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.

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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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