Achieving Civil Justice for All: Recommendations, Next Steps, and the Role of Bar Leaders

Thursday, February 2, 2017
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Hyatt Regency Miami, 400 SE 2nd Avenue, Ashe Auditorium, 3rd Floor

2017 ABA Midyear Meeting
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Presented by the
Standing Committee on the American Judicial System

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Commission on the American Jury
Achieving Civil Justice for All: Recommendations, Next Steps, and the Role of Bar Leaders

2017 ABA Midyear Meeting
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TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Call to Action: Achieving Civil Justice for All</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appendix I: Problems and Recommendations for High Volume Dockets</td>
<td>49</td>
</tr>
<tr>
<td>CCJ/COSCA Resolution 8 In Support of the Call to Action and Recommendations of the Civil Justice Improvements Committee</td>
<td>74</td>
</tr>
<tr>
<td>Landscape of Civil Litigation in State Courts and Implementation Slides</td>
<td>89</td>
</tr>
<tr>
<td>Brittany K.T. Kauffman, <em>Creating the Just, Speedy, and Inexpensive Courts of Tomorrow</em></td>
<td>105</td>
</tr>
<tr>
<td>ABA Model Rules of Professional Conduct, Preamble</td>
<td>136</td>
</tr>
<tr>
<td>ABA Model Code of Judicial Conduct, Preamble, Rule 1.2, Rule 2.12</td>
<td>137</td>
</tr>
<tr>
<td>Panelist Biographies</td>
<td>138</td>
</tr>
</tbody>
</table>
CALL TO ACTION:

Achieving Civil Justice for All

Recommendations to the Conference of Chief Justices
by the Civil Justice Improvements Committee
<table>
<thead>
<tr>
<th>Page</th>
<th>Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>CCJ Civil Justice Improvements Committee</td>
</tr>
<tr>
<td>2</td>
<td>The Call</td>
</tr>
<tr>
<td>4</td>
<td>A Strategic Response</td>
</tr>
<tr>
<td>8</td>
<td>Underlying Realities</td>
</tr>
<tr>
<td>15</td>
<td>Recommendations</td>
</tr>
<tr>
<td>39</td>
<td>Bench and Bar Leaders Hold the Key</td>
</tr>
<tr>
<td>43</td>
<td>Appendices</td>
</tr>
<tr>
<td>43</td>
<td>Notes</td>
</tr>
<tr>
<td>44</td>
<td>Acknowledgements</td>
</tr>
</tbody>
</table>
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Americans deserve a civil legal process that can fairly and promptly resolve disputes for everyone—rich or poor, individuals or businesses, in matters large or small. Yet our civil justice system often fails to meet this standard. Runaway costs, delays, and complexity are undermining public confidence and denying people the justice they seek. This has to change.

Navigating civil courts, as they operate now, can be daunting. Those who enter the system confront a maze-like process that costs too much and takes too long. While three-quarters of judgments are smaller than $5,200, the expense of litigation often greatly exceeds that amount. Small, uncomplicated matters that make up the overwhelming majority of cases can take years to resolve. Fearing the process is futile, many give up on pursuing justice altogether.

We’ve come to expect the services we use to steadily improve in step with our needs and new technologies. But in our civil justice system, these changes have largely not arrived. Many courts lack any of the user-friendly support we rely on in other sectors. To the extent technology is used, it simply digitizes a cumbersome process without making it easier. If our civil courts don’t change how they work, they will meet the fate of travel agents or hometown newspapers, entities undone by new competition and customer expectations—but never adequately replaced.

Meanwhile, private entities are filling the void. Individuals and businesses today have many options for resolving disputes outside of court, including private judges for hire, arbitration and online legal services, most of which do not require an attorney to navigate. But these alternatives can’t guarantee a transparent and impartial process. These alternative forums are not necessarily bound by existing law nor do they contribute to creating new law and shaping 21st century justice. In short, they are not sufficiently democratic.
Civil justice touches every aspect of our lives and society, from public safety to fair housing to the smooth transaction of business. For centuries, Americans have relied on an impartial judge or jury to resolve conflicts according to a set of rules that govern everyone equally. This framework is still the most reliable and democratic path to justice—and a vital affirmation that we live in a society where our rights are recognized and protected. Which is why our legal community has a responsibility to fix the system while preserving the best of our 200-year tradition.

Restoring public confidence means rethinking how our courts work in fundamental ways. Citizens must be placed at the center of the system. They must be heard, respected, and capable of getting a just result, not just in theory but also in everyday practice. Courts need to embrace new procedures and technologies. They must give each matter the resources it needs—no more, no less—and prudently shepherd the cases our system faces now.

It’s time for our system to evolve. Our citizens deserve it. Our democracy depends on it.
Our legal system promises the just, speedy, and inexpensive resolution of civil cases. Too often, however, it does not live up to that promise. This Report of the Civil Justice Improvements (CJI) Committee provides a roadmap for restoring function and faith in a system that is too important to lose. The Recommendations contained in this report are premised on the belief that courts can again be the best choice for every citizen: affordable for all, efficient for all, and fair for all.

WHY THE CIVIL JUSTICE IMPROVEMENTS COMMITTEE AND THIS REPORT?

The impetus for the CJI Committee and this Report is twofold. First, state courts are well aware of the cost, delay, and unpredictability of civil litigation. Such complaints have been raised repeatedly, and legitimately, for more than a century. Yet efforts at reform have fallen short, and over the last several decades the dramatic rise in self-represented litigants and strained court budgets from two severe recessions have further hampered our ability to promptly and efficiently resolve cases. The lack of coherent attempts to address problems in the civil justice system has prompted many litigants to seek solutions outside of the courts and, in some instances, to forgo legal remedies entirely. As a result, public trust and confidence in the courts have decreased.

Second, on a more positive note, dedicated and inventive court leaders from a handful of states recently have taken concrete steps toward change. They are updating court rules and procedures, using technology to empower litigants and court staff, and rethinking longstanding orthodoxies about the process for resolving civil cases. States (including Arizona, Colorado, New Hampshire, Minnesota, and Utah) have changed their civil rules and procedures to require
mandatory disclosure of relevant documents, to curb excessive discovery, and to streamline the process for resolving discovery disputes and other routine motions. A dozen other states have implemented civil justice reforms over the past five years, either on a “pilot” or statewide basis. Many of those reforms have now received in-depth evaluations to assess their impact on cost, disposition time, and litigant satisfaction. Most of those efforts, however, have focused on discrete stages of litigation (pleading, discovery) or on specific types of cases (business, complex litigation), rather than on the civil justice process overall.

The Conference of Chief Justices (CCJ) determined that, given the profound challenges facing the civil justice system and the recent spate of reform efforts, the time was right to examine the civil justice system holistically, consider the impact and outside assessments of the recent pilot projects, and develop a comprehensive set of recommendations for civil justice reform to meet the needs of the 21st century. At its 2013 Midyear Meeting, the CCJ adopted a resolution authorizing the creation of the CJI Committee. The Committee was charged with “developing guidelines and best practices for civil litigation based upon evidence derived from state pilot projects and from other applicable research, and informed by implemented rule changes and stakeholder input, and making recommendations as necessary in the area of caseflow management for the purpose of improving the civil justice system in state courts.”

THE CJI COMMITTEE MEMBERS AND GUIDING PRINCIPLES

With the assistance of the National Center for State Courts (NCSC) and IAALS, the Institute for the Advancement of the American Legal System, the CCJ named a diverse 23-member Committee to research and prepare the recommendations contained in this Report. Committee members included a broad cross-section of key players in the civil litigation process, including trial and appellate court judges, trial and state court administrators, experienced civil lawyers representing the plaintiff and defense bars and legal aid, representatives of corporate legal departments, and legal academics.

The Committee followed a set of eight fundamental principles aimed at achieving demonstrable civil justice improvements that are consistent with each state’s existing substantive law.

The time was right to examine the civil justice system ...and develop a comprehensive set of recommendations for civil justice reform to meet the needs of the 21st century.
THE WORK OF THE COMMITTEE, SUBCOMMITTEES, AND STAFF

The Committee worked tirelessly over more than 18 months to examine and incorporate relevant insight from courts around the country. Committee members reviewed existing research on the state of the civil justice system in American courts and extensive additional fieldwork by NCSC on the current civil docket, recent reform efforts, including evaluations of a number of state pilot projects, and technology, process, and organizational innovations. The Committee members thoughtfully debated the pros and cons of many reform proposals and the institutional challenges to implementing change in the civil justice system, bringing the lessons learned from their own experience as lawyers, judges, and administrators.

Strong leadership and bold action are needed to transform our system for the 21st century. With this Report, we have worked to provide the necessary insight, guidance, and impetus to achieve that goal.

Two subcommittees undertook the bulk of the Committee’s work. Judge Jerome Abrams, an experienced civil litigator and now trial court judge in Minnesota, led the Rules & Litigation Subcommittee. That subcommittee focused on the role of court rules and procedures in achieving a just and efficient civil process, including development of recommendations regarding court and judicial management of cases; right sizing the process to meet the needs of cases; early identification of issues for resolution; the role of discovery, and civil case resolution whether by way of settlement or trial.

Judge Jennifer Bailey, the Administrative Judge of the Circuit Civil Division in Miami with 24 years of experience as a trial judge, chaired the Court Operations Subcommittee. That subcommittee examined the role of the internal infrastructure of the courts—including routine business practices, staffing and staff training, and technology—in moving cases toward resolution, so that trial judges can focus their attention on ensuring fair and cost-effective justice for litigants. The subcommittee also considered the special issues of procedural fairness that often arise in “high-volume” civil cases, such as debt collection, landlord-tenant, and foreclosure matters, where one party often is not represented by a lawyer. And the subcommittee looked at innovative programs based on technology interfaces that some courts are using to assist self-represented litigants in a variety of civil cases.

The subcommittees held monthly conference calls to discuss discrete issues related to their respective work. Individual committee members circulated white papers, suggestions, and discussion documents. Spirited conversations led members to reexamine long-held views about the civil justice system, in light of the changing nature of the civil justice caseload, innovations in procedures and operations from around the country, the rise of self-represented litigants, and the challenge and promise of technology. The full CJI Committee met in four
plenary sessions to share insights and preliminary proposals. Gradually, Committee members reached a solid consensus on the Recommendations set out in this Report.

In presenting this Report, the Committee is indebted to the State Justice Institute, which supported the Committee’s work with a generous grant. Likewise, the Committee is grateful for substantive expertise and logistical support from NCSC and IAALS, without whose help this project could never have been started, much less completed. The President of the NCSC, Mary McQueen, and the Executive Director of IAALS, Rebecca Love Kourlis, served as ex-officio members of the Committee and provided invaluable guidance and assistance throughout the project. The Committee is most deeply indebted to the Committee staff, whose excellent work, tenacity, and good spirits brought the preparation of this Report to a successful conclusion: the Committee Reporter, Senior Judge Gregory E. Mize (D.C. Superior Court); Brittany K.T. Kauffman and Corina D. Gerety of IAALS; and Paula Hannaford-Agor, Shelley Spacek Miller, Scott Graves, and Brenda Otto of the NCSC.

Strong leadership and bold action are needed to transform our system for the 21st century. With this Report, we have worked to provide the necessary insight, guidance, and impetus to achieve that goal. The Recommendations identify steps that state courts can take now—and in the months and years ahead—to make the civil justice system more accessible, affordable, and fair for all. To empower courts to meet the needs of Americans in all jurisdictions, the Recommendations are crafted to work across local legal cultures and overcome the significant financial and operational roadblocks to change. With concerted action, we can realize the promise of civil justice for all.

Respectfully submitted by the Civil Justice Improvements Committee, July 2016

FUNDAMENTAL FRAMEWORK/PRINCIPLES FOR CJI COMMITTEE RECOMMENDATIONS

1. Recommendations should aim to achieve demonstrable improvements with respect to the expenditure of time and costs to resolve civil cases.

2. Outcomes from recommendations should be consistent with existing substantive law.

3. Recommendations should protect, support, and preserve litigants’ constitutional right to a civil jury trial and honor procedural due process.

4. Recommendations should be capable of implementation within a broad range of local legal cultures and practices.

5. Recommendations should be supported by data, experiences of Committee members, and/or “extreme common sense.”

6. Recommendations should not systematically favor plaintiffs or defendants, types of litigants, or represented or unrepresented litigants.

7. Recommendations should promote effective and economic utilization of resources while maintaining basic fairness.

8. Recommendations should enhance public confidence in the courts and the perception of justice.
The reality of litigation costs routinely exceeding the value of cases explains the relatively low rate of dispositions involving any form of formal adjudication.

THE CIVIL LITIGATION LANDSCAPE

Successful solutions only arise from clear-eyed understanding of the problem. To inform the deliberations of the CCJ Civil Justice Improvements Committee, the NCSC undertook a multijurisdictional study of civil caseloads in state courts. The Landscape of Civil Litigation in State Courts focused on non-domestic civil cases disposed between July 1, 2012, and June 30, 2013, in state courts exercising civil jurisdiction in 10 urban counties. The dataset, encompassing nearly one million cases, reflects approximately 5 percent of civil cases nationally.

The Landscape findings presented a very different picture of civil litigation than most lawyers and judges envisioned based on their own experiences and on common criticisms of the American civil justice system. Although high-value tort and commercial contract disputes are the predominant focus of contemporary debates, collectively they comprised only a small proportion of the Landscape caseload. Nearly two-thirds (64 percent) of the caseload was contract cases. The vast majority of those were debt collection, landlord/tenant, and mortgage foreclosure cases (39 percent, 27 percent, and 17 percent, respectively). An additional 16 percent of civil caseloads were small claims cases involving disputes valued at $12,000 or less, and 9 percent were characterized as “other civil” cases involving agency appeals and domestic or criminal-related cases. Only 7 percent were tort cases, and 1 percent were real property cases.

The composition of contemporary civil caseloads stands in marked contrast to caseloads of two decades ago. The NCSC undertook secondary analysis comparing the Landscape data with civil cases disposed in 1992 in 45 urban general jurisdiction courts. The 1992 Civil Justice Survey of State Courts, the ratio of tort to contract cases was approximately 1 to 1. In the Landscape dataset, this ratio had increased to 1 to 7. While population-adjusted contract filings fluctuate somewhat due to economic conditions, they have generally
remained fairly flat over the past 30 years. Tort cases, in contrast, have largely evaporated.

To the extent that damage awards recorded in final judgments are a reliable measure of the monetary value of civil cases, the cases in the Landscape dataset involved relatively modest sums. In contrast to widespread perceptions that much civil litigation involves high-value commercial and tort cases, only 0.2 percent had judgments that exceeded $500,000 and only 165 cases (less than 0.1 percent) had judgments that exceeded $1 million. Instead, 90 percent of all judgments entered were less than $25,000; 75 percent were less than $5,200.\(^1\)

Hence, for most litigants, the costs of litigating a case through trial would greatly exceed the monetary value of the case. In some instances, the costs of even initiating the lawsuit or making an appearance as a defendant would exceed the value of the case. The reality of litigation costs routinely exceeding the value of cases explains the relatively low rate of dispositions involving any form of formal adjudication. Only 4 percent of cases were disposed by bench or jury trial, summary judgment, or binding arbitration. The overwhelming majority (97 percent) of these were bench trials, almost half of which (46 percent) took place in small claims or other civil cases. Three-quarters of judgments entered in contract cases following a bench trial were less than $1,800. This is not to say these cases are insignificant to the parties. Indeed, the stakes in many cases involve fundamentals like employment and shelter. However, the judgment data contradicts the assumption that many bench trials involve adjudication of complex, high-stakes cases.

Most cases were disposed through a non-adjudicative process. A judgment was entered in nearly half (46 percent) of the Landscape cases, most of which were likely default judgments. One-third of cases were dismissed (possibly following a settlement, although only 10 percent were explicitly coded by the courts as settlements). Summary judgment is a much less favored disposition in state courts compared to federal courts. Only 1 percent were disposed by summary judgment. Most of these would have been default judgments in debt collection cases, but the plaintiff instead chose to pursue summary judgment, presumably to minimize the risk of post-disposition challenges.

The traditional view of the adversarial system assumes the presence of competent attorneys zealously representing both parties. One of the most striking findings in the Landscape dataset, therefore, was the relatively large proportion of cases (76 percent) in which at least one party was unrepresented, usually the defendant. Tort cases were the only case type in which attorneys represented both parties in a majority (64 percent) of cases. Surprisingly, small claims dockets in the Landscape courts had an unexpectedly high proportion (76 percent) of plaintiffs who were represented by attorneys. This suggests that small claims courts, which were originally developed as a forum for self-represented litigants to access courts through simplified procedures, have become the
forum of choice for attorney-represented plaintiffs in debt collection cases.

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

**CASELOAD COMPOSITION**

The vast majority of civil cases that remain in state courts are debt collection, landlord/tenant, foreclosure, and small claims cases. State courts are the preferred forums for plaintiffs in these cases for the simple reason that state courts still hold a monopoly on procedures to enforce judgments in most jurisdictions. Securing a judgment from a court of competent jurisdiction is the mandatory first step to being able to initiate garnishment or asset seizure proceedings. The majority of defendants in these cases are unrepresented. Even if defendants might have the financial resources to hire a lawyer, many would not because the cost of the lawyer exceeds the potential judgment. The idealized picture of the adversarial system in which both parties are represented by competent attorneys who can assert all legitimate claims and defenses is, more often than not, an illusion.

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

These trends have severe implications for the future of the civil justice system and for public trust and confidence in state courts. The cost and delays of civil litigation effectively deny access to justice for many members of our society, undermining the legitimacy of the courts as a fair and effective forum to resolve disputes. Reductions in the proportion of civil cases resolved through formal adjudication threaten to erode a publicly accessible body of precedents governing civil cases. Diminished common law will leave future litigants without clear standards for negotiating civil transactions, settling cases, or conforming their conduct to clear legal rules. The privatization of civil litigation likewise undermines the ability of the legislative and executive branches of government to respond effectively to changing societal circumstances that become apparent through claims filed in state courts.

Because the civil justice system directly touches everyone in contemporary American society—through cases involving housing, food, education, employment, household services, consumer products, personal finance, and other commercial transactions—ineffective civil case management has an even more pervasive effect on public trust and confidence than the criminal justice system.

PERCENTAGE OF CASES WITH ATTORNEY REPRESENTATION

If state court policymakers aim to restore the role of state courts as the primary forum for dispute resolution, civil justice reform can no longer be delayed or merely implemented incrementally through changes in rules of civil procedure. Instead, dramatic changes in court operations now must involve considerably greater court oversight of caseflow management to control costs, reduce delays, and ensure fairness for litigants.

**IMPERATIVE RESPONSES**

The Recommendations in this report spring from the realities made clear by the *Landscape* data as well as the experiences of pilot projects and rule changes around the country. They are founded on the premise that current civil justice processes are largely not working for litigants. A core contributing factor is that lawyers too often control the pace of litigation. This has led to unnecessary delays in case resolution. Thus, the leading Recommendation advocates that courts take definitive responsibility for managing civil cases from filing to disposition. This includes effective enforcement of rules and administrative orders designed to promote the just, prompt, and inexpensive resolution of civil cases. That Recommendation is the lynchpin for all that follow.

**THE ENTIRE COURT MUST LEAD CASE MANAGEMENT**

The concept of effective civil caseflow management is not new. It has been a hallmark of court administration for nearly half a century, but it has not been solidly institutionalized in most jurisdictions. Instead, a common trajectory for implementation of civil caseflow reform is an initial period of education and adoption, followed by predictable improvements in civil case processing. However, as new judges rotate into civil calendar assignments, the lessons previously learned tend to be forgotten and the court reverts to its previous practices. One of the primary reasons for this backsliding is the heavy reliance on the trial judge to ensure the forward momentum of civil cases toward resolution. For judges faced with heavy caseloads, the prospect is just too daunting. Unless litigants are clamoring for attention, most judges are willing to assume that the case will resolve itself without additional interference.

Recognizing that few judges have the luxury of a caseload small enough to permit individual judicial attention in every case, the Recommendations promote the expansion of responsibility for managing civil cases from the judge as an individual to the court as a collective institution. The term “court” encompasses the entire complement of courthouse personnel—judges, staff, and infrastructure resources including information technology. The Recommendations envision a civil justice system in which civil case automation plays a large role in supporting teams of court personnel as they triage cases to experienced court staff and/or judicial officers as needed to address the needs of each case. Routine case activity, such as scheduling and monitoring compliance with deadlines, can be automated, permitting specially trained court staff to perform basic case management responsibilities under the guidance of legally trained case managers. This in turn will free the judge to focus on tasks that require the unique expertise of a judicial officer, such as issuing decisions on dispositive motions and conducting evidentiary hearings, including bench and jury trials.

**ONE-SIZE-FITS-ALL IS NOT WORKING**

The Recommendations also recognize that uniform rules that apply to all civil cases are not optimally designed for most civil cases. They provide too much process for the vast majority of cases, including uncontested cases. And they provide too little management for complex cases that comprise a small proportion of civil caseloads, but which inevitably require a disproportionate amount of attention from the court. Instead, cases should be “right-sized” and triaged into appropriate pathways at filing. However, those pathways should be flexible enough to permit reassignment if the needs of the case change over time.
It is imperative that courts develop rules and procedures for promptly assigning all cases to pathways designed to give each case the amount of attention that properly fits the case’s needs.

Tiered court systems and DCM offer little flexibility once the initial decision has been made concerning the court in which to file or the assigned DCM track. A case filed in the general jurisdiction court cannot gain access to procedures or programs offered to cases in the limited jurisdiction court and vice versa. A case assigned to one DCM track usually cannot be reassigned later to another track. The rules and procedures for each court or DCM track typically apply to all cases within that court or track, even if a case would benefit from management under rules or procedures from another court or track.

DCM’s traditional three-track system often falters in application because, in some courts, tracking does not happen unless or until there is a case management conference. Thus, the benefits of early, tailored case management occur only in the small percentage of cases where such a conference is held. And if a properly tagged case does not receive corresponding staff and infrastructure support, the fruits of non-judicial case management are lost.

Furthermore, experience has found that case type and amount-in-controversy—the two factors most often used to define the jurisdiction of courts in tiered systems or DCM procedures—do not reliably forecast the amount of judicial management that each case demands. In Utah, for example, an answer was filed in less than half of cases in which the amount-in-controversy exceeded $300,000; the remaining cases were uncontested and thus did not require a great deal of court involvement. Although case type and amount-in-controversy were both significant predictors of the likelihood of future discovery disputes during the litigation (often cited as time-consuming case events for judges), other factors, including the representation status of the litigants, were stronger predictors of the need for court involvement in the case.

For these reasons it is imperative that courts develop rules and procedures for promptly assigning all cases to pathways designed to give each case the amount of attention that properly fits the case’s needs. As importantly, courts must implement business practices that ensure that rules and procedures are enforced. Rules and procedures for each pathway should move each case toward resolution in an expeditious manner. For example, empirical research shows that fact-pleading standards and robust mandatory disclosures induce litigants to identify key issues in dispute more promptly and help inform litigants about the merits of their respective claims and defenses. Other rules and procedures that have been shown to be effective...
are presumptive restrictions on the scope of necessary discovery and strictly enforced deadlines. These promote completion of key stages of litigation up to and including trials.5

CLOSE ATTENTION TO HIGH-VOLUME DOCKETS

It is axiomatic that court rules, procedures, and business practices are critical for maintaining forward momentum in cases where all litigants are fully engaged in the adversarial process to resolve their disputed issues. These rubrics are even more critical in the substantial proportion of civil caseloads comprised of uncontested cases and cases involving large asymmetries in legal expertise. While most of these cases resolve relatively quickly, the Landscape study makes clear that significant numbers of cases languish on civil calendars for long periods of time for no apparent reason. Research shows that poor management of high-volume dockets can especially affect unrepresented parties.6 The Recommendations advocate improved rules, procedures, and business practices that trigger closer and more effective review of the adequacy of claims in high-volume dockets.

Court rules, procedures, and business practices are critical for maintaining forward momentum in cases.
Recommendations

These realities illustrate the urgent need for change. It is imperative that court leaders move promptly to improve caseflow management to control costs, reduce delays, and ensure fairness for litigants, and embrace tools and methods that align with the realities of modern civil dockets. Toward those ends, these Recommendations present a broad range of practices that each state can embrace in ways that fit local legal culture and resources. The Recommendations are set forth under these topical headings:

• Exercise Ultimate Responsibility
• Triage Case Filings with Mandatory Pathway Assignments
• Strategically Deploy Court Personnel and Resources
• Use Technology Wisely
• Focus Attention on High-Volume and Uncontested Cases
• Provide Superior Access for Litigants

The Recommendations aim to create a future where:

• Each case receives the court attention necessary for efficient and just resolution;
• Teams of judges, court attorneys, and professionally trained staff manage the case from filing to disposition;
• Litigants understand the process and make informed decisions about their cases;
• Justice is not only fair but convenient, timely, and less costly;
• Modern technology replaces paper and redundancy, and
• Civil justice is not considered an insider’s game fraught with outdated rules and procedures.

In sum, the recommendations provide courts with a roadmap to make justice for all a reality.

These Recommendations intentionally use the verbs “must” and “should.” “Must” is used to convey an action that is essential and compelling in response to contemporary issues confronting civil case managers. “Should” is used to convey an action that is important and advisable to undertake. Hence, “must-do” Recommendations are immediately necessary because they go to the heart of improving caseflow and reducing unnecessary cost and delay. “Should-do” Recommendations are also necessary but may have to await the availability of such things as enabling authority or additional resources.
EXERCISE ULTIMATE RESPONSIBILITY

RECOMMENDATION 1
Courts must take responsibility for managing civil cases from time of filing to disposition.

1.1 Throughout the life of each case, courts must effectively communicate to litigants all requirements for reaching just and prompt case resolution. These requirements, whether mandated by rule or administrative order, should at a minimum include a firm date for commencing trial and mandatory disclosures of essential information.

1.2 Courts must enforce rules and administrative orders that are designed to promote the just, prompt, and inexpensive resolution of civil cases.

1.3 To effectively achieve case management responsibility, courts should undertake a thorough statewide civil docket inventory.

COMMENTARY
Our civil justice system has historically expected litigants to drive the pace of civil litigation by requesting court involvement as issues arise. This often results in delay as litigants wait in line for attention from a passive court—be it for rulings on motions, a requested hearing, or even setting a trial date. The wait–for–a–problem paradigm effectively shields courts from responsibility for the pace of litigation. It also presents a special challenge for self–represented litigants who are trying to understand and navigate the system. The party–take–the–lead culture can encourage delay strategies by attorneys, whose own interests and the interests of their cli-
ents may favor delay rather than efficiency. In short, adversarial strategizing can undermine the achievement of fair, economical, and timely outcomes.

It is time to shift this paradigm. The Landscape of Civil Litigation makes clear that relying on parties to self–manage litigation is often inadequate. At the core of the Committee’s Recommendations is the premise that the courts ultimately must be responsible for ensuring access to civil justice. Once a case is filed in court, it becomes the court’s responsibility to manage the case toward a just and timely resolution. When we say “courts” must take responsibility, we mean judges, court managers, and indeed the whole judicial branch, because the factors producing unnecessary costs and delays have become deeply imbedded in our legal system. Primary case responsibility means active and continuing court oversight that is proportionate to case needs. This right–sized case management involves having the most appropriate court official perform the task at hand and supporting that person with the necessary technology and training to manage the case toward resolution. At every point in the life of a case, the right person in the court should have responsibility for the case.

RE: 1.1
The court, including its personnel and IT systems, must work in conjunction with individual judges to manage each case toward resolution. Progress in resolving each case is generally tied both to court events and to judicial decisions. Effective caseflow management involves establishing presumptive deadlines for key case stages, including a firm trial date. In overseeing civil cases, relevant court personnel should be accessible, responsive to case needs, and engaged with the parties—emphasizing efficiency and timely resolution.
RE: 1.2
During numerous meetings, Committee members voiced strong concern (and every participating trial lawyer expressed frustration) that, despite the existence of well-conceived rules of civil procedure in every jurisdiction, judges too often do not enforce the rules. These perceptions are supported by empirical studies showing that attorneys want judges to hold practitioners accountable to the expectations of the rules. For example, the chart below summarizes results of a 2009 survey of the Arizona trial bar about court enforcement of mandatory disclosure rules.

Surely, whenever it is customary to ignore compliance with rules “designed to secure the just, speedy, and inexpensive determination of every action and proceeding,” cost and delay in civil litigation will continue.

KEY RESOURCES FOR RECOMMENDATION 1


RE: 1.3
Courts cannot meaningfully address an issue without first knowing its contours. Analyzing the existing civil caseload provides these contours and gives court leaders a basis for informed decisions about what needs to be done to ensure civil docket progression.

COURT ENFORCEMENT OF DISCLOSURE RULES (N=691*)

Almost Always  Occasionally  Almost Never

Copyright © 2016 by the National Center for State Courts. Reprinted with permission. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the copyright holder.
With the advent of e-filing, civil cover sheets, and electronic case management systems, courts can use technology to begin to right size case management at the time of filing. Technology can also help identify later changes in a case’s characteristics that may justify management adjustments.

This recommendation, together with Recommendation 1, add up to an imperative: Every case must have an appropriate plan beginning at the time of filing, and the entire court system must execute the plan until the case is resolved.

**KEY RESOURCES FOR RECOMMENDATION 2**


**RECOMMENDATION 3**

Courts should use a mandatory pathway-assignment system to achieve right-sized case management.

3.1 To best align court management practices and resources, courts should utilize a three-pathway approach: Streamlined, Complex, and General.

3.2 To ensure that court practices and resources are aligned for all cases throughout the life of the case, courts must triage cases at the time of filing based on case characteristics and issues.

3.3 Courts should make the pathway assignments mandatory upon filing.

3.4 Courts must include flexibility in the pathway approach so that a case can be transferred to a more appropriate pathway if significant needs arise or circumstances change.

3.5 Alternative dispute resolution mechanisms can be useful on any of the pathways provided that they facilitate the just, prompt, and inexpensive disposition of civil cases.

**COMMENTARY**

The premise behind the pathway approach is that different types of cases need different levels of case management and different rules-driven processes. Data and experience tell us that cases can be grouped by their characteristics and needs. Tailoring the involvement of judges and professional staff to those characteristics and needs will lead to efficiencies in time, scale, and structure. To achieve these efficiencies, it is critical that the pathway approach be implemented at the individual case level and consistently managed on a systemwide basis from the time of filing.

Implementing this right-size approach is similar to, but distinct from, differentiated case management. DCM is a longstanding case management technique that applies different rules and procedures to different cases based on established criteria. In some jurisdictions the track determination is made by the judge at the initial case management conference. Where assignment to a track is more automatic or administratively determined at the time of filing, it is usually based merely on case type or amount-in-controversy. There has been a general assumption that a majority of cases will fall in a middle track, and it is the exceptional case that needs more or less process.

While the tracks and their definitions may be in the rules, it commonly falls upon the judges to assign cases to an appropriate track. Case automation or staff systems are rarely in place to ensure assignment and right-sized management, or to evaluate use of the tracking system. Thus, while DCM is an important concept upon which these Recommendations build, in practice it has fallen short of its potential. The right-sized case management approach recommended here embodies a more modern approach than DCM by (1) using case characteristics beyond case type and amount-in-controversy, (2) requiring case triaging at time of filing, (3) recognizing that the great majority of civil filings present uncomplicated facts and legal issues, and (4) requiring utilization of court resources at all levels, including non-judicial staff and technology, to manage cases from the time of filing until disposition.
THE PATHWAY APPROACH

The pathway approach differs from and improves upon DCM in several fundamental respects. The pathway approach:

- Relies on case characteristics other than just case type and amount-in-controversy to triage cases onto a presumptive pathway at the time of filing.
- Provides flexibility and continuity by relying on automated case monitoring to assure cases remain on the appropriate pathway as indicated by the need for more or less judicial involvement in moving toward resolution.
- Enables judges to do more substantive case work by relying on trained court staff and technology to assign all cases promptly at filing.

RE: 3.2

Right-sized case management emphasizes transparent application of case triaging early and throughout the process with a focus on case characteristics all along the way. Pathway assignment at filing provides the opportunity for improved efficiencies because assignment does not turn on designation by the judge at a case management conference, which may not occur or be needed in every case. Entry point triage can be accomplished by non-judicial personnel, based upon the identified case characteristics and through the use of more advanced technology and training. Triage is done more effectively early in the process, with a focus on case issues and not only on case type or monetary value.

RE: 3.3

There has been much experimentation around the country with different processes for case designation upon filing, particularly for cases with simpler issues. Courts and parties invariably underutilize (and sometimes ignore) innovations that are voluntary. Hence, the Committee recommends mandatory application of a triage-to-pathway system. When all civil cases are subject to this right-sized treatment, courts can achieve maximum cost-saving and timesaving benefits.

RE: 3.4

While mandatory assignment is critical, the Committee recognizes that right sizing is dynamic. It contemplates that a case may take an off ramp to another pathway as a case unfolds and issues change. This flexibility comes from active participation of the court and litigants in assessing case needs and ensuring those needs are met.

RE: 3.5

In some jurisdictions, the availability of alternative dispute resolution (ADR) mechanisms is viewed as an invaluable tool for litigants to resolve civil cases quickly and less expensively than traditional court procedures. In others, it is viewed as an expensive barrier that impedes access to a fair resolution of the case. To the extent that ADR provides litigants with additional options for resolving cases, it can be employed on any of the pathways, but it is imperative that it not be an opportunity for additional cost and delay.

KEY RESOURCES FOR RECOMMENDATION 3


**RECOMMENDATION 4**

Courts should implement a Streamlined Pathway for cases that present uncomplicated facts and legal issues and require minimal judicial intervention but close court supervision.

4.1 A well-established Streamlined Pathway conserves resources by automatically calendaring core case processes. This approach should include the flexibility to allow court involvement and/or management as necessary.

4.2 At an early point in each case, the court should establish deadlines to complete key case stages including a firm trial date. The recommended time to disposition for the Streamlined Pathway is 6 to 8 months.

4.3 To keep the discovery process proportional to the needs of the case, courts should require mandatory disclosures as an early opportunity to clarify issues, with enumerated and limited discovery thereafter.

4.4 Judges must manage trials in an efficient and time-sensitive manner so that trials are an affordable option for litigants who desire a decision on the merits.

**COMMENTARY**

Streamlined civil cases are those with a limited number of parties, routine issues related to liability and damages, few anticipated pretrial motions, limited need for discovery, few witnesses, minimal documentary evidence and anticipated trial length of one to two days. Streamlined pathway cases would likely include these case types: automobile tort, intentional tort, premises liability, tort-other, insurance coverage claims arising out of claims listed above, landlord/tenant, buyer plaintiff, seller plaintiff, consumer debt, other contract, and appeals from small claims decisions. For these simpler cases, it is critical that the process not add costs for the parties, particularly when a large percentage of cases end early in the pretrial process. Significantly, the *Landscape of Civil Litigation* informs us that 85 percent of all civil case filings fit within this category.

**STREAMLINED PATHWAY CASE CHARACTERISTICS**

- Limited number of parties
- Routine issues related to liability and damages
- Few anticipated pretrial motions
- Limited need for discovery
- Few witnesses
- Minimal documentary evidence
- Anticipated trial length of one to two days

RE: 4.1

The Streamlined Pathway approach recognizes resource limits. Resource intensive processes like case management conferences are rarely necessary in simple cases. Instead, the court should establish by rule presumptive deadlines for the completion of key case stages and monitor compliance through a management system powered by technology. At the same time, the process should be flexible and allow court involvement, including judges, as necessary. For example, a case manager or judge can schedule a management conference to address critical issues that might crop up in an initially simple case.

RE: 4.2

Too many simple cases languish on state court dockets, without forward momentum or resolution. At or soon after filing, the court should send the parties notice of the presumptive deadlines for key case stages, including a firm trial date. The parties...
may always come to the court to fashion a different schedule if there is good cause. This pathway contemplates conventional fact finding by either the court or a jury, with a judgment on the record and the ability to appeal. Because this process is intended for the vast majority of cases in the state courts, it is important that the process ensure a final judgment and right to appeal to safeguard the rights of litigants and to gain buy-in from attorneys.

RE: 4.3

Mandatory disclosures provide an important opportunity in streamlined cases to focus the parties and discovery early in the case. With robust, meaningful initial disclosures, the parties can then decide what additional discovery, if any, is necessary. The attributes of streamlined cases put them in this pathway for the very reason that the nature of the dispute is not factually complex. Thus, streamlined rules should include presumptive discovery limits, because such limits build in proportionality. Where additional information is needed to make decisions about trial or settlement, the parties can obtain additional discovery with a showing of good cause. Presumptive discovery maximums have worked well in various states, including Utah and Texas, where there are enumerated limits on deposition hours, interrogatories, requests for production, and requests for admission.

Because this process is intended for the vast majority of cases in the state courts, it is important that the process ensure a final judgment and right to appeal to safeguard the rights of litigants and to gain buy-in from attorneys.

RE: 4.4

While the vast majority of cases are resolved without trial, if parties in a Streamlined Pathway case want to go to trial, the court should ensure that option is accessible. Because trial is a costly event in litigation, it is critical that trials be managed in a time-sensitive manner. Once a trial begins in a case, the trial judge should give top priority to trial matters, making presentation of evidence and juror time fit into full and consecutive days of business. A thorough pretrial conference can address outstanding motions and evidentiary issues so that time is not wasted and a verdict can be reached in one or two days.

KEY RESOURCES FOR RECOMMENDATION 4


RECOMMENDATION 5

Courts should implement a Complex Pathway for cases that present multiple legal and factual issues, involve many parties, or otherwise are likely to require close court supervision.

5.1 Courts should assign a single judge to complex cases for the life of the case, so they can be actively managed from filing through resolution.

5.2 The judge should hold an early case management conference, followed by continuing periodic conferences or other informal monitoring.

5.3 At an early point in each case, the judge should establish deadlines for the completion of key case stages, including a firm trial date.

5.4 At the case management conference, the judge should also require the parties to develop a detailed discovery plan that responds to the needs of the case, including mandatory disclosures, staged discovery, plans for the preservation and production of electronically stored information, identification of custodians, and search parameters.

5.5 Courts should establish informal communications with the parties regarding dispositive motions and possible settlement, so as to encourage early identification and narrowing of the issues for more effective briefing, timely court rulings, and party agreement.

5.6 Judges must manage trials in an efficient and time-sensitive manner so that trials are an affordable option for litigants who desire a decision on the merits.

COMMENTARY

The Complex Pathway provides right-sized process for those cases that are complicated in a variety of ways. Such cases may be legally complex or logistically complex, or they may involve complex evidence, numerous witnesses, and/or high interpersonal conflict. Cases in this pathway may include multi-party medical malpractice, class actions, antitrust, multi-party commercial cases, securities, environmental torts, construction defect, product liability, and mass torts. While these cases comprise a very small percentage (generally no more than 3%) of most civil dockets, they tend to utilize the highest percentage of court resources.

Some jurisdictions have developed a variety of specialized courts, such as business courts, commercial courts, and complex litigation courts. They often employ case management techniques recommended for the Complex Pathway in response to longstanding recognition of the problems complex cases can pose for effective civil case processing. While implementation of a mandatory pathway assignment system may not necessarily replace a specialized court with the Complex Pathway, courts should align their case assignment criteria for the specialized court to those for the Complex Pathway. As many business and commercial court judges have discovered, not all cases featuring business-to-business litigants or issues related to commercial transactions require intensive case management. Conversely, some cases that do not meet the assignment criteria for a business or commercial court do involve one or more indicators of complexity and should receive close individual attention.

RE: 5.1

To ensure proportionality for complex cases, a single judge should be assigned for the life of these cases. Judges can do much to prevent undue cost and delay. A one-judge-from-filing-through-resolution policy preserves judicial resources by avoiding the need for a fresh learning curve whenever a complex case
returns to court for a judicial ruling. The parties are also better served if a single judge is engaged on a regular basis. During the course of the case, attorneys can build upon prior communications rather than repeat them.

**COMPLEX PATHWAY CASE CHARACTERISTICS**

- Complex law
- Numerous parties
- Numerous witnesses
- Voluminous documentary evidence
- High interpersonal conflict

**RE: 5.2**

Research and experience confirms the importance of having a mandatory case management conference early in the life of complex cases. Case conferences provide an ideal opportunity to narrow the issues, discuss and focus dispositive motions prior to filing, and identify and address discovery issues before they grow into disputes. Periodic communications with the court create the opportunity for settlement momentum and reassessment of pathway designation if complexities are eliminated. For the Colorado Civil Access Pilot Project, the focus on early, active, and ongoing judicial management of complex cases was essential and received more positive feedback than any other part of the project.

**RE: 5.3**

Cases in which the parties are held accountable for completing necessary pretrial tasks tend to resolve more quickly. The longer a case goes on, the more it costs. Effective oversight and enforcement of deadlines by a vigilant civil case management team can significantly reduce cost and delay.

**RE: 5.4**

Once a discovery plan is determined, the court must continue to monitor progress over the course of discovery. Everyone involved in the litigation, and particularly the court, has a continuing responsibility to move the case forward according to established plans and proportionality principles. Litigation expense in complex lawsuits, especially discovery costs, easily can spin out of control absent a shepherding hand and guiding principles. Thus, proportionality must be a guiding standard in discovery and the entire pretrial process to ensure that the case does not result in undue cost and delay.

While proportionality is a theme that runs across all of the pathways, in the complex pathway this concept is more surgical. Given the complexities inherent in these cases, proportionality standards should be applied to rein in time and expense while still recognizing that some legal and evidentiary issues require time to sort out.

Mandatory disclosures can also play a critical role in identifying the issues in the litigation early, so that additional discovery can be tailored and proportional, although it is possible that the disclosures, like some discovery, will need to occur in phases.

**RE: 5.5**

Courts should utilize informal processes, such as conference calls with counsel, to encourage narrowing of the issues and concise briefing that in turn can promote more efficient and effective rulings by the court.

**RE: 5.6**

Judges must lead the effort to avoid unnecessary time consumption during trials. A robust pretrial conference should address outstanding motions and evidentiary issues so that the trial itself is conducted as efficiently as possible. The court and the parties should consider agreeing to time limits for
trial segments. Once a trial begins, the trial judge should give top priority to trial matters, making presentation of evidence and juror time fit into full and consecutive days of business.

KEY RESOURCES FOR RECOMMENDATION 5


To ensure proportionality for complex cases, a single judge should be assigned for the life of these cases. Judges can do much to prevent undue cost and delay.
RECOMMENDATION 6

Courts should implement a General Pathway for cases whose characteristics do not justify assignment to either the Streamlined or Complex Pathway.

6.1 At an early point in each case, the court should establish deadlines for the completion of key case stages including a firm trial date. The recommended time to disposition for the General Pathway is 12 to 18 months.

6.2 The judge should hold an early case management conference upon request of the parties. The court and the parties must work together to move these cases forward, with the court having the ultimate responsibility to guard against cost and delay.

6.3 Courts should require mandatory disclosures and tailored additional discovery.

6.4 Courts should utilize expedited approaches to resolving discovery disputes to ensure cases in this pathway do not become more complex than they need to be.

6.5 Courts should establish informal communications with the parties regarding dispositive motions and possible settlement, so as to encourage early identification and narrowing of the issues for more effective briefing, timely court rulings, and party agreement.

6.6 Judges must manage trials in an efficient and time-sensitive manner so that trials are an affordable option for litigants who desire a decision on the merits.

COMMENTARY

Like the other pathways, the goal of the General Pathway is to determine and provide “right-sized” resources for timely disposition. The General Pathway provides the right amount of process for the cases that are not simple, but also are not complex. Thus, General Pathway cases are those cases that are principally identified by what they are not, as they do not fit into either the Streamlined Pathway or the Complex Pathway. Nevertheless, the General Pathway is not another route to “litigation as we know it.” Like the streamlined cases, discovery and motions for these cases can become disproportionate, with efforts to discover more than what is needed to support claims and defenses. The goal for this pathway is to provide right-sized process with increased judicial involvement as needed to ensure that cases progress toward efficient resolution.

As with the other case pathways, at an early point in each case courts should set a firm trial date. Proportional discovery, initial disclosures, and tailored additional discovery are also essential for keeping General Pathway cases on track.

RE: 6.1 to 6.3

The cases in the General Pathway may need more active management than streamlined cases. A judge may need to be involved from the beginning to understand unusual issues in the case, discuss the anticipated pretrial path, set initial parameters for discovery, and be available to resolve disputes as they arise. The court and the parties can then work together to move these cases forward, with the court having the ultimate responsibility to guard against cost and delay.

A court’s consistent and clear application of proportionality principles early in cases can have a leavening affect on discovery decisions made in law offices. Parties and attorneys typically make their decisions about what discovery to do next without court involvement. A steady court policy with respect to proportionality provides deliberating parties and attorneys with guidance.
As in the Complex Pathway, courts should utilize informal processes, such as conference calls with counsel, to encourage narrowing of the issues and concise briefing that in turn can promote more efficient and effective rulings by the court. In addition, an in-person case management conference can play a critical role in reducing cost and delay by affording the judge and parties the opportunity to have an in-depth discussion regarding the issues and case needs.

Without doubt, alternative dispute resolution (ADR) is an important development in modern civil practice. However, to avoid it becoming an unnecessary hurdle or cost escalator, its appropriateness should be considered on a case-by-case basis. That said, settlement discussions are a critical aspect of case management, and the court should ensure that there is a discussion of settlement at an appropriate time, tailored to the needs of the case.

As with the other pathways, trial judges play a crucial role in containing litigation costs and conserving juror time by making time management a high priority once a trial begins.

### Key Resources for Recommendation 6


team case management resulted in a 25 percent increase in resolved foreclosure cases compared consistently at six months, twelve months, and eighteen months during the foreclosure crisis, and the successful resolution of a 50,000 case backlog. Specialized business courts across the country use team case management with similar success. In Atlanta, business court efforts resulted in a 65 percent faster disposition time for complex contract cases and a 56 percent faster time for complex business tort cases.

RE: 7.1
Using court management teams effectively requires that the court conduct a thorough examination of civil case business practices to determine the degree of discretion required for each. Based upon that examination, courts can develop policies and practices to identify case management responsibilities appropriately assignable to professional court staff or automated processes. Matching management tasks to the skill level of the personnel allows administrators to execute protocols and deadlines and judges to focus on matters that require judicial discretion. Evaluating what is needed and who should do it brings organization to the system and minimizes complexities and redundancies in court structure and personnel.

RE: 7.2
Delegation and automation of routine case management responsibilities will generate time for judges to make decisions that require their unique authority, expertise, and discretion.

KEY RESOURCES FOR RECOMMENDATION 7
Lee Suskin & Daniel Hall, A Case Study: Reengineering Utah's Courts Through the Lens of the Principles of Judicial Administration (2012).

The fair and prompt resolution of each case... is not the responsibility of the judge alone. Active case management at its best is a team effort aided by technology and appropriately trained and supervised staff.
The fair and prompt resolution of each case… is not the responsibility of the judge alone. Active case management at its best is a team effort aided by technology and appropriately trained and supervised staff.

For right-size case management to become the norm, not the exception, courts must provide judges and court staff with training that specifically supports and empowers right-sized case management. Courts should partner with bar leaders to create programs that educate lawyers about the requirements of newly instituted case management practices.

For right-size case management to become the norm, not the exception, courts must provide judges and court staff with training that specifically supports and empowers right-sized case management. Courts should partner with bar leaders to create programs that educate lawyers about the requirements of newly instituted case management practices.

Judicial training is not a regular practice in every jurisdiction. To improve, and in some instances reengineer, civil case management, jurisdictions should establish a comprehensive judicial training program. The Committee advocates a civil case management-training program that includes web-based training modules, regular training of new judges and sitting judges, and a system for identifying judges who could benefit from additional training.

Accumulated learning from the private sector suggests that the skill sets required for staff will change rapidly and radically over the next several years. Staff training must keep up with the impact of technology improvements and consumer expectations. For example, court staff should be trained to provide appropriate help to self-represented litigants. Related to that, litigants should be given an opportunity to perform many court transactions online. Even with well-designed websites and interfaces, users can become confused or lost while trying to complete these transactions. Staff training should include instruction on answering user questions and solving user process problems.

The understanding and cooperation of lawyers can significantly influence the effectiveness of any pilot projects, rule changes, or case management processes that court leaders launch. Judges and court administrators must partner with the bar to create CLE programs and bench/bar conferences that help practitioners understand why changes are being undertaken and what will be expected of lawyers. Bar organizations, like the judicial branch, must design and offer education programs to inform their members about important aspects of the new practices being implemented in the courts.

Lee Suskin & Daniel Hall, A Case Study: Reengineering Utah’s Courts Through the Lens of the Principles of Judicial Administration (2012).

RECOMMENDATION 9
Courts should establish judicial assignment criteria that are objective, transparent, and mindful of a judge’s experience in effective case management.

COMMENTARY
The Committee recognizes the variety of legal cultures and customs that exist across the breadth of our country. Given the case management imperatives described in these Recommendations, the Committee trusts that all court leaders will make judicial competence a high priority. Court leaders should consider a judge’s particular skill sets when assigning judges to preside over civil cases. For many years, in most jurisdictions, the sole criterion for judicial assignment was seniority and a judge’s request for an assignment. The judge’s experience or training were not top priorities.

FACTORS TO CONSIDER IN JUDICIAL ASSIGNMENT CRITERIA
- Demonstrated case management skills
- Civil case litigation experience
- Previous civil litigation training
- Specialized knowledge
- Interest in civil litigation
- Reputation with respect to neutrality
- Professional standing with the trial bar

To build public trust in the courts and improve case management effectiveness, it is incumbent upon court leaders to avoid politicization of the assignment process. In assigning judges to various civil case dockets, court leaders should consider a composite of factors including (1) demonstrated case management skills, (2) litigation experience, (3) previous training, (4) specialized knowledge, (5) interest, (6) reputation with respect to neutrality, and (6) professional standing within the trial bar.

KEY RESOURCE FOR RECOMMENDATION 9
Lee Suskin & Daniel Hall, A Case Study: Reengineering Utah’s Courts Through the Lens of the Principles of Judicial Administration (2012).
USE TECHNOLOGY WISELY

RECOMMENDATION 10

Courts must take full advantage of technology to implement right-sized case management and achieve useful litigant-court interaction.

10.1 Courts must use technology to support a court-wide, teamwork approach to case management.

10.2 Courts must use technology to establish business processes that ensure forward momentum of civil cases.

10.3 To measure progress in reducing unnecessary cost and delay, courts must regularly collect and use standardized, real-time information about civil case management.

10.4 Courts should use information technology to inventory and analyze their existing civil dockets.

10.5 Courts should publish measurement data as a way to increase transparency and accountability, thereby encouraging trust and confidence in the courts.

COMMENTARY

This recommendation is fundamental to achieving effective case management. To implement right-sized case management, courts must have refined capacities to organize case data, notify interested persons of requirements and events, monitor rules compliance, expand litigant understanding, and prompt judges to take necessary actions. To meet these urgent needs, courts must fully employ information technologies to manage data and business processes. It is time for courts to catch up with the private sector. The expanding use of online case filing and electronic case management is an important beginning, but just a beginning. Enterprises as diverse as commercial air carriers, online retailers, and motor vehicle registrars have demonstrated ways to manage hundreds of thousands of transactions and communications. What stands in the way of courts following suit? If it involves lack of leadership, the Committee trusts that this Report and these Recommendations will embolden chief justices and state court administrators to fill that void.

RE: 10.1

Modern data management systems and court-oriented innovations, such as e-filing, e-scheduling, e-service, and e-courtesy, provide opportunities for personnel coordination not only within courthouses but also across entire jurisdictions.

RE: 10.2

To move cases efficiently towards resolution, case management automation should, at a minimum, (1) generate deadlines for case action based on court rules, (2) alert judges and court staff to missed deadlines, (3) provide digital data and searchable options for scheduled events, and (4) trigger appropriate compliance orders. Courts should seek to upgrade their current software to achieve that functionality and include those requirements when they acquire new software.

RE: 10.3

Experience and research tell us that one cannot manage what is unknown. Smart data collection is central to the effective administration of justice and can significantly improve decision making.

Although court administrators appreciate the importance of recordkeeping and performance measurement, few judges routinely collect or use data measurements or analytical reports. As made clear in previous Recommendations, the entire court system acting as a team must collect and use data to improve civil caseflow management.
KEY FUNCTIONS OF CASE MANAGEMENT AUTOMATION

- Generate deadlines for case action based on court rules
- Alert judges and court staff to missed deadlines
- Provide digital data and searchable options for scheduled events
- Trigger appropriate compliance orders

representative picture of civil caseloads nationally, each court system should gain a firm understanding of its current civil case landscape. Using technology for this purpose will increase the ability of courts to take an active, even a proactive, approach to managing for efficiency and effectiveness.

An inventory should not be a one-time effort. Courts can regularly use inventories to gauge the effectiveness of previous management efforts and “get ahead” of upcoming caseload trends.

RE: 10.5

The NCSC and the Justice at Stake consortium commissioned a national opinion survey to identify what citizens around the country think about courts and court funding. The ultimate purpose of the project, entitled *Funding Justice: Strategies and Messages for Restoring Court Funding*, was to create a messaging guide to help court leaders craft more effective communications to state policymakers and the general public about the functions and resource needs of courts. Citizen focus groups indicated that certain narratives tend to generate more positive public attitudes to courts. These include (1) courts are effective stewards of resources, (2) the courts’ core mission is delivery of fair and timely justice, and (3) courts are transparent about how their funding is spent. In light of these findings, the Committee believes that smart civil case management, demonstrated by published caseflow data, can lead to increased public trust in the courts.

RE: 10.4

As mentioned above, one cannot manage what is unknown. This is true at both the macro the micro levels. A “30,000 foot” view allows court personnel to consider the reality of their caseload when making management decisions. As the *Landscape of Civil Litigation* provided the CJI Committee a
KEY RESOURCES FOR RECOMMENDATION 10


Lee Suskin & Daniel Hall, A Case Study: Reengineering Utah’s Courts Through the Lens of the Principles of Judicial Administration (2012).


Danielle Fox, Hisashi Yamagata & Pamela Harris, From Performance Measurement to Performance Management: Lessons From a Maryland Circuit Court, 35 Just. Sys. J. 87 (2014).


FOCUS ATTENTION ON HIGH-VOLUME AND UNCONTESTED CASES

RECOMMENDATION 11

Courts must devote special attention to high-volume civil dockets that are typically composed of cases involving consumer debt, landlord-tenant, and other contract claims.

11.1 Courts must implement systems to ensure that the entry of final judgments complies with basic procedural requirements for notice, standing, timeliness, and sufficiency of documentation supporting the relief sought.

11.2 Courts must ensure that litigants have access to accurate and understandable information about court processes and appropriate tools such as standardized court forms and checklists for pleadings and discovery requests.

11.3 Courts should ensure that the courtroom environment for proceedings on high-volume dockets minimizes the risk that litigants will be confused or distracted by over-crowding, excessive noise, or inadequate case calls.

11.4 Courts should, to the extent feasible, prevent opportunities for self-represented persons to become confused about the roles of the court and opposing counsel.

COMMENTARY

State court caseloads are dominated by lower-value contract and small claims cases rather than high-value commercial or tort cases. Many courts assign these cases to specialized court calendars such as landlord/tenant, consumer debt collection, mortgage
foreclosure, and small claims dockets. Many of these cases exhibit similar characteristics. For example, few cases are adjudicated on the merits, and almost all of those are bench trials. Although plaintiffs are generally represented by attorneys, defendants in these cases are overwhelmingly self-represented, creating an asymmetry in legal expertise that, without effective court oversight, can easily result in unjust case outcomes. Although most cases would be assigned to the Streamlined Pathway under these Recommendations, courts should attend to signs that suggest a case might benefit from additional court involvement. Indicators can include the raising of novel claims or defenses that merit closer scrutiny.

**RE: 11.1**
Recent federal investigations and agency studies have found widespread instances of judgments entered in cases in which the defendant did not receive notice of the complaint or the plaintiff failed to demonstrate standing to bring suit or adequate documentation of compliance with statutory requirements for timeliness or the basis for the relief sought. Courts have an obligation to implement practices that prevent such abuse.

**RE: 11.2**
This recommendation complements Recommendation 13 with respect to making court services more accessible to litigants. Self-represented litigants need access to accurate information about court processes, including trained court staff that can help them navigate the civil justice system. This information should be available electronically or in person at the courthouse, and at other sites where litigants can receive free assistance. Standardized forms should use plain English and include check-off lists for basic claim elements, potential common defenses, and the ability to assert counter-claims.

**RE: 11.3**
Courts often employ block calendaring on high-volume dockets in which large numbers of cases are scheduled for the same period of time. The result is often overcrowded, noisy, and potentially chaotic environments in which litigants may not hear their case when it is called or may become distracted by competing activities in the courtroom. Frequently, courts sequence cases after the initial call to benefit attorneys, resulting in long wait times for self-represented litigants. The use of electronic sign-in systems can help ensure that litigants are not mistakenly overlooked and that their cases are heard in a timely manner.

**RE: 11.4**
Self-represented litigants often lack understanding about the respective roles of the court and opposing counsel. They may acquiesce to opposing counsel demands because they mistakenly assume that the opposing counsel is connected to the court. As a result, judges may not obtain complete information from both sides to ensure a legally correct judgment on the facts and the law. Self-represented litigants also may not appreciate the far-reaching implications of agreeing to settle a case (e.g., dismissal, entry of judgment). To curb misunderstandings, courts should provide clear physical separation of counsel from court personnel and services, and standardized guidelines to all litigants and counsel concerning how settlement negotiations are conducted and the consequences of settlement. Before accepting settlements, judges should ascertain that both parties understand the agreement and its implications.
KEY RESOURCES FOR RECOMMENDATION 11


RECOMMENDATION 12

Courts must manage uncontested cases to assure steady, timely progress toward resolution.

12.1 To prevent uncontested cases from languishing on the docket, courts should monitor case activity and identify uncontested cases in a timely manner. Once uncontested status is confirmed, courts should prompt plaintiffs to move for dismissal or final judgment.

12.2 Final judgments must meet the same standards for due process and proof as contested cases.

COMMENTARY

Uncontested cases comprise a substantial proportion of civil caseloads. In the Landscape of Civil Litigation in State Courts, the NCSC was able to confirm that default judgments comprised 20 percent of dispositions, and an additional 35 percent of cases were dismissed without prejudice. Many of these cases were abandoned by the plaintiff, or the parties reached a settlement but failed to notify the court. Other studies of civil caseloads also suggest that uncontested cases comprise a substantial portion of civil cases (e.g., 45 percent of civil cases subject to the New Hampshire Proportional Discovery/Automatic Disclosure (PAD) Rules, 84 percent of civil cases subject to Utah Rule 26). Without effective oversight, these cases can languish on court dockets indefinitely. For example, more than one-quarter of the Landscape cases that were dismissed without prejudice were pending at least 18 months before they were dismissed.

RE 12.1

To resolve uncontested matters promptly yet fairly requires focused court action. Case management systems should be configured to identify uncon-
tested cases shortly after the deadline for filing an answer or appearance has elapsed. If the plaintiff fails to file a timely motion for default or summary judgment, the court should order the plaintiff to file such a motion within a specified period of time. If such a motion is not filed, the court should dismiss the case for lack of prosecution. The court should monitor compliance with the order and carry out enforcement as needed.

RE 12.2

Recent studies of consumer debt collection, mortgage foreclosure, and other cases that are frequently managed on high-volume dockets found that judgments entered in uncontested cases were often invalid. In many instances, the plaintiff failed to provide sufficient notice of the suit to the defendant. Other investigations found that plaintiffs could not prove ownership of the debt or provide accurate information about the amount owed. To prevent abuses, courts should implement rules to require or incentivize process servers to use smart technology to document service location and time. Courts should also require plaintiffs to provide an affidavit and supporting documentation of the legitimacy of the claim with the motion for default or summary judgment. Before issuing a final judgment, the court should review those materials to ensure that the plaintiff is entitled to the relief sought.

KEY RESOURCES FOR RECOMMENDATION 12


PROVIDE SUPERIOR ACCESS FOR LITIGANTS

RECOMMENDATION 13
Courts must take all necessary steps to increase convenience to litigants by simplifying the court-litigant interface and creating on-demand court assistance services.

13.1 Courts must simplify court-litigant interfaces and screen out unnecessary technical complexities to the greatest extent possible.

13.2 Courts should establish Internet portals and stand-alone kiosks to facilitate litigant access to court services.

13.3 Courts should provide real-time assistance for navigating the litigation process.

13.4 Judges should promote the use of remote audio and video services for case hearings and case management meetings.

COMMENTARY
The importance of “access to substantive justice” is inherent in the mission of the CJI Committee and underpins all of these Recommendations. Recommendation 13 addresses “access” in terms of making the civil justice system less expensive and more convenient to the public.

To mitigate access problems, we must know what they are. We also need to know how the public wants us to fix them. A national poll by NCSC in 2014 found that a high percentage of responders thought courts were not doing enough to help self-represented litigants, were out of touch, and were not using technology effectively. Responders frequently cited the time required to interact with the courts, lack of available ADR, and apprehensiveness in dealing with court processes. The poll found strong sup-
port for a wide array of online services, including a capacity for citizens to ask questions online about court processes.

RE: 13.1
Courts should simplify court forms and develop online “intelligent forms” that enable litigants to create pleadings and other documents in a manner that resembles a Turbo Tax interactive dialogue. Forms should be available in languages commonly spoken in the jurisdiction. Processes associated with the forms (attaching documents, making payments, etc.) should be simplified as much as possible.

RE: 13.2
To improve citizen understanding of court services, courts should install information stations inside and outside of courthouses as well as online. To expand the availability of important court information, courts might partner with private enterprises and public service providers, such as libraries and senior centers, to install interactive, web-based, court business portals at the host locations.

RE: 13.3
Courts should create online, real-time court assistance services, such as online chat services, and 800-number help lines. Litigant assistance should also include clear signage at court facilities to guide litigants to any on-site navigator personnel. Online resolution programs also offer opportunities for remote and real-time case resolution.

RE: 13.4
Vast numbers of self-represented litigants navigate the civil justice system every year. However, travel costs and work absences associated with attending a court hearing can deter self-represented litigants from effectively pursuing or defending their legal rights. The use of remote hearings has the potential to increase access to justice for low-income individuals who have to miss work to be at the courthouse on every court date. Audio or videoconferencing
can mitigate these obstacles, offering significant cost savings for litigants and generally resulting in increased access to justice through courts that “extend beyond courthouse walls.”

The growing prevalence of smartphones enables participants to join audio or videoconferences from any location. To the extent possible and appropriate, courts should expand the use of telephone communication for civil case conferences, appearances, and other straightforward case events.

If a hearing or case event presents a variety of complexities, remote communication capacities should expand to accommodate those circumstances. In such instances video conferencing may be more fitting than telephone conferencing. The visual component may facilitate reference to documents and items under discussion, foster more natural conversation among the participants, and enable the court to “read” unspoken messages. For example, the video may reveal that a litigant is confused or that a party would like an opportunity to talk but is having trouble getting into the conversation.

KEY RESOURCES FOR RECOMMENDATION 13


United Kingdom Civil Justice Council, Online Dispute Resolution for Low Value Civil Claims (2015).


This Report makes clear that state courts cannot simply use comfortable old methods to administer justice in the millions of civil cases now pending. These Recommendations tell state courts “what” they must do to address the challenges they face now. While many of the Recommendations to reduce delay and improve access to justice can be implemented within existing budgets and under current rules of procedure, others will require steadfast, strong leadership to achieve these goals. The next step is to develop a strategy for “how” court leaders can overcome barriers to needed changes and actually deliver better civil justice.

A key to implementing these Recommendations is to persuade civil justice actors that there is a problem and it belongs to all of us. As Chief Justice Roberts stated in his most recent year-end report on the federal judiciary, it is “the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation.” The Committee is confident that when a critical mass of judges and lawyers honestly confront the unvarnished facts about the civil justice system, bench and bar members will be moved to become problem solvers.

We know that successful problem solving is preceded by careful problem definition. The CJI Committee began its work with a comprehensive empirical study of the current state of civil litigation across the country. The national snapshot of civil litigation undertaken in the NCSC’s Landscape of Civil Litigation provides a model for problem identification, big-picture visioning, and strategic planning by state and local courts. The Committee urges state courts to undertake their own landscape study. Such a study will not only enable court leaders to diagnose the volume and characteristics of civil case dockets across the state, but will also help identify major barriers to reducing cost, delay, and inefficiency in civil litigation. Leaders can then sequence and execute strategies to surmount those barriers.

“We like comfortable old shoes out of style and worn through as they may be and dread having a new pair... None of us like to learn new ways of doing things (but) the convulsive change in society confronts our profession with the urgent challenge to get our house in order if we are to renew the public’s confidence in the American Justice system that safeguards and protects individual rights and liberties.”

—Justice William J. Brennan, Jr.

Improving the Administration of Justice Today, address to the Section of Judicial Administration, American Bar Association, 1958.
COURT STRATEGIES

Initially, the Committee urges court leaders to build internal support for change. This advice derives from the experience of the Committee during its two years of work. Thanks to the Landscape of Civil Litigation, this diverse group of judges, court managers, trial practitioners, and organization leaders started their work with an accurate picture of the civil litigation system. Simultaneously, from across the country, we collected a sampling of best practices that demonstrate smart case management and superior citizen access to justice. We then closely analyzed and discussed the data over the course of several in-person, plenary meetings and innumerable conference calls and email exchanges. What resulted? Unanimous and enthusiastic support for major civil justice improvements. And, for each participant, there arose intense convictions: The quality and vitality of the civil justice system is severely threatened. Now is the time for strong leadership by all chief justices and court administrators.

Behind this report, there stands a fundamental tenet: frontline judges and administrators must have the opportunity to ponder facts about the civil justice system in their state and strategize about the recommendations here. Once that opportunity and those deliberations occur, a wellspring of support for civil justice improvement will take shape within the judiciary. With a supportive judicial branch, tough issues will not only be faced and courthouse improvements undertaken, a unified judiciary will also facilitate external stakeholder participation.

STAKEHOLDER STRATEGIES

As the Chief Justice suggested, court improvement efforts must involve the bar. The Washington State Bar provides a prime example of lawyers, sobered by evidence of growing civil litigation costs, taking bold actions to improve the fair resolution of cases. After four years of labor, the Bar’s Task Force on the Escalating Costs of Civil Litigation last year issued a series of recommendations to make courts affordable and accessible. The principles of proportionality and cooperation infuse the recommendations. Significantly, the report closes by saying, “The Task Force urges the Board [of Governors] not only to adopt these recommendations, but to help educate the judges and lawyers who will be responsible for making the recommendations a reality.”

In addition to state and local bar associations, national organizations have a role in promoting the recommendations contained here. For example, during the years spent producing this Report, several respected lawyer groups provided significant input to CJI Committee members and staff. These include the American Board of Trial Advocates, the American Civil Trial Roundtable, the American College of Trial Lawyers, the National Creditors Bar Association, IAALS Advisory Groups, the Association of General Counsel, and the NCSC’s General Counsel Committee, Lawyers’ Committee, and Young Lawyers’ Committee. Some of these groups have state counterparts that can collaborate with court leaders to implement recommendations that fit their state or locality. Those alliances can also lead to focus groups that educate key constituencies about the state’s civil justice needs, and the demonstrated effectiveness of the recommendations collected here. Advocates for any recommendations can use the findings, proposals, and evidence-based resources in this report to build trust among legislators, executive branch leaders, and the general public.

Since the civil justice system serves large segments of society, these Recommendations have constituencies beyond the legal community. Households, businesses, civic institutions, vendors, and consumers are key stakeholders. Thought leaders and respected voices within those larger communities must be educated about the Recommendations and encouraged to join our call to action.
FUTURE ASSISTANCE

Recognizing that organizational change is a process, not an event, the NCSC and IAALS will collaborate to assist court leaders who want to implement civil justice change. They are taking steps to help move the Recommendations into action. During the planned implementation phase, they hope to:

- Develop a directory of experts (judges, administrators, lawyers, and national experts) with proven experience in successfully implementing change in the civil justice system.
- Provide technical assistance to jurisdictions wishing to adopt any CJI recommendations.
- Create an Implementation Roadmap for court leaders to use in developing a strategy for implementing civil justice improvements.
- Launch an online “community” for users to communicate with experienced court leaders who have successfully implemented change.
- Maintain a directory of successful projects for court leaders to use in initiating change.
- Identify technologies that support civil justice improvement and work with the court technology industry to develop new applications to support civil justice improvement.
- Continue to evaluate and document efforts to improve the civil justice system.
- Identify and coordinate with other national groups committed to improving efficient and accessible civil justice.

KEY RESOURCES FOR TAKING NEXT STEPS


Brian Ostrom, Roger Hanson & Kevin Burke, Becoming a High Performance Court, 26(4) Court Manager 35-43.


Mary McQueen, Governance: The Final Frontier, Harvard Executive Session for Court Leaders in the 21st Century (2013).


APPENDICES

Over the course of its deliberations, the CJI Committee developed a number of working papers and internal discussion briefs, which provide further background and context in support of the Recommendations. These materials and other resources are available as appendices to this report at: ncsc.org/civil.

Appendix A: A Day in the Life of a Judge: Descriptions of Judicial Tasks under each Pathway

Appendix B: NCSC Business Rules Visualization Tool

Appendix C: The Pathway Approach: Draft Rules and Example Rules from Around the Country

Appendix D: Pilot Projects, Rule Changes, and Other Innovations in State Courts Around the Country

Appendix E: Best Practices for Courts and Parties Regarding Electronic Discovery in State Courts

Appendix F: The Role of Proportionality in Reducing the Cost of Civil Litigation

Appendix G: Remote Conferencing—Findings and Recommendations

Appendix H: Judicial Assignment Criteria for Pathway Dockets

Appendix I: Problems and Recommendations for High-Volume Dockets

Appendix J: Best Practices for Trial Management

NOTES

1. These values varied somewhat based on case type; three-quarters of real property judgments, for example, were less than $106,000 and three-quarters of torts were less than $12,200.

2. Based on the Landscape of Civil Litigation in State Courts, NCSC staff estimate that 85 percent or more of civil cases could be more effectively managed using streamlined or simplified procedures. Complex cases, in contrast, generally consisted of no more than 3 percent of civil caseloads.


ACKNOWLEDGEMENTS

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FUTURE ASSISTANCE

The NCSC and IAALS are committed to assisting court leaders in implementing the Recommendations in this report. For more information, please visit ncsc.org/civil.

DISCLAIMER

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APPENDIX I

Problems and Recommendations for High-Volume Dockets

A Report of the High-Volume Case Working Group to the CCJ Civil Justice Improvements Committee
Introduction

As NCSC’s study The Landscape of Civil Litigation in State Courts reflects, the civil business of state courts has changed dramatically over the last few decades.

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

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

The outcomes in high-volume dockets typically have serious, long-lasting consequences for litigants. Although the average dollar value of the debt collection and small claims cases handled annually is low, a civil judgment can stand in the way of housing, employment and income. Data-miners check and report court records for prospective employers, landlords and creditors. With jobs, shelter and wages hanging in the balance, generally for persons of limited means, it is critical that the judgment be the product of a fair and adequate process.

Post-judgment enforcement efforts including wage garnishment follow on the heels of civil judgments in these cases and should likewise conform to applicable state and federal law. Studies reveal, however, that recurrent practices in many jurisdictions undermine the adequacy or fairness of the operations and results of such high-volume dockets.

Post-judgment enforcement efforts including wage garnishment follow on the heels of civil judgments in these cases and should likewise conform to applicable state and federal law. Studies reveal, however, that recurrent practices in many jurisdictions undermine the adequacy or fairness of the operations and results of such high-volume dockets.

This working group, tasked with developing recommendations regarding high-volume dockets aims here to (1) identify the unique characteristics of these cases and dockets; (2) define the most pressing problems they present; and (3) suggest some initial responses for possible inclusion in the final report of the CCJ Civil Justice Improvements Committee.

We are motivated by a sense of urgency. A judicial system that is not readily navigated by many, and where outcomes are too frequently not based on a
fair ventilation of the underlying case facts, will lose its integrity and legitimacy. It is thus ultimately our strong commitment to and respect for our system of justice that underlies this effort.

In putting together this document, we are mindful of the scope of the CCJ Committee mission. Our recommendations focus on changes that court systems can achieve (to varying degrees based on resources and need) through changes to court administration, operations, rules or “culture” (practices that may have developed over time but are not embodied in law or formal policies). They include suggestions for innovative partnerships and new uses of technology. They reflect recognition that court personnel, including judges, have opportunities to use the “bully pulpit” to educate the public and policymakers about the challenges facing the court system. We have steered away from recommendations that would likely require legislation or significant changes in substantive law. In keeping with our mission, we have concentrated on possible roles for courts in improving the management of high-volume dockets.
Cases filed in high-volume court dockets tend to share a number of common characteristics. The factual and legal issues alleged in the pleadings tend to be highly repetitive. Plaintiffs are likely to be represented by an attorney who often handles a high-volume of similar cases.10 Debt collection plaintiffs are almost always corporate entities rather than individual litigants, and landlord/tenant plaintiffs are often so. Plaintiffs are thus likely to have significantly greater knowledge of formal and informal court practices and greater resources, including access to case-specific and general information, than defendants.

Defendants, in contrast, are likely to be self-represented individuals,11 who are often of low or modest income. These defendants often face additional barriers that impede effective navigation of the civil justice system and their ability to present an effective defense.12 Barriers may include limited literacy; limited English proficiency; cognitive impairments including mental illness; and distrust of the courts based on prior experience or upbringing in a different culture. Many defendants are uncomfortable with the adversarial process and may adopt a non-linear approach to story narration that does not lend itself well to court proceedings. They are likely to be ill-equipped to handle formal court proceedings, specialized rules of evidence and procedure, complex or technical federal and state laws or rules related to standing, burdens of proof, and the availability of a wide range of defenses, mitigating circumstances, or opportunities for negotiation or settlement.13
Common Problems Experienced in High-Volume Dockets

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

INADEQUATE SERVICE

The *Landscape* study notes that “traditional procedures for serving notice in civil lawsuits are functionally obsolete, especially in suits against individuals. Typical methods of serving process are riddled with inaccuracies and inadequacies.” State Attorneys General, including those in New York (2009), California (2013) and Minnesota (2014) have pursued large-scale fraud where hundreds or thousands of persons were not properly served and therefore did not receive notice of the pendency of a complaint against them. These fraudulent practices taint untold numbers of individual cases. Victims of “sewer service” may not be aware that they were sued until garnishments, asset seizures or evictions are attempted or a judgment appears on a credit report, at which time it may be extraordinarily difficult, if not impossible to vacate the judgment and restore the individual to the status quo ante.

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

INSUFFICIENT LITIGANT INFORMATION

Many litigants lack sufficient information to enable them to navigate court processes effectively or efficiently, making each step frustrating both for the litigant and for court staff. Frontline court staff often cannot provide detailed information to help litigants answer a complaint; understand how, when and where to present the facts of their cases; understand what will happen in the courtroom and how
to respond; distinguish between court employees and other players including lawyers for the opposing party; and understand the language of the law and the courts. For their part, court staff members need assistance with self-represented litigants, many of whom need more assistance than staff have time to provide. Staff also need assistance to attend to litigants who are confused, upset, angry or have mental or cognitive impairments. Staff often need coaching to understand non-English speakers and respond in ways that bridge cultural differences; to identify the line between “legal advice” and “legal information;” and to adhere to appropriate boundaries about the litigant’s case (e.g., seeming to challenge the legitimacy of positions, asking questions such as “why did you default?” or “why do you need more time?”).21

OVERCROWDED, CONFUSING COURTROOM ENVIRONMENTS

In high-volume dockets, large numbers of cases are often scheduled for the same block of time. Courtrooms then become very crowded. Docket calls in the courtroom to determine who is present before the judge takes the bench are often fast-paced and hard to hear and understand. Litigants may miss their case call because they don’t hear it, don’t understand what is required of them, don’t recognize their case by number or plaintiff name, or because their name is mispronounced. They can become distracted by competing activities such as loud interruptions from counsel looking for opposing parties. Default judgments are often sought and entered quickly after an apparent lack of response.22

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

LACK OF EXPLANATIONS CONCERNING THE ROLE OF PLAINTIFF COUNSEL

The behavior of plaintiffs’ attorneys in the courtroom can lead to coerced or misunderstood settlements. Attorneys who regularly handle landlord/tenant or consumer debt cases in significant volume may occupy desks or places in the well of the court, hallways, or public areas adjacent to the courtroom. Sometimes the positioning of their desks suggests to a newcomer that they have an official court role. To move cases along, judges may encourage parties to return to the hallway to explore settlement possibilities. Litigants often read this as judicial pressure to settle23 or they may unnecessarily acquiesce to opposing counsel demands because they mistakenly assume that the attorney with whom they are speaking is connected to the court. Studies have documented repeated instances of lawyers violating the ethical rules against advising unrepresented opponents, or misrepresenting the law.24 This practice has been well documented for years in both densely populated urban areas and smaller communities.25

As a result of the hallway negotiations, judges often do not obtain complete information from both sides to ensure a legally correct judgment on the facts and the law. When presenting a settlement for court review, attorneys opposing self-represented litigants tend to dominate the courtroom colloquy.26 Self-represented litigants also may not appreciate the far-reaching implications of choices in how a case is resolved and recorded in court records when they agree to settle (e.g., dismissal, entry of judgment).27
SELF-REPRESENTED LITIGANT DIFFICULTIES AT TRIAL

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

PROBLEMS SPECIFIC TO CONSUMER DEBT COLLECTION CASES

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

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

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

Exacerbating the legal insufficiencies of the claims themselves, well-documented instances of sharp litigation practices on the part of some debt collection attorneys may also serve to keep relevant information from the trial judge. For example, some debt collection attorneys do not expect defendants to appear in court on the hearing date, and when defendants do appear, the attorneys frequently claim lack of preparedness and seek continuances that are costly for litigants and inefficient for courts.

There have been documented instances of recurrent choice of inconvenient forums or improper venue by the same high-volume collection attorneys. Some high-volume collection attorneys have engaged in documented practices of “robo-signing” including automated signing of incorrect or false affidavits, inclusion of unlawful rates of interest and claims for improper fees. Debt collectors also have high rates of non-compliance with state bonding requirements, which in some jurisdictions provide a defense or an affirmative counterclaim in response to the collection effort.
Recommendations

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

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

RECOMMENDATION 1:
Ensure that Constitutional notice requirements are met.38

- Require or incentivize process servers to use and document GPS records and smartphone photographs to document service location and time. Such systems should have protections against forgery, such as systems that are proprietary to the courts and capable of independently verifying real-time upload locations. If requiring use of GPS documentation exceeds a court's rule-making authority,39 the court could incentivize use of such proof through a rule that would confer a presumption of validity for service that is supported by GPS documentation. Note that some process servers are using their capacity to “geotag” as a marketing device that provides additional assurance of the validity of service, reinforcing the reasonableness of such a requirement.40

- Utilize a procedure such as that adopted in New York City that requires plaintiffs in consumer debt collection cases to provide the court with a stamped envelope addressed to the defendant with a return address to the Clerk of the Court. The envelope contains a standardized notice of the lawsuit, which the court mails. The Court will not enter a default judgment in instances where the notice is returned to the court as undeliverable, addressee unknown, etc.41

- Conduct random audits; announce the fact that the court will be doing this periodically.42

- Institute penalties for improper service, such as: impose court and other costs incurred by opposing party and the court as a result of moving forward with cases in which the plain-tiff had reason to know that service was not properly effectuated; post notices of entities or persons who purposefully or routinely engage in inadequate service in prominent places in the courthouse and in local legal publications or newspapers.

- Require parallel electronic service via court-controlled e-filing portals to allow and confirm electronic delivery and acknowledgment of receipt of summons, complaint and other documents for parties with verifiable smart phone numbers or email accounts.

- Encourage actions of consumer protection agencies and other policymakers, including legislators, to examine the issue of inadequate service and the desirability of additional protections.

- In jurisdictions that require licensing or bonding of professional process servers, maintain and post lists of licensed entities. Refuse to accept service from professional process servers who are unlicensed or who have not documented that they have paid the required bond.
• Notice of the availability of such services should accompany the first communication from the court; perhaps required as a form with service of the complaint or summons.

• Inform litigants that they may seek reasonable accommodations for physical or mental disabilities with the first court communication. Provide defendants with a form to indicate that they have special needs that require a reasonable accommodation or assistance.

• Notices and information should be available in languages that are spoken by significant numbers of litigants and community members.

• Services should be available on-site and remotely, including web-based and potentially at off-site, community-based locations. Web-based services should include an interactive portal, where a court employee or other informed person provides interactive guidance. The court, alone or in partnership with others, could develop webinars or other canned presentations on common questions or concerns.

• The information should include a step-by-step guide to how particular court processes work. Such a presentation could be offered in video form with an opportunity to select a language preference.

• The information should include sources for additional legal assistance in the community.

• In light of observations that unrepresented individuals often have difficulty using self-help materials, consider “reimagined” tools that draw from other disciplines and take into account other impediments that self-represented persons face, including cognitive, psychological and emotional challenges. Use simple illustrations to explain court layout, logistics and players.

• Deliver clinics or workshops on-site and/or in the community on the basics of relevant laws and procedures (e.g., landlord-tenant; debt collection) and how the court system works. For example, the Los Angeles Superior Court system offers consumer debt workshops at two of its courthouses which are conducted by legal aid organizations and a county consumer protection agency. Court clerk's offices and self-help centers throughout the county distribute flyers and information about the workshops. They also provide workshops for both tenants and landlords (separately). The workshops for landlords are organized to guide participants through each stage of the litigation process.
Develop an automated system that takes the litigant through a series of steps (guided pathway) starting with filing a complaint and an answer. Based on “Turbo Tax” and Access to Justice models, the system could achieve multiple functions: (1) initial triage - placing a matter into the correct docket or pathway; (2) increased adequacy of filings - requiring completion of standardized forms that require the plaintiff to establish basic service and standing requirements; (3) assistance with answers, including standardized questions that lead to the inclusion of common defenses or counterclaims. The assistance should include an explanation of next steps, options and choices, such as whether the litigant wants a jury trial. This tool could be made available on the Internet and accessible after initial filing/response as a private portal, so that litigants could continue to handle much of their case remotely. Although such an automated “triaging” system may be well suited to high-volume dockets where there tends to be an identifiable universe of issues and defenses, some litigants may have difficulty using such a system. Therefore, a qualified person should be available to assist those for whom such a system is difficult and a bailout option for persons who cannot use it or lack reliable access to a computer. The system should be accessible in jurisdiction appropriate multiple languages.

• Notify litigants of court dates and other deadlines via text messaging.

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

RECOMMENDATION 4:
Develop opportunities for optional remote responses and hearings.46

• Develop on-line systems for pre-litigation resolution of disputes incorporating user friendly plain language systems such as HiiL.org’s Rechtwijzer 2.0 online dispute resolution platform now being implemented for use in the Netherlands and England.

• Provide assisted access to such systems at court-authorized locations for parties otherwise unable to access or use the systems on their own and provide a “bailout” option for persons whose circumstances (e.g., disability, cultural background, lack of reliable computer access) preclude effective use of such systems.

• Develop systems, including periodic evaluation or monitoring by persons who are neither court personnel nor associated with either party, to ensure that the above systems are not manipulated to coerce or mislead less sophisticated litigants.

• Develop user-friendly capacity for self-represented litigants to file and answer complaints online. Integrate with the triaging system described above. Remote filing opportunities may enable litigants to avoid trips to the courthouse and facilitate expeditious processing by court personnel.

• For cases or hearings that are procedural or involve very few witnesses or documents, provide opportunities for remote appearances through videoconferencing, Skype, Facetime or other online mechanisms. Work with community–based resources, such as libraries, to provide appropriate spaces where litigants who otherwise lack access to technology could participate in hearings remotely. Consider training a cadre of laypersons to assist such litigants with using the technology (a remote version of the Court Navigator pilot described in note 63, below).
highly truncated version of the “fair, reasonable and adequate” determination judges make in approving a class action settlement. Such a review could be integrated readily into a Court Navigator type program.

• Give litigants the opportunity to seek legal guidance from an on-site or immediately accessible on-line resource regarding settlement/mediation process and results before final agreement is reached. See infra at p. 17 (Recommendation 12).

• Organize dockets so as not to benefit any category of litigant (for example, volume-driven attorneys) at the expense of other litigants and attorneys. Scheduling cases at pre-designated intervals instead of requiring everyone to appear all at once should benefit litigants and court personnel, including interpreters.

• Provide heightened review by a judge or court staff attorney of proposed settlement agreements that exceed the normal ranges of outcomes before judgment can be finalized.

• Provide clear physical separation of counsel from court personnel and services (e.g., no counsel desks, no negotiations with self-represented opposing parties in the well of the courtroom; no storage of collection attorney file boxes in courtroom).

• Clear signage should reinforce physical separation of court personnel and counsel.

• Provide standardized guidelines to all litigants and counsel regarding how settlement discussions may be conducted and the consequences of settlement. Affirm that litigants have the right to trial in a way that doesn’t suggest that going to trial is something to be feared. Make it clear that the lawyers are not court personnel.

• Adopt a program like New York City's Court Navigator Program that includes making volunteer assistance available to self-represented litigants for “hallway” settlement discussions. See infra at p. 17 (Recommendation 12).

• Before accepting settlements, judges should ascertain that both parties understand what they are signing and its implications. It might be helpful to develop a standard set of protocols/questions that both sides answer orally based on clear criteria and incorporating information to avoid common misunderstandings. The inquiry might be analogous to the inquiry a judge makes before accepting a plea in a criminal case or a
RECOMMENDATION 7:
Develop an electronic or other user-friendly “sign in” system to reduce possibility that a litigant will fail to respond when case is called.

RECOMMENDATION 8:
Establish statewide procedures and forms for standard filings and consistent venue (e.g., avoid concurrent jurisdiction of multiple courts in same system).49

Standardized forms should:

• Be available online, at court and at other sites where litigants can receive free assistance.50

• Use plain English.

• Include checklists for standing and other basic claim elements, potential common defenses, and ability to assert counterclaims.51

• Include form discovery requests (including requests to conduct discovery where not available as a matter of right).
RECOMMENDATION 9:
Provide adequate access for persons with limited English proficiency.

• Multilingual notice on each point of contact with the court (summons, complaint, subpoena, etc.) in jurisdictions where there is a significant non-English speaking population.
• Multilingual signage at the courthouse.
• Basic forms should be available in multiple languages.
• Staff in self-help centers should be able to access language assistance promptly.
• Front-line staff should be able to communicate with litigants in widely spoken languages in addition to English. Have adequate access to on-demand telephone interpreter services for infrequently encountered languages.
• First filers should be required to provide known language information about any party at time of filing. Courts should use the information to provide the appropriate notice and language-sensitive scheduling, where possible.
• Institute simple interpreter request processes. Process should not be dependent on request of litigant but should be used by court personnel and judges when it is needed.
• Qualified language assistance should be free in all cases involving LEP parties or witnesses who complete an IFP form, including mediations, settlement conferences, other ancillary proceedings and court services.
• Courts should not use relatives, opposing parties, friends, or other “casual interpreters.” Courts must never use children to interpret.
• Courts should seek to avoid delays and continuances to obtain interpreters, so that LEP litigants do not make unnecessary trips to court and so court time is not wasted.
• Judges and other court personnel should receive cultural competency training that includes ways non-English speakers or persons from different cultures narrate events.
• Courts should explore high quality video remote interpreting systems, especially for languages other than Spanish and for courts located away from high LEP population centers.52
RECOMMENDATION 10:
Enable judges and judicial staff to have immediate electronic access to case records to enter dispositions and other information into the system from the bench.53

- Electronic records should significantly reduce the risk of lost or misfiled paper. Electronic records should be available online.
- Access to electronic records will enable judges to ascertain a party's adherence to procedural rules before entering an order and could facilitate identification of recurrent problems.
- Electronic records and recordkeeping systems could simplify and speed up communications between the court and litigants/attorneys.
Long and complex legal text about the process of civil justice and the role of judges. Includes recommendations for training judges on cultural competency, mental capacity, and procedural aspects of civil cases. The text also suggests strategies for simplifying legal processes and improving communication with self-represented litigants.

**RECOMMENDATION 11:** Provide training that enables judges to effectively guide self-represented litigants.

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

- Review order and protocols of an evidentiary hearing at the beginning of hearing.
- Explain elements of claims and defenses that each side will need to demonstrate to get the relief they are seeking.
- Explain the burden of proof and what that means in simple, lay terms.
- Explain the kind of evidence that may or may not be considered. Consider rules that emphasize weight, rather than traditional technical standards of "admissibility."
- Permit litigants to offer narrative testimony.
- Question self-represented litigants to obtain general information about litigant's story (claims/defenses).
- Avoid questions that coerce self-represented litigants to admit liability or settle.
- Assist self-represented litigants to establish the foundational requirements of claims and defenses by probing for the facts when they are not otherwise clear.

- Consider a standard interrogatory form that judges would follow to establish entitlement to claim and whether defenses exist. Given limited or no discovery in many jurisdictions, judges don't get benefit of developed facts.
- Provide training on cultural competency and mental capacity/disability.
RECOMMENDATION 12:
Foster opportunities for self-represented litigants to secure assistance, including “unbundled representation” for all stages of the litigation process.

Many of the problems identified in this document would be eliminated or substantially reduced if both parties to a dispute were represented by lawyers. Courts can play a helpful role in facilitating opportunities that make counsel available to persons who want counsel in civil matters but are unable to afford representation. We encourage courts to collaborate with stakeholders to secure access to representation for civil litigants. We also recommend that courts continue to develop robust collaborations with legal aid and other providers to facilitate informed and balanced case development, presentation and resolution. Examples include:

- Subject-specific self-help centers (e.g., consumer, small claims) where volunteer lawyers provide “unbundled” services, assisting with discrete and limited tasks to help litigants successfully navigate the process. The lawyers could enter a limited appearance to develop or draft pleadings (claims, defenses, counterclaims), write/argue motions, respond to or ask for discovery, gather evidence, prepare a litigant about how to talk to the court or present the case; offer trial assistance, review settlement agreements, and/or accompany a litigant to talk to the opposing counsel, etc. The assistance should be available to help a litigant at any stage of the litigant’s case. Information about such opportunities should be made available to litigants at the courthouse and in the first communication(s) the litigant receives about the pendency of a lawsuit. Self-help centers staffed by volunteers and legal aid programs already exist in some state courts (e.g., Superior Court of the District of Columbia); this recommendation would broaden the scope of services such centers typically provide.

- New York City’s “Court Navigator Program,” launched as a pilot project in 2014, where college students, law students and other volunteers assist self-represented litigants in housing court proceedings, including helping litigants explain facts to judges (when the judges ask) and opposing counsel, helping litigants organize their papers, and securing other litigant needs, such as interpreters.

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

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

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

RECOMMENDATION 2:
Provide standardized answer forms, containing check-off list for common defenses, as have been adopted in New York and other jurisdictions.

RECOMMENDATION 3:
Adopt rules awarding defendants costs of preparing for and attending hearings that are cancelled or postponed at the request of collecting party, including lost wages and costs of transportation.

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

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

1. Acknowledgement: This report was produced by a working group comprised of CJI Committee members Hannah E. M. Lieberman and Linda Sandstrom Simard, and Ed Marks (Executive Director, New Mexico Legal Aid).


3. There are other “high-volume” courts outside the scope of the CCJ mandate (e.g., domestic relations), for which some of the recommendations offered here may be applicable.

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

5. For example, a 2008 study estimated that approximately 300,000 eviction cases were filed in New York City annually. Jessica K. Steinberg, Demand Side Reform in the Poor People’s Court, 47 Conn. L. Rev. 741, 750 n.22 (2015) [hereinafter Steinberg] (citing Rashida Abuwala & Donald J. Farole, The Perception of Self-Represented Tenants in a Community-Based Housing Court, 44 Ct. Rev. 56 (2008). This is not only an urban problem. The Quincy Housing Court in Massachusetts handles 1,280 cases annually. James D. Greiner et al., The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future, 126 Harv. L. Rev. 901, 917 (2013) [hereinafter Greiner, Limits]. See also Landscape, supra note 2, at 17–19 (contract and small claims cases comprised 80 percent (as an average) of caseloads in studied jurisdictions). The study notes that some of the small claims cases are also likely debt collection cases. That means that, in those ten jurisdictions alone, debt collection cases numbered in the hundreds of thousands, and landlord/tenant cases exceeded 100,000.

6. Unlike other types of cases discussed in the Landscape, delay and litigation expenses are typically not problems in these courts. Trials are infrequent; discovery rarely occurs and when it does, is limited and streamlined. Greiner, Limits, supra note 5, at 915–16 (noting simplified rules and standardized forms used in landlord/tenant courts and the rarity of evidentiary hearings, including trials). Indeed, the Landscape study indicated a 42 percent higher default rate and a trebling of dismissals over the past two decades, leading the authors to conclude that “very little
formal adjudication is taking place in state courts at all.” Landscape, supra note 2, at 23.

7. Landscape, supra note 2, at 35.

8. See Mary Spector, Litigating Consumer Debt Collection: A Study, 31 Banking & Financial Services Policy Report 1, 3 (2012) [hereinafter Spector, Litigating]; Greiner, supra note 5 at 914, 916, and n. 59. A quick online inquiry reveals the substantial business of record searching, which includes court records. Courts have responded to the increase in efforts to obtain bulk data in varying ways; some charge a fee for the information and restrict its resale. More information can be obtained at the NCSC Privacy/Public Access to Court Records—State Links. Improper garnishments increase the harm of improper practices. Federal Trade Commission, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation ii (2010) [hereinafter FTC Report].


10. See Landscape, supra note 2, at 31–32 (of almost 650,000 cases, plaintiffs were represented by counsel in 92 percent of cases compared with 24 percent of defendants). Greiner, Limits, supra note 5, at 908, n. 26 (over 90 percent of evictors represented by counsel); Carroll Seron et al., The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City Housing Court: Results of a Randomized Experiment, 35 L. & Soc’y Rev. 419, 421 (2001) (indicating that 98 percent of landlords had legal representation compared to 12 percent of tenants). See also Mary Spector, Defaults and Details Exploring the Impact of Debt Collection Litigation on Consumers and Courts, 6 Va. L & Bus. Rev. 257, 285 (2011) [hereinafter Spector, Debt, Defaults & Details] (noting the concentration of cases in the hands of a few high-volume law firms).

11. The vast majority of tenants are not represented by counsel. See Landscape, supra note 2, at 32; see also Steinberg, supra note 5, at 751. Among the statistics cited in the article, a 2008 study revealed that 88 percent of tenants in New York City did not have counsel, while 98 percent of their landlords were represented. Id. at n. 23, 24 (with similar statistics for other jurisdictions including Maine, California, New Hampshire and Illinois). In Maryland, a 2011 report indicated that 95 percent of tenants – approximately 601,751 litigants – were self-represented. Id.

12. Steinberg, supra note 5, at 758–59 (“Tenants with mental disabilities, victims of domestic violence, overwhelmed single mothers, non–English speakers, and the mentally ill flood the courts and exacerbate the inadequacy of self-representation;” “Even in courts where pro se litigants are the rule rather than the exception, judges and other court players routinely disregard the narrative–style testimony of unrepresented litigants…”); see also id. at 756 “[In Baltimore Housing Court] … judges typically reject the way pro se litigants speak – through narrative – and automatically deem their stories legally irrelevant;” Paris R. Baldacci, Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City’s Housing Court, 3 Cardozo Pol’y & Ethics J.659, 662–665 (2006) [hereinafter Baldacci].

13. For example, landlord tenant cases may require application of federal and states statutes, regulations and common law involving a variety of types of housing (federal subsidies, public housing, private landlord–tenant, condominium). The wide ambit of issues addressed in landlord-tenant disputes can include non-payment of rent; substandard conditions; accommodations for persons with disabilities; state laws that protect rights of first purchase; relocation assistance; or the obligations of governmental subsidy providers, to name a few. See also Greiner, Limits, supra note 5, at 915 (“The substantive law applicable in summary eviction cases bears notable complexity. Sources of relevant law include federal statutes, federal
regulations, state statutes, state regulations, and state common law. Content includes, for example, non-waivable warranties, allocations of duties that can be shifted only by means of written agreements, dependent covenants, and procedural requirements regarding the service and content of the ‘notice to quit,’ the initial document the would-be evictor must serve on the occupant as a precursor to a formal court action.

14. Landscape, supra note 2, at 2.

15. See, e.g., Press Release, The Office [Minnesota] Attorney General Lori Swanson, Attorney General Swanson Sues Legal Process Server for Engaging in “Sewer Service,” (Nov. 6, 2014); Press Release, Attorney General Cuomo Announces Arrest of Long Island Business Owner for Denying Thousands of New Yorkers Their Day in Court, (Apr. 14, 2009) (also announced intent to sue law firm that used the process server to serve over 28,000 summons and complaints); Press Release, Attorney General Kamala D. Harris Announces Suit Against JP Morgan chase for Fraudulent and Unlawful Debt–Collection Practices (May 9, 2013); See also People v. Zmod Process Corp. DBA Am. Legal Process & Singler, Index No. 2009–4228 (Erie County Sup. Ct., Apr. 2009) (civil suit alleged more than 100,000 instances of sewer service in New York. Defendants thereby lost their opportunity to defend and had default judgments entered against them). People v. Singler & Zmod Process Corp. dba Am. Legal Process, Inc. (Apr. 2009) (felony complaint); In re Pfau v. Forster & Garbus et al., Index No. 2009–8236 (Erie County Sup. Ct., July 2009) (civil petition to vacate default judgments obtained against consumers in debt collection cases filed against numerous attorney collectors who used American Legal Process to serve process and obtained default judgments in New York); MFY Legal Services, Justice Disserved: A Preliminary Analysis of the Exceptionally Low Appearance Rate by Defendants in Lawsuits Filed in the Civil Court in the County of New York, (2008) (personal service achieved in only six percent of civil debt collection cases in King and Queen Counties, NY).

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

17. FTC Report, supra note 8, at 7 (estimates from 60% to 95%). See also Holland, Peter A., “Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers,” University of Maryland Francis King Carey School of Law Legal Studies Research Paper No. 2014–13 [hereinafter Holland], at 192.

18. Landscape, supra note 2, at 26.

19. Spector, Debt, Defaults and Details, supra note 10, at 272; Spector, Litigating, supra note 8, at 3. Federal and state laws may provide defenses. Forty-two states supplement the federal Fair Debt Collection Act with legislation governing debt collection. Id. at 2.

20. Spector, Debts, Defaults and Details, supra note 10, at 263.


23. See, e.g., Russell Engler, Out of Sight and Out of Line: The Need for Regulation of Lawyers’ Negotiation
28. At the time of the bulk sale, the buyer typically acquires a computerized record of often hundreds of transactions, with only the names, addresses of consumers, account numbers and total amount allegedly owed. The information is “rarely sufficient to support a judgment against the consumer.” Spector, Debts, Defaults and Details, supra note 10, at 259. See also FTC Report, supra note 8; Spector, Litigating, supra note 8, at 1, 2; Jamie S. Hopkins, Maryland Court Dismisses 3,168 Debt-Collection Cases, Balt. Sun (Oct. 11, 2012) (Maryland court dismissed 3,168 debt collection cases and ordered liens released as part of a class action settlement. The debt collection firm was alleged to have been unlicensed, sued for wrong amounts, sued for debt barred by limitations, and included private social security numbers in public filings. The firm was also ordered to pay penalties and damages.); Jamie S. Hopkins, A Push for More Proof in Debt Collection Lawsuits, Balt. Sun (July 24, 2011); Lippman, C.J., Law Day Remarks: Consumer Credit Reforms (Apr. 30, 2014) [hereinafter Lippman].

29. Id. See also District Council 37, Municipal Employees Legal Services, Debt Collection Abuse: 10 Tips for Working Families 4 (2010)(citing their report that found that debt buyers failed to provide documentation in over 94 percent of the MELS cases in an 18 month period in which a debt buyer sued a consumer; 27 percent were not properly served and 50 percent were beyond the statute of limitations).

30. Lippman, supra note 28 at 2–3 (plaintiff debt buyers file lawsuits “based on little more than boilerplate language and a few fields of data from a spreadsheet. All too often, these credit card debts are several years old, have been resold multiple times, and critical documents like the original credit agreement and account statements are missing. By the time these so-called ‘zombie’ debts show up in court, it is extremely difficult for debtors – 98 percent of whom are unrepresented – to assess the validity of the...
The growth of such specialized courts underscores the extent to which the courts are called upon to address problems that have both legal and non-legal dimensions, as well as individual and community-wide impact. Although beyond the scope of these recommendations and this Report, we encourage courts to examine successful experiments in which courts have joined with community organizations and others to find broad-based solutions to the problems they are eventually called upon to resolve. See, e.g., Judge Henry Nowak, Buffalo Housing Court Reform Project: 2006 Report (2006).

Despite lack of comprehensive national evidence, the FTC had sufficient information to recommend that states strengthen protections against inadequate service. See also, id. at n. 14, 15.

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

See, e.g., Certified Serve (last visited Nov. 11, 2015).

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

FTC Report, supra note 8, at 10, n. 30, noting that such an audit in Cook County, Illinois revealed significant problems.

Greiner, Limits, supra note 5, at 33.
44. Greiner, Engaging, supra note 9.

45. Los Angeles Superior Court Self-Help Center.

46. This would avoid loss of work time, avoidance of costly transportation, promote efficiency for all parties. It may only be suitable if persons have adequate access to, and familiarity/comfort with technology, and therefore should be offered as an option and not as a requirement. See FTC Report, supra note 8, at 13.

47. See FTC Report, supra note 8, at 13, n. 12. (noting caveats).

48. Id. at 14, 16; see also Engler, supra note 23, at i, 43-44.

49. See, e.g., Virginia’s statewide forms for landlord-tenant and consumer case. See also Mass. Unif. Summ. Process R.


52. See generally Standards for Language Access in Courts (Am. Bar Assoc.).


54. Discussed in greater length at Baldacci, supra note 12, at 670-71.

55. Id. at 671-72. In Turner, the Supreme Court has suggested that, where liberty or other constitutionally-protected interests are at stake, such increased “judicial engagement” may be required to ensure that self–represented litigants receive adequate procedural safeguards. Turner v. Rogers 131 S. Ct. 1507 (2011). See also Steinberg, supra note 5, at 790–92 (arguing that explosion of self-representation requires judges to assume burdens of litigation traditionally left to parties including notice, availability of defenses, how to elicit factual information, making sure that required findings can be made.

56. See Baldacci, supra note 12, at 671–72 (citing Pro Se Implementation Committee of the Minnesota Conference of Judges; Idaho Committee to Increase Access to the Courts Protocol).

57. Steinberg, supra note 5, at 747; Baldacci, supra note 12, at 680–84.

58. See Steinberg, supra note 5, at 756.


60. See Greiner, Limits, supra note 5, at 903 (randomized study found having a lawyer makes a difference in retention of housing and increased positive outcomes for tenants); see also Seron, supra note 10 (only 22 percent of represented tenants had final judgments against them, compared with 51 percent of tenants without legal representation). The Greiner study also found that defendants’ representation did not significantly add to the burden on the court in terms of number of motions or rulings, although it did increase the time the case the case took. Id. at 932, et seq. The FTC also notes that access to counsel would improve outcomes in debt collection cases and provides examples of courthouse-based programs that exist in several states (New York, Illinois and Massachusetts) and are often staffed by a combination of pro bono and legal services attorneys. Such programs are most effective when they offer litigants full representation or meaningful ongoing guidance over the entire course of their case, rather than simply helping them complete an initial complaint or answer. See also Rosmarin, Tr. V at 50–52; but see Debski, Tr.V at 29 (claiming that such programs may unethically involve poaching clients or soliciting clients at the courthouse steps while they’re in an emotional state).
61. We encourage incorporating explicit approval in Rules of Professional Responsibility for this type of “unbundled assistance.”

62. See Steinberg, supra note 5, at 785 (the availability of “unbundled” services tends to drop off as litigation continues; litigant satisfaction with unbundled service declines over time as cases progress and become more complex). See also FTC Report, supra note 8, at 13.

63. See, e.g., New York City Housing Court, Court Navigator Program (last visited, Nov. 11, 2015) The program has an online manual which could provide a model.


65. Based on Spector, Litigating, supra note 8, at 5–6 (discussing rampant violations in Texas).


67. See, e.g., FTC Report, supra note 8, at 14, 22 (with example from Blair County, PA judge who reported that if collector fails to appear at mandatory conciliation conference, case is dismissed with prejudice); Mass. Ann. Laws. Unif. Small Claims R. 7(c) (judgment for defendant must be entered if defendant appears and plaintiff does not appear, is not ready to proceed and no good cause for continuance).


70. FTC Report, supra note 8, at 35.
CONFERENECE OF CHIEF JUSTICES
CONFERENCE OF STATE COURT ADMINISTRATORS

Resolution 8

In Support of the Call to Action and Recommendations of the Civil Justice Improvements Committee to Improve Civil Justice in State Courts

WHEREAS, civil litigation in the United States is a matter of high importance to protect access to justice, public trust and confidence, and the constitutional role of the courts; and

WHEREAS, in 2011 the Conference of Chief Justices adopted Resolution 4, In Support of State Action Plans to Reduce the Costs Associated with the Prosecution and Defense of Ordinary Civil Cases; and

WHEREAS, in 2013 the Conference of Chief Justices adopted Resolution 5, to establish a Civil Justice Improvements Committee charged with (1) developing guidelines and best practices for civil litigation based upon evidence derived from state pilot projects and from applicable research, implemented rule changes, and stakeholder input; and (2) making recommendations as necessary in the area of case flow management for the purpose of improving the civil justice system in the state courts; and

WHEREAS, the Civil Justice Improvements Committee, after undertaking two years of research, found that:

- Over the last several decades there has been a dramatic rise in self-represented litigants. Now, in more than 75% of civil cases, at least one party is self-represented; and

- High-value tort and commercial contract disputes are only a small proportion of civil caseloads. Instead, the vast majority of civil cases are debt collection, landlord/tenant, mortgage foreclosure, and small claims cases involving relatively modest monetary claims; and

- For most litigants, the costs of litigating a case through trial would greatly exceed the monetary value of the case; and

- The vast majority of civil cases are disposed of without adjudication on the merits; and

- Some litigants with meritorious claims and defenses are effectively denied access to justice because it is beyond their financial means to litigate. Others, who have the resources and legal sophistication to do so, are opting for private alternatives to the civil justice system; and
o Our legal system promises the just, speedy, and inexpensive resolution of civil cases. Too often, however, it does not live up to that promise; and

WHEREAS, the Civil Justice Improvements Committee, after two years of intensive deliberations, made principled and practical recommendations to restore faith in the civil justice system by reducing cost and enhancing its fairness and efficiency; and

WHEREAS, the Recommendations are founded on several core premises:
  o The courts must take responsibility for managing civil cases, with the expected cooperation of the lawyers and the parties, from the time of filing to disposition; and
  o Responsibility for ensuring that cases are moved fairly and expeditiously to disposition rests not solely with the trial judge, but with the “court,” including staff and technological resources; and
  o Civil cases should be assigned immediately at filing to a case management pathway that provides the amount of judicial attention needed to resolve all disputed issues in a just, timely, and cost-effective way; and
  o Effective rules, procedures, business practices, and innovative uses of technology are especially critical to ensure just, speedy, and inexpensive resolutions in uncontested cases and cases involving large asymmetries in legal expertise;

NOW, THEREFORE, BE IT RESOLVED that Conference of Chief Justices and Conference of State Court Administrators strongly endorse the Recommendations of the Civil Justice Improvements Committee as set out in the “Call to Action: Achieving Civil Justice for All”; and

BE IT FURTHER RESOLVED that Conference of Chief Justices and Conference of State Court Administrators encourage their members to consider the “Call to Action: Achieving Civil Justice for All” as a worthy guide for their own state endeavors to improve the delivery of civil justice for all; and

BE IT FURTHER RESOLVED that Conference of Chief Justices and Conference of State Court Administrators encourage each state to develop and implement a civil justice improvements plan to improve the delivery of civil justice; and

BE IT FURTHER RESOLVED that Conference of Chief Justices and Conference of State Court Administrators direct the National Center for State Courts to take all available and reasonable steps to assist court leaders who desire to implement civil justice improvements.

Adopted as proposed by the CCJ Civil Justice Improvements Committee at the CCJ/COSCA Annual Meeting on July 27, 2016.
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state chief justices offer a blueprint for building citizen-centered courts for the 21st century
Many remember the alarming call to mission control from the Apollo 13 spacecraft crew. “Houston, we’ve had a problem.” Well, dear *Judicature* readers, we denizens of the judicial system have a very serious problem also. While we firmly believe Americans deserve a civil legal process that can fairly and promptly resolve disputes for everyone — rich or poor, individuals or businesses, in matters large or small — our civil justice system too often fails to meet this standard. Runaway costs, delays, and complexity are undermining public confidence and denying people the justice they seek. This article describes recent efforts taken by the Conference of Chief Justices (CCJ) to effectively address the shortcomings of our civil justice system.

**BACKGROUND**

Civil justice is relevant to all aspects of our lives and society, from public safety to fair housing to the smooth conduct of business. For centuries Americans have relied on an impartial judge or jury to resolve conflicts according to a set of rules that govern everyone equally. This framework is still the most reliable and democratic path to justice — and a vital affirmation that we live in a society where our rights are recognized and transparently protected. Yet navigating civil courts, as they operate now, can be daunting. Those who enter the system confront a maze-like process that costs too much and takes too long. While three-quarters of judgments are smaller than $5,200, the expense of litigation often greatly exceeds that amount. Small, uncomplicated matters that make up the overwhelming majority of cases can take years to resolve. Fearing the
process is futile, many give up on pursuing justice altogether.

We have come to expect the services we use to steadily improve in step with our needs and new technologies. But in our civil justice system, these changes have largely not arrived. Many courts lack any of the user-friendly support we rely on in other sectors. To the extent technology is used, it simply digitizes a cumbersome process without making it easier. If our civil courts do not change how they work, they will meet the fate of travel agents or hometown newspapers, entities undone by new competition and change how they work, they will meet the fate of travel agents or hometown newspapers, entities undone by new competition and from other applicable research, and informed by implemented right sizing the process to meet the needs of cases, early identification of issues for resolution, the role of discovery, and civil case resolution, whether by way of settlement or trial.

Confronted with these profound realities, the CCJ determined that it is imperative to examine the civil justice system holistically, consider the impact of the recent civil justice innovations, and develop a comprehensive set of recommendations for civil justice reform to meet the needs of the 21st century. At its 2013 Midyear Meeting, the CCJ adopted a resolution authorizing the creation of a special Civil Justice Improvements (CJI) Committee. The committee was charged with “developing guidelines and best practices for civil litigation based upon evidence derived from state pilot projects and from other applicable research, and informed by implemented rule changes and stakeholder input; and making recommendations as necessary in the area of caseflow management for the purpose of improving the civil justice system in state courts.”

With the assistance of the National Center for State Courts (NCSC) and IAALS, the Institute for the Advancement of the American Legal System, the CCJ named a diverse 23-member committee, chaired by Oregon Chief Justice Thomas Balmer, to research and prepare the recommendations contained in this article. Committee members included key players in the civil litigation process, including trial and appellate court judges, trial and state court administrators, experienced civil lawyers representing the plaintiff and defense bars and legal aid, representatives of corporate legal departments, and legal academics.

The CJI Committee followed a set of nine fundamental principles to guide the development of recommendations: demonstrable impact on cost and delay; consistent with existing substantive law; protect right to a jury trial and procedural due process; capable of implementation across legal cultures and practices; supported by data, committee members’ experience, and “extreme common sense”; neutrality toward party identification, litigant type, and representation status; promote efficient use of resources and fairness; enhance public confidence.

With financial support from the State Justice Institute and substantive expertise and logistical support from NCSC and IAALS, the CJI Committee worked tirelessly over more than 18 months, reviewing existing research on the state of the civil justice system.

Two subcommittees undertook the bulk of the committee’s work. Judge Jerome Abrams, an experienced civil litigator and now trial court judge in Minnesota, led the Rules & Litigation Subcommittee. That subcommittee focused on the role of court rules and procedures in achieving a just and efficient civil process, including developing recommendations regarding court and judicial management of cases, right sizing the process to meet the needs of cases, early identification of issues for resolution, the role of discovery, and civil case resolution, whether by way of settlement or trial.

Judge Jennifer Bailey, the administrative judge of the Circuit Civil Division in Miami with 24 years of experience as a trial judge, chaired the Court Operations Subcommittee. That subcommittee examined the role of the internal infrastructure of the courts — including routine business practices, staffing and staff training, and technology — in moving cases towards resolution, so that trial judges can focus their attention on ensuring fair and cost-effective justice for litigants. The subcommittee also considered the special issues of procedural fairness that often arise in “high volume” civil cases such as debt collection, landlord-tenant, and foreclosure matters, where one party often is not represented by a lawyer.

The subcommittees held monthly conference calls to discuss discrete issues related to their respective work. Individual committee members circulated white papers, suggestions, and discussion documents. Spirited conversations led members to reexamine long-held views about the civil justice system, in light of the changing nature of the civil justice caseload, innovations in procedures and operations from around the country, the rise of self-represented litigants, and the challenges and promise of technology. The full CJI Committee met in four plenary sessions over the course of this project to share insights and preliminary proposals. Gradually, committee members came to consensus on the recommendations set out in this article.

SOBERING REALITIES

To inform the CJI Committee’s deliberations, the NCSC undertook a multijurisdictional study of civil caseloads in state courts. Entitled The Landscape of Civil Litigation in State Courts, the study
focused on nondomestic civil cases disposed between July 1, 2012, and June 30, 2013, in state courts exercising civil jurisdiction in 10 urban counties. The dataset, encompassing nearly one million cases, reflects approximately five percent of civil cases nationally.

The Landscape findings presented a very different picture of civil litigation than most lawyers and judges envisioned based on their own experiences and on common criticisms of the American civil justice system. Although high-value tort and commercial contract disputes are the predominant focus of contemporary debates, collectively they comprised only a small proportion of the Landscape caseload. Nearly two-thirds (64 percent) of the caseload was contract cases. The vast majority of those were debt collection, landlord/tenant, and mortgage foreclosure cases (39 percent, 27 percent, and 17 percent, respectively). An additional sixteen percent of civil caseloads were small claims cases involving disputes valued at $12,000 or less, and nine percent were characterized as “other civil” cases involving agency appeals and domestic or criminal-related cases. Only seven percent were tort cases and one percent were real property cases.

The composition of contemporary civil caseloads stands in marked contrast to caseloads of two decades ago. The NCSC undertook secondary analysis comparing the Landscape data with civil cases disposed in 1992 in 45 urban general jurisdiction courts. In the 1992 Civil Justice Survey of State Courts, the ratio of tort to contract cases was approximately 1:1. In the Landscape dataset, this ratio had increased to 1:7. While population-adjusted contract filings fluctuate somewhat due to economic conditions, they have generally remained fairly flat over the past 30 years. Tort cases, in contrast, have largely evaporated.

To the extent that damage awards recorded in the final judgment are a reliable measure of the monetary value of civil cases, the cases in the Landscape dataset involved relatively modest sums. In contrast to widespread perceptions that much civil litigation involves high-value commercial and tort cases, only 0.2 percent had judgments that exceeded $500,000, and only 165 cases (less than 0.1 percent) had judgments that exceeded $1 million. Instead, 90 percent of all judgments entered were less than $25,000; 75 percent were less than $5,200.

Hence, for most litigants, the costs of litigating a case through trial would greatly exceed the monetary value of the case. In some instances, the costs of even initiating the lawsuit or making an appearance as a defendant would exceed the value of the case. The reality of litigation costs routinely exceeding the value of cases explains the relatively low rate of disputes involving any form of formal adjudication. Only four percent of cases were disposed by bench or jury trial, summary judgment, or binding arbitration. The overwhelming majority (97 percent) of these were bench trials, almost half of which (46 percent) took place in small claims or other civil cases. Three-quarters of judgments entered in contract cases following a bench trial were less than $1,800. This is not to say these cases are insignificant to the parties. Indeed the stakes in many cases involve fundamentals like employment and shelter. However, the judgment data contradicts the assumption that many bench trials involve adjudication of complex, high-stakes cases.

Most cases were disposed through a nonadjudicative process. A judgment was entered in nearly half (46 percent) of the Landscape cases, most of which were likely default judgments. One-third of cases were dismissed (possibly following a settlement although only 10 percent were explicitly coded by the courts as settlements). Summary judgment is a much less favored disposition in state courts compared to federal courts. Only one percent were disposed by summary judgment. Most of these would have been default judgments in debt collection cases, but the plaintiff instead chose to pursue summary judgment, presumably to minimize the risk of post-disposition challenges.

The traditional view of the adversarial system assumes the presence of competent attorneys zealously representing both parties. One of the most striking findings in the Landscape dataset, therefore, was the relatively large proportion of cases (76 percent) in which at least one party was unrepresented, usually the defendant. Tort cases were the only case type in which attorneys represented both parties in a majority (64 percent) of cases. Surprisingly, small claims dockets in the Landscape courts had an unexpectedly high proportion (76 percent) of plaintiffs who were represented by attorneys. This suggests that small claims courts, which were originally developed as a forum for self-represented litigants to access courts through simplified procedures, have become the forum of choice for attorney-represented plaintiffs in debt collection cases.

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

In response to these realities, the CJI Committee found that courts must improve how they serve citizens in terms of efficiency, cost, and convenience, and they must make the court system a more attractive option to achieve justice in civil cases. The committee’s recommendations address the contemporary reality of the civil justice system and offer a blueprint for restoring function and faith in a system that is too important to lose. The following pages set forth the CJI Committee’s recommendations and major portions of the accompanying commentaries. The full text of the commentaries, key resources, and appendices are available for downloading at NCSC.org/civil.
RECOMMENDATION 1. Courts must take responsibility for managing civil cases from time of filing to disposition.

1.1 Throughout the life of each case, courts must effectively communicate to litigants all requirements for reaching just and prompt case resolution. These requirements, whether mandated by rule or administrative order, should at a minimum include a firm date for commencing trial and mandatory disclosures of essential information.

1.2 Courts must enforce rules and administrative orders that are designed to promote the just, prompt, and inexpensive resolution of civil cases.

1.3 To effectively achieve case management responsibility, courts should undertake a thorough statewide civil docket inventory.

COMMENTARY

Our civil justice system has historically expected litigants to drive the pace of civil litigation by moving for court involvement as issues arise. This often results in delay as litigants wait in line for attention from a passive court — be it for rulings on motions, a requested hearing, or even setting a trial date. The wait-for-a-problem paradigm effectively shields courts from responsibility for the pace of litigation. It also presents a special challenge for self-represented litigants who are trying to understand and navigate the system. The party-take-the-lead culture can encourage delay strategies by attorneys, whose own interests and the interests of their clients may favor delay rather than efficiency. In short, adversarial strategizing can undermine the achievement of fair, economical, and timely outcomes.

It is time to shift this paradigm. The Landscape of Civil Litigation makes clear that relying on parties to self-manage litigation is often inadequate. At the core of the committee’s recommendations is the premise that the courts ultimately must be responsible for assuring access to civil justice. Once a case is filed in court, it becomes the court’s responsibility to manage the case toward a just and timely resolution. When we say “courts” must take responsibility, we mean judges, court managers, and indeed the whole judicial branch, because the factors producing unnecessary costs and delays have become deeply imbedded in our legal system. Primary case responsibility means active and continuing court oversight that is proportionate to case needs. This right-sized case management involves having the most appropriate court official perform the task at hand and supporting that person with the necessary technology and training to manage the case toward resolution.

At every point in the life of a case, the right person in the court should have responsibility for the case.

RE: 1.1

The court, including its personnel and IT systems, must work in conjunction with individual judges to manage each case toward resolution. Progress in resolving each case is generally tied both to court events and to judicial decisions. Effective caseflow management involves establishing presumptive deadlines for key case stages including a firm trial date. In overseeing civil cases, relevant court personnel should be accessible, responsive to case needs, and engaged with the parties — emphasizing efficiency and timely resolution.

RE: 1.2

During numerous meetings, committee members voiced strong concern (and every participating trial lawyer expressed frustration) that, despite the existence of well-conceived rules of civil procedure in every jurisdiction, judges too often do not enforce the rules. These perceptions are supported by empirical studies showing that attorneys want judges to hold practitioners accountable to the expectations of the rules.
For example, the chart at right summarizes results of a 2009 survey of the Arizona Trial Bar about court enforcement of mandatory disclosure rules.

Surely, whenever it is customary to ignore compliance with rules “designed to secure the just, speedy, and inexpensive determination of every action and proceeding,” cost and delay in civil litigation will continue.

**RE: 1.3**

Courts cannot meaningfully address an issue without first knowing its contours. Analyzing the existing civil caseload provides these contours and gives court leaders a basis for informed decisions about what needs to be done to ensure civil docket progression.

**PART II - PROVIDE EFFECTIVE CASE MANAGEMENT**

**RECOMMENDATION 2.** Beginning at the time each civil case is filed, courts must match resources with the needs of the case.

**COMMENTARY**

Virtually all states have followed the federal model and adopted a single set of rules, usually similar and often identical to the federal rules, to govern procedure in civil cases. Unfortunately, this pervasive one-size-fits-all approach too often fails to recognize and respond effectively to individual case needs.

The one-size-fits-all mentality exhibits itself at multiple levels. Even where innovative rules are implemented with the best of intentions, judges often continue to apply the same set of rules and mindset to the cases before them. When the same approach is used in every case, judicial and staff resources are misdirected toward cases that do not need that kind of attention. Conversely, cases requiring more assistance may not get the attention they require because they are lumped in with the rest of the cases and receive the same level of treatment. Hence the civil justice system repeatedly imposes unnecessary, time-consuming steps, making it inaccessible for many litigants.

Courts need to move beyond monolithic methods and recognize the importance of adapting court process to case needs. The committee calls for a “right sizing” of court resources. Right sizing aligns rules, procedures, and court personnel with the needs and characteristics of similarly situated cases. As a result, cases get the amount of process needed — no more, no less. With right sizing, judges tailor their oversight to the specific needs of cases. Administrators align court resources to case requirements, coordinating the roles of judges, staff, and infrastructure.

With the advent of e-filing, civil cover sheets, and electronic case-management systems, courts can use technology to begin to right size case management at the time of filing. Technology can also help identify later changes in a case’s characteristics that may justify management adjustments.

This recommendation, together with Recommendation 1, add up to an imperative: Every case must have an appropriate plan beginning at the time of filing, and the entire court system must execute the plan until the case is resolved.

**A. TRIAGE CASE FILINGS WITH MANDATORY PATHWAY ASSIGNMENTS**

**RECOMMENDATION 3.** Courts should use a mandatory pathway-assignment system to achieve right-sized case management.

3.1 To best align court management practices and resources, courts should utilize a three-pathway approach: Streamlined, Complex, and General.

3.2 To ensure that court practices and resources are aligned for all cases throughout the life of the case, courts must triage cases at the time of filing based on case characteristics and issues.

3.3 Courts should make the pathway assignments mandatory upon filing.

3.4 Courts must include flexibility in the pathway approach so that a case can be transferred...
THE PATHWAY APPROACH
Differentiated Case Management (DCM)

The Pathway Approach differs from and improves upon DCM in several fundamental respects. The Pathway Approach:

- Relies on case characteristics other than just case type and amount-in-controversy to triage cases onto a presumptive pathway at the time of filing.
- Provides flexibility and continuity by relying on automated case monitoring to assure cases remain on the appropriate pathway as indicated by the need for more or less judicial involvement in moving toward resolution.
- Enables judges to do more substantive casework by relying on trained court staff and technology to assign all cases promptly at filing.

...to a more appropriate pathway if significant needs and circumstances change.

3.5 Alternative dispute-resolution mechanisms can be useful on any of the pathways provided that they facilitate the just, speedy, and inexpensive disposition of civil cases.

COMMENTARY
The premise behind the pathway approach is that different types of cases need different levels of case management and different rules-driven processes. Data and experience tell us that cases can be grouped by their characteristics and needs. Tailoring the involvement of judges and professional staff to those characteristics and needs will lead to efficiencies in time, scale, and structure. To achieve these efficiencies, it is critical that the pathway approach be implemented at the individual case level and consistently managed on a system-wide basis from the time of filing.

Implementing this right-size approach is similar to, but distinct from, differentiated case management (DCM). DCM is a long-standing case-management technique that applies different rules and procedures to different cases based on established criteria. In some jurisdictions, the track determination is made by the judge at the initial case-management conference. Where assignment to a track is more automatic or administratively determined at the time of filing, it is usually based merely on case type or amount in controversy. There has been a general assumption that a majority of cases will fall in a middle track, and it is the exceptional case that needs more or less process.

While the tracks and their definitions may be in the rules, it commonly falls upon the judges to assign cases to an appropriate track. Case automation or staff systems are rarely in place to ensure assignment and right-sized management, or to evaluate use of the tracking system. Thus, while DCM is an important concept upon which these recommendations build, in practice it has fallen short of its potential. The right-sized case-management approach recommended here embodies a more modern approach than DCM by (1) using case characteristics beyond case type and amount in controversy, (2) requiring case triaging at time of filing, (3) recognizing that the great majority of civil filings present uncomplicated facts and legal issues, and (4) requiring utilization of court resources at all levels, including nonjudicial staff and technology, to manage cases from the time of filing until disposition.

RECOMMENDATION 4. Courts should implement a streamlined pathway for cases that present uncomplicated facts and legal issues and require minimal judicial intervention but close court supervision.

4.1 A well-established streamlined pathway conserves resources by automatically calendaring core case processes. This approach should include the flexibility to allow court involvement and/or management as necessary.

4.2 At an early point in each case, the court should establish deadlines to complete key case stages including a firm trial date. The recommended time to disposition for the streamlined pathway is six to eight months.

4.3 To keep the discovery process proportional to the needs of the case, courts should require mandatory disclosures as an early opportunity to clarify issues, with enumerated and limited discovery thereafter.

4.4 Judges must manage trials in an efficient and time-sensitive manner so that trials are an affordable option for litigants who desire a decision on the merits.

COMMENTARY
Streamlined civil cases are those with a limited number of parties, routine issues related to liability and damages, few anticipated pretrial motions, limited need for discovery, few witnesses, minimal documentary evidence, and anticipated trial length of one to two days. Streamlined pathway cases would likely include these case types: automobile tort, intentional tort, premises liability, tort—other, insurance coverage claims arising out of claims listed above, landlord/tenant, buyer plaintiff, seller plaintiff, consumer debt, contract—other, and appeals from small claims decisions. For these simpler cases, it is critical that the process not add costs for the parties, particularly when a large percentage of cases end early in the pretrial process. Significantly, the Landscape of Civil Litigation informs us that 85 percent of all civil case filings fit within this category.

[ COMPLEX PATHWAY ]

RECOMMENDATION 5. Courts should implement a complex pathway for cases that present multiple legal and factual issues, involve many parties, or otherwise are likely to require close court supervision.
5.1 Courts should assign a single judge to complex cases for the life of the case, so they can be actively managed from filing through resolution.

5.2 The judge should hold an early case-management conference, followed by continuing periodic conferences or other informal monitoring.

5.3 At an early point in each case, the judge should establish deadlines for the completion of key case stages including a firm trial date.

5.4 At the case-management conference, the judge should also require the parties to develop a detailed discovery plan that responds to the needs of the case, including mandatory disclosures, staged discovery, plans for the preservation and production of electronically stored information, identification of custodians, and search parameters.

5.5 Courts should establish informal communications with the parties regarding dispositive motions and possible settlement, so as to encourage early identification and narrowing of the issues for more effective briefing, timely court rulings, and party agreement.

5.6 Judges must manage trials in an efficient and time-sensitive manner so that trials are an affordable option for litigants who desire a decision on the merits.

COMMENTARY
The complex pathway provides right-sized process for those cases that are complicated in a variety of ways. Such cases may be legally complex or logistically complex, or they may involve complex evidence, numerous witnesses, or high interpersonal conflict. Cases in this pathway may include multiparty medical malpractice, class actions, antitrust, multiparty commercial cases, securities, environmental torts, construction defect, product liability, and mass torts. While these cases comprise a very small percentage (generally no more than 3 percent) of most civil dockets, they tend to utilize the highest percentage of court resources.

Some jurisdictions have developed a variety of specialized courts such as business courts, commercial courts, and complex litigation courts. They often employ case-management techniques recommended for the complex pathway in response to long-standing recognition of the problems complex cases can pose for effective civil case processing. While implementation of a mandatory pathway-assignment system may not necessarily replace a specialized court with the complex pathway, courts should align their case-assignment criteria for the specialized court to those for the complex pathway. As many business and commercial court judges have discovered, not all cases featuring business-to-business litigants or issues related to commercial transactions require intensive case management. Conversely, some cases that do not meet the assignment criteria for a business or commercial court do involve one or more indicators of complexity and should receive close individual attention.

[GENERAL PATHWAY]

RECOMMENDATION 6. Courts should implement a general pathway for cases whose characteristics do not justify assignment to either the streamlined or complex pathway.

6.1 At an early point in each case, the court should establish deadlines for the completion of key case stages, including a firm trial date. The recommended time to disposition for the general pathway is 12 to 18 months.

6.2 The judge should hold an early case-management conference upon request of the parties. The court and the parties must work together to move these cases forward, with the court having the ultimate responsibility to guard against cost and delay.

6.3 Courts should require mandatory disclosures and tailored additional discovery.

6.4 Courts should utilize expedited approaches to resolving discovery disputes to ensure cases in this pathway do not become more complex than they need to be.

6.5 Courts should establish informal communications with the parties regarding dispositive motions and possible settlement, so as to encourage early identification and narrowing of the issues for more effective briefing, timely court rulings, and party agreement.

6.6 Judges must manage trials in an efficient and time-sensitive manner so that trials are an affordable option for litigants who desire a decision on the merits.

COMMENTARY
Like the other pathways, the goal of the general pathway is to determine and provide “right-sized” resources for timely disposition. The general pathway provides the right amount of process for the cases that are not simple, but are also not complex. Thus, general pathway cases are those cases that are principally identified by what they are not, as they do not fit into either the streamlined pathway or the highly managed pathway. Nevertheless, the general pathway is not another route to “litigation as we know it.” Like the streamlined cases, discovery and motions for
these cases can become disproportionate, with efforts to discover more than what is needed to support claims and defenses. The goal for this pathway is to provide right-sized process with increased judicial involvement as needed to ensure that cases progress toward efficient resolution.

As with the other case pathways, at an early point in each case courts should set a firm trial date. Proportional discovery, initial disclosures, and tailored additional discovery are also essential for keeping general pathway cases on track.

B. STRATEGICALLY DEPLOY COURT PERSONNEL & RESOURCES

RECOMMENDATION 7. Courts should develop civil case management teams consisting of a responsible judge supported by appropriately trained staff.

7.1 Courts should conduct a thorough examination of their civil case business practices to determine the degree of discretion required for each management task. These tasks should be performed by persons whose experience and skills correspond with the task requirements.

7.2 Courts should delegate administrative authority to specially trained staff to make routine case-management decisions.

COMMENTARY

Recommendation 1 sets forth the fundamental premise that courts are primarily responsible for the fair and prompt resolution of each case. This is not the responsibility of the judge alone. Active case management at its best is a team effort aided by technology and appropriately trained and supervised staff. The committee rejects the proposition that a judge must manage every aspect of a case after its filing. Instead the committee endorses the proposition that court personnel, from court staff to judge, be utilized to act at the “top of their skill set.”

Team case management works. Utah’s implementation of team case management resulted in a 54 percent reduction in the average age of pending civil cases from 335 days to 192 days (and a 54 percent reduction for all case types over that same period) despite considerably higher caseloads. In Miami, team case management resulted in a 25 percent increase in resolved foreclosure cases compared consistently at six months, 12 months, and 18 months during the foreclosure crisis, and the successful resolution of a 50,000-case backlog. Specialized business courts across the country use team case management with similar success. In Atlanta, business court efforts resulted in a 65 percent faster disposition time for complex contract cases and a 56 percent faster time for complex business-tort cases.

RECOMMENDATION 8. For right-size case management to become the norm, not the exception, courts must provide judges and court staff with training that specifically supports and empowers right-sized case management. Courts should partner with bar leaders to create programs that educate lawyers about the requirements of newly instituted case-management practices.

COMMENTARY

Judicial training is not a regular practice in every jurisdiction. To improve — and in some instances reengineer — civil case management, jurisdictions should establish a comprehensive judicial-training program. The committee advocates a civil case-management training program that includes web-based training modules, regular training of new judges and sitting judges, and a system for identifying judges who could benefit from additional training.

Accumulated learning from the private sector suggests that the skill sets required for staff will change rapidly and radically over the next several years. Staff training must keep up with the impact of technology improvements and consumer expectations. For example, court staff should be trained to provide appropriate help to self-represented litigants. Related to that, litigants should be given an opportunity to perform many court transactions online. Even with well-designed websites and interfaces, users can become confused or lost while trying to complete these transactions. Staff training should include instruction on answering user questions and solving user-process problems.

The understanding and cooperation of lawyers can significantly influence the effectiveness of any pilot projects, rules changes, or case management processes that court leaders launch. Judges and court administrators must partner with the bar to create CLE programs and bench/bar conferences that help practitioners understand why changes are being undertaken and what will be expected of lawyers. Bar organizations, like the judicial branch, must design and offer education programs to inform their members about important aspects of the new practices being implemented in the courts.
RECOMMENDATION 9. Courts should establish judicial assignment criteria that are objective, transparent, and mindful of a judge’s experience in effective case management.

COMMENTARY
The committee recognizes the variety of legal cultures and customs that exist across the breadth of our country. Given the case management imperatives described in these recommendations, the committee trusts that all court leaders will make judicial competence a high priority. Court leaders should consider a judge’s particular skill sets when assigning judges to preside over civil cases. For many years, in most jurisdictions, the primary criteria for judicial assignment were seniority and a judge’s request for an assignment. The judge’s experience or training were not top priorities.

To build public trust in the courts and improve case-management effectiveness, it is incumbent upon court leaders to avoid politicization of the assignment process. In assigning judges to various civil case dockets, court leaders should consider a composite of factors including: (1) demonstrated case management skills, (2) litigation experience, (3) previous training, (4) specialized knowledge, (5) interest, (6) reputation with respect to neutrality, and (6) professional standing within the trial bar.

C. USE TECHNOLOGY WISELY

RECOMMENDATION 10. Courts must take full advantage of technology to implement right-size case management and achieve useful litigant-court interaction.

10.1 Courts must use technology to support a court-wide teamwork approach to case management.

10.2 Courts must use technology to establish business processes that ensure forward momentum of civil cases.

10.3 To measure progress in reducing unnecessary cost and delay, courts must regularly collect and use standardized, real-time information about civil case management.

10.4 Courts should use information technology to inventory and analyze their existing civil dockets.

10.5 Courts should publish measurement data as a way to increase transparency and accountability, thereby encouraging trust and confidence in the courts.

COMMENTARY
This recommendation is fundamental to achieving effective case management. To implement right-sized case management, courts must have refined capacities to organize case data, notify interested persons of requirements and events, monitor rules compliance, expand litigant understanding, and prompt judges to take necessary actions. To meet these urgent needs, courts must fully employ information technologies to manage data and business processes. It is time for courts to catch up with the private sector. The expanding use of online case filing and electronic case management is an important beginning — but just a beginning. Enterprises as diverse as commercial air carriers, online retailers, and motor vehicle registrars have demonstrated ways to manage hundreds of thousands of transactions and communications. What stands in the way of courts following suit? If it involves lack of leadership, the committee trusts that these recommendations will embolden chief justices and state court administrators to fill that void.

D. FOCUS ATTENTION ON HIGH-VOLUME AND UNCONTESTED CASES

RECOMMENDATION 11. Courts must devote special attention to high-volume civil dockets that are typically composed of cases involving consumer debt, landlord-tenant, and other contract claims.

11.1 Courts must implement systems to ensure that the entry of final judgments complies with basic procedural requirements for notice, standing, timeliness, and sufficiency of documentation supporting the relief sought.

11.2 Courts must ensure that litigants have access to accurate and understandable information about court processes and appropriate tools, such as standardized court forms and checklists for pleadings and discovery requests.

11.3 Courts should ensure that the courtroom environment for proceedings on high-volume dockets minimizes the risk that litigants will be confused or distracted by over-crowding, excessive noise, or inadequate case calls.

11.4 Courts should, to the extent feasible, prevent opportunities for self-represented persons to become confused about the roles of the court and opposing counsel.
Courts have an obligation to implement practices that prevent judgments from being entered if the defendant did not receive notice of the complaint or the plaintiff failed to demonstrate standing to bring suit, adequate documentation of compliance with statutory requirements for timeliness, or the basis for the relief sought.

COMMENTARY
State court caseloads are dominated by lower-value contract and small claims cases rather than high-value commercial or tort cases. Many courts assign these cases to specialized court calendars such as landlord/tenant, consumer debt collection, mortgage foreclosure, and small claims dockets. Many of these cases exhibit similar characteristics. For example, few cases are adjudicated on the merits, and almost all of those are bench trials. Although plaintiffs are generally represented by attorneys, defendants in these cases are overwhelmingly self-represented, creating an asymmetry in legal expertise that, without effective court oversight, can easily result in unjust case outcomes. Although most cases would be assigned to the streamlined pathway under these recommendations, courts should attend to signs that suggest a case might benefit from additional court involvement. Indicators can include the raising of novel claims or defenses that merit closer scrutiny.

RECOMMENDATION 12. Courts must manage uncontested cases to assure steady, timely progress toward resolution.

12.1 To prevent uncontested cases from languishing on the docket, courts should monitor case activity and identify uncontested cases in a timely manner. Once uncontested status is confirmed, courts should prompt plaintiffs to move for dismissal or final judgment.

12.2 Final judgments must meet the same standards for due process and proof as contested cases.

PART III - PROVIDE SUPERIOR ACCESS FOR LITIGANTS

RECOMMENDATION 13. Courts must take all necessary steps to increase convenience to litigants by simplifying the court-litigant interface and creating on-demand court-assistance services.

13.1 Courts must simplify court-litigant interfaces and screen out unnecessary technical complexities to the greatest extent possible.

13.2 Courts should establish internet portals and stand-alone kiosks to facilitate litigant access to court services.

13.3 Courts should provide real-time assistance for navigating the litigation process.

13.4 Judges should promote the use of remote audio and video services for case hearings and case-management meetings.

COMMENTARY
Uncontested cases comprise a substantial proportion of civil caseloads. In the Landscape of Civil Litigation in State Courts, the NCSC was able to confirm that default judgments comprised 20 percent of dispositions, and an additional 35 percent of cases were dismissed without prejudice. Many of these cases were abandoned by the plaintiff or the parties reached a settlement, but failed to notify the court. Other studies of civil caseloads also suggest that uncontested cases comprise a substantial portion of civil cases (e.g., 45 percent of civil cases subject to the New Hampshire Proportional Discovery/Automatic Disclosure (PAD) Rules, 84 percent of civil cases subject to Utah Rule 26). Without effective oversight, these cases can languish on court dockets indefinitely. For example, more than one-quarter of the Landscape cases that were dismissed without prejudice were pending at least 18 months before they were dismissed.

RE 12.1
To resolve uncontested matters promptly yet fairly requires focused court action. Case-management systems should be configured to identify uncontested cases shortly after the deadline for filing an answer or appearance has elapsed. If the plaintiff fails to file a timely motion for default or summary judgment, the court should order the plaintiff to file such a motion within a specified period of time. If such a motion is not filed, the court should dismiss the case for lack of prosecution. The court should monitor compliance with the order and carry out enforcement as needed.
NEXT STEPS
The CJI Committee’s recommendations advocate “what” state courts must do to address the evident urgencies in the civil justice system. While many of the recommendations can be implemented within existing budgets and under current rules of procedure, others will require significant change and steadfast, strong leadership to achieve that change. In the few months since the CCJ resolution endorsing the recommendations, the CCJ addressed “how” court leaders can overcome barriers to needed changes and actually deliver better civil justice. The conference encouraged “each state to develop and implement a civil justice improvements plan to improve the delivery of civil justice.” The CCJ Resolution characterized the recommendations as a “worthy guide” for the states and directed the NCSC “to take all available and reasonable steps to assist court leaders who desire to implement civil justice improvements.”9 In the few months since the CCJ made its call for action, implementation strategies have begun to form.

COURT AND STAKEHOLDER STRATEGIES
As discussed earlier, the NCSC’s Landscape of Civil Litigation provided a template for problem identification, big-picture visioning, and strategic planning by state and local courts. The Landscape became so central to the formation of the recommendations that the CJI Committee, in its final communication to the full CCJ, urged each state court to undertake its own landscape study. Such a study would not only enable court leaders to diagnose the volume and characteristics of civil case dockets across their state, but would also help identify major barriers to reducing cost, delay, and inefficiency in civil litigation. Leaders can then sequence and execute strategies to surmount those barriers.

The CJI Committee also suggested that court leaders build internal support for change. This suggestion derived from the experience of the committee during its two years of work. Thanks again to the Landscape, this diverse group of judges, court managers, trial practitioners, and organization leaders started their work with an accurate picture of the civil litigation system. From across the country, they collected a sampling of best practices that demonstrate smart case management and superior citizen access to justice. They then closely analyzed and discussed the data over the course of several in-person, plenary meetings and innumerable conference calls and email exchanges. What resulted? Unanimous and enthusiastic support for major civil justice improvements. And, for each committee member, there arose strong convictions: The quality and vitality of the civil justice system is severely threatened. Now is the time for strong leadership by all chief justices and court administrators. Frontline judges and administrators must have the opportunity to ponder facts about the civil justice system in their state. Once that opportunity and those deliberations occur, a wellspring of support for civil justice improvement will take shape within the judiciary. With a supportive judicial branch, courts can face down tough issues and undertake needed courthouse improvements. What’s more, a unified judiciary will also facilitate external stakeholder participation.

The CJI Committee also made clear that court improvement efforts must involve the bar. The committee pointed to the Washington State Bar as a prime example of lawyers, sobered by evidence of growing civil litigation costs, taking bold actions to improve the fair resolution of civil cases. After four years of labor, the Bar’s Task Force on the Escalating Costs of Civil Litigation issued a series of recommendations to make courts affordable and accessible. The principles of proportionality and cooperation infuse the recommendations. In the words of the Task Force, “Lowering litigation costs depends on keeping the costs of cases proportional to their needs. . . .”10 With respect to cooperation, the recommendations close by saying, “[t]he Task Force urges the Board [of Governors] not only to adopt these recommendations, but to help educate the judges and lawyers who will be responsible for making the recommendations a reality.”11

Several other lawyer groups provided significant input to the CJI Committee’s work. These include the American Board of Trial Advocates, the American Civil Trial Roundtable, the American College of Trial Lawyers, the National Creditors Bar Association, IAALS’ Advisory Groups, and the NCSC’s General Counsel Committee, Lawyers’ Committee, and Young Lawyers’ Committee. Some of these groups have state counterparts that can collaborate with court leaders to implement civil justice improvements that benefit their state or locality. The committee trusts these alliances can also lead to focus groups that educate key constituencies about their state’s top civil justice needs and the probable effectiveness of many of the recommendations. Perhaps Judicature readers also will advocate for some recommendations using the CJI Committee’s proposals and evidence-based resources to build understanding and trust among the general public.

FUTURE TECHNICAL ASSISTANCE TO STATE COURTS
Recognizing that organizational change is a process, not an event, the National Center for State Courts and IAALS are collaborating to assist court leaders

* Publisher’s note: Chief Justice John Roberts expressed support for proportionality and enhanced case-management techniques in his 2015 end-of-year report. The Duke Law Center for Judicial Studies has published Guidelines and Practices for Implementing the 2015 Discovery Proportionality Amendments at law.duke.edu/judicialstudies.
who desire to implement civil justice change. With generous financial support from the State Justice Institute, the NCSC and IAALS have begun a three-year project to implement the CJI Recommendations across the country. The CJI Implementation Plan is a multifaceted effort involving education, technical assistance, and practical tools to help state and local courts with implementation efforts, as well as several pilot projects to demonstrate the impact that these recommendations have on effective civil case management. Additional information is available at www.ncsc.org/civil.

1. CCJ Resolution 5 (Jan. 30, 2013)
3. These values varied somewhat based on case type; three-quarters of real property judgments, for example, were less than $106,000 and three-quarters of torts were less than $12,200.
5. The Appendix to the recommendations address topics such as “Problems and Recommendations for High Volume Dockets,” “The Role of Proportionality in Reducing the Cost of Civil Litigation,” and “Best Practices for Trial Management.”
8. CCJ Resolution 8 (July 27, 2016).
Landscape of Civil Litigation in State Courts

CMS data from ALL courts with civil jurisdiction in 10 urban counties

More than 900,000 civil cases
  ◦ 2 single tier courts
  ◦ 10 general tier
  ◦ 9 limited tier

Final dataset reflects 5% of total civil caseload nationally
Civil Caseload Composition

- Contract: 64%
- Small Claims: 16%
- Other Civil: 12%
- Tort: 7%
- Real Property: 1%
Subcategories of Contract Cases

- Debt Collection: 39%
- Landlord/Tenant: 27%
- Foreclosure: 17%
Subcategories of Tort Cases

- Automobile Tort: 40%
- Other PI/PD: 20%
- Medical Malpractice: 3%
- Product Liability: 2%
## Civil Dispositions

<table>
<thead>
<tr>
<th>Disposition</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dismissal</td>
<td>35%</td>
</tr>
<tr>
<td>Judgment (unspecified)</td>
<td>26%</td>
</tr>
<tr>
<td>Default judgment</td>
<td>20%</td>
</tr>
<tr>
<td>Settlement</td>
<td>10%</td>
</tr>
<tr>
<td>Unknown disposition</td>
<td>4%</td>
</tr>
<tr>
<td>Adjudicated disposition</td>
<td>4%</td>
</tr>
<tr>
<td>Other disposition</td>
<td>1%</td>
</tr>
<tr>
<td>Summary judgment</td>
<td>1%</td>
</tr>
</tbody>
</table>
Median Judgment Amounts

- Real Property: $12,789
- Tort: $6,000
- Small Claims: $3,000
- Contract: $2,272
- Other Civil: $2,002
Attorney Representation

- **Tort**: 96% (Plaintiff: 67%, Defendant: 45%)
- **Real Property**: 95% (Plaintiff: 39%, Defendant: 25%)
- **Other**: 78% (Plaintiff: 36%, Defendant: 23%)
- **Contract**: 95% (Plaintiff: 20%, Defendant: 13%)
- **Small Claims**: 76% (Plaintiff: 13%, Defendant: 13%)

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Takeaways from the Landscape

- Tort cases have largely evaporated
- In the vast majority of cases, the amount at stake is small (but still very important to the parties)
- For most litigants, the costs of litigating greatly exceed the monetary value of the case
- Most cases are disposed through a non-adjudicative process, with jury trials at 0.1%
- In 76% of cases, one or both parties are self-represented
The pathway approach

- **Recommendation 4 – Streamlined Pathway**
  - Limited # of parties, routine issues related to liability and damages, few anticipated pretrial motions, limited need for discovery, few witnesses, anticipated trial length of 1-2 days

- **Recommendation 5 – Complex Pathway**
  - Complex law, numerous parties, numerous witnesses, voluminous documentary evidence, high interpersonal conflict

- **Recommendation 6 – General Pathway**
The Streamlined Pathway

- We need to reorient how we think of the cases in our state courts – *this is the vast majority of civil cases*
- Automatically calendar core case processes
- Establish and communicate clear deadlines
- Proportional and streamlined process to decrease cost and delay and increase access to the system
The Complex Pathway

- This is a very small percentage of cases, but they have unique needs
- Single judge
- Early, active case management, including an in-depth early case management conference
- Clear deadlines and a firm trial date
- Discovery plans including mandatory initial disclosures
The General Pathway

- Establish clear deadlines and set a firm trial date
- Early case management conference
- Focus on discovery to ensure process is proportional, through mandatory disclosures, expedited discovery procedures, and informal communications regarding dispositive motions and possible settlement
Additional Themes

- Strategically Deploy Court Personnel and Resources
- Use Technology Wisely
- Focus Attention on High-Volume and Uncontested Cases
- Provide Superior Access for Litigants
Implementation Tools

DIY Landscape Assessment Guide

Civil Case Management VizTool

Automated Civil Case Triage and Caseflow Management Requirements

Coming Soon:
- Implementation Roadmap
- Factors for Automated Triage
- Civil Case Management Staffing Teams
Demonstration Projects

NCSC and IAALS seek states and local courts as pilot project sites to implement recommendations.

- Technical assistance and funding for infrastructure development available
- Collaboration on documenting impact on court operations and case management
Creating the Just, Speedy, and Inexpensive
COURTS OF TOMORROW

IDEAS FOR IMPACT FROM IAALS’
FOURTH CIVIL JUSTICE REFORM SUMMIT

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information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database
or retrieval system without the express written consent of the copyright holder.
“Improving our civil justice system requires culture change. Culture change requires serious leadership from the top. Judges and lawyers don’t like to be led. We have to convince them it’s in their best interest. And we need to appeal to their professionalism and the reason they became lawyers and judges in the first place.”

Hon. Thomas A. Balmer
Chief Justice, Oregon Supreme Court
Creating the Just, Speedy, and Inexpensive Courts of Tomorrow

Ideas for Impact from IAALS’ Fourth Civil Justice Reform Summit

Brittany K.T. Kauffman
Director, Rule One Initiative

August 2016

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

Executive Summary ................................................................. 1

Introduction ............................................................................. 2

The Landscape of Litigation in America’s Courts ...................... 3

Momentum for Reform ............................................................... 5

The Importance of Implementation .......................................... 7

The Role of Attorneys ............................................................... 11

The Role of Judges ..................................................................... 12

The Role of Courts ..................................................................... 16

The Role of Technology ............................................................ 17

In Service to Litigants .............................................................. 18

A Vision for the Courts of Tomorrow ....................................... 20

Conclusion ................................................................................. 21
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Executive Summary

In February 2016, the Rule One Initiative at IAALS—the Institute for the Advancement of the American Legal System at the University of Denver—hosted its Fourth Civil Justice Reform Summit: Creating the Just, Speedy, and Inexpensive Courts of Tomorrow. The goal of the Summit was to bring together federal and state court judges, court administrators, attorneys on both sides of the “v,” academics, and users of the system to chart the next steps for creating the just, speedy, and inexpensive courts of tomorrow.

It was a packed two-day Summit that covered the waterfront—current civil justice reform efforts around the country at the state and federal levels, simple cases to complex cases, the importance of case management by judges and the court, and the varying perspectives of the users of the system. The Summit provided a unique opportunity for discussion about the state of innovation across our federal and state courts—and a corresponding unique opportunity to share lessons that can be learned from those very different experiences and dockets.

The discussion highlighted the realities of our civil justice system, including similarities and differences in state and federal courts. It also highlighted the need for civil justice reform, efforts that are currently underway, and ideas for future impact. From the discussion, a vision for the courts of tomorrow took shape—a court system where we have:

- Litigation that is cost effective;
- Courts that are accessible and affordable;
- Technology that serves litigants;
- Judges who are engaged and attentive; and
- Lawyers who are cooperative and innovative.

The Summit ignited a renewed energy and commitment to achieving this goal. That energy was palpable in the room, which was filled with attendees spanning not only the nation but also the world—united in their dedication to making our civil justice system better.

Our goal is to spread that energy beyond the Summit. Thus, this report summarizes the discussion at the Summit and captures current efforts toward reform, challenges of implementation, and specific proposals that were shared. It is our hope that these ideas for impact inspire attorneys, judges, our courts, and other members of the system to embrace their role in creating the just, speedy, and inexpensive courts of tomorrow.
Introduction

On February 25 and 26, 2016, IAALS hosted its Fourth Civil Justice Reform Summit. All four Summits have focused on the extent to which America’s civil justice system has fallen short of its promise of a just, speedy, and inexpensive process and have proposed solutions designed to achieve this goal.

The first Summit was held in 2007, when IAALS convened a number of prominent leaders, both from the United States and internationally, to discuss reform in the civil justice system and draw lessons from the experiences of others. The goal of the second Summit, in 2009, was to initiate a proposed action plan for implementation of pilot projects and collection of data. At our third Summit, in 2012, IAALS continued the dialogue, this time with more than 70 influential Rules reformers, federal and state judges, representatives of the National Center for State Courts, representatives of the Federal Judicial Center, and attorneys. The third Summit recognized the new landscape of innovation that had taken hold, including multiple pilot projects and rule changes underway at the state and federal level. This history highlights just how far we have come in civil justice reform in the United States. In ten years, we have moved beyond making the case for civil justice reform and are now engaged in a widespread movement to make it happen.

With this fourth Summit, IAALS has endeavored to engage an even wider audience in this movement, to recognize that we are not there yet, and to create a collective vision for the courts of tomorrow. The Summit began with panels that highlighted the civil justice reform efforts at the state and federal level, as well as lessons learned from evaluations of those efforts over the last three years. An international panel of speakers from Singapore, Australia, England, and Canada provided insight into the challenges facing civil justice reform around the globe, and solutions. The international panel also served as a catalyst for thinking outside the box in terms of next steps and our overall vision for civil justice in the United States. This background, at home and abroad, laid the groundwork for more in depth discussion for the remainder of the Summit. Panels focused on implementation of proportionality concepts at the state and federal level, cooperation, the role of attorneys, the role of judges, the role of the courts, and perspectives from the users of the system. The Summit included a session devoted to brainstorming a vision for the just, speedy, and inexpensive courts of tomorrow, and concluded with a judges’ panel that pulled together themes and highlights.

This report summarizes the discussion that occurred and highlights themes that emerged over the two days. The viewpoints, recommendations, and perspectives expressed in this report do not represent the positions of any represented organizations that attended the Summit, or any individual Summit attendees. Rather, this report seeks to recount the robust conversation and ideas that were shared to broaden the reach and impact of this important dialogue.

1 IAALS, the Institute for the Advancement of the American Legal System, is a national, independent research center at the University of Denver dedicated to facilitating continuous improvement and advancing excellence in the American legal system. IAALS has four initiative areas, one of which is the Rule One Initiative. The Rule One Initiative is focused on improving the civil justice process, with the goal of ensuring access to justice, an efficient court process, and an accountable system that is fair and reasoned—all with the goal of service to litigants. Learn more about IAALS and Rule One at http://iaals.du.edu.
The Landscape of Litigation in America’s Courts

To understand the challenges, and to have a basis for developing solutions, the Summit began by looking at the current landscape of litigation in our civil justice system. While individual jurisdictions have their own challenges, and there are certainly differences between the state and federal systems, there are also many commonalities.

The National Center for State Courts recently studied the landscape of litigation in state courts, yielding significant takeaways. That 2015 study highlights that the dockets in state courts are changing. Nearly two-thirds of cases are contract cases, and a majority of those are debt collection and landlord/tenant cases. The most recent large-scale comparable study was conducted by NCSC in 1992, and at that time there was a one to one ratio of contract to tort cases. Today, the ratio is seven to one. Tort cases have largely evaporated. In addition to this change in type of case, civil case loads in general around the country are dropping at a rate of between 2% and 6% annually.

For decades we have watched the decline in civil jury trials, with the current rate of jury trials at less than 1%. However, NCSC’s recent study highlights that our system is suffering from more than just a drop in the number of jury trials. Across the board, there is very little formal adjudication happening in the civil cases in state court. The biggest mode of case disposition in state courts is dismissal. In addition, we need to readjust our vision of the size of the average case in our state courts. In the study, 90% of judgments entered were less than $25,000.

In terms of representation, most plaintiffs are represented in state courts, but most defendants are not. Looking at both plaintiffs and defendants, in 76% of cases in the study, one of the parties was not represented. This is

4 See Landscape of Civil Litigation in State Courts, supra note 2, at 6.
7 Landscape of Civil Litigation in State Courts, supra note 2, at 22-23.
8 Call to Action: Achieving Justice for All—A Report to the Conference of Chief Justices from the Civil Justice Improvements Committee 9 (2016).
9 Id. at 9.
inconsistent with the common view of our system as an adversarial one in which both parties have representation. The numbers of self-represented litigants in federal courts are growing as well. At the same time, we know that nationwide, attorneys are turning down the smaller cases, commonly citing $100,000 or more as the threshold amount to be able to afford to take a case.

In addition to lack of representation, there are significant issues plaguing the simpler cases. High-volume dockets in particular present their own unique challenges. Factual issues tend to be repetitive in these cases, where the plaintiffs tend to be entities and defendants tend to be self-represented litigants. While these cases often involve small amounts, they nevertheless are critical cases. The amounts are not “small” to the defendants. Yet self-represented litigants lack a knowledge of our legal system and procedure. There are issues with service of process, overcrowding in courtrooms, and insufficient scrutiny by the court to determine if the plaintiff is able to satisfy the legal requirements prior to judgment. In addition, these cases have an important impact on our civil justice system because of their vast numbers and the collective effort necessary by courts to manage them efficiently and effectively.

Concerns regarding time to disposition have been around for a century. In 2011, the Conference of Chief Justices and other agencies adopted new model time standards for our state courts. We are not meeting these standards. The same is true in federal courts. The consensus from surveys of judges and attorneys around the country is that our civil justice system takes too long and costs too much.

10 See Emery G. Lee III, Law Without Lawyers: Access to Civil Justice and the Cost of Legal Services, 69 U. Miami L. Rev. 499, 505 (2015) (noting that while the percentage has remained relatively steady, the absolute number of non-prisoner pro se filings increased by 65% between 1999 and 2013).
Discovery in particular continues to present significant challenges in our system, particularly in the mid-size to larger cases. Next to trials, which now happen in less than 1% of cases in the United States, the next most expensive aspect of the civil process in terms of time and cost is discovery. Discovery is cited as the primary reason for the current cost and delay in our system. Attorneys have not focused discovery on the issues in the case, particularly with the advent of electronically stored information, but rather, have taken a much broader approach, discovering everything that may be even tangentially relevant before focusing on what is really needed. Discovery is more time consuming and costly than ever before. As the international panelists at the Summit highlighted, the United States is unique in this “discovery to the ends of the earth” mentality.

Momentum for Reform

These challenges have not gone unnoticed. To the contrary, there is clear momentum toward reform. We are at a stage where there are many pioneering jurisdictions that have embraced pilot projects, rule changes, and other innovations, and we now have some data from those experiences to inform future efforts. The Summit began with several panels that discussed those experiences, highlighting the significant efforts toward reform underway and the lessons learned.

Over the last seven years, pilot projects have been implemented and evaluated in New Hampshire, Massachusetts, and Colorado. Utah has implemented sweeping statewide rule changes focused on achieving proportionality in discovery. Other states have formed civil justice reform task forces and implemented significant statewide rule changes and other innovations, such as Minnesota and Iowa. To further and share these significant efforts, in 2013 the Conference of Chief Justices created the Civil Justice Improvements Committee (“CJI Committee”) with the purpose of:

16 Galanter & Frozena, supra note 6, at 26–27.
18 Gerety, supra note 15, at 11.
developing guidelines and best practices for civil litigation based upon evidence derived from state pilot projects and other applicable research, and informed by implemented rule changes and stakeholder input; and (2) making recommendations as necessary in the area of caseflow management for the purpose of improving the civil justice system in the state courts.  

The report and recommendations of the CJI Committee, Call to Action: Achieving Justice for All, were presented to and adopted by the Conference of Chief Justices in July 2016.  

There are states like Arizona that are already leading the effort to analyze their own landscape of civil litigation and act on recommendations designed to improve their system. Other states will hopefully follow suit, on the heels of the Conference of Chief Justices’ recommendations.

States have already served as laboratories for reform, but this spirit of innovation has not been limited to our state courts. There has been a focused effort to address the problems associated with civil litigation in our federal courts over the last seven years as well, dating back to the 2010 Conference on Civil Litigation at Duke Law School and culminating in significant amendments to the Federal Rules of Civil Procedure that went into effect on December 1, 2015. The Amendments intend to change litigation in the federal system for the better, by focusing on attorney cooperation, proportionality, and active judicial case management. In addition to, and in some cases, underlying the federal rule amendments, there have also been significant pilot projects at the federal level. These efforts include the Initial Discovery Protocols for Employment Cases Alleging Adverse Action, the Southern District of New York’s Pilot Project Regarding Case Management Techniques for Complex Civil Cases, and the Seventh Circuit Electronic Discovery Pilot Program.

Thus, while the current landscape of litigation in the United States presents significant challenges, our civil justice system is also in the midst of historic reform at the state and federal level. There is national momentum around

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22 Conference of Chief Justices, Resolution 5 To Establish a Committee Charged with Developing Guidelines and Best Practices for Civil Litigation (Jan. 2013).
23 Call to Action: Achieving Justice for All—A Report to the Conference of Chief Justices from the Civil Justice Improvements Committee (2016).
reducing the costs and delays associated with civil litigation, in order to continue to provide and protect access to the courts and ensure a just, speedy, and inexpensive system for all. There are common themes across these reforms, including a focus on cooperation, proportionality, and early active management of cases to ensure an efficient and effective process. There is also a recognition that the courts have a responsibility along with the lawyers to move cases through the process in a just and efficient way. Although these themes have resonated throughout the history of our system, dating back to Roscoe Pound’s speech in 1906 calling for reform, recent efforts have demonstrated a renewed and serious commitment by judges and attorneys around the country to reform our system to achieve these goals.

The Importance of Implementation

Discovery is a pressure point in our system where there is great opportunity for change and impact. The research and experiences across the country illustrate that if we want reasonable discovery, we must incorporate limits guided by proportionality, along with active case management. This is true for the rest of the pretrial process as well. An important message from the Summit was that while we have seen significant progress toward reform, we are not at the finish line yet. We need to remain committed to ensuring that these changes have a positive impact on the ground. Fair and efficient implementation of the federal rule changes and the recommendations from the CJI Committee at the state level are paramount.

Incorporation of proportionality into the scope of discovery was the most controversial of the federal rule amendments. Some believe the changes will have a significantly negative impact on access to justice; other commentators view it as much sound and no light; and still others embrace the goals but worry about their achievability. This difference of opinion reinforces the need for continued focus and effort surrounding the implementation of the amendments. The Civil Rules Advisory Committee recognized in submitting the proposed amendments that “a rule amendment alone will not produce reasonable and cooperative behavior among litigants, but . . . [c]ombined with the continuing work of the FJC on judicial education and the continuing exploration of discovery protocols and other pilot projects, the Committee believes that these changes will promote worthwhile objectives identified at the Duke Conference and improve the federal civil litigation process.”28 The Summit highlighted that a great deal of the concern

28 See Campbell Memorandum, supra note 25, at B-13 to B-14.

“A lesson we learned at Duke and the ABA Roadshow is the power of terminology. Core, phased, staggered, etc. We learned how much baggage these terms carry.”
Steven S. Gensler
University of Oklahoma College of Law

“The Civil Rules Advisory Committee didn’t go through all of this effort just so a couple of rules could be changed. The larger intention was to change the way we do business—to change the way civil litigation is run in the United States. We have to envision—what could civil litigation look like?”
Hon. Jeremy Fogel
Director, Federal Judicial Center
around proportionality stems from distrust by lawyers. Given this distrust, judges play an essential role in facilitating application of proportionality. It is also clear that developing case law will be closely watched, and will provide continued guidance and—hopefully—clarity from the courts to ensure that the rule amendments are implemented as intended.

After six months of implementation, one of the most helpful changes appears to be additional opportunities and encouragement for the parties to engage in a dialogue regarding the important issues in the case, their discovery needs, and production challenges. Attorneys need to exercise their judgment, and their judgment improves when these conversations happen. Much of the implementation will come down to the intent behind these rule changes, and the extent to which the attorneys and judges embrace that intent. There is clear energy surrounding the new amendments, with the goal of making a positive difference—now it just needs to “hit the ground.” Organizations around the country—including the Federal Judicial Center, the Duke Center for Judicial Studies, and the American Bar Association—are dedicated to educating the bench and bar to ensure a clear understanding of the rules and fair and effective implementation.

While proportionality has been emphasized as a guiding principle at the federal level, the CJI Committee recommendations echo the same theme, but frame it in terms of a “pathway approach” to right size the process to the case needs, based on case characteristics. In both instances, there is a common theme: case management is central to achieving proportionality both in discovery and in the overall process. That means we need court staff, administrators, and judges engaged in the process of assuring that the case is on the right path.

The state court pilot projects support the importance of case management in achieving proportionality. Utah, Colorado, and Minnesota have incorporated proportionality prominently into their rules without the adverse consequences of sideline litigation and limited access that some feared. Clearly, reform in each jurisdiction must be driven by that jurisdiction’s needs and must be the outgrowth of multiple stakeholder input. Reform also requires leadership, courage, and the capacity to imagine what can be, and then to work toward it.
Ideas for Impact

- We need strong leadership, among the bench and bar, to ensure successful implementation.
- Judges must play an essential role in facilitating the application of proportionality.
- Increased dialogue between the parties will go far to focus the issues of the case, address discovery challenges before they become disputes, and build trust between the parties.
- Pilot projects provide an important opportunity for innovation and culture change.
“Lawyers and judges are idealistic, and they’re good at perfection. But in our system, resolution can be more important than perfection, which is hard to accept.”

Kevin Traskos
Civil Division Chief, U.S. Attorney’s Office

“The notion that cooperation is not part of what we do—let’s shelve that concept. Cooperation to me means communication, courtesy, being civil. Civil litigation is not an oxymoron. Half of my job is getting lawyers to communicate with each other. As Shakespeare once said, ‘Strive mightily, but eat and drink as friends.’”

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

“Zealous advocacy is not a professional conduct standard—it’s a matter of old language that’s been hanging around. We have to take a look at what we mean by advocacy. We do not mean obstructionist tactics. Let’s just talk about effective advocacy.”

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

“The whole emphasis from Duke is the importance of lawyers working together to devise a program of proportional discovery and a reasonable judge moving things along.”

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

“My students asked me about my best advice and my answer was ‘Do unto others as you would have them do unto you.’ They laughed, but it’s true. If you do that all the time, in the end you’ll win more than you lose. We’ll improve the practice of law if we do that.”

William A. Rossbach
Rossbach Hart, P.C.
The Role of Attorneys

With individual panels on cooperation and the role of attorneys, another clear theme that arose from the Summit was that attorneys play an essential role in reform. Particularly with regard to discovery, much of what happens occurs between the parties outside of the courtroom. Rules provide essential guidance and limits, but the choices attorneys make within the confines of the rules are equally important. Beyond rule changes, we need culture change from the bar.

Lawyers are taught to look under every stone. They are risk averse and tend toward perfection. This tendency toward perfection often gets in the way of service to the clients, however, who need a just and fair resolution and not perfection in discovery. There is a connection between time and money, and to the extent lawyers are making decisions about time, they are also driving the cost.

Attorneys need to be thoughtful about the impact of their discovery efforts. Requesting parties need to think about the cost of what they are requesting, and producing parties need to recognize the cost of obstruction. What is needed is a clear focus on the issues in the case, and then efficient and effective discovery guided by those issues towards ultimate resolution. We also need to be open to a new and better system for discovery of pertinent information, including through technology.

The recent federal rule amendments highlight the important role of cooperation in achieving a just, speedy, and inexpensive process. Negotiation—and working across the aisle to achieve the best outcome for the client—has always been an essential tool in the attorney’s toolbox. Attorneys who do not know how to pick their battles are not doing justice for their clients. Attorneys need to be thoughtful and use this judgment. Thus, rather than being incompatible, cooperation and advocacy actually go hand in hand. Cooperation and working issues out between counsel are a necessary part of the process—and a necessary part of service to the client. We cannot afford to lose this important aspect of our system with the advent of technology and the decrease in direct communication. Constructive communication builds connections and creates trust, which fosters an atmosphere where the parties can fully engage in a discussion about what discovery is necessary and proportional, as well as about other aspects of the case.

The Rule 26(f) conference in federal court provides an opportunity for increasing communication and reining in excessive discovery. Senior attorneys perform a critical function in these early communications, as well as in later discovery disputes, because they have the judgment that comes from experience. Relegating discovery disputes to junior lawyers may not serve the client well even though those lawyers are—in the first instance—more economical. Honing in and shaping appropriate discovery requires judgment, analysis, decision-making skills, and the authority to compromise. Thus, an important question is: how do we train and empower younger lawyers?

There are examples around the country of this type of early, serious engagement in the issues by attorneys and the courts. Judges and lawyers at the state and federal level universally praise informal motion practice that achieves immediate resolution of discovery disputes. There is also broad-based support for the new federal amendment that allows for early Rule 34 requests. These requests are one way to get the parties thinking about the case earlier, and engaging in a dialogue, supported on both sides. Some argue that we should push this even further to requests for production. We should use these tools as a means for discussion of discovery early in this case. Use of these tools, such as early Rule 34 requests, will result in a more robust conference between the parties, and a more robust case management conference with the court.

Attorneys have the opportunity to have great impact, for good or bad, on the system. We need to harness this opportunity to ensure that the bar is fully invested and engaged in reform.
When the lawyer has a choice, he or she will go to the court where there is access to, and management by, the judge.”

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

**Ideas for Impact**

- Attorneys need to focus on the issues in the case, and then conduct discovery in an efficient and effective way—guided by those issues—towards ultimate resolution.

- Early robust meet and confer conferences between the parties provide an important opportunity for increased communication regarding the issues in the case and heading off potential discovery challenges.

- Initial disclosures and early discovery requests, such as early Rule 34 requests, help highlight the issues and significantly move the case forward, to the benefit of all parties.

- Expedited court processes for resolving discovery disputes can have a significant impact on reducing the cost and delay of discovery.

**The Role of Judges**

Another important takeaway from the Summit is the important role that judges must play in implementation of existing reforms and as leaders in future reforms. Time and again over the course of the two-day discussion, the conversation circled back to the importance of judges in achieving change—for the individual cases before them and as leaders in the system more broadly. For these reasons, education and engagement of our judges at the federal and state levels is vital.

An important theme from recent civil justice efforts is that courts and judges must take responsibility for management of the cases in our system. As Judge Jerome Abrams noted, “It comes down to every case in the system needing a plan, and the courts and the judges managing that plan.” Judges need to change how they think about managing cases and about the importance of that management. Litigants look to the judges to make the system work; attorneys look to the judges to ensure fairness and to move the case through the system. The judges themselves need to embrace that responsibility. This is no longer optional, but a full imperative.
The input from attorneys at the Summit made it clear that different attorneys want and need different levels of involvement from the court. And different cases have different needs. Judges need to recognize that every single case that comes into the system does not need active hands-on management by the judge himself or herself. This isn’t necessary, and for judges in the state courts, it isn’t even possible. Rather, some cases only need to be monitored. Others need the attention of court staff other than the judge. But overall, cases move better when a judge is involved. We need judges who are paying attention and can be flexible in their approach. Courts must be involved earlier in the process, including as part of the discussion on the scope of discovery.

Just as there is an obligation on the part of attorneys to cooperate, so too is there a real obligation on the part of judges to set the tone. Judges can make clear that cooperation will get more positive attention from the court than uncooperative behavior. Along with setting the tone for the case, judges also can make an important impact by issuing timely decisions. Waiting months for a summary judgment ruling, or for a ruling on any contested motion, stymies the progress of the case and infuriates the litigants. Money is continuing to be spent while the case is on hold—and it is often for naught. Ultimately, although the time to disposition of the case matters in terms of measuring court efficiencies, what really matters to the litigants is whether the process is efficient and responsive. Relatedly, judges need to recognize that the time taken to craft highly detailed decisions comes at a cost to litigants. Judges should understand the case sufficiently to assess the impact of a process or a ruling—both in terms of time and money. One practice around the country that touches on all the above is the use of expedited motions practice in lieu of full briefing on discovery disputes. By meeting with the parties promptly to address any discovery disputes, the judge sets the tone for increased communication, cooperation, and prompt resolution of disputes. An early robust case management conference that includes direct communication between the court and parties and a thorough discussion of case needs and proportionality similarly sets the stage for the rest of the litigation.

Given the important role of judges, there is a related takeaway: we need to motivate judges. We need to convince judges that active case management is in their interest. This management will actually free their time up to do more of what they like. Additionally, case management is not a rote, mechanistic process. It is complex and sophisticated, calling upon experience, understanding of the issues and of the interrelationship of the parties in order to craft the best possible path to resolution for that case. We need to make it as easy as possible for the judges and to make them feel the urgency of the needs of our consumers. This is, indeed, a component of access to justice.
Education is a critical component of this change. We need to educate judges and include lessons from business, management, and leadership. The skills we need from our judges are not necessarily what led to their success as an attorney. Rather, judges need to be able to facilitate a cooperative atmosphere and engage the parties, encourage them to identify goals and legal issues early, and enforce the rules when necessary. We need more training for judges—such that they can facilitate a cooperative atmosphere and engage the attorneys and self-represented litigants around the goals and issues in their case. Judges need training in soft skills, too.

Finally, judges need support from the appellate level. From the focus groups in Utah regarding the rule changes, we learned that one of the messages was that trial judges were anxious about whether they could enforce the rules. They did not want to be overturned on appeal. Judges need their appellate courts to affirm their rulings when they enforce the rules and take an active and engaged approach at the trial level. For judges to manage cases, we need appellate courts that will support and reinforce their efforts.

When Thomas Church studied efficiency of courts around the country, what he found was that local legal culture drives efficiency. It was the judges that created this culture. Individual courts have unique cultures, but another takeaway from the Summit is that judges have a lot to gain from interaction with each other and across jurisdictions. Judges can be siloed, which undermines widespread innovation. Judges should be encouraged to interact, learn from each other, and serve as leaders in this movement.

“We need education for judges focused on modern litigation and its needs. It is like cooking school. We need cooking classes for judges, where they learn to cook, not just how to read a recipe.”

Jonathan M. Redgrave
Redgrave LLP

IDEAS FOR IMPACT

• Judges play a critical role in achieving change—for the individual cases before them and as leaders in the system more broadly.

• Judges need to take ownership and manage the cases before them to ensure an efficient and just outcome.

• We need to motivate judges to be leaders and active case managers. We need to get the buy-in of our state and federal judges in order to effect lasting change and demonstrate the ways in which that involvement benefits them and the users of the system.

• We need to invest in education for our judges, including lessons from business, management, and leadership.

• For judges to be willing to manage cases, we need appellate courts that will support and reinforce their efforts.
The Role of Courts

Courts are the next player in achieving this change. A clear theme of the Summit and recent reform efforts is that we need the judges and courts to take responsibility for management of cases through the process. The number one recommendation from the CJI Committee is that courts must take responsibility for managing civil cases from time of filing to disposition. This responsibility exists in tandem with and separately from the responsibility of lawyers to move cases toward fair resolution. Once a case is filed in court, it is not simply the responsibility of the parties or the lawyers. The courts must be involved. That does not mean just the judges. Teams of court staff, under the leadership of a judge, or working directly with a judge, can achieve great change. Given the number of cases and the docket pressures, it is not possible for the judges to take sole responsibility for moving cases forward. It must also be the duty of case managers and other non-judicial staff, who can help move these cases along and take responsibility for them. Our court system will serve the public better if it can move cases toward resolution quickly.

As we learned from our keynote speaker, Judge Carolyn Kuhl, Presiding Judge of the Superior Court of California for the County of Los Angeles, all court officers and court staff must think outside the box to meet the ultimate goal of our system—service to litigants. When we recognize the court’s role and this service orientation, then we can start resolving issues. One of the biggest challenges for courts is service to litigants with high demands while the courts themselves are limited in their resources, particularly regarding technology. How do we make the court more accessible? There are numerous opportunities through forms, consistency across courts and websites, use of technology, and availability to appear/achieve resolution by video/phone.

In order to modernize our courts, we must develop the court infrastructure, invest in technology, and implement training. Most importantly, we need to figure out a way to share ideas. One of the biggest challenges is that while some courts have embraced innovation, those innovations are not being shared more broadly.
Ideas for Impact

- Courts must take responsibility for managing civil cases from time of filing to disposition.
- Teams of court staff, under the leadership of a judge, or working directly with a judge, can achieve great change.
- In order to modernize our courts, we must develop the court infrastructure, invest in technology, and implement training.
- We need to continue to share the innovative work of individual courts so that our system as a whole can improve.

The Role of Technology

Technology is a short-term challenge but also a long-term answer to creating the courts of tomorrow. And it is an essential component in ensuring that courts will be able to meet the expectations and needs of our system’s users.

Technology is challenging because it requires an investment of resources, it requires understanding to be effective, and it is ever changing. Our initial successes in this arena have also bred all kinds of problems, such as security concerns and issues with scraping data from court websites. There is a clear tension between data and privacy. Yet technology has allowed us to innovate in whole new ways. Technology holds the key to so many options, such as analyzing high volume dockets and triaging cases.

In particular, there are great opportunities via technology to increase access to justice. There are huge opportunities to provide litigants, especially self-represented litigants, with greater access to services and information through technology. We may not see increased resources or judges coming to our system, but we may be able to use technology to solve some of these issues.

“Law is inherently backward looking. As a result, we are inclined to force new problems to fit into old models. The good news here is that technology may force us to develop new solutions.”

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

- There are opportunities to provide litigants, especially self-represented litigants, with greater access to services and information through technology.
- The value of technology is not limited to increased access and information. It can also be harnessed to fully realize the power of case management within our courts.

In Service to Litigants

An important takeaway from the Summit is a reminder that the system, and all of us in it, are here to serve litigants. We are responsible for providing a just, speedy, and inexpensive resolution in every case for the litigants.

We need to think about our system without blinders. We need to think of big dollar cases on the one hand and high volume dockets where most defendants are self-represented litigants on the other. In many cases, there are issues with lack of notice and proper service, rampant inadequacies in documentation, and confused and intimidated litigants...
who do not know how to communicate their narrative to the court within
the structure and process of our system. Being involved in such a case can
be a dramatic and traumatic experience in their lives. This is how many
Americans experience our court system. Those cases are a prime example of
a context in which we must work hard to preserve the integrity of our legal
system, and to ensure public trust and confidence.

For litigants, there is a common theme of the importance of information. The
more information that can be provided about the process, the expectations,
and options, the better. This includes disclosure of information to litigants
within the litigation as well. As an example, New Hampshire's Proportional
Discovery/Automatic Disclosure (PAD) Pilot Project replaced notice
pleading with fact-based pleading and required early initial disclosures after
which only limited additional discovery was permitted.29 One consequence
of the increased information provided through fact pleading was a decrease
in the number of default judgments.30 Parties are better able to engage in the
process when they have more information and understand the claims that
are being asserted against them.

We also need to teach judges how to deal with self-represented litigants. Self-represented litigants comprise a large percentage of the parties in court,
and judges need to be knowledgeable about how best to deal with them in a
positive and fair way. Just like attorneys, judges come to the bench with an
underlying expectation that both parties will be represented in our adversary
system. That is no longer the reality, and self-represented litigants will
continue to make up a significant percentage of cases at the state and federal
levels. We need training and guidance for judges regarding self-represented
litigants, and we need better sources of information and assistance for those
individuals as they move through the system.

We have to keep in mind the users of the system on the other end of the
spectrum as well. Predictability and efficiency in the courts is essential for
business litigants. Inconsistency results in greater costs. For example, this has
been true with regard to the preservation of electronically stored information
related to litigation. As we engage in civil justice reform, we must continue to
value the voice of businesses that litigate in a variety of forums and depend
upon effective courts for their own sustainability.

29 Paula Hannaford-Agor et al., Nat’l Ctr. for State Courts, Civil Justice
Initiative, New Hampshire: Impact of the Proportional Discovery/
30 Id. at 17-18.
A Vision for the Courts of Tomorrow

Ultimately, we need to be guided by a vision for the courts of tomorrow. What does that vision look like? The following list highlights ideas brainstormed at the Summit:

- One-hundred percent of people have access to justice. Courts should be accessible and understandable for all, with levels of assistance that can meet various needs.
- We embrace that lawyers, judges, and courts exist to serve.
- We no longer view non-traditional means of providing legal information and services as a threat to the legal profession but rather as an important way to empower citizens.
- Providers are available to offer services to help those who have neither the need nor the pocketbook for full-scale legal assistance.
- We mentor junior attorneys.
- Each case receives the “due process” it requires to achieve just, speedy and inexpensive resolution.
- We reimagine discovery through discovery planning and discovery budgets, with each type of case getting what it needs—no more and no less.
- We harness the power of the pretrial process to identify and flesh out the real issues in the case as early as possible—through robust initial disclosures, more active use of e-discovery, efficient use of ADR, limited deposition of experts, efficient trials, a streamlined process for the majority of cases, and prompt rulings from the bench.
- Courts utilize and harness the power of online dispute resolution.
- Courts differentiate their approach to case management so we can do more things effectively.
- Courts harness technology to support court operations, including outreach to juries, case tracking, and advanced user interfaces.
- Courts harness the power of people, using ombudsmen and other non-judicial personnel to help litigants in a more efficient way.
- Attorneys and courts learn from business/organizational change science.
- We have increased access to information across the system for all.
- We invest real money in our courts, recognizing their importance in society.
- We increase trust and confidence in the system.
- We have real-time exchange of ideas across jurisdictions, including state and federal, to share best practice ideas.
- Rule 1 is a guiding directive, and not just a slogan.
Conclusion

IAALS’ Executive Director Rebecca Love Kourlis began the Summit by imagining a court system in five years, where we have litigation that is cost effective, courts that are accessible and affordable, technology that serves litigants, judges who are engaged and attentive, and lawyers who are cooperative and innovative.

An important takeaway from the Summit is that we are in this together, and together we can achieve real change. It is too easy to point fingers. We can’t view problems from any one perspective or blame any one aspect of the system. The public sees us all as responsible for the system. In addition, we need to draw from one another in terms of ideas and solutions. State and federal judges can learn from each other, as can court administrators. Academics and researchers need to be solution oriented and helpful. No one group can do this alone. We are facing complex problems, and the solutions are also multi-faceted. To get others invested in positive change, we need to tap into and synergize around what people value: regaining market share and investment in the courts, legitimacy, trustworthiness, making their jobs easier, happier clients, more satisfaction with the profession.

One of the takeaways from our international guests is that we need to remember the goals of the process. The Woolf reforms resulted in quicker time to disposition but huge increases in costs, resulting in reduced access to justice. The Jackson reforms came about because of those cost increases. We all need to think about the ramifications of our behavior, from attorneys to judges. Not enough judges are asking, “If I do X, how much will that cost the parties?” Attorneys need to think about this same question from the perspective of their clients.

An underlying current throughout the Summit was the importance of culture change. We have come so far, but to achieve widespread and lasting change, civil justice reform must include culture change. As Chief Justice Roberts recognized in his year-end report:

“The 2015 civil rules amendments are a major stride toward a better federal court system. But they will achieve the goal of Rule 1—the “just, speedy, and inexpensive determination of every action and proceeding”—only if the entire legal community, including the bench, bar, and legal academy, step up to the challenge of making real change.”

Jonathan M. Redgrave
Redgrave LLP

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The people here have passion, they believe in something better. And the variety of different experiences in the room is informative. We need to extend this experience and energy to the entire bar. There is not one solution, but we can influence those around us to believe in a better way and find multiple solutions.”

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Rule changes are an essential component of reform, but they alone will not change the culture. There are lessons to be learned from the failed attempt to include more robust initial disclosures in the 1990s. The rules ended up being diluted because we were not ready culturally for this change. To achieve change, it has to be about more than just “the rules,” because that approach alone will not change the outcomes.
We are at a critical moment in this movement. We have had great success in individual jurisdictions. Now we are moving from individual adoption to implementation system-wide. This type of system-wide implementation and change takes time. Judge John Koeltl noted that the requirement to hold a Rule 26(f) conference has been in the rules since 1993. When he came on the bench in 1994, he would inquire if the parties had held such a conference, and they typically had not. Today, Judge Koeltl sees that more parties are holding conferences than ever before, and the research reflects that parties now meet and confer to plan for discovery in a majority of cases. Change takes time.

How do we speed up this change? Ideas for impact from the Summit include pilot projects, judicial involvement, and a clear expectation that the parties will be prepared, engaged, and cooperative. Education and outreach also makes a difference, for judges and attorneys, as does leadership from the bench and the bar, focused on a culture of excellence and integrity. The Federal Rules Advisory Committee has spent many years engaging with the bench and bar to revise the federal rules. The states should look to that effort and the resulting amendments as they move forward with their own reform. At the same time, we should look to the states for lessons that can inform change at the federal level. State courts are able to be more innovative on a quicker time frame. Accountability and transparency can also drive behavior, for both attorneys and judges. The technology is now available to assist in these efforts and we need to capitalize on it.

And most importantly, we need to continue to come together to share ideas, inspiration, and our commitment to civil justice reform. How wonderful it would be if commentators looking back in ten or twenty years traced profound change to these moments, and these efforts—change that ensures the accessibility and trustworthiness of the American civil justice system.

“Utah was the first state to build upon the work of the ACTL Task Force and change its discovery rules for all cases. Change takes time, but we have already seen positive impact. That gives me hope that we can achieve changes to the discovery culture throughout the country.”

Francis M. Wikstrom
Parsons Behle & Latimer

32 See, e.g., Emery G. Lee III, Fed. Judicial Ctr., Early Stages of Litigation Attorney Survey: Report to the Judicial Conference Advisory Committee on Civil Rules 9 (2012) (78% of survey respondents who provided a “yes” or “no” answer to the question reported a discovery planning conference); Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., Federal Judicial Center National, Case-Based Civil Rules Survey 7 (2009) (for cases in which some discovery took place, 82% of plaintiff attorneys and 83% of defense attorneys reported a conference to plan discovery).
“This is possible. Together we really can make this a system that is trusted, trustworthy, and a system that serves.”

Rebecca Love Kourlis
Executive Director, IAALS
Preamble: A Lawyer’s Responsibilities

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.
Model Code of Judicial Conduct

Preamble
[1] An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.

Rule 1.2: Promoting Confidence in the Judiciary
A judge shall act at all times in a manner that promotes public confidence in the independence,* integrity,* and impartiality* of the judiciary, and shall avoid impropriety and the appearance of impropriety.
Comments:
[4] Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all.

Rule 2.12: Supervisory Duties
(A) A judge shall require court staff, court officials, and others subject to the judge’s direction and control to act in a manner consistent with the judge’s obligations under this Code.
(B) A judge with supervisory authority for the performance of other judges shall take reasonable measures to ensure that those judges properly discharge their judicial responsibilities, including the prompt disposition of matters before them.
Comments:
[1] A judge is responsible for his or her own conduct and for the conduct of others, such as staff, when those persons are acting at the judge’s direction or control. A judge may not direct court personnel to engage in conduct on the judge’s behalf or as the judge’s representative when such conduct would violate the Code if undertaken by the judge.
[2] Public confidence in the judicial system depends upon timely justice. To promote the efficient administration of justice, a judge with supervisory authority must take the steps needed to ensure that judges under his or her supervision administer their workloads promptly.
Achieving Civil Justice for All: Recommendations, Next Steps, and the Role of Bar Leaders

2017 ABA Midyear Meeting
February 2, 2017

PANELISTS

Administrative Judge Jennifer D. Bailey has been a circuit court judge in Miami-Dade, Florida, for twenty-four years. She is the Administrative Judge for the 25-judge Circuit Civil Division, and handles a docket of Complex Business Litigation cases. Previously she ministered justice to Miami’s families in the Family Court for nearly a decade.

Judge Bailey serves on the Board of Governors of Directors of the National Center for State Courts and on the Board of Advisors for IAALS, the Institute for the Advancement of the American Legal System. She is a member of the Florida Commission on Trial Court Performance and Accountability and is pursuing an LLM in Judicial Studies at Duke University Law School.

Judge Bailey chaired the Court Operations subcommittee of the Civil Justice Initiative, created by the Conference of Chief Justices to evaluate and recommend best practices to reduce cost and delay in state civil courts. She chaired the Florida Supreme Court Residential Mortgage Foreclosure Task Force at the height of the foreclosure crisis, and previously served as Dean of the Florida College of Advanced Judicial Studies, as Chair of the Florida Bar Civil Procedure Rules Committee, and was appointed Vice-Chair of the Florida Court Education Council by four consecutive Chief Justices of the Florida Supreme Court.

Judge Bailey taught as faculty for the Florida New Judge’s College, the Florida College of Advanced Judicial Studies, and for the Florida Conference of Circuit Court Judges. She has received multiple awards for her service, including 2015 Florida Jurist of the Year from the Florida chapter of the American Board of Trial Advocates and the Equal Justice Judicial Leadership Award from Legal Services of Greater Miami in 2011. She is a magna cum laude double graduate of the University of Georgia (B.A., 1980, J.D. 1983). Jennifer and Mark Bailey have been married for 29 years, and they are the parents of two daughters.

Chief Justice Thomas A. Balmer has served as Chief Justice of the Oregon Supreme Court since May 1, 2012, and as a member of that court since 2001. Prior to his appointment, he was in private practice in Portland from 1982-93 and 1997-2001, including serving as managing partner of Ater Wynne LLP. He was Deputy Attorney General of Oregon (1993-1997), served as a Trial Attorney with the Antitrust Division of the U.S. Dept. of Justice (1979-80), and practiced with firms in Boston and Washington, D.C.

As a lawyer in private practice, Chief Justice Balmer handled individuals and business in a variety of civil disputes, including antitrust, intellectual property, employment, energy and other commercial cases. As Deputy Attorney General, he advised the Attorney General, the Governor, and other officials on constitutional, election, and administrative law matters, and represented the state in trial and appellate courts, including argument before the U.S. Supreme Court.
Chief Justice Balmer currently serves as the Chair of the Conference of Chief Justices (CCJ) Civil Justice Improvements Committee and a board member of CCJ. He has also served on numerous law-related boards, including the visiting Committee of the University of Chicago Law School, Classroom Law Project, Multnomah County Legal Aid Service, and the Advisory Committee of the Campaign for Equal Justice. He is a frequent speaker and author, and his articles on antitrust, legal history, and constitutional law have been widely cited, including by the U.S. Supreme Court and many lower federal and state courts. Chief Justice Balmer has participated in various international legal programs, including lecturing on judicial ethics in Tashkent, Uzbekistan (under the auspices of the United Nations); working with judges and schools on law-related education in Zagreb, Croatia; and speaking to judges and court administrators through the Russian-American Rule of Law Consortium.

Chief Justice Balmer is a graduate of Oberlin College and the University of Chicago Law School. He is married to Mary Louise McClintock, director of education programs for the Oregon Community Foundation, and they have two adult children.

Chief Justice Wallace B. Jefferson is a partner at Alexander Dubose Jefferson & Townsend. Prior to joining the firm in 2013, he served as Chief Justice of the Supreme Court of Texas. Appointed to the Supreme Court in 2001 and named Chief Justice in 2004, Wallace made Texas judicial history as the Court’s first African-American Justice and Chief Justice. He led the Court’s efforts to fund access to justice programs; helped reform juvenile justice; and inaugurated a statewide electronic filing system for Texas courts. Jefferson is Treasurer of the American Law Institute, Chair of the Texas Commission to Expand Civil Legal Services, and has been certified in Civil Appellate Law by the Texas Board of Legal Specialization since 1993.

Associate Dean Hannah Lieberman joined the David A. Clarke School of Law as Associate Dean for Experiential and Clinical Programs in September, 2016, bringing to the position broad experience as a leader and litigator in the public interest sector.

Ms. Lieberman began her legal career as a litigation Associate and, later, a Partner, at the Washington, DC law firm of Shaw Pittman Potts & Trowbridge (now Pillsbury Winthrop Shaw Pittman). After twelve years at Shaw Pittman, she refocused her career on civil legal aid, serving as the Director of Advocacy for Community Legal Services (CLS) in Arizona for six years, then as the Director of Advocacy and later Deputy Executive Director for the Legal Aid Bureau of Maryland (LAB) for ten, and subsequently as a consultant to legal aid programs nationwide.

In 2012, Ms. Lieberman joined Neighborhood Legal Services Program for the District of Columbia (NLSP) as its Executive Director, where she served for almost five years. She was a member of the Conference of Chief Justices’ Civil Justice Improvements Committee and chaired the subcommittee that focused on challenges presented by high volume dockets.
**MODERATOR**

**Don Bivens** is a litigation partner in the Phoenix office of Snell & Wilmer. He was Chair of the ABA Section of Litigation (2013-14) and currently serves as a Delegate for the Section to the ABA House of Delegates. Don chairs the Civil Justice Reform Committee of the Arizona Supreme Court, which has proposed numerous reforms recommended by the Conference of Chief Justices and the Institute for the Advancement of the American Legal System. Don is a past member of the ABA Board of Governors, past President of the State Bar of Arizona, and past President of the Western States Bar Conference. He is listed by Best Lawyers as the 2017 Lawyer of the Year for Banking and Finance Litigation in Phoenix. He has been ranked as one of the top 500 lawyers in America by The Dragon Law 500, and one of the Top 50 Super Lawyers in Arizona.