agreement.

   The Florida Supreme Court establishes minimum standards and procedures for the qualifications, certification, professional conduct, discipline and training for both mediators and arbitrators who are appointed by a court. The arbitrators and mediators are certified by the Supreme Court.

   Florida is unique. Its ADR act provides that the Chief Judge of a Judicial Circuit, in consultation with the Board of County Commissioners, may establish a Citizen Dispute Settlement Center, upon approval of the Chief Justice of the Florida Supreme Court. There is a seven-person council appointed for each dispute settlement center. The council's responsibility is to formulate and implement a plan for creating an informal forum for the mediation and settlement of disputes. Guidelines for its procedure are set forth in the statute.

FLORIDA RULES OF CIVIL PROCEDURE

There are several Rules of Civil Procedure that have been mandated in Florida relating to ADR. They relate to the whole spectrum of civil, appellate, juvenile, and family mediation. They are Florida Rules of Civil Procedure 1.700-1.830; Rule 7.090; 8.290, 9.70-9.740, and Rules 12.10, 12.610, and 12.740-741.

Similarly, the Florida Supreme Court has established a variety of rules relating to certified and court appointed mediators, including their qualification and conduct. To be certified a mediator needs to obtain a total of 100 points. The points are allocated for general education, mediation education, experience, and mentorship. The various components are weighted depending on the court to which the mediator is certified. Thereafter a mediator must adhere to the standards of professional conduct established by the Supreme Court.

An arbitrator must be a member of the Florida Bar unless otherwise agreed upon by the parties. There are additional qualifications for arbitrators, but certification is not among them.

NEBRASKA

1. Court or State Office of Court ADR. There is an Office of Dispute Resolution in Nebraska which has been in operation for twenty years. The Office of Dispute Resolution director is a State Judicial Employee. The director is hired by the Supreme Court of Nebraska to administer the Dispute Resolution Act. The Office of Dispute Resolution reports annually to the Chief Justice, the Governor, and the Legislature.

   Among its other duties, the ODR is to award grants to approved dispute resolution centers around the State of Nebraska. An approved center can accept cases referred to it by a court, an attorney, a law enforcement officer or a social service agency or school. Mediators of approved centers are to have completed at least thirty hours of training in conflict resolution techniques, neutrality, and ethics. To be a Family Law mediator there must be an additional thirty hours in family law mediation and mentorship mediations with an experienced mediator.

2. Court-Affiliated ADR Processes Used. Mediation appears to be the preferred method of court affiliated ADR, regardless of its origin. However, arbitration is available in general civil litigation. In 2009-2010, the mediation centers in Nebraska opened 2,190 new mediation cases. Fifty-five percent (55%) of the cases were family law cases. Juvenile neglect cases accounted for approximately 19%. Virtually all the family law cases were court referred. It appears that most civil cases that are resolved through ADR are done so in the private as opposed to court referred mediation arena.

3. Funding. The primary source of funding is from fees. The Director of the ADR program develops sliding-scale fees annually.

4. Principal Statutes/Court Rules. There are two statutes in Nebraska governing court affiliated ADR. They are both mediation statutes.

   One is referred to as The Nebraska Resolution Act and the other is the Nebraska Uniform Mediation Act. Neither of these acts is as comprehensive as most states that have state affiliated programs. However, virtually all of the rules and statistics maintained in Nebraska relate to specialty mediations. Family law mediation is by far the most used. Also, special mediation procedures are established for special education students, juveniles, and other social service institution issues.

NORTH CAROLINA

1. Court or State Office of Court ADR. In 1995 the North Carolina Legislature established the North Carolina Dispute Resolution Commission. The commission is charged with administering mediator and mediator training programs for certification. Oversight includes regulating the conduct of mediators and training program personnel. It supports the court-based mediation and settlement conference programs in the North Carolina's courts. Further, the Commission recommends policy, rules, and rule revisions to the alternative Dispute Resolution Committee of the State Judicial Council.

   The Commission is a sixteen member body. It includes five judges, A Clerk of the Superior Court, five mediators, two certified in family and financial settlement conferences, two certified to conduct mediation settlement conferences in Superior Court and one certified to conduct criminal district court mediations; two practicing attorneys who are not mediators, one of whom must be a family law specialist and three citizens knowledgeable about mediation.

2. Court-Affiliated ADR Processes Used. Mediation is the preferred mode of ADR in the North Carolina judicial system. However, mediated settlement conferences appear are widely used. Arbitration, early neutral evaluation and summary jury trials are used as well.

   All cases involving claims for money damages of $15,000 or less are eligible for arbitration. The cost of arbitration is $100 to each arbitrator for each hearing. This is paid by the court, but a fee of $100 is imposed on each of the parties. The hearings are limited to one hour and take place at the courthouse. The arbitrator's ruling can be appealed and tried as a trial de novo.

The court mediation program is generally referred to as a "Clerk Mediation Program." The Clerk of each Superior Court in the State of North Carolina may refer any eligible matter to mediation. It is designed as what is called a "party pay" program. The parties compensate the mediator for his or her services. The parties are given an opportunity to select their mediator. If the matter involves estate or guardianship disputes, the parties must choose a mediator who has been trained to mediate estate and guardianship cases. Otherwise, the parties can select any mediated settlement conference or family financial settlement mediator who has been certified.

A "mediated" settlement conference program is viewed as something other than general mediation. The object of the program is to promote early settlement of cases that are filed in the Superior Court or trial court. The parties who are court referred to a mediated settlement conference are required to meet with their attorneys, a representative of any insurance carrier involved in the litigation, and a mediator to discuss their dispute to try and resolve it. No settlement agreement reached at the mediation is enforceable unless it has been reduced in writing and signed by the parties.

3. Funding. The North Carolina Dispute Resolution Commission budget is comprised of fees collected from mediators and mediation training programs for certifications and renewal of certifications. This generated approximately $200,000 in revenue in the fiscal year for 2009-2010. For court mandated arbitration a fee of $100 imposed on each of the parties. Costs of a court mediated settlement conference are born by the parties.

4. Principal Statutes/Court Rules. North Carolina General Statutes 7A-37.1, 7A-38.3B and related Supreme Court Rules, are the principle authorities for court affiliated ADR in North Carolina.

OREGON

1. Court or State Office of Court ADR. There is no state court ADR office or commission in Oregon.

2. Court-Affiliated ADR Processes Used. Oregon utilizes both discretionary court ordered mediation and mandatory arbitration in certain cases as its preferred, court-affiliated ADR processes.

3. Funding. There is a dispute resolution account established in the State Treasury in Oregon. The money is generally raised through surcharges in civil litigation and court costs. In court

mandated arbitration, the parties are responsible for the fees and expenses. Under Oregon law, the Dean of the University of Oregon School of Law has the power to allocate much of the resources, develop rules and regulations for programs, and terminate dispute resolution programs.

4. Principal Statutes/Court Rules. Mediation and arbitration are governed by the provisions of Oregon Revised Statute §36.100-700. Those provisions that relate to civil litigation ADR are 36.100-36.238, inclusive, for general mediation, and 36.400-36.425 for court arbitration programs.

In Oregon, a Judge of any Circuit Court can refer a civil dispute to mediation. However, if a party files a written objection to mediation with the court, the action then proceeds in a normal fashion. The parties select their own mediators or the mediators are selected by the court from the court's panel of mediators, if the civil litigants fail to do so. Each circuit court establishes a panel of mediators. Unless instructed otherwise, the Clerk of Court selects three individuals from the panel, submits them to the parties. Within five days the parties are to select a mediator from these three. If they fail to do so, the Clerk will select one. However, the parties are free at their option and expense to obtain the mediation services from other than those suggested by the court and enter into a private mediation agreement.

Attorneys participate in the mediation only upon the written agreement of the parties. If settlement is reached in mediation the mediators are commanded by statute to encourage the disputing parties to obtain individual legal counsel to review the mediated agreement prior to signing it.

The court arbitration program is mandatory. Each circuit court requires arbitration in matters involving $50,000 or less. There are exceptions for certain class of cases to this rule. Although the arbitration may proceed, an arbitrator is by statute not allowed to let any party appear or participate in the arbitration proceeding unless the party pays the arbitrator a fee established by the court prior to that time. A party cannot be compelled to arbitration if they have already participated in a mediation program offered by the court. The arbitration hearing is open to the public to the same extent that it would be as a trial. There are provisions that upon appeal, i.e. a trial de novo, the appellant will forfeit certain fees that they have deposited with the court and may have to pay the fees and expenses incurred by the opposing party during arbitration, if the de novo trial does not better the position of the appellant.

Medical negligence cases are, also, subject to mandatory mediation.

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G. Rock Island County Arbitration Caseloads

A. Rock Island County Arbitration Caseloads

Arbitration Caseload FY 06

Cases Pending/Referred to Arbitration	1078
Cases Settled/Dismissed	815
Arbitration Hearings	107
Awards Accepted	15
Awards Rejected	53
Cases filed in Arbitration that proceeded to trial	14

Arbitration Caseload FY 07

Cases Pending/Referred to Arbitration	617
Cases Settled/Dismissed	394
Arbitration Hearings	74
Awards Accepted	9
Awards Rejected	38
Cases filed in Arbitration that proceeded to trial	17

Arbitration Caseload FY 08

Cases Pending/Referred to Arbitration	558
Cases Settled/Dismissed	333
Arbitration Hearings	51
Awards Accepted	10
Awards Rejected	23
Cases filed in Arbitration that proceeded to trial	9

Arbitration Caseload FY 09

Cases Pending/Referred to Arbitration	592
Cases Settled/Dismissed	396
Arbitration Hearings	43
Awards Accepted	5
Awards Rejected	17
Cases filed in Arbitration that proceeded to trial	6

Arbitration Caseload FY 10

Cases Pending/Referred to Arbitration	583
Cases Settled/Dismissed	394
Arbitration Hearings	34
Awards Accepted	7
Awards Rejected	13
Cases filed in Arbitration that proceeded to trial	4

H. Court-Connected General Civil Mediation Programs

Court-Connected General Civil Mediation Programs

Issues and Options with Respect to Mediators

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Report to Court-Annexed ADR Subcommittee,
Civil Justice Reform Task Force
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Gittler, Court-Connected General Civil Mediation Programs: Issues and Options with Respect to Mediators

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Gittler, Court-Connected General Civil Mediation Programs: Issues and Options with Respect to Mediators

Gittler, Court-Connected General Civil Mediation Programs: Issues and Options with Respect to Mediators

INTRODUCTION

This report dealing with the mediation of court-referred civil cases was prepared for the Court-Annexed ADR Subcommittee of the Iowa Supreme Court's Civil Justice Reform Task Force[1]. For the purpose of this report, court-connected civil mediation programs refers to programs providing mediation services in cases on a court's general civil trial docket, other than domestic relations, probate and small claims cases. (Center for Dispute Resolution & Institute of Judicial Administration, 1992).

Appendix A of this report contains the results of a literature review and references. Appendix B contains the results of a survey of state statutes and court rules with respect to mediation of court-referred civil cases in twelve states (hereinafter state survey). Seven of these states—Illinois, Kansas, Minnesota, Missouri, Nebraska, South Dakota, and Wisconsin—were included in the state survey because of their proximity to Iowa; and five of these states—California, Florida, Maryland, Ohio, and Virginia—were included in the state survey because they have well-established and well-respected programs.

CAVEAT: It must be emphasized that state statutes and state court rules do not necessarily furnish a complete picture of the court–connected general civil mediation programs in the states included in the survey. For example, in Illinois, Missouri, and Ohio, it largely has been left to local courts to determine the requirements for any court-connected programs.

BACKGROUND

Mediation Defined, Models of Mediation and Popularity of Mediation

There is no generally accepted definition of mediation. The Model Standards of Conduct for Mediators, issued by the American Arbitration Association, the American Bar Association (ABA), and the Association for Conflict Resolution, broadly defines mediation as "a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute." (American Arbitration Association, ABA & Association for Conflict Resolution, 2005, p. 1).

A core principle of mediation is party determination. Thus, the Model Standards of Conduct for Mediators states: "A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome." (American Arbitration Association, ABA & Association for Conflict Resolution, 2005, p. 2). It is this core principle of party determination that distinguishes mediation from adjudicative dispute resolution processes, such as litigation and arbitration, in which a neutral third party controls and decides the outcome of the dispute.

As mediation has evolved, three different models of mediation have gained recognition. A leading mediation text describes these models as follows:

[1] I appreciate the assistance provided by Mario Kladis in conducting research for this report and the administrative assistance provided by Kelley Winebold in compiling it.

> In **facilitative mediation**, the mediator conducts the process along strict lines in order to define the problem comprehensively, focusing on the parties' needs and concerns and helping them to develop creative solutions that can be applied to the problem. The facilitative mediator views her role as facilitating communication and helping the parties avoid common pitfalls in problem solving. They are "process" experts, not "content" experts. They do not provide opinions about the quality of settlement options, although they may through questioning, and other techniques, assist the parties in evaluating the settlement options for themselves.
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> ***
>
> In **evaluative mediation**, the mediator guides and advises the parties on the basis of his or her expertise with a view to their reaching a settlement that accords with their legal rights and obligations, industry norms, or other objective social standards. In doing so, the mediator will often provide opinions concerning an acceptable settlement range and likely outcome in court if the dispute is not settled. The primary focus of the evaluative mediator is to highlight the strengths and weakness of the parties' positions and arguments, as he sees them, in order to bring about a compromise.
>
> ***
>
> In **transformative mediation**, the mediator assists parties in conflict to improve or transform their relationship as a basis for resolving the dispute …. A transformative mediator's primary focus is assisting the parties to have constructive interaction to improve the relationship, not settling the dispute at hand. By improving the quality of the relationship, the parties are better equipped to resolve not only the problem at hand, but future conflicts as well (emphasis added). (Boulle, Coaltrella Jr. & Picchioni, 2008, p.12-13).

Different mediators adopt the facilitative, evaluative, or transformative model depending on their individual orientation and style, the wishes of the parties, the nature of the case being mediated, and the context in which the mediation occurs.

In the past few decades, the use of mediation has risen dramatically and is said to be a more popular form of dispute resolution than litigation. (Boulle, Coaltrella Jr. & Picchioni, 2008; Reuben, 1996). The benefits of mediation to which its popularity is attributable have been summarized as : "(1) greater participant control over the proceedings and outcome; (2) greater likelihood of preserving and enhancing the relationship of the participants; (3) greater access to creative and adaptable solutions; (4) quicker resolutions for participants; (5) less expensive proceedings for participants; and (6) conservation of court resources." (Boulle, Coaltrella Jr. & Picchioni, 2008, p. 30).

Emergence of Court-Connected Civil Mediation

Almost all states have some type of statewide or local court-connected mediation programs. The 1980's saw the emergence of court-connected general civil mediation with the 1988 enactment of a Florida statute under which judges, at their discretion, could refer any case on the civil trial docket to mediation. (Baruch Bush, 2008). Today, mediation of court-referred civil cases is common throughout

the country. (Baruch Bush, 2008, McAdoo & Welsh, 2004; Wissler, 2004; Young 2006). All but one of the states included in the state survey (CA, FL, IL, KS, MD, MN, MO, NE, OH, VA, WI) had state statutes and/or court rules mandating or permitting court-referred general civil mediation programs (hereafter court-connected programs). (Appendix B, Table One).

Court-connected programs may be wholly mandatory, wholly voluntary or somewhere in between from the standpoint of the participation of the parties. At one end of the continuum are programs where the court automatically refers all cases, or some subset of cases, to mediation. At the other end of the continuum are programs where the court refers cases to mediation with the consent of all the parties. (Baruch Bush, 2008; Cole, 2005; Rogers & McEwen, 2010a; McAdoo & Welsh, 2004; Wissler, 2004).

Although court-connected mediation is now widely accepted, the institutionalization of mediation in court-connected programs is sometimes viewed as problematical. Two long-term and well-known observers of court-connected programs have explained their reservations about these programs as follows:

> "The classic definition of mediation ….assumes a generally facilitative mediator whose focus is on fostering the parties' ability to discuss their dispute and work together toward a settlement. In the court-connected environment, however, mediation often looks more evaluative, with mediators pursuing settlement quite aggressively and in a manner that may become inconsistent with party self-determination. Some critics now worry that court-connected mediation is virtually indistinguishable from an early neutral or even a judicial settlement conference, albeit with a mediator taking the place of a judge. " (McAdoo & Welsh, 2004, p. 6).

Other commentators have expressed the same or similar reservations. (Baruch Bush, 2004; Golann & Folberg, 2011).

PLANNING OF COURT-CONNECTED PROGRAMS AND ISSUES WITH RESPECT TO MEDIATORS

An excellent source of information and advice about planning court-connected programs can be found in McAdoo and Welsh, "Court-Connected General Civil ADR Programs: Aiming for Institutionalization, Efficient Resolution, and the Experience of Justice," a chapter in the *ADR Handbook for Judges*, published by the ABA Section of Dispute Resolution in 2004. (McAdoo & Welsh, 2004). (A copy of this chapter was included in the materials submitted by the Court-Annexed ADR Subcommittee to the Civil Justice Reform Task Force). McAdoo and Welsh examine the many issues, about which decisions must be made in planning court-connected programs, and they term the decisions concerning mediators and their relationship to the court as among "[the] most important" that must be made. (McAdoo & Welsh, 2004, p.19).

At the outset it must be decided who will provide mediation services. Court-connected programs may use mediators in private practice, employ full-time or half-time in-house staff mediators, or use a combination of private providers and court staff. Most programs, however, rely on independent private providers for mediation services. (McAdoo & Welsh, 2004; Wissler, 2002).

Once the decision as to who will provide services is made, a series of other decisions regarding the initial screening and selection of mediators and the ongoing monitoring, evaluation and support of mediators must be made. The issues and options concerning these decisions are discussed below.

CREDENTIALING OF MEDIATORS AND COURT-CONNECTED PROGRAMS

There is a long standing debate over whether mediation is a profession that should be subject to state regulation and what, if any, approaches to credentialing are most appropriate for mediators to ensure their competence to provide quality mediation services. (See. e.g. Cole, 2005; McEwen, 2005; Pou, 2004; Welsh & McAdoo, 2005). According to one nationally recognized authority, "competence is the term often used to describe the ability to use dispute resolution skills and knowledge effectively to assist disputants in prevention, management, or resolution of their disputes in a particular setting or context." (Pou, 2002, p. 4).

Credentialing can take various forms including licensure and certification. Licensure refers to a mandatory form of credentialing by governmental or governmentally authorized entities involving the grant of a license to engage in a particular occupation or profession to individuals who have demonstrated that they have met established competency standards. (ABA Section of Dispute Resolution, 2002; ACR, 2010; Pou, 2002). Certification refers to a voluntary rather than a mandatory form of credentialing by private as well as public entities involving certification that individuals have designated qualifications for an occupational field or professional practice. (ABA Section of Dispute Resolution, 2002; ACR, 2010; Pou, 2002). While a state license is a prerequisite for the practice of law and a number of other professions, it is not currently a prerequisite for the practice of mediation in any state. (ACR, 2010). However, credentialing in the form of certification is increasingly being used for mediators, including mediators in court-connected programs. (ACR, 2010). (See Appendix B, Table One, Table Two A and TableTwo B).

Credentialing of mediators can also entail rosters and registries that list mediators who have purportedly satisfied the criteria for listing. The criteria may range from the minimal to the very restrictive. (ABA Section of Dispute Resolution, 2002; Association for Conflict Resolution, 2010). (See Appendix B, Table One). A variety of organizations and groups have created rosters and registries that specify a variety of criteria for listings. (Association for Conflict Resolution, 2010; Della Noce, 2008). Many court-connected programs have made extensive use of rosters from which parties select mediators for court-referred cases. (Association for Conflict Resolution, 2010; Della Noce, 2008; McAdoo & Welsh, 2004). (See Appendix B, Table One).

Although no general consensus exists regarding whether mediators should be credentialed and how they should be credentialed, there is a consensus that courts have a special responsibility to ensure the competency of mediators to whom they refer cases, especially when participation in mediation is mandated for parties. This consensus is reflected in the National Standards for Court-Connected Mediation Programs, which the Center for Dispute Resolution and the Institute for Judicial Administration developed with support from the State Justice Institute, and it is reflected in the recommendations of other nationally recognized experts. (Center for Dispute Resolution & the Institute

for Judicial Administration, 2004). It is likewise reflected in the numerous state statutes and court rules requiring mediators in court-connected programs to satisfy specified criteria. All of the states surveyed with court-connected programs have some such requirements for mediators, albeit they vary widely from state to state and often within states. (See Appendix B, Table Two A, Table Two B and Table Three).

The basic rationale for such requirements is quality control and assurance. More specifically, such requirements are directed at protecting consumers from "poor" mediators and thereby protecting the credibility and integrity of court-connected programs and mediation as a dispute resolution process; assisting consumers in selecting qualified mediators, allowing mediators to market themselves to consumers as qualified mediators, and promoting the overall improvement of mediator competence and thereby the overall quality of mediation services. (Cole, 2005; Della Noce, 2008).

Court-connected programs can take a "free market" approach to mediator credentialing and place the responsibility for choosing "good" mediators entirely upon the parties and their lawyers. (Pou, 2004). Underlying this approach is the assumption that parties and their attorneys know what type of mediation services they need, are familiar with the mediation marketplace, and can determine which mediators are competent and will provide them with the type of services they need. This assumption rests in turn upon the assumption that parties and their attorneys always will be sophisticated repeat users of mediation. However, the validity of these assumptions cannot be presumed.

It should be noted that court-connected programs may allow parties to select by mutual agreement mediators who have not been certified, or otherwise approved, to provide services in court-referred cases. (McAdoo & Welsh, 2004). Three of the states surveyed with court-connected programs (FL, MD, MN) have state statutes and/or court rules specifically giving parties this alternative. (See Appendix B, Table One).

The development of appropriate and effective standards and methods for ensuring and promoting the competency of mediators and the quality of mediation services in court-connected programs presents substantial challenges. These challenges stem in part from the lack of agreement as to the constellation of knowledge, skills, abilities and other attributes (KSAOs) that determine and are associated with mediator competence. (Pou, 2002). These challenges also are attributable to the diversity of mediator orientations and styles, the diversity of cases mediated, the diversity of contexts in which mediation takes places, and the diversity of goals and objectives of court-connected programs.

Requirements for mediators to assure competency and accountability can be divided into two main categories. One category consists of the initial requirements that individuals must satisfy in order to become mediators, and the other category consists of requirements that mediators must satisfy in order to continue as mediators. Pou has created a Mediator Quality Assurance Grid "displaying the height of 'hurdles' that mediators must meet at the outset to engage in practice and the amount of 'maintenance' or development aid provided them later on …." (Pou, 2004, p. 324). This Grid identifies five approaches to mediator requirements: (1) no hurdle/no maintenance, (2) high hurdle/low maintenance, (3) high hurdle/high maintenance, (4) low hurdle/low maintenance, (5) low hurdle/high maintenance.

INITIAL SCREENING AND SELECTION OF MEDIATORS FOR COURT-CONNECTED PROGRAMS

The Qualifications Approach to Mediator Quality Assurance

The predominant credentialing model used in process for the initial screening and selection of mediators for court-connected programs is a qualifications model. There is considerable variation in the qualifications required for mediators who serve in these programs. The qualifications may include age, educational degrees, legal experience, mediation training, and prior mediation experience.

Age and Educational Degree Requirements

Among the mediator qualifications that state court-connected programs may initially require for program participation is a minimum age requirement. For example, state court rules in two of the states surveyed (FL, MD) require mediators to be at least 21 years of age. (See Appendix B, Table Two A).

Court-connected programs also may require mediators to have obtained a specified level of education. For example, one of the states surveyed (MD) has a court-connected program that requires mediators to have a bachelor's degree; one state (FL) has two different court-connected programs, one requiring a high school diploma/GED and the other requiring a bachelor's degree; and one state (CA) has "model" state standards recommending that local court rules require a high school diploma/GED. (See Appendix B, Table Two A).

Experts have criticized age and educational degree requirements on the ground that they are not an accurate measure or predictor of mediator competency; and they have been criticized on the ground that they can result in the exclusion of competent mediators from program participation. (Association for Conflict Resolution, 2010; Center for Dispute Settlement & Institute of Judicial Administration, 1992; National Association for Community Mediation, n.d.).

Legal Experience Requirements

Not surprisingly, many attorneys have a preference for mediators who are attorneys with litigation experience and substantive legal knowledge, and attorney mediators frequently serve as mediators in court-referred civil cases. (McAdoo & Welsh, 2004; Wissler, 2002). However, none of the states surveyed had state statutes or court rules making a law degree, a valid license to practice law, or legal practice experience, a requirement for conducting mediations in court-connected programs. One surveyed state (FL) does have a minimum point system for mediator certification under which additional points are awarded for a law license, as well as for other professional degrees. (See Appendix B, Table Two A).

In the *ADR Handbook for Judges,* McAdoo and Welsh concluded: "[Legal] qualifications and training will not be ideal in every situation. Some cases will be aided more by the presence of mediators with other types of expertise, such as human resources, cross-cultural communication, business valuation, or engineering skills. As a result, your court-connected program should include both attorneys and non-attorneys as mediators." (McAdoo & Walsh, 2004, p 23). Similarly, the drafters of National Standards for Court-Connected Mediation Programs commented that mediator competence is not a function of a

particular professional background or standing, such as law, but they recognized that the selection of a mediator with legal knowledge or experience related to the subject of a case may be appropriate. (Center for Dispute Settlement & Institute of Judicial Administration, 1992). (See also Association for Conflict Resolution, 2010).

Empirical research lends some support for the position that both attorneys and non-attorneys should be allowed to serve as mediators for general civil cases in court-connected programs. An empirical study of Ohio's court-connected programs for general civil actions found that "neither whether the mediators were familiar with the substantive issues in the case from their legal practice nor the number of years of practice was related to the likelihood of settlement." (Wissler, 2002, p. 679).

Mediation Training Requirements

Mediation training is widely regarded as an essential qualification for mediators. (ACR Mediator Certification Task Force, 2004; Broderick & Carroll, 2002; Center for Dispute Resolution & Institute for Judicial Administration, 1992; National Association for Community Mediation, n.d.; Pou, 2002, 2004; Raines, Needen & Barton, 2010). Completion of a specified amount of mediation training is a common initial requirement for mediators in court-connected programs. The amount of training required varies from program to program, but the norm appears to be 40 hours. For example, six of the surveyed states (FL, KS, MD, MN, MO, VA) have state statutes and/or court rules requiring mediators to complete mediation training ranging from 16 hours to 40 hours; and one state (CA) has "model" state standards for local court rules recommending 40 hour of training. (See Appendix, Table Two A).

In addition to requiring a minimum number of hours of training, there appears to be a trend toward requiring approval of mediation training programs and trainers, and a trend toward specifying the subject matter covered by training and/or the training methodologies used. For example, in five of the states surveyed (FL, KS, MD, MN, VA), state statutes and/or court rules contain such requirements. (See Appendix B, Table Two A). These requirements are directed at assuring that the programs providing training are of an acceptable quality and that the topics covered and the methodologies used are relevant to and appropriate for mediators in particular court-connected programs.

Mediation training requirements reflect the belief that training is necessary, or at least desirable, to prepare mediators to provide quality services. (Pou, 2002). However, mediation training—even the best training—does not necessarily translate into the competent and ethical practice of mediation. The relationship between training and mediator competence is not clear. (Cole, 2005). Two empirical studies, which are relevant in this regard, found that "[t]he amount of mediation training was not related to settlement … or to litigant' or attorneys' assessments of the fairness of mediation." (Wissler, 2004, p.69).

Prior Mediation Experience Requirements

Some court-connected programs require mediators to possess prior mediation experience in order to serve as mediators for court-referred cases. For example, two of the surveyed states (MD, VA) have court-connected programs requiring the completion of a minimum number of mediation cases, hours, or

both for mediator certification; one state (FL) has a point system for mediator certification under which points are awarded on the basis of the number of cases mediated; and one state (CA) has "model" state standards recommending that local court rules include an experience requirement for mediators . (See Appendix B, Table Two B).

Some authorities take the position that prior experience should be required for mediators in court-connected programs because they regard experience as a better indicator of competence than other commonly relied upon qualifications. (Association for Conflict Resolution, 2010; ACR Mediator Certification Task Force, 2004). A few empirical studies have, in fact, found that mediators with more mediation experience have higher settlement rates than those with less experience. (Wissler, 2004). But other authorities have expressed the concern that experience requirements make it difficult for newer and less experienced mediators to enhance their skills. There is also the concern that such requirements may exclude potentially capable mediators from program participation. (Pou, 2004).

The Performance-Based Assessment, Mentorship, and Peer Support Approach to Mediator Quality Assurance

Dissatisfaction with the limitations of a qualifications model of mediator credentialing has led to the development of methods for performance-based assessment of mediators. (Honeyman, 2009; National Institute of Dispute Resolution, 1995). Many experts regard performance-based assessment, properly designed and implemented, as the best measurement and predictor of mediator competence. (McAdoo & Walsh, 2004; National Institute of Dispute Resolution, 1995; Pou, 2004, 2002; Society of Professionals in Dispute Resolution, 1989).

Some court-connected programs have incorporated elements of performance-based assessment into their processes for the initial screening and selection of mediators. For example, three of the states surveyed (FL, MD, VA) have court-connected programs that have made efforts to use performance-based assessment. (See Appendix B, Table Two B). The Virginia program has been at the forefront of these efforts. In Virginia, applicants for certification as mediators in court-referred civil cases must co-mediate with and must be evaluated by already certified mediators.

Information and tools are available to assist court-connected programs in instituting performance-based mediator assessment. (McAdoo & Welsh, 2004). Despite the availability of such assistance, it may not be feasible for court-connected programs to incorporate a performance-based assessment component into their processes for the initial screening and selection of mediators, because of the significant financial, administrative and mediator resources such an assessment component necessitates. (ACR Mediator Certification Task Force, 2004; McAdoo & Walsh, 2004).

A model that is sometimes used in combination with performance-based assessment is mentorship and peer support. The aim of mentorship and other forms of peer support is to assist mediators in enhancing their skills and in improving their performance through interaction with and feedback from other mediators. Three of the states surveyed (FL, MD, VA) have court-connected programs that have elements of mentorship and peer support. (Appendix B, Table Two B). Of these states, Florida has done the most to incorporate mentorship and peer support into the initial screening and selection of

mediators. Under Florida's point system for certification of mediators, applicants for certification must have a specified number of mentorship points that are awarded for working with two different mediators; an applicant must observe a specified number of mediations conducted by their mentors; and their mentors must supervise a specified number of mediations conducted by the applicant.

ONGOING MONITORING, EVALUATION, AND SUPPORT OF MEDIATORS IN COURT-CONNECTED PROGRAMS

Just as requirements for the initial screening and selection of mediators are needed to ensure the quality of court-connected programs, requirements are needed for the ongoing monitoring, evaluation and support of mediators after their selection to ensure the quality of these programs. Such monitoring should be part of larger and more comprehensive processes to ensure the quality of the court-connected programs as a whole. (Ostermeyer & Keilitz, 1997; Brown, 2005).

Based on the state survey conducted for this report, it appears that by and large the state statutes and court rules pertaining to the programs surveyed set forth "front-end" requirements, which mediators initially must satisfy in order to be selected to mediate court-referred cases, but do not set forth "back-end" requirements, which mediators, once selected, must satisfy in order to continue to mediate court-referred cases. However, it may well be that local court rules have enunciated such requirements and that the offices which administer these programs have put in place such requirements.

Continuing Education Requirements

Mediators who are selected for court-connected programs frequently must comply with continuing mediation education requirements. For example, five surveyed states (FL, KS, MD, MN, VA) have state statutes and/or court rules requiring mediators in court-connected programs to participate in continuing mediation education; and one state (CA) has "model" state standards recommending that local court rules require continuing education. The number of hours of education required ranges from 6 to 16 hours and the frequency of education required ranges from annually to every three years. (See Appendix B, Table Three).

Participant Satisfaction Surveys

Information about satisfaction of mediation participants with their mediator can be used by court-connected programs to evaluate the performance of mediators and to assist them in improving their performance and their development as mediators. Programs typically determine participant satisfaction after a mediation by asking participants to fill out a form or brief questionnaire. None of the surveyed states with court-connected programs has a state court rule specifically requiring participant evaluation of mediators, but participant satisfaction surveys may, in fact, be used by administrators or evaluators of court-connected programs in the surveyed states.

Performance-Based Assessment, Mentorship, And Peer Support

As it has been pointed out, performance-based assessment can be a reliable indicator of mediator performance, and mentorship and peer support can assist mediators in improving their performance

and their development as mediators. Two states surveyed with court-connected programs (KS, MD) have state court rules specifically providing for performance-based assessment, mentorship, or peer support. (See Appendix B, Table Three).

Ethics Requirements for Mediators

National dispute resolution organizations and other authorities have recommended that court-connected programs should monitor, evaluate, and support mediators in court-referred cases, not only to ensure their competence, but also to ensure their ethical conduct. (Center for Dispute Settlement & Institute of Judicial Administration, 1992; McAdoo & Welsh, 2004; Young, 2006). In a growing number of states, state statutes and/or court rules enunciate ethics requirements applicable to mediators in court-connected programs. For example, in six of the surveyed states (CA, FL, KS, MD, MN, VA) state statutes and/or court rules require mediators for court-referred cases to adhere to an ethics code, standards or guidelines. (See Appendix B, Table Three).

Complaint and Grievance Mechanisms

National dispute resolution organizations and other authorities have recognized that mechanisms for the reporting and resolution of problems with mediators or the mediation process can play a significant role in efforts to monitor, evaluate, and support mediators in court-connected programs. (ABA Section on Dispute Resolution, 2002; Center for Dispute Settlement & Institute of Judicial Administration, 1992; McAdoo & Welsh, 2004; Young, 2006). For example, four of the states surveyed (CA, FL, KS,VA), have state court rules containing detailed procedures for reporting and handling of complaints involving mediators and processes for enforcement of mediator standards of ethics and conduct. (See Appendix B, Table Three).

COMPENSATION OF MEDIATORS AND FUNDING OF COURT-CONNECTED PROGRAMS

As it was previously mentioned, most court-connected programs use mediators in private practice to mediate court cases. These mediators may be paid by the parties or the court or may provide services on a pro bono basis. Some programs use in-house staff, employed on a full-time or part-time basis by the court, to mediate court-referred cases. These mediators, like other court staff, receive a salary. Still other programs contract with organizational entities, such as a community mediation center or bar association, for the provision of mediation services. Such entities may use salaried staff, unpaid volunteers, or private practitioners paid on a case by case basis, for the provision of mediation services. (McAdoo & Welsh, 2004; Wissler. 2002).

The cost of compensating mediators is not the only cost associated with a court-connected program. Another major cost is that of program administration. Many programs have a statewide or local offices, typically located within the court administrative infrastructure, to manage the program and coordinate its activities. There also may be additional costs associated with training of program mediators and program monitoring and evaluation. (McAdoo & Welsh, 2004).

Securing the funding needed to establish and maintain a quality court-connected program can be difficult. As one knowledgeable observer has pointed out:

> "Most courts struggle to maintain and increase their budgets to provide ADR services…. Court ADR programs have to compete for their funding with other traditional court services, a competition that ADR programs often lose, particularly in recent years when state … budgets for nonessential programs have been slashed. Courts have experimented with a number of funding options, including filing fees, user fees, and certification fees …, but the funding for many programs remains uncertain." (Brown, 2005).

CONCLUSION

Since the Iowa court system is one of the few state court systems that currently does not have a court-connected program for the mediation of cases on the general civil trial docket, the Civil Justice Reform Task Force may wish to consider whether the Iowa court system should follow the lead of other state court systems and develop a court-connected program or programs. One option, of course, is not to recommend such a program; another option is to recommend a full-scale statewide program; and still another option is to recommend a pilot project or projects.

The establishment and maintenance of a quality court-connected program would necessitate adequate funding, an appropriate administrative infrastructure, and a sufficient pool of qualified mediators. In planning and implementing court-connected mediation programs, numerous issues must be addressed, including, most importantly, issues concerning mediators. Many of these issues relate to the initial screening and selection of mediators for court-connected programs and the ongoing monitoring, evaluation and support of mediators in court-connected programs. In addressing these issues, the individuals and groups charged with the responsibility of planning court-connected programs can draw upon the recommendations of national dispute resolution organizations, the experience of other states with court-connected programs, and a growing body of knowledge as to what constitutes best practices in the development of court-connected programs.

Appendix A

Literature Review and References

Methodology

Appendix A was prepared for this report for the Court Annexed Subcommittee of the Iowa Supreme Court's Civil Justice Reform Task Force. It presents the results of a literature review conducted to identify literature related to court connected mediation programs, particularly general civil mediation programs, and the credentialing of mediators in court connected programs, particularly general civil mediation programs.

Westlaw, LexisNexis, and Google Scholar searches were conducted using the following key words and phrases *court connected mediation, court annexed mediation, court-connected general civil mediation, mediator credentialing, mediator certification, mediator accreditation, mediation training accreditation, mediator qualifications, mediator requirements,* and various combinations thereof. The websites of the ABA Dispute Resolution Section and the Association for Conflict Resolution also were consulted.

Appendix A contains references to materials identified as a result of the literature review that are most relevant to the subject matter of this report. It also contains additional references to materials referred to in this report.

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Appendix B

Survey of State General Civil Jurisdiction Court-Connected Mediation Programs

Methodology

This Appendix was prepared for a report on state-connected general civil mediation programs for the Court annexed ADR Subcommittee of the Iowa Supreme Court's Civil Justice Reform Task Force. It presents the results of a survey of state statutes and court rules pertaining to court-connected general civil mediation programs. The purpose of the survey was to ascertain which of the states surveyed had such programs and to identify how such programs were organized and structured with a focus on the requirements for individuals who provide mediation services in in these programs.

Twelve states were surveyed (CA, FL, IL, KS, MD, MN, MO, NE, OH, SD, VA, & WI). They were selected because either they were states bordering on Iowa, or they were states known to have well-established and well- respected court-connected mediation programs.

The first step in the survey was to consult the website Courtadr.org to identify pertinent state statutes and court rules. Westlaw searches were ten conducted to identify pertinent statutes and rules. Key words and phrases included *alternative dispute resolution*, *conflict resolution*, *dispute resolution*, *mediate*, *mediation*, *mediator(s)*, *neutral(s)*, *qualification(s)*, *qualified*, *education*, *educational*, *hour(s)*, *requirement(s)*, *settlement*, *standard(s)*, *training*, and various combinations of these words. Finally, each state's official government web site was consulted for materials not listed/linked by courtadr.org or not available through WestLaw.

Several caveats about the state survey are in order. As it has been pointed out, the survey was directed at identifying state statutes and court rules pertaining to court-connected general civil mediation programs. Only the provisions of such state statutes and court rules are reflected in the tables of this Appendix. However, the state statutes and court rules at issue are not necessarily clear and can be difficult to interpret. Moreover, in some states, such as Illinois and Ohio, local court rules, rather than state statutes and court rules, determine the nature and extent of the initial screening and selection of mediators and the ongoing monitoring, evaluation, and support of mediators. However, the Appendix tables do not reflect such local rules. Finally, it was not possible to contact the court systems in the states surveyed in order to verify the results of the survey reported in the Appendix tables because of time constraints.

Table One
State Statutes and Court Rules
STATE COURT-CONNECTED CIVIL MEDIATION PROGRAMS,
SOURCE OF MEDIATORS AND MEDIATOR REQUIREMENTS

STATE	COURT/ TYPE OF CASE	SOURCE OF MEDIATORS						SOURCE OF MEDIATOR REQUIREMENTS			
		Court Staff	Private Mediators					State Statutes	Court Rules		No Requirements If Mediator Selection by Party Agreement
			Referral to Mediation Provider Organization	Court Mediator Roster	Court Appointment of Individual Mediators	Parties Can Select Outside Mediators			State	Local	
CA	Superior Court	☑	☑	☑	☑	☑		☑	☑ **Note:** Each superior court must have local rules establishing minimum qualifications for mediators. Superior courts are "encouraged" to consider the CA Rules of Court, Model Qualification Standards.	☑	☑

Table One, cont'd
State Statutes and Court Rules
STATE COURT-CONNECTED CIVIL MEDIATION PROGRAMS,
SOURCE OF MEDIATORS AND MEDIATOR REQUIREMENTS

STATE	COURT/ TYPE OF CASE	SOURCE OF MEDIATORS						SOURCE OF MEDIATOR REQUIREMENTS			
		Court Staff	Private Mediators				State Statutes	Court Rules		No Requirements If Mediator Selection by Party Agreement
			Referral to Mediation Provider Organization	Court Mediator Roster	Court Appointment of Individual Mediators	Parties Can Select Outside Mediators		State	Local	
FL	County Court			☑		☑	☑	☑	☑	☑
	Circuit Court			☑		☑	☑	☑	☑	☑
	Mortgage Foreclosure Mediation			☑					☑	
IL	Circuit Court			☑		☑	☑	☑	☑	☑
								Note: Supreme Court authorizes Circuit Courts to set own local mediation rules. Supreme Court reviews and approves rules.		
KS	General Civil Cases			☑		☑	☑	☑	☑	☑

Table One, cont'd
State Statutes and Court Rules
STATE COURT-CONNECTED CIVIL MEDIATION PROGRAMS,
SOURCE OF MEDIATORS AND MEDIATOR REQUIREMENTS

STATE	COURT/ TYPE OF CASE	SOURCE OF MEDIATORS						SOURCE OF MEDIATOR REQUIREMENTS			
		Court Staff	Private Mediators				State Statutes	Court Rules			No Requirements If Mediator Selection by Party Agreement
			Referral to Mediation Provider Organization	Court Mediator Roster	Court Appointment of Individual Mediators	Parties Can Select Outside Mediators		State	Local	
MD	Circuit Court, Civil Actions			☑		☑	☑	☑		☑
	Business & Tech. Case Mgmt. Program			☑		☑	☑	☑		☑
	Foreclosure of Lien Instrument Proceedings			☑		☑	☑	☑		☑
	Health Care Malpractice Claims			☑		☑	☑	☑		☑
MN	General Civil Cases			☑		☑	☑	☑	☑	☑ If parties select neutral for his/her expertise, neutral does not have to satisfy requirement re qualifications.

Table One, cont'd
State Statutes and Court Rules
STATE COURT-CONNECTED CIVIL MEDIATION PROGRAMS,
SOURCE OF MEDIATORS AND MEDIATOR REQUIREMENTS

STATE	COURT/ TYPE OF CASE	SOURCE OF MEDIATORS					SOURCE OF MEDIATOR REQUIREMENTS			
			Private Mediators					Court Rules		No Requirements If Mediator Selection by Party Agreement
		Court Staff	Referral to Mediation Provider Organization	Court Mediator Roster	Court Appointment of Individual Mediators	Parties Can Select Outside Mediators	State Statutes	State	Local	
MN	Debtor and Creditor Mediation			☑			☑	☑		
	Conciliation Court				☑ Mediators are "assigned by court"					
MO	General Civil Cases			☑	☑	☑	☑	☑	☑	
	Residential Construction Defect Claims					☑				

Table One, cont'd
State Statutes and Court Rules
STATE COURT-CONNECTED CIVIL MEDIATION PROGRAMS,
SOURCE OF MEDIATORS AND MEDIATOR REQUIREMENTS

STATE	COURT/ TYPE OF CASE	SOURCE OF MEDIATORS						SOURCE OF MEDIATOR REQUIREMENTS			
		Court Staff	Private Mediators				State Statutes	Court Rules			No Requirements If Mediator Selection by Party Agreement
			Referral to Mediation Provider Organization	Court Mediator Roster	Court Appointment of Individual Mediators	Parties Can Select Outside Mediators		State	Local		
NE	Civil Claims		☑ Courts **may** refer cases to approved mediation center. However, courts usually refer to mediators chosen by agreement of parties, rather than to a center.				☑				☑
	Farm Mediation		Qualified mediators selected by farm mediation program. Courts can refer parties to program.				☑	☑			

Table One, cont'd
State Statutes and Court Rules
STATE COURT-CONNECTED CIVIL MEDIATION PROGRAMS,
SOURCE OF MEDIATORS AND MEDIATOR REQUIREMENTS

STATE	COURT/ TYPE OF CASE	SOURCE OF MEDIATORS						SOURCE OF MEDIATOR REQUIREMENTS			
		Court Staff	Private Mediators				State Statutes	Court Rules		No Requirements If Mediator Selection by Party Agreement
			Referral to Mediation Provider Organization	Court Mediator Roster	Court Appointment of Individual Mediators	Parties Can Select Outside Mediators		State	Local	
OH	Court of Common Pleas						☑	☑ Note: Supreme Court authorizes courts of common pleas to set own local mediation rules. Courts have wide latitude in setting own rules.	☑	
SD	No court-connected mediation program	Not applicable.								
VA	District Court Civil Claims			☑			☑	☑		
	Circuit Court Civil Claims			☑			☑	☑		

Table One, cont'd
State Statutes and Court Rules
STATE COURT-CONNECTED CIVIL MEDIATION PROGRAMS,
SOURCE OF MEDIATORS AND MEDIATOR REQUIREMENTS

STATE	COURT/ TYPE OF CASE	SOURCE OF MEDIATORS					SOURCE OF MEDIATOR REQUIREMENTS			
		Court Staff	Private Mediators				State Statutes	Court Rules		No Requirements If Mediator Selection by Party Agreement
			Referral to Mediation Provider Organization	Court Mediator Roster	Court Appointment of Individual Mediators	Parties Can Select Outside Mediators		State	Local	
WI	General Civil Cases				☑	☑	☑	☑		
	Health Care Liability and Injured Patients and Families Compensation Mediator Panels			☑			☑	☑		

Table Two A
State Statutes and Court Rules
INITIAL SCREENING AND SELECTION OF MEDIATORS FOR COURT-CONNECTED PROGRAMS
(Age/Educational Degree/Legal Experience/Mediation Training)

STATE	COURT/ TYPE OF CASE	AGE	EDUCATIONAL DEGREE(S)	LAW LICENSE	MEDIATOR TRAINING	TRAINING PROGRAMS	
						Accreditation/ Approval of Programs/ Trainers	Required Curriculum
CA	Superior Court		☑ *CA Rules of Court, Model Qualification Standards:* HS diploma/GED or 4 yrs work or volunteer experience.	*CA Rules of Court, Model Qualification Standards:* Law license not required but education or experience re legal system and civil litigation required.	☑ *CA Rules of Court, Model Qualification Standards:* 40 hours that includes specified curriculum completed within past 2 years or 40 hours that includes specified curriculum completed at any time and 7hrs of continuing/advanced training covering specified topics completed within past 2 years.		☑
					Note: Each superior court must have local rules establishing minimum qualifications for mediators. Superior courts are "encouraged" to consider the *CA Rules of Court, Model Qualification Standards.* This table refers to the Model Qualification Standards, rather than local court rules, which vary.		

Table Two A, cont'd
State Statutes and Court Rules
INITIAL SCREENING AND SELECTION OF MEDIATORS FOR COURT-CONNECTED PROGRAMS
(Age/Educational Degree/Legal Experience/Mediation Training)

STATE	COURT/ TYPE OF CASE	AGE	EDUCATIONAL DEGREE(S)	LAW LICENSE	MEDIATOR TRAINING	TRAINING PROGRAMS	
						Accreditation/ Approval of Programs/ Trainers	Required Curriculum
FL	County Court	☑ 21	☑ A minimum number of points are required for County Court mediator certification. HS diploma/GED required. Additional points awarded for education/ mediation experience beyond this requirement.	Law license not required, but under point system used for mediator certification, additional points awarded for law license and for other professional licenses.	☑ Completion of county court mediation training required. Under point system used for certification, additional points awarded for mediation training approved by jurisdiction other than Florida.	☑	☑
	Circuit Court	☑ 21	☑ A minimum number of points are required for Circuit Court mediator certification. Bachelor's degree required. Additional points awarded for education/ mediation experience beyond this requirement.	Law license not required, but under point system used for mediator certification, additional points awarded for law license and for other professional licenses.	☑ Completion of circuit court mediation training required. Under point system used for certification, additional points awarded for mediation training approved by jurisdiction other than Florida.	☑	☑
	Mortgage Foreclosure Mediation **Note:** Circuit courts set own rules. Table does not contain information re variable local rules.				☑ Training in foreclosure mediation and legal concepts related to foreclosure.		

Table Two A, cont'd
State Statutes and Court Rules
INITIAL SCREENING AND SELECTION OF MEDIATORS FOR COURT-CONNECTED PROGRAMS
(Age/Educational Degree/Legal Experience/Mediation Training)

STATE	COURT/ TYPE OF CASE	AGE	EDUCATIONAL DEGREE(S)	LAW LICENSE	MEDIATOR TRAINING	TRAINING PROGRAMS	
						Accreditation/ Approval of Programs/ Trainers	Required Curriculum
IL	Circuit Court	**Note:** Supreme Court authorizes, reviews and approves local circuit court rules. Rule must address "qualifications" of mediator, but nature and extent of requisite qualifications is matter of local rules. Table does not contain information about variable local rules.					
KS	General Civil Cases				☑ 16 hours of core mediator training, 14 hours of mediation-skills training, and 10 hours of training related to the specific subject being mediated or civil litigation system.	☑	☑
MD	Circuit Court, Civil Actions	☑ 21	☑ Bachelor's		☑ 40 hours	☑	☑
	Business & Tech. Case Mgmt. Program	☑ 21	☑ Bachelor's		☑ 40 hours	☑	☑
	Foreclosure of Lien Instrument Proceedings	☑ 21	☑ Bachelor's, plus specialized knowledge		☑ 40 hours	☑	☑
	Health Care Malpractice Claims	☑ 21	☑ Bachelor's, plus specialized knowledge		☑ 40 hours	☑	☑

Table Two A, cont'd
State Statutes and Court Rules
INITIAL SCREENING AND SELECTION OF MEDIATORS FOR COURT-CONNECTED PROGRAMS
(Age/Educational Degree/Legal Experience/Mediation Training)

STATE	COURT/ TYPE OF CASE	AGE	EDUCATIONAL DEGREE(S)	LAW LICENSE	MEDIATOR TRAINING	TRAINING PROGRAMS	
						Accreditation/ Approval of Programs/ Trainers	Required Curriculum
MN	General Civil Cases				☑ Requirements may be waived for individuals who "clearly demonstrate exceptional competence to serve as a neutral."		☑
	Debtor and Creditor Mediation **Note:** No rules available.						
	Conciliation Court						
MO	Judicial Circuit				☑ 16 hours		
NE	Civil Claims						
OH	Court of Common Pleas	**Note:** The Supreme Court's Dispute Resolution Section assists Courts of Common Pleas in developing mediation services. Each court can set its own rules for mediation problems. Table does not contain information about variable local rules.					
SD	No court-connected mediation program	Not applicable.					

Table Two A, cont'd
State Statutes and Court Rules
INITIAL SCREENING AND SELECTION OF MEDIATORS FOR COURT-CONNECTED PROGRAMS
(Age/Educational Degree/Legal Experience/Mediation Training)

STATE	COURT/ TYPE OF CASE	AGE	EDUCATIONAL DEGREE(S)	LAW LICENSE	MEDIATOR TRAINING	TRAINING PROGRAMS	
						Accreditation/ Approval of Programs/ Trainers	Required Curriculum
VA	District Court Civil Claims		☑ Bachelor's or evidence of relevant experience and qualifications sufficient to support certification.		☑ 20 hours of basic mediation training by a certified trainer. If not a member of the Virginia State Bar, and at least 4 hours of certified training re Virginia's judicial system. Applicants must observe at least 2 complete cases conducted by a certified mentor or complete an additional 8 hours of training during which the applicant can observe at least 2 mediations, one of which must be a live demonstration conducted by a certified mentor.	☑	☑

Table Two A, cont'd
State Statutes and Court Rules
INITIAL SCREENING AND SELECTION OF MEDIATORS FOR COURT-CONNECTED PROGRAMS
(Age/Educational Degree/Legal Experience/Mediation Training)

STATE	COURT/ TYPE OF CASE	AGE	EDUCATIONAL DEGREE(S)	LAW LICENSE	MEDIATOR TRAINING	TRAINING PROGRAMS	
						Accreditation/ Approval of Programs/ Trainers	Required Curriculum
VA	Circuit Court Civil Claims		☑ Bachelor's or evidence of relevant experience and qualifications sufficient to support certification.		☑ 40 hours of training by a certified trainer, including 20 hours of basic mediation training and 20 hours of advanced-skills training for procedurally complex cases. If not a member of the Virginia State Bar, at least 4 hours of certified training in Virginia's judicial system. Applicants must observe at least 2 complete circuit-court civil cases conducted by a certified circuit-court civil mentor or complete an additional 8 hours of training during which the applicant observes 2 circuit-court civil cases, one of which must be a live demonstration conducted by a certified circuit-court civil mediator.	☑	☑
WI	General Civil Cases	If parties cannot agree on mediator, judge may appoint any person with the necessary "ability and skills".					
	Health Care Liability and Injured Patients and Families Compensation Mediator Panels	**Note:** Director of State Court appoints panel consisting of 1 public member, who is not attorney or health care provider, 1 attorney, and 1 health care provider.					

Table Two B
State Statutes and Court Rules
INITIAL SCREENING AND SELECTION OF MEDIATORS FOR COURT-CONNECTED PROGRAMS
(Experience/Performance-Based Assessment/Mentorship)

STATE	COURT/ TYPE OF CASE	PRIOR MEDIATION EXPERIENCE	PERFORMANCE-BASED ASSESSMENT/ MENTORSHIP
CA	Superior Court	☑ *CA Rules of Court, Model Qualification Standards:* At least 2 mediations of at least 2 hrs., co-mediated or observed by mentor mediator and evaluated by monitor mediator; In addition, at least 4 mediations of at least 2 hrs., mediated or co-mediated within past 2 yrs.	☑ See Mediator Experience
		Note: Each superior court must have local rules for establishing minimum qualifications for mediators. Superior courts are "encouraged" to consider the CA Rules of Court, Model Qualification Standards. This table refers to the Model Qualification Standards, rather than local court rules, which vary.	

Table Two B, cont'd
State Statutes and Court Rules
INITIAL SCREENING AND SELECTION OF MEDIATORS FOR COURT-CONNECTED PROGRAMS
(Experience/Performance-Based Assessment/Mentorship)

STATE	COURT/ TYPE OF CASE	PRIOR MEDIATION EXPERIENCE	PERFORMANCE-BASED ASSESSMENT/ MENTORSHIP
FL	County Court		☑ All court certified mediators must complete mentorship with two different court certified mediators involving observation of mediations that certified mediators conduct and supervision of mediations that certified mediators supervise. Under point system, points are awarded on basis of number of observed and supervised mediations.
	Circuit Court	1 point per year awarded to court certified mediator for each year that 15 cases of any type are mediated. Maximum of 5 points awarded to any mediator regardless of court certification who has conducted minimum of 100 mediations in 5 year period.	
	Mortgage Foreclosure Mediation		
IL	Circuit Court	**Note:** Supreme Court authorizes, reviews and approves local circuit court rules. Rule must address "qualifications" of mediator, but nature and extent of requisite qualifications is matter of local rules. Table does not contain information about variable local rules.	
KS	General Civil Cases		

Table Two B, cont'd
State Statutes and Court Rules
INITIAL SCREENING AND SELECTION OF MEDIATORS FOR COURT-CONNECTED PROGRAMS
(Experience/Performance-Based Assessment/Mentorship)

STATE	COURT/ TYPE OF CASE	PRIOR MEDIATION EXPERIENCE	PERFORMANCE-BASED ASSESSMENT/ MENTORSHIP
MD	Circuit Court, Civil Actions		☑ Submit to periodic monitoring of court ordered mediations by qualified mediators.
	Business & Tech. Case Mgmt. Program	☑ At least 5 non-domestic circuit ct. mediations or 5 non-domestic non-circuit ct. mediations, at least 2 of which business & tech cases, or co-mediated additional 2 cases from Business & Tech Case Mgmt. Program with approved mediator of comparable complexity.	☑ Submit to periodic monitoring of court ordered mediations by qualified mediators.
	Foreclosure of Lien Instrument Proceedings	☑ At least 5 non-domestic circuit ct. mediations or 5 non-domestic non-circuit ct. mediations of comparable complexity.	☑ Submit to periodic monitoring of court ordered mediations by qualified mediators.
	Health Care Malpractice Claims	☑ At least 5 non-domestic circuit ct. mediations or 5 non-domestic non-circuit ct. mediations of comparable complexity.	☑ Submit to periodic monitoring of court ordered mediations by qualified mediators.

Table Two B, cont'd
State Statutes and Court Rules
INITIAL SCREENING AND SELECTION OF MEDIATORS FOR COURT-CONNECTED PROGRAMS
(Experience/Performance-Based Assessment/Mentorship)

STATE	COURT/ TYPE OF CASE	PRIOR MEDIATION EXPERIENCE	PERFORMANCE-BASED ASSESSMENT/ MENTORSHIP
MN	General Civil Cases		
	Debtor and Creditor Mediation		
	Conciliation Court		
MO	Judicial Circuit		
NE	Civil Claims		
OH	Court of Common Pleas	**Note:** The Supreme Court's Dispute Resolution Section assists Courts of Common Pleas in developing mediation services. Each court can set its own rules for mediation programs. Table does not contain information about variable local rules.	
SD	No court-connected mediation program	Not applicable.	

Table Two B, cont'd
State Statutes and Court Rules
INITIAL SCREENING AND SELECTION OF MEDIATORS FOR COURT-CONNECTED PROGRAMS
(Experience/Performance-Based Assessment/Mentorship)

STATE	COURT/ TYPE OF CASE	PRIOR MEDIATION EXPERIENCE	PERFORMANCE-BASED ASSESSMENT/ MENTORSHIP
VA	District Court Civil Claims	☑ 5 hours of supervised co-mediation, including a minimum of 3 complete cases, evaluated by a certified mentor.	☑ See Mediator Experience Evaluation by a certified mediator who must recommend that applicant be certified.
	Circuit Court Civil Claims	☑ 10 hours of supervised co-mediation, including a minimum of 5 complete circuit-court civil (non-family) cases, evaluated by a certified mentor.	☑ See Mediator Experience Evaluation by a certified mediator who must recommend that applicant be certified.
WI	General Civil Cases		
	Health Care Liability and Injured Patients and Families Compensation Mediator Panels	**Note:** Director of State Court appoints panel consisting of 1 public member, who is not an attorney or health care provider, 1 attorney, and 1 health care provider.	

Table Three
State Statutes and Court Rules
ONGOING MONITORING, EVALUATION AND SUPPORT OF MEDIATORS IN COURT-CONNECTED PROGRAMS

STATE	COURT/ TYPE OF CASE	CONTINUING EDUCATION	PERFORMANCE-BASED ASSESSMENT, MENTORSHIP, AND PEER SUPPORT	ETHICS CODES	COMPLAINT/ GRIEVANCE MECHANISMS
CA	Superior Court	☑ *CA Rules of Court, Model Qualification Standards:* 10 hours per year for paid mediators, 5 hours related to mediation and 5 hours related to substantive areas of the law; at least 15 hours every three years for both paid mediators and pro bono mediators.		☑	☑
		Note: Each superior court must have local rules establishing minimum qualifications for mediators. Superior courts are "encouraged" to consider the *CA Rules of Court, Model Qualification Standards*. This table refers to the Model Qualification Standards, rather than local court rules, which vary.			

Table Three, cont'd
State Statutes and Court Rules
ONGOING MONITORING, EVALUATION AND SUPPORT OF MEDIATORS IN COURT-CONNECTED PROGRAMS

STATE	COURT/ TYPE OF CASE	CONTINUING EDUCATION	PERFORMANCE-BASED ASSESSMENT, MENTORSHIP, AND PEER SUPPORT	ETHICS CODES	COMPLAINT/ GRIEVANCE MECHANISMS
FL	County Court	☑ 16 hours every 2 years.		☑	☑
	Circuit Court	☑ 16 hours every 2 years.		☑	☑
	Mortgage Foreclosure Mediation				
IL	Circuit Court	**Note:** Supreme Court authorizes, reviews and approves local circuit court rules. Rule must address "qualifications" of mediator, but nature and extent of requisite qualifications is matter of local rules. Table does not contain information about variable local rules.			
KS	General Civil Cases	☑ 6 hours of approved mediation training annually.	☑ New mediators must co-mediate with **or** be supervised by an approved mentor-mediator on three cases during new mediator's first year of practice. Court-approved mentor-mediator must certify that new mediator has demonstrated basic skills and knowledge.	☑	☑

Table Three, cont'd
State Statutes and Court Rules
ONGOING MONITORING, EVALUATION AND SUPPORT OF MEDIATORS IN COURT-CONNECTED PROGRAMS

STATE	COURT/ TYPE OF CASE	CONTINUING EDUCATION	PERFORMANCE-BASED ASSESSMENT, MENTORSHIP, AND PEER SUPPORT	ETHICS CODES	COMPLAINT/ GRIEVANCE MECHANISMS
MD	Circuit Court, Civil Actions	☑ 8 hours of continuing mediation training every 2 years on specified topics.	☑ Periodic monitoring by qualified mediator.	☑	
	Business & Tech. Case Mgmt. Program	☑ 8 hours of continuing mediation training every 2 years	☑ Periodic monitoring by qualified mediator.	☑	
	Foreclosure of Lien Instrument Proceedings	☑ 8 hours of continuing mediation training every 2 years	☑ Periodic monitoring by qualified mediator.	☑	
	Health Care Malpractice Claims	☑ 8 hours of continuing mediation training every 2 years	☑ Periodic monitoring by qualified mediator.	☑	

Table Three, cont'd
State Statutes and Court Rules
ONGOING MONITORING, EVALUATION AND SUPPORT OF MEDIATORS IN COURT-CONNECTED PROGRAMS

STATE	COURT/ TYPE OF CASE	CONTINUING EDUCATION	PERFORMANCE-BASED ASSESSMENT, MENTORSHIP, AND PEER SUPPORT	ETHICS CODES	COMPLAINT/ GRIEVANCE MECHANISMS
MN	General Civil Cases	☑ 18 hours of continuing education on ADR subjects every three years.		☑	
	Debtor and Creditor Mediation				
	Conciliation Court				
MO	Judicial Circuit				
NE	Civil Claims				
OH	Court of Common Pleas	**Note:** The Supreme Court's Dispute Resolution Section assists Courts of Common Pleas in developing mediation services. Each court can set its own rules for mediation programs. Table does not contain information about variable local rules.			

Table Three, cont'd
State Statutes and Court Rules
ONGOING MONITORING, EVALUATION AND SUPPORT OF MEDIATORS IN COURT-CONNECTED PROGRAMS

STATE	COURT/ TYPE OF CASE	CONTINUING EDUCATION	PERFORMANCE-BASED ASSESSMENT, MENTORSHIP, AND PEER SUPPORT	ETHICS CODES	COMPLAINT/ GRIEVANCE MECHANISMS
SD	No court-connected mediation program	Not applicable			
VA	District Court Civil Claims	☑ 8 hours of approved general mediation training, including at least 2 hours in mediation ethics, every 2 years. Mediator must also present evidence of having completed at least 5 complete cases or 15 hours of mediation during the 2-year certification period. The cases may be court-referred or privately referred.		☑	☑

Table Three, cont'd
State Statutes and Court Rules
ONGOING MONITORING, EVALUATION AND SUPPORT OF MEDIATORS IN COURT-CONNECTED PROGRAMS

STATE	COURT/ TYPE OF CASE	CONTINUING EDUCATION	PERFORMANCE-BASED ASSESSMENT, MENTORSHIP, AND PEER SUPPORT	ETHICS CODES	COMPLAINT/ GRIEVANCE MECHANISMS
VA	Circuit Court Civil Claims	☑ 8 hours of approved general mediation training, including at least 2 hours in mediation ethics, every 2 years. Mediator must also present evidence of having completed at least 5 complete cases or 15 hours of mediation during the 2-year certification period. The cases may be court-referred or privately referred.		☑	☑

Table Three, cont'd
State Statutes and Court Rules
ONGOING MONITORING, EVALUATION AND SUPPORT OF MEDIATORS IN COURT-CONNECTED PROGRAMS

STATE	COURT/ TYPE OF CASE	CONTINUING EDUCATION	PERFORMANCE-BASED ASSESSMENT, MENTORSHIP, AND PEER SUPPORT	ETHICS CODES	COMPLAINT/ GRIEVANCE MECHANISMS
WI	General Civil Cases				
	Health Care Liability and Injured Patients and Families Compensation Mediator Panels				

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I. Business Courts in Various States

Alabama (2009) The Alabama Supreme Court established a commercial litigation docket by administrative judicial order in the Tenth Judicial Circuit of Alabama-Birmingham. There is currently one judge assigned to the docket with a back up judge to serve if necessary.

Claims heard arise from allegations of breach of contract or breach of fiduciary duty, business torts (such as unfair competition), and other statutory violations arising out of business dealings (sales of assets or securities, corporate structuring, partnership, shareholder, joint venture and other business agreements, trade secrets and restrictive covenants). Other actions involve securities, intellectual property disputes, trademarks, development of commercial real property, commercial class actions, consumer class actions not based on personal injury or product liability claims, malpractice involving a business entity, environmental claims, ICC, and any other case where the presiding judge determines the case may result in significant interpretation of a statute within the scope of the docket or there is some other reason for inclusion.

The docket does not include: (1) disputes regarding sales or construction of residences; (2) professional malpractice arising outside the context of a commercial dispute; (3) cases seeking declaratory judgment as to insurance coverage or property damage; (4) individual consumer claims including product liability, personal injury, or wrongful death; and (5) individual employment-related claims.

When a new case is filed, the plaintiff may file a "Request for Assignment to the Commercial Litigation Docket" along with other required forms available from the Circuit Clerk. The request shall be served with the Summons and Complaint. A defendant may file a request with responsive pleadings.
*No funding was necessary to create the program. Instead, cases were reassigned under the Rules of Judicial Administration.

Arizona (2003) The Arizona Supreme Court established the complex litigation case management model as a pilot program in Phoenix (Maricopa County) with three judges. The pilot program is slated to become a permanent part of the court system by the end of 2011. The court handles seventy-five cases per year. The three judges assigned to the complex litigation docket also are assigned cases from the general docket.

Construction litigation comprises 25% of the court's docket. The remaining cases include fires, mass torts, breach of fiduciary duty, and security cases.

A plaintiff may designate an action as a complex case at the time of filing the initial complaint by filing a motion and separate certification of complex civil case. The motion is then ruled upon by the Civil Presiding Judge within thirty days after the filing of the response to the designating party's motion. The court may also decide on its own motion that a civil action is a complex case. Parties shall not have the right to appeal the court's decision regarding such a designation.

In deciding whether a civil action is a complex case, the court is to consider the following: pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve; management of a large number of witnesses or a substantial amount of documentary evidence; management of a large number of separately represented parties; coordination with related actions pending in one or more courts in other counties, states or countries, or in a federal court; substantial post judgment judicial supervision; whether the case would benefit from permanent assignment to a judge with a substantial body of knowledge in a specific area of the law; inherently complex legal issues; factors justifying the expeditious resolution of an otherwise complex dispute; and any other factor which in the interests of justice warrants a complex designation or is otherwise required to serve the interests of justice.

California (2000) The California Supreme Court established a complex civil litigation docket. Six courts handle complex cases, such as anti-trust, security claims, construction defects, toxic torts, mass torts, class action. The chief judge assigns judges to the docket. California did not create a "business court" or "business docket" because it wanted to avoid the perception that business courts only serve businesses. The courts are available to anyone with complex litigation, which requires exceptional judicial management to avoid placing burdens on the court or litigants, to expedite the case and to keep costs reasonable. Judges are extensively trained and technology has been improved. The courts received nearly $4 million in grants each year for training, technology, more clerks, etc.

According to attorneys whose cases were assigned to the pilot program, there was improved judicial comprehension of legal and evidentiary issues, fewer instances of excessive or inappropriate referee appointments, and closer judicial supervision of and insistence on case management requirements including referee decisions. These impressions were confirmed by the empirical examination of the pilot program cases that demonstrated measurably higher numbers of interim dispositions, suggesting more effective and faster case resolution, compared to non-pilot cases.

In Orange County, the court operates a 36,000 square foot, five-courtroom facility specially designed to handle complex civil litigation. There are five judges, who are assigned substantive areas of law. For example, one judge, Judge Andler, handles fertility issues, Dominos Pizza overtime cases, and BCBG wage and hour cases. Another judge, Judge Dunning, handles cases involving the Episcopal Church, Montrenes; Nordstrom Commercial Debit; Nissan 350Z; Weekend Warrior Trailer; Hard Rock Cafe wage and hour claims; and Yamaha Rhino litigation, etc.

Rule 3.400 of the California Rules of Court defines a complex case as an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision-making by the court, the parties and counsel.

Characteristics of a complex cases include: (1) antitrust; (2) construction defect claims involving many parties or structures; (3) securities claims or investment losses involving many parties; (4) environmental or toxic tort claims involving many parties; (5) mass torts claims; (6) class actions; (7) insurance coverage claims involving trade regulations or class actions; and (8) other cases involving numerous pretrial motions raising difficult or novel legal issues, management of a large number of witnesses or documentary evidence, management of a large number of separately represented parties, or coordination with related actions pending in one or more courts in other counties, states, or countries, or in federal court.

There is a "Desk Book on the Management of Complex Civil Litigation" manual for litigants and judges to identify complex cases more efficiently, as well as printed guidelines that outline service procedures, initial case management issues, motion practice, mandatory settlement conferences, etc.

Colorado (2007) Projected case numbers did not justify a specialty court. The Colorado Supreme Court, however, created a business docket to relieve congestion of business cases that have a broad impact or significant impact on the community. Judges are assigned by the chief judge. The docket exists as a subset to an existing docket and requires that parties are either seeking injunctive relief or equitable relief affecting members of community who are not named as parties, such as a corporate control dispute, which is incapacitating employees, customers, and creditors. The case also must involve unusually complex litigation. A clerk in the court administrator's office works solely with the subdivision. Judges have the right to order ADR. Written decisions are contained in the clerk's office and are available to public at no charge except fees for copying.

Connecticut The Connecticut Supreme Court established a complex litigation docket at three locations. One judge handles each case from suit to trial. The court handles cases involving multiple litigants, legally intricate issues, lengthy trials, or claims for large monetary damages (potentially in the millions of dollars). The primary benefit is increased efficiency. If one party asks to be included on the docket, the judge must automatically consider it. There is a $325.00 fee for filing such a request. The chief judge has the discretion to hold a hearing on whether the case should be transferred to the docket.

Delaware The Delaware Court of Chancery is widely recognized as the nation's preeminent forum for the determination of disputes involving the internal affairs of the thousands upon thousands of Delaware corporations and other business entities through which a vast amount of the world's commercial affairs is conducted.

However, because of increasing numbers new business courts across the nation, a new Superior Court Complex Commercial Litigation Division (CCLD) was created on May 1, 2010. President Judge James T. Vaughn, Jr. stated: "The new division will provide for streamlined and more uniform administration of complex commercial cases."

Firm pretrial and prompt trial dates will streamline cases. In addition, cases will be assigned to one of the three judges on a panel of superior court judges created to hear these cases and will be given scheduling priority over other cases the assigned judge hears. Uniformity in administration will be promoted through the establishment of consistent procedures by the panel of judges, as well as a case management order that will provide guidance on handling discovery disputes and dispositive motions, require mandatory disclosures such as those contemplated by Federal Rule of Civil Procedure 26(a), and establish procedures for other matters relevant to the case, including electronic discovery.

To be eligible for the CCLD, a case must involve an amount in controversy of $1 million dollars or more, be designated by the President Judge of the Superior Court, or involve an exclusive choice of court agreement or a judgment resulting from an exclusive choice of court agreement. To ensure that the CCLD focuses on true large-scale commercial disputes, the following types of cases are excluded: any case containing a claim for personal, physical or mental injury; mortgage foreclosure actions; mechanics' lien actions; condemnation proceedings; and any case involving an exclusive choice of court agreement where a party to the agreement is an individual acting primarily for personal, family, or household purposes, or where the agreement relates to an individual or collective contract of employment. Judges serve three-year terms on the CCLD panel.

Florida (2004) The Florida Supreme Court created a complex litigation court that operates in six separate courts. Depending on the court, amounts in controversy range from more than $75,000 to $150,000. Cases include breach of contract, business torts, business dealings, UCC, sale or purchase of stock, and insurance coverage disputes. Other cases have other jurisdictional amount limits. Parties are required to file a brief of up to twenty pages so the judge can accept or reject a case.

Georgia (2005) The Supreme Court of Georgia established a business court. The court started with twelve cases in 2006. The amount doubled the following year, doubled to fifty by 2008, and handled sixty-four cases in 2010. The business court became a permanent division in 2010.

Consent is not required if one party agrees. Cases include those involving the UCC, the Georgia Security Act and other state business codes, and any case involving a material issue related to a law governing corporations or partnerships. The chief judge appoints the judge. The court uses a high-tech courtroom with document cameras, projectors, and evidence display system. Teleconference hearings also can be arranged.

Illinois (1993) The Illinois Supreme Court established the Cook County commercial calendars, which are managed by the court of chancery. Cases involve any commercial relationship between parties. In some cases, parties must mediate their claims before a trial date is set. Cases heard are all equitable. Cases include shareholder disputes, appointment of receivers, etc.

Maine (2007) The Maine Supreme Court established a business and consumer docket based in Portland. The judge has discretion to accept a case. Discovery is limited to thirty interrogatories, twenty requests for admissions and five depositions. The principal claim must involve significant matters of transaction, operations or governance of a business, or consumer rights arising out of transactions or other dealings with business. Two judges, appointed by the chief judge, serve on the docket.

The principal claim or claims involve matters of significance to the transactions, operation or governance of a business entity or the rights of a consumer arising out of the consumer's dealings with a business. The cases also require specialized and differentiated judicial management. The court can handle both jury and nonjury matters.

The decision to assign cases to the business court includes a review of the complexity of the case, any novel issues, the number of witnesses, number of parties, size of the anticipated document

discovery, and the need for ongoing judicial supervision. The larger and more complex the case, the more likely it is to be assigned to the business court.

Assignment or not of a case to the business court cannot be appealed. The court has several unique features. A modified discovery procedure and intensive individual case management keep the case focused on those issues requiring judicial resolution. Case management sets time periods for and encourages negotiations. Scheduling is done with the particular needs of the case and the parties in mind.

The decisions of the business court are published, as are all court decisions in Maine. The court has the ability to conduct motions and other hearings via videoconference. Press coverage of the business court is very favorable.

Maryland (2003) The Maryland Supreme Court established a business and technology program as part of the civil division. The judges are specially trained with three judges serving state wide. Cases assigned to this program present commercial or technological issues of such a complex or novel nature that specialized treatment is likely to improve the administration of justice.

Both parties can opt out of the program and there is a $50,000 jurisdictional minimum. One judge is assigned to one case, there are expedited appeals, e-filings, a whiteboard, multi-media briefs, and other technological capabilities. The court has handled 113 cases since its inception. Maryland is the first state to propose creation of a court to handle both business and technology cases.

Special circumstances: Maryland is home to many Internet businesses, as well as a large concentration of bioscience and aerospace companies. Maryland may be home to the largest technological expert population in the nation.

Massachusetts (2003) The Massachusetts Supreme Court established a pilot program in 2003 and made it permanent in 2009. Parties can opt out of participating in the Business Litigation Section. Cases include employment contracts, shareholder disputes, securities, mergers, consolidations, UCC, complex issues, anti-trust, commercial claims, insurance, and construction.

A new pilot project in Suffolk Superior Court's Business Litigation Section (BLS) began in January 2010 and is aimed at saving corporate counsel thousands of dollars by shrinking discovery. At the start of each case, a BLS judge will essentially manage the use of discovery, including electronic data and depositions, and settle on the

right amount of discovery proportionate to the type of case at hand. Judges manage discovery by giving time limitations for depositions, including limiting the people from whom discovery will be sought.

Nevada (2006) The legislature established a business court docket. The court hears corporate governance issues and cases involving trademark, trade secret, security laws, deceptive business practices, and disputes between businesses. Judges must publish all opinions. The legislature drafted legislation later encouraging the Nevada Supreme Court to adopt rules that: direct business courts to issue written opinions; direct those courts to publish their opinions; direct those courts to provide citations for those opinions; and direct those courts to specify precedential value or authoritative weight that must be given to the business opinions. The legislature also supported additional funding for the courts to cover these costs.

New Hampshire (2008) The New Hampshire Legislature established a business court model as part of the civil division. One party must be a business and no party may be a consumer. Both parties must consent to have the court handle their case. There is a minimum amount at issue of $50,000. The court hears cases involving breach of contract, UCC, property sales, surety bonds, franchisee, professional malpractice (non-medical), and shareholder derivative actions. The governor appointed the judge. Docket orders are posted on the Internet.

New York (1993) Originally, the Commercial Division was established on an experimental basis. It has been part of the court system since 1995. The commercial division has grown from two counties to ten counties. Judges apply for a position on the Commercial Division, which have jurisdictional minimums that vary depending on location from $25,000 to $100,000.

Commercial Division cases include: breach of contract, fraud, misrepresentation, business tort, UCC cases, derivative actions, class actions, commercial insurance coverage, corporate dissolution, malpractice of accountants or actuaries, and legal malpractice arising out of representation in commercial matters. Parties submit statements requesting assignment to the Commercial Division.

North Carolina (1996) The North Carolina Supreme Court established a business court to hear complex commercial, technology, and business disputes. Three judges hear cases statewide. One judge is assigned to each case, and cases are tried in the county where filed. The governor appoints the judges.

Since 1996, the court has handled 738 cases; 233 of which are still pending. There is mandatory participation for cases involving a material issue related to the law of corporations, securities, antitrust

law, state trademark, unfair competition, intellectual property, and certain cases involving technology. Other cases can be moved to the business court through a Notice of Designation, including certain tax cases. There are no dollar limitations and no waiver of jury trial is required. Consumer litigation is not allowed. The court publishes its opinions.

The fee to move a case to the business docket is $1,000 (raised from $200 in 2009). Once the increased fee was instituted, there was a 28.6% drop in cases assigned to the business court.

Ohio (2009) A pilot program was recommended by a task force and later approved by the Supreme Court, which adopted a business court model. The Court will review the pilot project again in January 2012. Judges volunteer for the jobs and hear cases involving corporate governance issues, shareholder disputes, the formation, dissolution or liquidation of business, trade secrets and business disputes. The court has handled 600 cases since its inception. Motions are ruled on within sixty days and cases must be disposed of within eighteen months. The court publishes opinions and employs special masters.

After examining the 2007 filings, of the 50,000 cases filed in state courts, approximately 600 would have qualified to be heard in business court.

Oregon (Dec. 2010) The court, known as the "Oregon Complex Litigation Court (OCLC)," was established following a successful, single-county pilot program. That pilot program began in 2006.

Because the court is new, the number of cases it will handle is unknown at this time. However, the court is intended to handle only "the most complex" cases, not simply cases in which a business interest is involved.

Judges are drawn from sitting circuit court judges. "Sitting circuit court judges who wish to serve on the OCLC must submit a resume and a detailed description of their civil trial experience on the bench and in the bar." Chief Justice Order No. 10-066. One motivation for the specialty court seems to be to have specialty judges who are experienced in complex litigation and thus "know how to move a case more efficiently" and "whether to position it for settlement or fast track it for trial." *See* Oregon Task Force Laywer.

Parties must consent to become part of the docket. Judges look at the number of parties, complexity of legal issues, complexity of factual issues, complexity of discovery and anticipated length of trial to determine whether a case should be assigned to the docket. Cases are assigned to a single judge, who handles discovery plans and

can order mediation, settlement or trial. The presiding judge is the gatekeeper on accepting cases but has written guidance to follow. The court's web site publishes decisions.

Pennsylvania (1999) The Supreme Court established a Commerce Court in Philadelphia and Pittsburgh. Initially, there were two judges to handle the cases and currently there are three. By 2005, the court concluded the commerce program led to efficient, fair, and cost-effective resolution of business litigation. The cases involved business-to-business cases, with at least $50,000 at issue. Opinions are published on the court's web site. More than 800 opinions were issued in its first nine years and the commerce court hears more than 100 cases per year.

The types of cases that may be assigned to the court fall into two major categories: Commerce or Complex Litigation. The Commerce category is subject matter based. The Complex Litigation category is based on the complexities of the litigation. Many cases coming within the Commerce category will also come within the Complex Litigation category. The Commerce category is broken into two subcategories, those that because of the subject matter are presumptively accepted, and commercial cases.

Cases are assigned to different management tracks. Expedited commerce cases have target trial dates within thirteen months of filing. Standard commerce cases have target trial dates within eighteen months. Exceptionally complicated cases have target trial dates of two years.

The trial judge actively manages the case to provide an efficient, cost effective, timely and fair resolution of the case. All matters, including the trial and motions, are handled by the same judge except for jury selection.

South Carolina (2007) The Supreme Court established a business court pilot program by administrative order. It has been deemed a success and therefore has been extended until October 2011.

In the first two years of the pilot program, forty-two cases were assigned to the business court. Since then, the numbers have remained consistent.

For the pilot program, the chief justice selected one judge from each of the three districts in which the business court exists. These judges received specialized training in business court disputes (e.g., shareholder derivative suits, various corporate structures and obligations) through training programs.

Without respect to the amount in controversy, civil matters in which the principal claim or claims are made under the following Titles of the South Carolina Code of Laws are appropriate matters to be assigned to the business court: securities, trusts, monopolies, restraints of trade, etc. Assignment of cases to the business court may be made by the Chief Justice sua sponte or at the request of counsel.

Business court "cases are not subject to time and scheduling rules and constraints imposed on other cases on the regular docket and they are quite often given precedence in scheduling matters." In addition, "to the extent available in a business court forum, the use of technology by parties in matters assigned to the business court is encouraged. The business court judge presiding over a matter shall make the final determination on whether the use of technology in any proceeding or conference is warranted."

Also, business court judges must publish all written orders related to motions to dismiss and motions for summary judgment on the court's webpage. Business court judges are "encouraged" to "issue written orders on other non-jury, pretrial matters." *See* S.C. Sup. Ct. Admin. Order No. 2007-09-07-01 (2007), amended by S.C. Sup. Ct. Admin. Order No. 2007-11-30-01 (2007).

Business court cases are not subject to the same time rules of other cases and some priority is given in scheduling matters to business court cases. Because of the latter, business court cases can move through the system more quickly.

States Considering Business Courts/Dockets:

Indiana (May 2009) No formal system but the Supreme Court appointed one judge, who is devoted full time to manage the complex litigation docket, paving the way for a business court.

Michigan (2011) A Statewide task force recommended a three-year pilot program for a specialized business docket in the two largest counties and other areas as the Supreme Court deems fit. An oversight body of the bench and bar is to draft protocols for evaluating its success. The executive director of the Michigan State Bar met with the House Judiciary Committee in late February and was expected to meet with the committee again to discuss the pilot program.

West Virginia (May 2010) A law recommending the creation of a business court was signed into law by the governor in 2010. The law encourages the supreme court to establish a business court. The Supreme Court of Appeals of West Virginia held a public forum in

November to discuss the possibility of establishing a business court in the state. A committee is still studying the feasibility of such a project.

The state is interested in a court to resolve business disputes because it believes it might be good vehicle to bring business to the state.

States that rejected or stalled business courts:

Mississippi (2008) A study group was appointed to research whether business courts were a feasible option in Mississippi. It appears that the study group ceased meeting toward the end of 2008.

One of the attorneys involved with the study group provided us with the minutes of several meetings and a survey the group performed of several states. The survey they used is similar to the one we used in Iowa.

According to the Secretary of State's office, a bill was ultimately introduced regarding establishment of a business court system, but it died in a judiciary subcommittee. More than likely, this was probably the last "event" that occurred regarding the business court system. (There were other bills with higher priority that the Secretary of State's office and others wanted passed and the business courts bill would have required more effort to gain passage.)

Although business courts are still an objective, the committee is no longer active. However, the committee submitted a packet of information to the Supreme Court, which can establish a court without legislative approval.

New Jersey The legislature refused to make a ten-year pilot program permanent saying the current system was fine the way it was. The pilot program is still in effect but rarely used. Cases can be designated as "complex commercial," which is a box one can check when filing a case. At this point, the New Jersey system is "largely inactive."

Oklahoma (2003) The Supreme Court did not act on legislation proposing a business court.

Rhode Island (2001) A business calendar was set by judicial administrative order. Cases include breach of contract, UCC, commercial business transactions, shareholder derivative and matters affecting business transactions. The calendar was suspended in 2009 because of a case backlog in other areas.

Virginia A bill proposing a business court was not passed by the Legislature.

Wisconsin The Supreme Court established a stream-lined business set of civil procedure rules for business actions but they have not been used by the bar. The court initially had proposed a business court in Milwaukee but determined it did not have sufficient cases to justify one.

J. Iowa District Court Civil Filings & Dispositions '09

Sept. 6, 2010

Iowa District Courts

Regular Civil Filings, 2009 (Including Contempts)

Torts (P.I. = Pers. Injury)	State	1A	1B	2A	2B	3A	3B	D4	5A	5B	5C	D6	D7	8A	8B
P.I. - Med/dental malp*	172	5	11	4	19	8	10	10	8	2	47	18	12	10	8
P.I. - Motor vehicle	1,892	71	115	76	157	73	109	149	86	19	540	224	150	73	50
P.I. - Premises liability	400	13	22	8	30	15	19	17	24	2	134	55	43	14	4
P.I. - Prod liab & toxic*	37	1	1	0	2	2	1	3	6	1	6	8	4	1	1
P.I. - Other negl/intent.	542	22	42	25	48	21	26	34	20	15	111	80	48	32	18
Profess. malp (no PI)*	40	1	3	2	1	0	1	4	0	1	14	7	4	1	1
Other torts (no PI)	445	20	32	21	45	20	23	27	29	8	96	39	37	29	19
Contract/Commercial															
Debt Collection	15,112	648	1,129	615	1,191	676	858	1,078	929	334	2,852	2,117	1,528	671	486
Fraud/Misrep.	142	5	11	5	9	3	5	11	8	3	33	24	13	10	2
Employment claim	286	10	12	9	18	9	8	10	12	4	117	36	25	12	4
Cont/commrc: other**	1,229	59	69	45	73	59	60	60	96	20	356	135	109	65	23
Real Property/Other Equity															
Mortgage Foreclosure	11,611	374	689	462	937	314	505	876	1,175	232	2,603	1,388	1,270	470	316
Other Real Property	461	29	50	27	31	24	27	52	24	16	77	36	31	27	10
Other Equity	2,973	160	197	98	300	112	167	115	184	61	571	447	235	142	184
Other Civil															
Admin Appeals to DCt	2,203	118	149	86	142	98	77	159	138	52	398	330	277	75	104
Distress warrants***	103	7	5	0	7	0	2	5	4	0	38	13	14	2	6
Foreign judgments	825	31	12	17	25	17	174	317	23	6	84	37	53	21	8
Liens***	5,650	191	293	234	411	221	300	351	532	120	1,171	950	498	237	141
Post conviction relief	438	15	33	4	53	9	22	23	7	1	70	64	43	22	72
Other actions***	2,299	99	439	210	156	89	169	146	96	61	373	157	168	96	40
Total Reg. Civil	46,860	1,879	3,314	1,948	3,655	1,770	2,563	3,447	3,401	958	9,691	6,165	4,562	2,010	1,497

* In weighted caseload formula for judges, these case types are considered "complex" civil cases (see next note).

**In the weighted caseload formula for judges, 10% of "other contract/commercial" cases are considered "complex" civil cases.

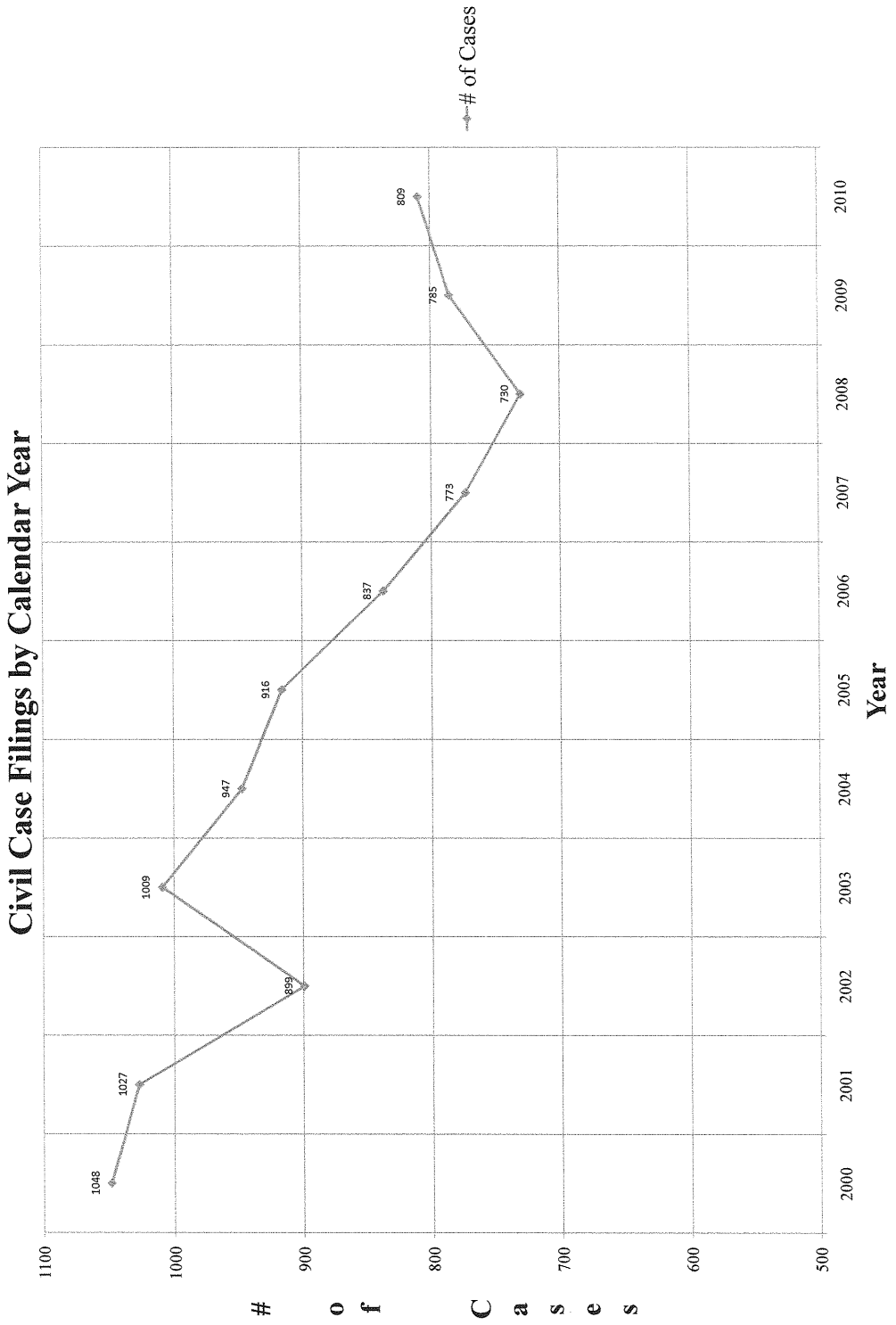
***These civil actions are not included in the judgeship formulas.

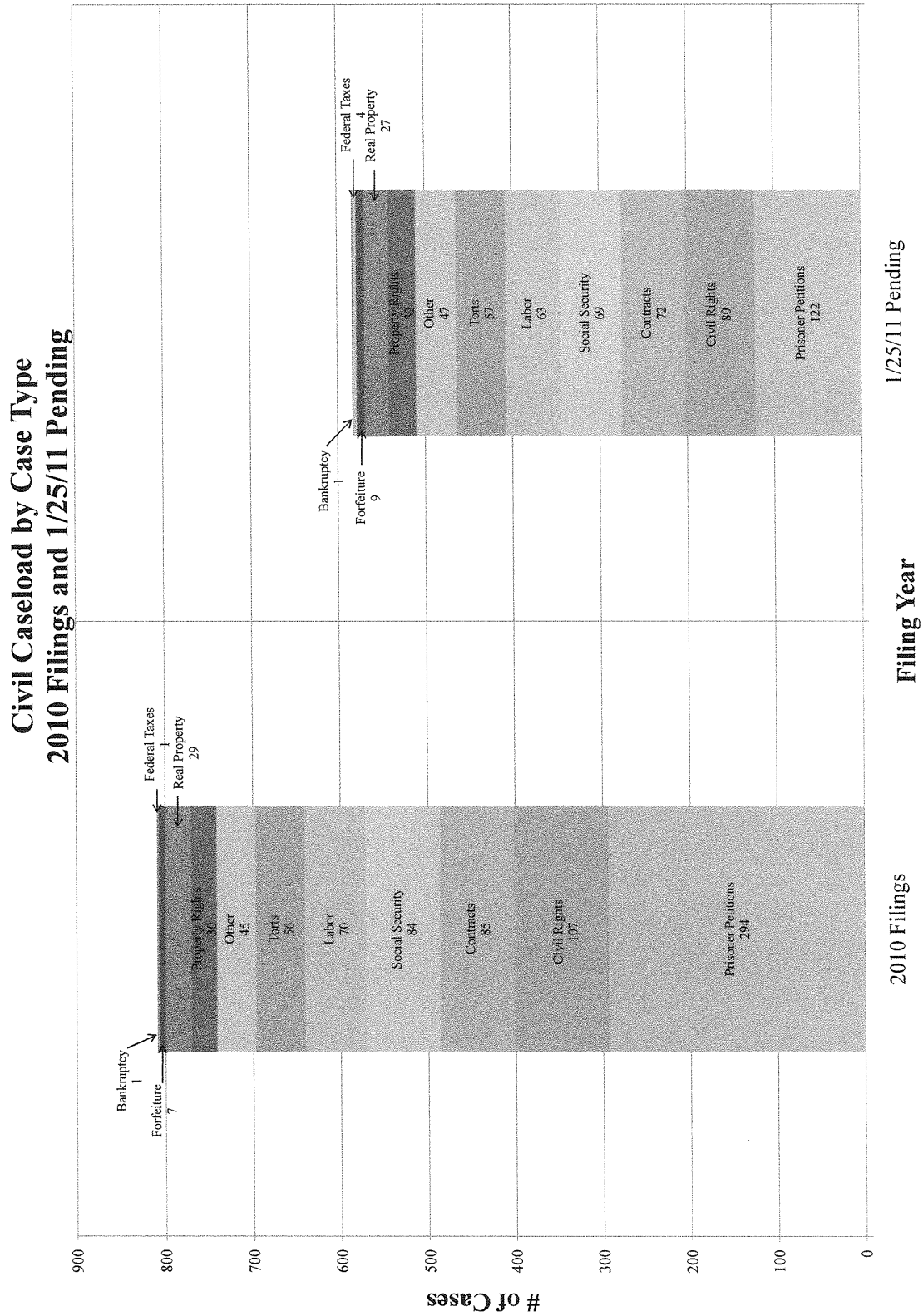
Regular Civil Case Dispositions by Disposition Type -- State -- 2009

		Trial		WITHOUT TRIAL				
Law: Torts (P.I. = Personal Injury)	**Total disposed**	**Jury**	**Nonjury***	Default jgmt	Other jgmt	Vol. Dism	Other dism	Transfer
P.I. - Med/dental malp	**192**	26	3	3	4	100	50	6
P.I. - Motor vehicle	**1,794**	102	22	54	49	1016	535	16
P.I. - Premises liability	**413**	42	4	1	3	226	131	6
P.I. - Prod liab & toxic	**44**	2	1	0	0	18	21	2
P.I. - Other neg/intent.	**520**	27	18	6	25	247	184	13
Profess. malp (no PI)	**60**	8	2	0	1	30	18	1
Other tort (no PI)	**383**	15	27	39	33	121	142	6
Law: Contract/Comrc.								
Contract - Debt Collec	**13,391**	4	529	4,420	3897	2393	2018	130
Fraud/Misrep.	**109**	9	11	9	7	28	41	4
Employment claim	**224**	4	15	11	5	92	70	27
Cont/commrc: other	**1,136**	18	82	196	155	380	288	17
Equity								
Mortgage Foreclosure	**9,406**	0	797	2,429	2927	1971	1280	2
Other Real Property	**423**	0	73	34	99	97	118	2
Other Equity	**2,391**	1	580	276	968	187	362	17
Other Civil								
Admin Appeals to DCt	**1,737**	5	204	500	458	166	386	18
Distress warrants	**20**	0	5	4	10	0	1	0
Foreign judgments	**602**	0	5	187	408	1	1	0
Liens	**1,170**	0	19	253	887	0	10	1
Post conviction relief	**434**	0	93	8	34	27	232	40
Other actions	**714**	0	78	129	412	7	80	8
TOTAL REG. CIVIL	**35,163**	**263**	**2,565**	**8,559**	**10,385**	**7,107**	**5,968**	**316**
% of Total	*100.0%*	*0.7%*	*7.3%*	*24.3%*	*29.5%*	*20.2%*	*17.0%*	*0.9%*

Final: 4-19-2010

K. Federal Civil Case Filings




Civil Caseload by Case Type
2010 Filings and 1/25/11 Pending
# of Cases
900
800
700
600
500
400
300
200
100
0
Bankruptcy 1
Forfeiture 7
Federal Taxes 1
Real Property 29
Property Rights 30
Other 45
Torts 56
Labor 70
Social Security 84
Contracts 85
Civil Rights 107
Prisoner Petitions 294
Bankruptcy 1
Forfeiture 9
Federal Taxes 4
Real Property 27
Property Rights 32
Other 47
Torts 57
Labor 63
Social Security 69
Contracts 72
Civil Rights 80
Prisoner Petitions 122
2010 Filings
1/25/11 Pending
Filing Year

	Contract					Other Tort	IP			Other			
IA-N Total	53					4	11			43			
	Insurance	Stockholder's Suits	Other Contract	Contract Product Liability	Franchise	Property	Copyright	Patent	Trademark	Antitrust	Banks and Banking	Commerce	Securities/Commodities/Exchange
	11	0	35	0	0	4	1	5	5	11	0	1	0
	Contract					Other Tort	IP			Other			
IA-S Total	69					11	25			34			
	Insurance	Stockholder's Suits	Other Contract	Contract Product Liability	Franchise	Property	Copyright	Patent	Trademark	Antitrust	Banks and Banking	Commerce	Securities/Commodities/Exchange
	24	1	40	0	0	11	2	12	7	0	1	0	4

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