

**ADM10-8051
STATE OF MINNESOTA
IN SUPREME COURT**

In re: Minnesota Supreme Court Civil Justice Reform Task Force

**Recommendations of the
Minnesota Supreme Court Civil Justice Reform Task Force**

**FINAL REPORT
December 23, 2011**

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Final Report of the Civil Justice Task Force

Introduction

By order dated November 24, 2010, the Minnesota Supreme Court established the Civil Justice Reform Task Force to review the Civil Justice Forum Report and civil justice reform initiatives undertaken in other jurisdictions and recommend to the court changes that will facilitate more effective and efficient case processing. The court directed the task force to submit final recommendations by December 31, 2011.

The task force began its work by identifying the issues we face—namely excessive cost and delay that affect both administrative efficiency and the accessibility of our civil justice system. Our courts must remain relevant to Minnesota litigants by providing a forum for just, prompt, and inexpensive resolution of civil disputes.

The task force met eight times. In addition to discussing the civil justice experiences of its members, the task force collected extensive information about reform efforts in other jurisdictions and received presentations from:

- Rebecca Love Kourlis, Executive Director of the Institute for the Advancement of the American Legal System (IAALS) at the University of Denver, and former Colorado Supreme Court Justice;
- Martha Walters, Associate Justice of the Oregon Supreme Court;
- Paula Hannaford, National Center for State Courts;
- Debra Dailey, Director of the State Court Administrator's Office, Court Services Division Research & Evaluation Unit; and
- Nancy Nystuen, State Court Administrator's Office, Court Services Division Research & Evaluation Unit.

The task force was divided into the following three subcommittees: 1) Rules of Procedure Committee; 2) Differentiated Case Management Committee; and 3) Specialty Courts Committee. The three subcommittees met separately to work on their specific recommendations, reporting back periodically to the full task force. The work of the three subcommittees generated some overlapping recommendations, which are reflected herein.

The task force recommendations are intended to address a number of problems in the current court system. First, the recommendations are designed to bring the legal community back to the court system. Second, the recommendations are designed to keep costs down and provide the parties with firm trial dates. Finally, the recommendations are designed to bring effective and efficient judicial management to complex cases.

Identifying the Problems

Civil Justice Forum Report

In the fall of 2009 the Minnesota Supreme Court established a Civil Justice Forum modeled after a successful effort on criminal justice reform. The Forum's charge was to examine civil case processing and to identify proposed changes aimed at facilitating more cost effective and efficient civil case processing. Using a round-table discussion format, the Forum convened several times and produced a ranked list of proposals and described how they would help make the civil justice system more effective and efficient. The Forum also recommended the establishment of a workgroup or task force to perform a more detailed review.

The Forum's recommendations included examining whether case differentiation will promote better use of resources, both public and private; and if so, make recommendations for changes to rules, policies and practices that allow for civil case differentiation, including:

- Development of a definition for simplified and complex cases that clearly distinguishes them from a "standard" case; and
- Development of a simplified civil case process (e.g. Colorado Simplified Process) and a complex civil case process (e.g. California), including formal rules that would make the processing of these cases more efficient and cost-effective. The processes should more closely match the needs of litigation in terms of cost and resources appropriate to the specific nature of the litigation. Cases should be easily identified at initiation for differentiation, track assignment and differential management.

The Forum's eight-page report titled Minnesota Civil Justice Forum Recommendations for Improved Civil Case Processing is attached as Appendix A to this report.

Strengths and Challenges Identified

After reviewing the work of the Forum, task force members identified a number of strengths or challenges facing the current civil justice system. The responses of each task force member are set out in the table below.

#	Strengths	Challenges
1	Outstanding judges and court staff with strong sense of purpose and non-partisanship	Expense; can be cost prohibitive for some litigants which creates a gap of cases attorneys cannot service, but discovery expense is also problematic in complex cases
2	Outstanding, professional, collegial, and sophisticated practicing bar	Delay from filing to trial, including in outstate areas; significant delays between discovery and trial force attorneys to re-learn the case, clients lose interest
3	Do not see the same type of discovery disputes as in other jurisdictions	Court less predictable than arbitration ¹ as judges have not kept up with business law developments; need to increase subject matter expertise
4	Court meeting case processing time standards for most cases	Not enough trials to provide experience for younger lawyers
5	Minnesota courts have avoided the knee jerk reaction of sacrificing access to justice for efficiency	Increasing number of criminal cases that has to be juggled with civil cases
6	Single judge assignments for cases in some of the larger districts	Insufficient judicial resources for civil cases, different resource needs between judicial districts, more interpreters needed, not enough time to thoughtfully consider increasing complexity of motions in order to reduce discovery costs
7	Ability to be heard on every motion rather than paper submission only	Smaller cases do not need the same amount of discovery or the same time period in which to complete it, but are treated the same as other cases
8	Hip pocket filing (if cases that are trial ready upon filing can be processed promptly)	More pro se cases and greater difficulty in trying these cases
9	ADR system works well and helps with caseload	Lack of firm and early trial dates and early judge evaluation of case's merits
10	Outstanding jurors	Immunity defense motions left undecided until after lengthy discovery

¹ The task force is also aware that there are concerns about the fairness of arbitration. See, e.g., Pat K. Chew, *Arbitral and Judicial Proceedings: Indistinguishable Justice or Justice Denied?* 46 WAKE FOREST L. REV. 185 (2011) (includes quantitative and qualitative analysis of arbitration and court litigation of racial harassment cases, and concludes that more recently employees fare worse in arbitration than in litigation on racial harassment matters).

11	Pleasant experience to appear in MN courts and practicing bar is good to deal with	Expedited process rules not used as they require two parties to agree
12	Delays in processing civil cases are not as large as other jurisdictions	Attorneys do not get to the nub of the dispute quick enough
13	Recent jury trial case tried within one year of filing	Need to do a better job of identifying up front those cases that are ready for trial
14	Housing court bench and practicing bar are good problem solvers	Continuance requests due to lack of notice to the other side
15		Untimely informational statements
16		Focusing resources where we spend most of our time in civil matters
17		Businesses favor arbitration as it permits control on discovery and input on decision maker
18		Can't be all things to all people
19		Expense; can be cost prohibitive for some litigants which creates a gap of cases attorneys cannot service, but discovery expense is also problematic in complex cases
20		Increasing low income population has language barriers that require additional resources to address
21		Startup intellectual property companies are frightened to litigate because of the costs

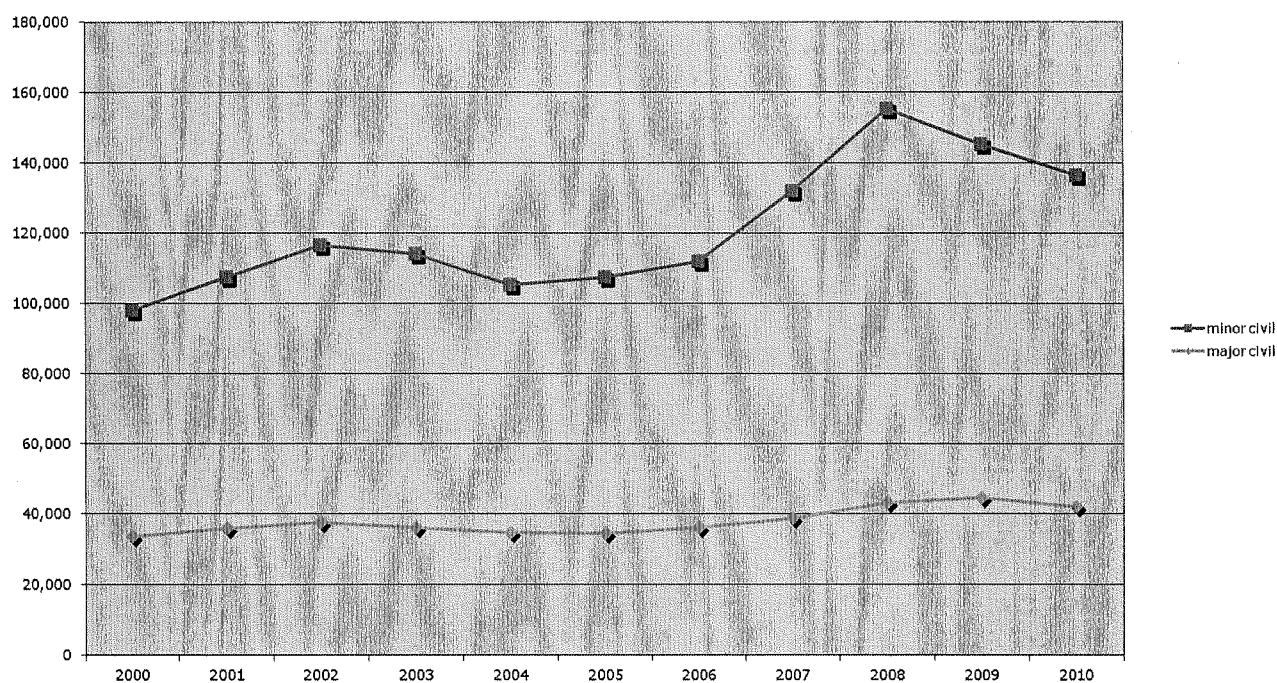
Minnesota Case Statistics

The task force received an overview of civil caseloads in Minnesota state courts over the last ten years from the State Court Administrator's office, Court Services Division Research & Evaluation Unit. Civil cases are divided into two categories, major and minor. Major civil case types include contracts, mechanics liens, receivership, consumer credit, condemnation/eminent domain, employment (including sexual harassment and discrimination), forfeiture, torts (including class actions, malpractice, and products liability), personal injury, wrongful death, harassment, torrens, property damage, assessment appeals, conciliation court appeals, welfare appeals, minor settlements, quiet

title, replevin, rent escrow, workers compensation (*Henning*²-type issues involving allocation to workers compensation in tort cases), and habeas corpus. Minor case types include conciliation court (small claims), implied consent, unlawful detainer, and minor civil judgments.

As the chart below illustrates, major civil filings were up 17% over the past ten years but appear to have flattened out the past two years. Minor case filings³ showed a similar pattern.

Civil Filings 2000-2010



The most recent trial rates, however, show a very small percentage of filings result in trials. The table below displays the trial rates in terms of percentages of filings, along with trial length.

² *Henning v. Wineman*, 306 N.W.2d 550 (Minn.1981)

³ Conciliation court filings are excluded from these totals as complete data prior to 2004 is not available.

2010 Trial Rates and Average Length			
Case Category	Trial Rates	Trial Length (min)	Trial Length (hours)
Major Civil			
Contract	4.1%	1,663	27.7
Consumer Credit Contract	0.3%		
Condemnation	1.4%	578	9.6
Employment	2.3%	1654	27.6
Forfeiture	8.8%	600	10.0
Tort	12.1%	2093	34.9
Personal Injury	6.4%	1998	33.3
Harassment	0.5%	83	1.4
Torrens	0.1%		
MNCIS Civil Other/ Misc	1.5%	1063	17.7
Other Major Civil	13.6%	484	8.1
Minor Civil			
Conciliation	0.4%		
Minor Civil Judgments	0.0%		
Implied Consent	1.0%	30	0.5
Unlawful Detainer	2.9%	66	1.1

Data that are not collected or readily ascertainable include the number of cases in a particular category that involved a dispositive or non-dispositive motion, how much judge time is spent on specific activities such as case management or ruling on dispositive motions or discovery disputes, and the number of hip-pocket cases (i.e., cases that are commenced by service but are not filed with the Minnesota courts) that are resolved without court involvement.

National Perspective on the Problem

The task force was fortunate to receive a national perspective on civil justice issues and reforms from former Colorado Supreme Court Justice Rebecca Love Kourlis, who is now the Executive Director of the Institute for the Advancement of the American Legal System (IAALS) at the University of Denver. IAALS is a national, non-partisan organization dedicated to improving the process and culture of the civil justice system. Rebecca Kourlis' prepared presentation to the task force, including a summary of reform activity in other jurisdictions, is set forth as an appendix to this report.

Rebecca Kourlis' presentation reinforced the belief of most task force members that the current civil justice system takes too long and costs too much. Five nation-wide surveys

using a variation on the same survey instrument yielded similar results from the groups surveyed (American College of Trial Lawyers, the ABA Litigation Section, Judges, both state and federal, the National Employment Lawyers' Association and Corporate Counsel). These conclusions were further reinforced by separate studies by the Rand Group (costs associated with e-discovery), the Federal Judicial Center (cases terminated in the last quarter of 2008 using multivariate cost analysis and surveys and interviews of counsel), the Searle Center at Northwestern Law in partnership with the Lawyers for Civil Justice (Fortune 200 companies surveyed on the costs of lawsuits and litigation cost trends), and the IAALS (7,700 federal civil cases analyzed to determine what makes cases move more quickly and what slows them down).

The reasons for the high cost include excessive discovery and expense related to discovery management, particularly e-discovery. High litigation costs cause parties to forgo claims that do not exceed the litigation expenses. The most commonly cited monetary threshold for pursuing a case is \$100,000. Some task force members feel that the local threshold may be closer to \$200,000. The surveys and studies also present evidence of agreement that litigation costs also drive cases to settle for reasons unrelated to the substantive merits of the claims or defenses.

A related challenge is the vanishing civil jury trial. Jury trials are a defining feature of our civil justice system and provide a primary means for citizen engagement. The task force learned that the National Center for State Courts is working on a new study that will show that:

- jurors outnumber litigants, witnesses and lawyers, and judges in the civil justice system;
- one third of the population has served on a jury;
- jury service is an overwhelmingly positive experience for jurors; and
- experiences of other participants, including clients, even if they win, are less positive.

There are also researchers who report that people who serve as jurors have higher voting rates and a higher engagement in the community.⁴ Civil justice reform aimed at making our courts more accessible to civil litigants may lead to more civil jury trials.

⁴ JOHN GASTIL, ET AL., *THE JURY AND DEMOCRACY, HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* (Oxford University Press 2010).

No Minnesota Survey Needed to Validate Problems

The task force considered but ultimately rejected the need for a Minnesota-based survey to confirm that excessive cost and delay are significant problems in our civil justice system. The work of the Civil Justice Forum, the experience of task force members, and the surveys and studies conducted elsewhere adequately support this view. Any further survey would be duplicative and potentially waste valuable time and other resources.

Search for Solutions

National Perspective on Solutions

The presentation of the IAALS' Rebecca Kourlis, discussed above and set forth more fully in the appendices, included a national perspective on possible solutions for consideration, including:

- Arizona Court Rules that front-load the system with disclosures and tamp down discovery. Adopted over 15 years ago, and Arizona lawyers think that it shortens the process and does not negatively impact fairness, although there is less certainty about whether it saves money.
- Oregon Court Rules requiring fact-based pleading with quite limited discovery unless the case is designated as complex. The limits on discovery include NO disclosure or discovery of experts, although Oregon lawyers surveyed would prefer a short expert report rather than no advance expert information. Oregon also has an expedited jury trial pilot project with limited discovery and a trial date within four months.
- Colorado Court Rules establishing an expedited procedure for cases under \$100,000 (also considered by the Civil Justice Forum). Attorneys and the judges think that it makes the process shorter and less expensive without negatively impacting fairness, and they report that the trial rate for cases under the expedited process is somewhere between 8 and 12 percent as opposed to under 1% for other general civil cases.
- IAALS Pilot project rules addressing a host of issues including: consideration of proportionality for all discovery and consideration of cost effectiveness as an express goal for managing cases; fact-based pleading; pre-complaint discovery; single judge assignment of all civil cases; initial or automatic disclosures; meet and confer regarding preservation of electronically stored information; mandatory pre-trial conferences resulting in discovery limits and deadlines, and a date or time frame certain for trial; proportional and relevant discovery limits; written expert

witness reports that define the scope of direct testimony; and sanctions for failure to follow requirements or for unnecessary delay.

Task force members were interested in the Oregon approach, which has been in place for some time as Oregon is one of a few jurisdictions that did not adopt the 72-year old federal court approach of notice pleading and broad discovery. The task force invited Oregon Associate Justice Martha Walters to explain the Oregon process and the legal culture involved.

Justice Walters explained that:

- Oregon Rule 18 requires pleading ultimate facts. In a case involving a harassing comment, for example, the complaint would specify the date of the comment and the actual comment that was made. In practice there are some motions to require a more definitive statement as well as motions to dismiss for failure to state a claim.
- Claims are not made “on information and belief” but must have factual allegations and state that you have a basis for those facts.
- Liberal rules allow amendment of pleadings limited to adding claims rather than changing the statement of facts. Objections at trial that certain matters are beyond the scope of the pleadings will, however, be upheld unless the pleadings are amended to conform.
- For affirmative defenses, defendant must plead specific facts.
- IAALS surveys for Multnomah County, Oregon, indicated that the legal sufficiency of pleadings was challenged far less frequently in Oregon state courts than in Oregon federal court, and that this was particularly true in discrimination cases, and that discovery volume is less compared to federal court.
- Studies have not demonstrated that there are reduced costs due to this pleading aspect alone, or that parties are doing less discovery because of it. Fact-based pleadings establish the scope of the case early on and permits a test of the case early on. Otherwise there is no statistical evidence to show either a downside or upside.
- There is some evidence to suggest that fewer cases are brought because of fact-based pleadings because if legal sufficiency is not challenged as much as in federal court, the process must be effective in screening out some insufficient cases.

Expedited Litigation Trial Programs

The task force reviewed civil expedited litigation programs operating in several jurisdictions, including Arizona, Colorado, Kentucky, Massachusetts, New Mexico, and Oregon. Common features include: automatic disclosures, early court involvement, limited discovery, firm trial date, and voluntary participation.

Oregon's expedited litigation program is brand new and requires agreement of all parties in the form of a joint motion and a decision by the presiding judge. It is in lieu of mandatory arbitration and all other forms of ADR. A case management conference is held within 10 days of designation as an expedited case, and a trial date is set no later than 4 months out. Unless otherwise agreed, discovery is limited to 2 depositions, one set of production requests and 1 set of admission requests per side, and all discovery must be completed no later than 21 days prior to the trial date.

Expedited Jury Trial Programs

The task force also reviewed civil Expedited Jury Trial (EJT) programs operating in several jurisdictions, including California (statewide statute and rules), New York (Chautauqua County), and South Carolina (Charleston County). All are voluntary programs that offer a mixture of abbreviated procedures.

The California EJT is also new and involves a one-day trial with 3 hours for each side including cross examinations. Voir dire is limited to 15 minutes for the judge and 15 minutes for each party. There are 8 or fewer jurors and 3 peremptory challenges per side. The verdict is binding subject to high - low agreements between the parties. Grounds for appeal are limited to: judicial misconduct materially affecting substantial rights; jury misconduct; corruption, fraud by court, jury or adverse party preventing fair trial. New trial motions must be made within 10 days. Post-trial motions are allowed for costs, attorney fees, clerical error, and judgment enforcement. Parties may not move to set aside a verdict or judgment as matter of law, or based on inadequate or excessive damages.

New York's Chautauqua County version of EJT has been in place for a decade and has one-day trials with summary presentation of evidence and a six-person jury. Trial is typically scheduled within 60 days of the last settlement effort. There are strict time limits on voir dire and only 2 peremptory challenges per side. Trial is often completed in

60 to 90 minutes. Each side gets a 10 - minute opening and closing statement and one hour to present its case. Attorneys are typically limited to two live or videotaped witnesses; additional testimony may be submitted by deposition transcript or sworn affidavit. Each counsel may prepare a notebook of materials for the jurors (previously reviewed by the other side) and walk the jury through the exhibits. Medical testimony is submitted by written report, PowerPoint presentation, physician affidavit or video. The judge gives a streamlined charge to the jury, which renders its verdict by the end of the day. The process can be binding or nonbinding, per parties agreement, with high/low limits of recovery often stipulated in the binding format. There is no appeal in the binding format, and the record can be waived if all sides agree. Findings of Fact/Conclusions of Law are not required, and judgment is not entered, instead releases and stipulations are exchanged.

The New York EJT binding processes are mainly used for relatively small damage cases where the cost of medical experts is prohibitive; cases involving large amounts where negotiations are close; and cases where injuries may result in verdicts exceeding policy limits and defense counsel seeks to cap the verdict.⁵ The nonbinding processes typically include damage cases where an advisory verdict would promote settlement; cases where damages are the only issue; and cases where one party has an unrealistic settlement position. Even with a nonbinding verdict, court officials say the parties get a good indication of what may happen at a traditional trial and may settle.

South Carolina's Charleston County version of EJT has been around for many years but its popularity faded for a while but has recently been revived.⁶ The program is binding and there are no time limits for the length of trial but most are completed in one or two days. Parties may call live witnesses or summarize their testimony. Evidence rules are substantially relaxed; no rule prohibits hearsay in medical records and reports. A local attorney chosen by the parties serves as "judge." That person is deputized by court order but paid by the parties. The process uses jurors (summoned and paid by the court per usual), but no court reporter, and no appeals. The paradigm case is a simple torts case, involving an automobile accident or a slip-and-fall, in which a plaintiff allegedly suffered significant but not life-altering injuries as a result of the defendant's conduct. Virtually every case in the program involves a "high/low" damages agreement.

⁵ See Silver, *Summary Bench Trial: Overlooked, Efficient Resolution*, 237 N.Y.L. J. 52 (March 19, 2007).

⁶ Croley, *Summary Jury Trials in Charleston County, South Carolina*, LOYOLA OF L.A. L. REV. (Summer 2008).

Summary jury trials are currently offered as a form of alternative dispute resolution (ADR) under Minnesota rules. Gen. R. Prac. 114.02(a)(4). The process is non-binding and requires agreement of the parties. Minnesota rules also permit the parties to create an ADR process by agreement. Gen. R. Prac. 114.02(a)(10).

Importance of Planning an Evaluation of any Proposed Rule or Case Management Changes

The task force also received a brief presentation from the National Center for State Courts (NCSC) which has obtained a Bureau of Justice Assistance Grant to assist state courts in evaluating civil justice reform. The NCSC and IAALS have also jointly produced a report entitled "The 21st Century Civil Justice System, A Roadmap for Reform, Measuring Innovation" that emphasizes the need for early and consistent focus on evaluation and measurement of any civil justice reform project. The NCSC is available to assist in designing an evaluation to measure objective criteria.

Divide and Conquer Approach: Subcommittees

The task force identified several areas that were worthy of more detailed discussion and review: court rules changes (including IAALS pilot rules), differentiated case management (including programs such as Colorado's expedited procedure for cases under \$100,000), and specialty courts (e.g. for business and/or complex cases). The task force was divided into the following three subcommittees: 1) Rules of Procedure Committee; 2) Differentiated Case Management Committee; and 3) Specialty Courts Committee. The three subcommittees met separately to work on their specific areas, reporting back periodically to the full task force. The work of the three subcommittees generated some overlapping recommendations, which are reflected herein.

The task force recommendations are intended to address a number of problems in the current court system. First, the recommendations are designed to bring the legal community back to the court system. Second, the recommendations are designed to keep costs down and provide the parties with firm trial dates. Finally, the recommendations are designed to bring effective and efficient judicial management to complex cases.

Task Force Recommendations

Overview

The task force's preliminary recommendations are organized into the following categories:

- Rule Recommendations
- Case Management Recommendations
- Education and Policy Changes
- Changes Discussed but Not Recommended

Rule Recommendations

Adopt A Proportionality Consideration Requirement for Discovery

The task force recommends that Minnesota adopt Model Rules 1 and 10 of the IAALS Pilot Project Rules. These changes would create a presumption of narrower discovery and require consideration of proportionality in all discovery matters, limiting discovery to the reasonable needs of the case. To some degree, this is an issue that should be addressed in a best practices document, as Minn. R. Civ. P. 26 already contains provisions that encourage the court to impose meaningful limits on discovery. For example, Rule 26.02(b) sets forth several directions for limiting discovery. In practice, these limits have rarely been enforced however; and the expansion of discovery and increasing expense of discovery literally threaten the civil justice system. This recommendation is probably one of the most important recommendations the task force advances. The recommended language from IAALS would require the modification of Rule 1 of the Rules of Civil Procedure and the adoption of a new provision within Rule 26 to implement IAALS Rule 10. IAALS Rules 1 and 10 state:

Rule 1 Scope

1.1. These Rules govern the procedure in all actions that are part of the pilot project. They must be construed and administered to secure the just, timely, efficient, and cost-effective determination of such actions.

1.2. At all times, the court and the parties must address the action in ways designed to assure that the process and the costs are proportionate to the amount in controversy and the complexity and importance of the issues. The factors to be

considered by the court in making a proportionality assessment include, without limitation: needs of the case, amount in controversy, parties' resources, and complexity and importance of the issues at stake in the litigation. This proportionality rule is fully applicable to all discovery, including the discovery of electronically stored information.

Rule 10 Discovery

10.1. Discovery must be limited in accordance with the initial pretrial order. No other discovery will be permitted absent further court order based on a showing of good cause and proportionality.

10.2. Discovery must be limited to matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and must comport with the factors of proportionality in [Rule] 1.2, including the importance of the proposed discovery in resolving the issues, total costs and burdens of discovery compared to the amount in controversy, and total costs and burdens of discovery compared to the resources of each party.

The task force recommends the implementation of the changes reflected in these IAALS model rules, but believes that they will require adaptation of the specific language to fit into the Minnesota rules.

Adopt the Federal Court Automatic Disclosure Regime

The automatic disclosure system used in federal court since 1993 requires automatic disclosure of certain information before discovery occurs, and permits discovery only after the parties have conferred with each other regarding discovery needs. Rule 26(a) of the Federal Rules of Civil Procedure provides for three categories of automatic disclosure: initial disclosures (Rule 26(a)(1)), expert disclosures (Rule 26(a)(2)), and trial disclosures (Rule 26(a)(3)). The task force reviewed all three categories of changes, and believes there is now enough experience with the operation of automatic disclosure in the federal courts to warrant the adoption of these federal court automatic disclosure requirements in Minnesota.⁷

⁷ Although the automatic initial disclosures under the federal system are somewhat similar to IAALS Pilot Rule 5, the task force prefers consistency with the federal practice.

This issue was last reviewed by the Minnesota Supreme Court Advisory Committee on Rules of Civil Procedure many years ago, and at the time the initial disclosure process was relatively untested and more controversial. Minnesota litigators had little experience with it. In the ensuing years, a broad consensus has developed that these changes have worked reasonably well in federal court and permit the early exchange of relevant information about a case.

The other salutary part of the federal system is the requirement that the parties confer on the discovery needs of the case before discovery is conducted. The parties meet and confer on their own, without the court, although in most cases there is a subsequent Rule 16 conference with the court. Minnesota should investigate an appropriate mechanism to implement this in state court, including a process for holding judicially-supervised discovery conferences in appropriate cases. The federal rules exempt certain categories of cases from the automatic disclosure requirements, and a similar list of excluded categories of cases would need to be developed for Minnesota. The task force believes this is a useful tool to limit the scope and extent of discovery, reduce the amount of money spent on discovery that does not address the merits of the litigation, and streamline the litigation process.

Adopt an Expedited Procedure for Nondispositive Motions

The task force believes that many judges who have implemented expedited procedures for hearing discovery and other nondispositive motions without requiring (or always permitting) formal briefing and scheduling of oral argument have accomplished significant returns in terms of expediting dispute resolution, reducing cost to the litigants, and easing of the judicial task. These procedures include requiring motions to be raised first by a brief letter (perhaps with a two-page limit) followed by a brief response, and then a judicial determination as to how the motion should be heard and decided. In some cases, it is appropriate and the parties ultimately acquiesce in a ruling provided over the telephone without any further briefing; in some cases the court may determine that further briefing and oral argument is necessary.

The task force believes that expediting nondispositive motion practice would substantially improve Minnesota's system. The opt-in model found in case management orders entered by Hon. Janie Mayeron, United States Magistrate Judge, District of Minnesota, might serve as a model:

3. All non-dispositive motions relating to fact and expert discovery, including those which relate to discovery and any request for extension or modification of this Pretrial Scheduling Order, shall be served, filed and HEARD on or before [DATE]. The parties are encouraged to consider whether the motion, including motions relating to discovery and scheduling, can be informally resolved through a telephone conference with the Magistrate Judge. At the Rule 16 Scheduling Conference, the Court advised the parties that it is willing to resolve nondispositive disputes between the parties on an informal basis via a telephone conference. However, before the Court will agree to proceed with this informal resolution mechanism, all parties to the dispute must agree to use this informal resolution process as the very nature of the process is such that the parties are giving up rights they would otherwise have (e.g. the dispute is heard over the phone; there is no recording or transcript of the phone conversation; no briefs, declarations or sworn affidavits are filed). If the parties do agree to use this informal resolution process, one of the parties shall contact Calendar Clerk to schedule the conference. The parties may (but are not required to) submit short letters, with or without a limited number of documents attached, prior to the conference to set forth their respective positions. The Court will read the written submissions of the parties before the phone conference, hear arguments of counsel at the conference, and if no one changes their decision during the phone conference regarding their willingness to participate in this informal resolution process, the Court will issue its decision at the conclusion of the phone conference or shortly after the conference. Depending on the nature of the dispute, the Court may or may not issue a written order. If there is no agreement to resolve a dispute through this informal resolution process, then the dispute must be presented to the Court via formal motion and hearing.

Note that this version requires consent of the parties. The task force believes that it might be preferable to allow the moving party to invoke the expedited process, with the district court ultimately deciding whether expanded briefing and argument would be helpful.

The task force would hasten to point out that this change is also worthy of attention in a best practices manual. Ultimately it is impossible to determine by category what motions should be treated in this way. Motions to amend to add a claim or omitted party or clarify a factual allegation may be well suited to this procedure. Other motions to amend, including, for example, to add a claim of punitive damages, may require extensive briefing and documentation, and would be wholly inappropriate for it. The rule would

require the judge to determine how a particular motion would be treated after receiving the initial letter briefs.

Continue to Allow Commencement of Actions by Service, but with a
One-Year Filing Requirement

Minnesota continues to be an outlier (one of three states) in permitting actions to be commenced by service of the complaint rather than by filing it with the court – aka “hip pocket filing.” Accordingly, the Rules Subcommittee and the task force considered how hip pocket filing impacts the issues of excessive cost and delay that the task force is attempting to address. Many task force members believe it is not necessary to change the rule on commencement of actions, and that the confusion it would entail and the energy it would require to make this change is not warranted. The fact is that any party can file with the court at any time and they control costs incurred prior to court involvement. Many task force members and their colleagues acknowledge that service without filing allows litigation to be resolved without taking up court resources, and that the absence of publicity or other confidentiality concerns is often a factor in initiating actions by service and keeping them out of the public eye. They also acknowledge that there would be a resource impact if hip pocket filing were abandoned, although it is difficult to estimate the number of cases that might be added to the courts already crowded dockets.⁸

On the other hand, many task force members believe that cases can only be effectively managed when a judge is assigned to the case, and that managing cases in a way that is effective for courts and parties makes a difference in reducing cost and delay. There are cases in which plaintiffs use the authority of the court to summon someone and then do

⁸ Collection firms estimate that they currently have 50,000 non-filed consumer cases that have accumulated over the past several years, and that there are approximately twice as many non-filed consumer cases as there are filed consumer cases.

When planning its e-filing project, the Fourth Judicial District visited Clark County, Nevada, which is thought to have an equivalent civil litigation environment; Clark County has roughly 200 new civil filings per day, while the Fourth Judicial District has roughly 100 per day, so the concern is that caseloads could double if hip pocket filing is abandoned. In contrast, in New York, where hip-pocket filing was replaced in 1991 with a requirement to file within 30 days of service, and changed again in 1992 to require filing as part of commencement, it is estimated that the first year impact was an increase of \$10 million dollars in filing revenue, representing approximately a 20% increase, with a million or two more added by the second change. Thus, an argument could be made that the potential impact of eliminating hip-pocket filing might be somewhere between a 20% and 100% civil filing increase.

nothing, while some defendants, particularly poor consumers, do not have the resources to bring a motion to dismiss. For other litigants the burdens of discovery and costs of maintaining litigation holds on documents continue until the matter is concluded. When cases eventually come into court many years after service, everything is harder to accomplish at that point. Time is not a friend to litigation. It increases burdens for all participants.

A task force subcommittee recommended that an appropriate solution to this problem is to amend Minn. R. Civ. P. 3 to retain its current rule on commencement, but to require that an action be filed within one year of commencement. This would give the parties one year to litigate, resolve any issues, or even settle the case without any judicial involvement, but would require, if the case is not resolved within a year, that the case be filed and subjected to judicial supervision and management. Mandatory filing after one year would address problems caused by excessive delay, help the court to know what cases are out there, and increase filing fee revenue.

The task force discussed at length the potential impact on consumer debtors of a requirement to file within one year of commencement. The task force heard from consumer collection attorneys representing creditors who indicated that waiting for consumers to get back on their feet is the most common reason for waiting to file, that it is advantageous for consumers to not have the debt appear on the court record, and filing fees and attorney fees will only add to a consumer's debt burden. Attorneys representing consumers indicated that filing adds little damage to a debtor's credit report because the debt is reported as soon as there is a non-payment. They also noted that many consumers in debt are essentially judgment proof or living on social security, they suffer from having their cases simply hang out there, and many will not see an attorney until a case gets filed, so filing may be helpful in that regard.

By a vote of 16 to 4, the task force decided that requiring filing within one year is reasonable. Those opposed reasoned that a one-year period is not long enough to allow resolution in construction cases involving a repair plan (e.g., a roof repair); imposing a filing deadline could, in effect, shorten statutes of limitations; consumers at all income levels would be harmed by having cases appear on their record; lawyers are concerned about malpractice claims if the one-year deadline is missed and a case gets dismissed; filing is a solution in search of problem; and the effort required to change the legal culture could take away from other valuable initiatives of the task force.

Although the rules subcommittee recommended dismissal with prejudice as the consequence for failing to file within one year of commencement,⁹ a majority of the task force felt that dismissal with prejudice was too harsh. The task force considered a number of alternative consequences, including loss of the ability to file non-dispositive motions, dismissal without prejudice subject to monetary sanctions to reinstate the case, dismissal without prejudice but filing is required to reinitiate the case, a rebuttable presumption of failure to prosecute which requires a motion to dismiss and court action granting the motion, and dismissal with prejudice after one year unless parties within that year sign a stipulation to extend the filing period. Following a vote the task force recommends the following two alternative consequences for failure to file within one year of service. The relative advantages and disadvantages of each recommendation are noted.

Alternative #1	
Dismissal with prejudice after one year unless parties within that year sign a stipulation to extend the filing period (16 out of 21 possible votes of support)	
Pros	Cons
Accommodates parties with sensitive cases that cannot be resolved within 1 year but are actively being worked on	Does not deal with cases coming in with years of discovery disputes piled up
Does not require a motion so less burden on court and staff	Unsophisticated defendants may not know what they are signing
Stipulation creates a defense to estoppel by rule	Litigation hold/spoliation of evidence burden remains

Alternative #2	
Dismissal without prejudice but filing is required to reinitiate the case. (14 out of 21 possible votes of support)	
Pros	Cons
Requires filing to reinstate	Litigation hold/spoliation of evidence burden remains
Good middle ground; ends litigation so it addresses consumer debtor cases	Case law is clear that statute of limitations is not tolled during pendency of the proceedings

⁹ Minn. R. Civ. P. 60 allows parties to seek relief from a dismissal order.

This is a more active version of an alternative file-before-statute-of-limitations-expires approach	Not a bright line standard like dismissal with prejudice
Does not require a motion so less burden on court and staff ¹⁰	
Does not impact voluntary dismissals under R. Civ. P. 41	

Case Management Recommendations

Pilot an Expedited Litigation Track Program

Voluntary, expedited case processing programs designed to reduce costs and delays are not new to Minnesota or other jurisdictions. One common problem, however, is that these voluntary programs are simply not used because they require all parties to agree to the process. Another problem is that the current informational statement form is not helpful in differentiating cases for management. Thus, the task force recommends adoption of a pilot program for a mandatory Expedited Litigation Track (“ELT”) for certain types of cases that will include automatic disclosures, limited discovery, and a date-certain/week certain trial within four to six months. The task force recommends that pilots be conducted in two districts, one in the Twin Cities metropolitan area and one in greater Minnesota. The complete ELT proposal is set forth in Appendix C attached to this report.

Defining appropriate ELT cases was a difficult first step. There is no readily available court data on dollar values and claims, and it may take a pilot project to provide useful data. Task force members struggled with case type definitions and relative dollar values. A condemnation case, for example, would not be appropriate for ELT until after a commissioner’s report is filed. Contract cases can encompass many different claims including business disputes, eminent domain, and tortious interference with a contract. On the other hand, ELT is very attractive for many contract cases, which is one reason why these cases are often sent to arbitration. Property damage may include a simple fender bender or a substantial construction defect. The task force recommends the simplicity of an across-the-board dollar value definition with an opt-out process as a safety valve, plus an opt-in process for cases involving higher amounts but needing less process.

¹⁰ Dismissal is by operation of rule. In the 1980’s when the Fourth District did away with the note of issue and dismissed cases by rule, approximately 100,000 cases were dismissed.

The proposed dollar threshold is \$100,000. Some members felt that a higher amount would attract more cases to the pilot, while others felt that the numbers should be kept lower to have a higher probability of success. The personal injury defense bar is concerned that if the amount is too high, defendants would face substantial injury claims without sufficient time they need to obtain records and schedule independent medical examinations. Thus, the task force is recommending a threshold of up to \$100,000, exclusive of costs, disbursements and attorney fees, for claims subject to the mandatory ELT.

The task force determined that the certification of the dollar amount is to be made in a new civil cover sheet submitted at the time of each party's initial filing. The cover sheet is intended to replace the current Gen. R. Prac. 111 Informational Statement and to incorporate the current Gen. R. Prac. 104 Certificate of Representation and Parties. The new cover sheet is discussed elsewhere in this report.

The certification or indication of dollar amount is truly binding in that the ELT proposal permits a party to make a motion to be excluded from the ELT, and the district court would have the discretion to decide that motion. This is envisioned as being similar to a motion to amend the pleadings. Motions made more than 30 days after service of the ELT Certification require a showing of good cause related to a new development that could not have been previously raised.

The task force decided that the timing of automatic disclosures should be set at 30 days after the certification of amount involved is made so that it happens after the 20-day window for filing an answer if the case is served and filed at the same time. The task force recognizes that automatic disclosure requirements may be impossible for the defense to comply with if filing is made contemporaneously with service. Such circumstances would appear to be a reason for requesting that the matter be moved out of ELT under the attached ELT Rule 1, subd. 3(E). If the case is hip-pocket filed for a period of time, it is possible that initial disclosures may have already been made.

The task force agreed that the ELT should limit the number of interrogatories, depositions, and document requests to 15 per category, and that admissions should be limited to 25. The task force felt that it is important for ELT training to emphasize a shift to more effective discovery tools including requests for admissions and stipulations to help expedite trial.

The task force rejected the idea that depositions need to occur in a distinct order, with plaintiff or defendant being deposed first. There is no inherent logical order except for

disclosure of experts, and scheduling orders can limit the number of depositions and impose the deadline for their completion. The suggestion to limit depositions to 2.5 hours in length so that two could be taken in a single day was also rejected. If there are limits on written discovery, then the process may need to provide more room for depositions to take place.

The task force also considered but rejected a modified summary judgment process. Although dispositive motions generally can add 4 to 6 months and significant costs to a case, there are some simple dispositive motions that should be heard, and the problems, if any, can be addressed at the case management conference.

The task force believes that it is important to measure the success of the ELT pilot. Measures include the number of parties using the program, the number of trials it produces, and the number of opt-out motions granted, together with the satisfaction rates of parties, attorneys and judges. The National Center for State Courts is willing to assist with designing and conducting an evaluation.¹¹ An ELT participant survey could address: who is opting out and in what category of cases; suggestions for a dollar limit; reporting of settlement amounts (provided the survey responses are confidential); whether users found the process cheaper, faster, and fair, and would they use it again; strategic advantages and disadvantages; whether cases involved hard medicals and specials; and whether experts were involved; whether business entities were involved.

¹¹ The National Center for State Courts (NCSC) is prepared to conduct the evaluation for the Minnesota Judicial Branch including designing an appropriate evaluation strategy based on the objectives that the reforms are intended to accomplish; working with the state court administrator's office to review the available case-level data that would serve as reasonable evaluation measures; conducting case file reviews if necessary; preparing and presenting a baseline data report to judicial leadership; collecting evaluation data from civil cases affected by the reforms; analyzing the data; and preparing and presenting an evaluation report. The actual scope and timeframe for the evaluation will ultimately depend on what specifically is adopted and the typical lifespan of affected cases. In the other states that NCSC is working with, the timeframe is running 2 to 3 years after the reforms have been adopted, with the final evaluation report scheduled for 3 to 6 months after the completion of data collection.

The NCSC has a grant from the Bureau of Justice Assistance that runs through the end of 2012, which could cover the initial evaluation design and baseline work for reforms adopted early in 2012. Thereafter NCSC plans to use NCSC Technical Assistance funds to complete the evaluation.

Adopt a Complex Case Program

The task force identified the need for more effective and efficient case management of complex cases. The fact is that complex cases are leaving the state court system and going elsewhere, and when the court does handle them, they tend to take a significant amount of time and resources to process. The task force determined early on that a stand-alone court for business or complex cases does not make sense in Minnesota. There is no funding and it is not workable in a practical, detailed sense. The task force then examined the various complex case management tracks and specialty courts that have been operating in more than twenty states over the last 15 years.¹² The task force recommends adoption of a statewide program that would apply to all complex civil cases.

The envisioned Complex Civil Program or CCP features early assignment of a designated case to a specially trained judge who will handle the matter from beginning to end. The CCP would leverage flexibility found within existing rules (R. Civ. P. 16 and Gen. R. Prac. 113) and also be responsive to lawyer input and adaptable to change over much shorter time periods than the full court system. The CCP creates a special case docket for complex cases, which would not involve significant cost increases to the court, and would provide flexibility to move cases into and out of that docket. Proposed Special Rules for a Complex Case Program are set forth in Appendix D to this report.

The definition of a complex case is based on the California program. It is designed to be broad and flexible so that it encompasses not only the multi-party, complex subject matter cases but also a smaller dollar, two-party case involving a number of experts or other detailed issues.

Parties will designate a case as complex in a separate form to be submitted when they make their initial filing in a case. The designation is subject to review by the chief judge of the district, who ultimately determines if a particular case is appropriate for the CCP.

A key component of the CCP is the training and education of judges to handle complex cases. Education would include specific courses for management of complex litigation as well as rotating and rigorous curriculum of content directed at substantive law and related issues (such as the list of claims or actions that would be provisionally designated as

¹² The twenty-two states currently operating these tracks are as follows: Alabama, Arizona, California, Connecticut, Delaware, Florida, Georgia, Illinois, Maine, Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, and West Virginia. Most, if not all, of these states actively and publicly promote these unique processes or courts as a way of demonstrating aptitude in complex civil matters, especially business disputes.

complex under the proposal set forth in the appendices to this report). This could take the form of a one-week residential setting and/or a series of shorter sessions over the course of a year or two that would be open to any interested judges who would commit to participation in the entire program. The eventual desired result would be a cadre of trained judges across the state with at least one such judge for each district.

The task force recognizes that judicial training may not be a cost-neutral item. Travel costs associated with the training may require additional funding, although it may be possible to conduct some interactive training over the Internet using Webex, Lync, or similar functionality that is already available to the judicial branch.

Although business clients often turn to arbitration due, in part, to their ability to select the decision maker, the task force does not favor this approach. The CCP designation form should allow the parties to creatively weigh in on the issue, but stop short of selecting individual judges. Rather than attempt to define which judges are “qualified” or adequately trained, the task force recommends that in making the assignment of judges to a CCP case, the chief judge of the district should consider, among other factors, the needs of the court, the judge’s ability, interest, training, experience (including experience with complex cases) and willingness to participate in educational programs related to the management of complex cases.

The task force decided against including a sample CCP case management order as part of its proposal due to concern that the sample might become a de facto standard and would not provide the necessary flexibility to address the wide variety of “complex” matters encompassed by the CCP. To assist courts, however, the CCP proposal incorporates a reference to Minn. R. Civ. P. 16.02-.03 for a list of items that such orders should address.

The task force identified the following as measures of the success of a CCP pilot:

- How long it took to resolve the case.
- Number of judge events (e.g. hearings, calls).
- Level and number of motions brought.
- Special master appointments.
- Baseline data from prior year(s)
- Level of satisfaction.
- Election over arbitration.

As is the case with the ELT, the information can be collected through the court's case management system and through surveys of participants. The National Center for State Courts may be able to assist with designing the assessment including surveys and cost measurement.

Revise Current Informational Statement

To accommodate both the Expedited Litigation Track (ELT) and Complex Case Program (CCP) discussed above, changes will have to be made to the Informational Statement, or a separate certification or designation form developed. Some task force members also felt that the current informational statement is out of date, and that Gen. R. Prac. 111 requires the courts to wait too long before issuing scheduling orders.

Gen. R. Prac. 111 requires the court to wait 60-90 days after the parties file informational statements before issuing the scheduling order.¹³ This allows parties a certain window of time to provide input to the court in regard to scheduling before the court issues a scheduling order. Information about the case is needed in part because we do not have a very good categorization of cases to begin with. In addition, Gen. R. Prac. 111 and related civil rules were designed in part to prevent the waiver of a jury trial by omission of a form or omission of a check box on a form.

The task force recommends that a revised cover sheet/certificate of representation and parties (that includes ELT information in the pilot districts) be filed with the initial pleading, and that complex case designation would be made in a separate document to be filed with initial pleadings in addition to the cover sheet. Key information on a new civil cover sheet/certificate of representation and parties should include: identification of parties and counsel and their e-mail addresses, category of case, brief description of case; amount in controversy, discovery completion date, trial date, trial length, jury trial or waiver, issues in dispute, independent medical examination needs, and interpreter needs. Proposed motion deadlines have not been of much value in the informational statement and are more appropriately dealt with as part of a later Rule 16 conference. In any event, the task force is comfortable delegating the form drafting tasks to the state court administrator, who already maintains the majority of court forms on the state court website.

¹³ Some courts call the parties in to discuss scheduling.

Provide a Trial Date Certain

The task force has a strong view that the litigation process in Minnesota will be enhanced if the courts are able to establish, early in the case, a trial date certain (meaning a specific date or week) that will have a high probability of occurring. The task force understands that “certain” in this context cannot mean absolutely certain, but the realities of the litigation and settlement process are that the sobering effect of a firm trial date is one of the best tools to bring disputes to a conclusion and to focus the parties’ attention on resolving the case if possible. Conversely, a “soft” trial date fails to engender this reaction. A trial date certain thus encourages settlement discussions and movement without any aspect of coercion or unfair pressure on the parties. Judges and court administrators should place a high priority on providing firm trial dates in all civil cases, without regard to category.

Some task force members believe that, if firm trial dates are to be meaningful, it is equally important that continuances should only be granted in limited, extraordinary circumstances, and that the appellate courts should recognize the importance of upholding denials of requests for continuance. Other members noted that having a firm trial date is likely more important than having a single judge assigned (discussed below).

Assign Civil Cases to a Single Judge

The task force is mindful of the preferences within the various judicial districts for assigning judges to cases.¹⁴ Without undertaking to mandate abolition of master calendar assignment systems for civil cases, the task force is strongly of the view that civil cases – and certainly cases where more than one pretrial conference or motion proceeding is necessary – are best handled by assignment to the same judge for all proceedings.¹⁵ The task force favors the adoption of a block assignment system for all civil cases. Even short of assignment of all cases to a block, the task force would favor more liberal use of

¹⁴ There is something about the local culture in some districts that resists a requirement to block-assign all civil cases. In one-judge or two-judge counties it is hard to count on blocking. District chief judges are responsible for managing their district workloads and it is hard to have the process dictated. It is also difficult to give firm trial dates to everyone without affecting other priority cases. A certain amount of flexibility is also required to allow another judge to fill in on occasion.

¹⁵ Decades ago the Fourth Judicial District used a master calendar but converted to a block assignment system following a successful three-month pilot and an endorsement from the local bar association. HENNEPIN COUNTY BAR ASSOCIATION, FINAL REPORT OF THE SPECIAL TASK FORCE TO REVIEW THE CIVIL COURT TRIAL CALENDAR IN HENNEPIN COUNTY, (Jan. 31, 1984)

the existing rules permitting the assignment of particular cases to a single judge, even if that is not done universally. This procedure is available pursuant to Minn. Gen. R. Prac. 113.02 and should be invoked more frequently by the court on its own initiative or in response to a motion from the parties.

The task force also sees value in assigning a pool of judges to try cases, particularly those in the ELT, and also use of pools of adjunct judicial officers to handle initial case conferences. A pool approach may provide the flexibility necessary to ensure a trial date certain (without the prospect for the removal of the judge on the day of trial) that is important to moving cases to conclusion.

Education and Policy Recommendations

Raise Conciliation Court (Small Claims) Limits

A majority (16 members) of the task force recommends that the cap on conciliation court jurisdiction, except for consumer debt cases, be increased, and that the judicial branch support legislation to accomplish that result.¹⁶ This recommendation requires a change in the statutory jurisdictional limit of conciliation court, and the subcommittee believes that is a worthwhile change that the judicial branch should affirmatively seek.

A majority of the task force believes that the jurisdictional limit, now established at \$7,500 for most cases (\$4,000 for certain consumer credit transactions and \$15,000 for forfeiture cases), should be increased to \$15,000 for all cases except the existing consumer credit category. Increasing the limit to only \$10,000 is not a significant change for impact purposes, and \$15,000 was already proposed in legislation and would dovetail nicely with the ELT proposal; it provides meaningful choice. Litigants from businesses to consumers discount claims to get under the current limits, and this is persuasive evidence that a change should be made. Raising limits would mean less discounting and greater access to the courts.

The task force is aware that the Minnesota State Bar Association Civil Litigation Section opposed past legislative efforts to increase the conciliation court jurisdictional limit to \$15,000, including consumer credit transaction matters, unless there are corresponding changes to procedures including limiting appeal rights and having a plaintiff make an election of remedy whether to proceed in conciliation court or district court as is done in

¹⁶ Although this is more of a statute change than a rule change, conciliation court procedural rules may also need to be reviewed in conjunction with this change.

other states with higher jurisdictional limits such as Utah, Alaska, and North Dakota. Part of the Civil Litigation Section's concern is that there may be massive increases in de novo reviews (essentially a new trial) in district court.

The task force believes that increases in de novo reviews would be minimal. In 2010 there were 54,577 conciliation court filings in Minnesota; they generated only 782 de novo reviews. Several task force members opined that despite any increase in de novo reviews, starting out in conciliation court is easier than starting in district court, and increased limits will increase access to the courts.

The task force does not believe that the consumer credit limit should be changed. A \$15,000 claim is huge for person with a \$10,000 annual income. In addition, many low income individuals do not proceed with de novo review as they often can't complete the paper chase to get de novo and can barely collect if they win at conciliation court. The Civil Litigation Section looks more favorably on the task force proposal as it does not increase the dollar limit for consumer debt matters.

One significant issue in consumer debt cases is whether the claimants have an actual contract rather than a computer printout to prove their debt. Any increase in the jurisdictional dollar limit for consumer credit transaction cases should only come with increased protections such as requiring that claimants present actual proof of debts using contracts and not virtual evidence produced via computer print out.

The task force is not unmindful of the potential burdens that may come with any increase in conciliation court dollar amounts. In districts where judges are currently handling conciliation court matters, raising jurisdictional dollar limits may affect workload, although some district courts are starting to use referees/volunteer attorneys to handle conciliation court matters. Court administrators are required to assist litigants in filling out conciliation court paperwork, and increasing this burden could hurt an already thin court staff. On the other hand some of the burden may be offset by efforts such as the Volunteer Lawyers Network whose attorneys staff a conciliation court support team in the Fourth District and meet with litigants to help go over things with them.

The task force believes conciliation court is an increasingly appropriate forum for the resolution of disputes of relatively modest dollar amounts, and that it is particularly appropriate that the limits other than for consumer credit transaction matters be increased given the fact that it is difficult to retain counsel to handle many disputes involving \$15,000 or less. Conciliation court procedures are much better suited to disputes

involving pro se parties, and can handle these cases in a more efficient and cost-effective basis.

Complex Case Program (CCP) Training

A key part of the task force's Complex Case Program recommendation, discussed above, is the training and education of judges to handle complex cases. Education would include specific courses for management of complex litigation as well as a rotating and rigorous curriculum of content directed at substantive law and related issues (such as the list of claims or actions that would be provisionally designated as complex under the proposal set forth in the appendices to this report). This could take the form of a one-week residential setting and/or a series of shorter sessions over the course of a year or two that would be open to any interested judges who would commit to participation in the entire program. The goal is to create a cadre of trained judges with at least one such judge for each district. As also noted above this training may not be entirely cost neutral and could require some additional funding for the travel required to attend interactive sessions.

Develop Education Program and Best Practices Manual for All Civil Matters

The task force considered a number of case management techniques that it believes are quite worthwhile to address problems in case management that arise with varying frequency. Ultimately, the task force concludes that the rules need not be amended to address each of these problems; and in some instances, rules already exist for dealing with them. The task force's conclusion thus is that it would be worthwhile to identify these issues and create a guidance document or training program that might generally outline "best practices" for managing civil cases. Ideally this should be a publicly available document so that lawyers and litigants are aware of what the courts are trying to accomplish in the case management area, and also could profitably be the subject of judicial education to help make appropriate case management practices more nearly uniform. The task force believes the goal would be to make the use of these practices more widespread, without mandating their use or creating a right of the parties to expect them in any particular case. The task force believes this document could be a pamphlet-sized publication that should be issued with some form of official approval or adoption. Among the specific recommendations that might be addressed in such a document include the following:

- Use of special masters. The task force believes that special masters, as authorized by Minn. R. Civ. P. 53, offer significant opportunities to improve case management in civil cases. The task force is well aware that Minnesota state judges do not have judicial adjuncts generally available to them, and it is not likely that will change in the foreseeable future. In cases where there are protracted discovery disputes, complex pretrial management issues, or repeated nondispositive motions of any type, the task force believes the courts ought to consider the use of the appointment of a special master to facilitate case management. The experience of the task force members is that in many cases the costs of appointing a master are substantially outweighed by the savings the parties accomplish in both time and dollars, without even considering the judicial time taken away from other cases. The task force does not believe special masters ought to be appointed routinely, but they are generally underused in Minnesota and are an available tool that should be given greater consideration.
- Appointment of a second judge to supervise settlement in some cases. Just as the federal system profitably uses a district court judge and magistrate judge for differing roles in a case, the task force believes there are circumstances in state court litigation where the appointment of two judges would be very helpful. In equitable cases where the assigned judge will be deciding the relief and adjudicating the merits of the case, it may be particularly helpful to have another judge available to deal with the supervision of settlement negotiations. Special masters could be put to better use on this issue as well.
- Rule 12 motion practice. Although the task force recommends that the pleading rules in Minnesota not be substantially changed, the task force does believe that judicial education could profitably address the proper role of Rule 12 motions, particularly motions to dismiss, and occasionally, for a more definite statement, to facilitate the resolution of cases on their merits but without expensive discovery practice.
- Use of interrogatories. The task force considered a rule change to reduce the number of available interrogatories in a case. Ultimately, the task force concluded that there really is no “magic” number of interrogatories that should be the proper limit, and that their use really varies from case to case. The task force believes, however, that they are generally overused, and that both litigants and judges should be encouraged to limit their use in individual cases to numbers probably smaller than the existing 50-interrogatory limit of Minn. R. Civ. P. 33.01(a). The task force also notes that interrogatories are probably of diminished importance in discovery where meaningful automatic disclosure provisions exist because the

parties will have already disclosed the information about which interrogatories are sometimes required.

Official Endorsement of Sedona Conference Proclamation

Judges in the majority of the states and federal districts around the United States have adopted or endorsed the Sedona Conference's Cooperation Proclamation. The subcommittee believes it would be helpful, although presumably not a "game changer," for the Minnesota Supreme Court to embrace this doctrine of cooperation. The proclamation can be found as Appendix E to this report. The task force recommends that the leaders of the Minnesota judiciary consider endorsing this proclamation.

Changes Discussed but Not Recommended

Reject More Stringent Pleading Requirements

The task force considered whether the pleading rules should be modified to require greater specificity. The task force's considered judgment is that the current pleading rules work reasonably well, and provide adequate opportunity to challenge the legal sufficiency of claims asserted. As noted elsewhere, the task force believes Rule 12 motions should have some greater play in some cases, but does not believe that making Rule 12 an inevitable part of most cases is a wise investment of judicial time. The task force recommends that Rule 12 of the current Rules of Civil Procedure not be amended and that the current standard be retained.

Reject Further Rule 68 Changes

The subject of offers of judgment and settlement under rule 68 was addressed in the 2008 amendments to Rule 68. The task force does not believe it is appropriate to revisit that rule at this time. Rule 68 was recently and extensively reviewed by the Civil Rules Advisory Committee. To the extent some would advocate that Rule 68 ought to defeat statutory cost-shifting following an offer of settlement, the task force believes that matter should be addressed by legislation, not rulemaking.

Defer Meet and Confer on Preservation Requirements

The task force considered the requirement to meet and confer regarding preservation of electronically stored information as set forth in IAALS Pilot Rule 7. The task force is aware that this requirement regarding preservation is currently under consideration in the federal courts and concludes that it would be wise to wait and see what the federal courts do on this issue.

Reject Limits on Jury Trials

The task force considered but rejected placing limits on the length of jury trials. The task force wants to preserve full trial rights. The expenses related to trial itself are not perceived to be the drivers of the excessive costs that the task force is trying to address.

Conclusions

The task force confirmed that excessive cost and delay affect both administrative efficiency and the accessibility of our civil justice system. Among the task force recommendations designed to minimize cost and delay are:

1. Providing a trial date certain;
2. Adopting discovery reforms including a proportionality requirement, federal court automatic disclosures, and an expedited process for non-dispositive motions;
3. Establishing an Expedited Litigation Track pilot;
4. Establishing a Complex Case Process; and
5. Changing hip pocket service by requiring filing within one year of service.

The task force believes that implementation of all of the recommendations set forth in this report will make the Minnesota civil justice system more relevant by providing Minnesota litigants with a forum for just, prompt, and inexpensive resolution of civil disputes. Members of the task force stand ready to assist the Supreme Court as it moves forward in attempting to implement the task force recommendations.

Appendices

Appendix A: Minnesota Civil Justice Forum Recommendations for Improved Civil Case Processing

MINNESOTA CIVIL JUSTICE FORUM RECOMMENDATIONS FOR IMPROVED CIVIL CASE PROCESSING

Introduction

The Civil Justice Forum¹⁷ was established in the fall of 2009. This effort was at the request of the 2009 Legislature which reacted favorably to the Criminal Justice Forum and asked that a like group be established in the civil justice arena. Specifically the Legislature asked that the Civil Justice Forum examine civil case processing statutes, court rules and practices in an effort to identify proposed changes aimed at facilitating more cost effective and efficient civil case processing.

Deliberations

The Forum reviewed current statutes, rules and court practices, current constraints on the system, measures the various constituencies have taken to change policies, procedures, or operations to address these constraints, and other state models for civil case processing.

The Civil Justice Forum reviewed efficiencies being used in Minnesota courts, including the use of subordinate judicial officers, mediation, and the development of e-filing.

The Colorado "simplified" procedure for civil litigation was also reviewed. This process generally applies to all civil actions, whether for monetary damages or any other form of relief, with a maximum allowable monetary judgment to \$100,000 against any one party. The procedure requires early, full disclosure of persons, documents, damages, insurance, and experts, and early, detailed disclosure of witnesses' testimony, whose trial testimony is then generally limited to that which has been disclosed. Normally, no depositions, interrogatories, document requests, or requests for admission are allowed.

The Forum also identified changes to policies, procedures, and practices in the civil justice system that would increase efficiencies and reduce costs. Proposals identified included the following:

1. Provide more clear definitions in information statements:
 - a. Complex case
 - b. Standard case
2. Do more with the information statement – use it to focus; e.g. to refine scheduling orders

¹⁷ The Civil Justice Forum roster can be found at Appendix A.

3. Shorten time requirement for filing information statements
4. Provide more certainty in trial dates – for fee?
5. Increase use of ITV
 - a. Consolidation of cases
 - b. Interviews
 - c. Remote trials and hearings
6. Expedite consumer credit cases
7. Create specialized referees and magistrates to hear cases such as:
 - a. Housing
 - b. Conciliation court
 - c. CHIPs – truancy, run away, less serious CHIPs and/or traditional CHIPs cases and TPRs.
8. Reduce duplication of resources, e.g. predatory offender civil commitments
9. Let IFP designated litigants continue with IFP status without annual review, especially persons represented by Legal Aid.
10. Standardize length of oral arguments
11. Implement e-filing throughout the state.
12. Implement expedited procedures for “smaller \$ amount” civil cases, e.g. in Colorado there is an expedited process for civil actions under \$100,000.
13. Implement “loser pay system” to discourage excessive motion practice OR adopt Federal Rule 6.
14. Implement e-filing.
15. Move to centralized administration of court documents. Documents should be accessible throughout the state and not just in the county where the action is filed.
16. Expand the use of subordinate judicial officers
 - a. Conciliation court
 - b. Housing matters
 - c. Harassment
 - d. Implied consent
 - e. Name changes
 - f. Consumer credit actions
17. Create specialization in subject matters for subordinate judicial officers, judges, and volunteer conciliation court referees. Judges in greater MN could travel throughout the district to hear certain case types.
18. Implement methods to assist in the processing of cases with pro se litigants
 - a. Free attys?
 - b. Self Help Center
 - c. Law students
19. Streamline all case processing procedures.
20. E-mail notices
21. Simplify processes, especially in the area of family law.
22. Encourage use of mediation (the counterpoint raised was that this might add to cost of litigation if is not binding).
23. Look at appellate ease processing, e.g. electronic records in lieu of transcripts
24. Need limits on appeals. Need more final decisions.

25. Analyze whether we have pushed to create process that is way beyond the definition of due process.
26. Have attys send electronic documents that judge can use in drafting orders, jury instructions, etc.
27. Create uniform submission standards for documents – judges all have different personal styles to accommodate.
28. Create a docket for complex civil cases.
29. Remove Implied Consent cases from the court system to an administrative process which is done in nearly every other state.
30. Changing MRCP, Rule 43.07 and Minn. Stat. 546.44 to allow for taxation of interpreter costs in the discretion of the court
31. Providing an exclusive means based test for granting IFP status. The current screening tools and training allow for such programs as Minnesota Care to be used as qualifiers, when that program's guidelines are well in excess of what should be considered.
32. Adopting rules which make the parties responsible for the per diem costs of civil trials, including jury, clerk, and reporter costs as is done in some other jurisdictions, subject to judicial discretion.
33. Permitting the parties to supplement the daily jury fee, by agreement, in an amount permitted by the court
34. Looking at a change in the method by which civil discovery is done to shift the initial obligation of production to be consistent with the federal rules and other proposals.
35. Utilize court commissioners or similar officers to handle routine matters requiring court approval, especially those which are administrative or default.

At a subsequent meeting the group reviewed the proposals and “ranked them” according to need to move forward, both in the short term and the long term. The initiatives with the most votes are listed below:

Proposal	Short Term Solution	Long Term Solution	How would this help?	How would we tackle it?
Simplify process	13	4		Examine Colorado simplified process.
Create a docket for complex civil cases	12	12	Better case management.	Create task force to explore alternatives and make recommendations.
Information Statement issues a. Provide more clear definitions in information statements:	11	0	Would result in more effective case management	Look at Colorado simplified process. Add complex litigation

Proposal	Short Term Solution	Long Term Solution	How would this help?	How would we tackle it?
i. Complex case ii. Standard case b. Do more with the information statement – use it to focus; e.g. to refine scheduling orders c. Shorten time requirement for filing information statements			for parties. Would speed up case processing.	designation on scheduling order. Would require Rule changes.
Create specialization in subject matters for subordinate judicial officers, judges, and volunteer conciliation court referees. Judges in greater MN could travel throughout the district to hear certain case types.	10	2	The use of subordinate judicial officers has been a huge help where used today.	The Judicial Council currently has this issue under consideration.
Encourage use of mediation (the counterpoint raised was that this might add to cost of litigation if is not binding).	8	2	Cases will settle and not go to trial, saving time four courts, and possibly money for litigants.	We already have a Court Rule requirement to consider mediation. Should require it.
Rule 68 – offers of judgment – return to use as tool in trying to achieve early settlements of cases so that it is like the federal rule.	8	0	In those cases that involve a potential attorney's fee award to plaintiff's counsel, a mechanism to put teeth into an offer of judgment – similar to the federal Rule 68 – would be helpful in encouraging early settlements of	Amendment to Rule 68

Proposal	Short Term Solution	Long Term Solution	How would this help?	How would we tackle it?
E-mail notices Note: Court Administrators: Concern expressed about emailing notices due to confidentiality issues. Suggested faxing is a better approach.	8	1	civil cases. Would save time and money Do not believe there would be privacy issues.	

Recommendations

At the final meeting the Civil Justice Forum was in agreement that the Supreme Court should be asked to establish a workgroup to study case processing of both complex and simple civil litigation to determine if and how these cases can be handled better, faster and at less expense through changes in court rules and court processes.

Suggestions for Workgroup membership include the following:

- Supreme Court Justices
- Court of Appeals Judges
- District court judges
- Minnesota State Bar Association
- Plaintiff Bar
- Defense Bar
- Court Administration
- Academicians
- Legal Aid
- Association of Corporate Counsel
- Business Interests
- Civil Rules Committee

The Forum suggests that the Workgroup charge be as follows:

- Examining whether case differentiation will promote better use of resources, both public and private; and if so:
- Making recommendations for changes to rules, policies and practices that allow for civil case differentiation, including:
 - Development of a definition for simplified and complex cases that clearly distinguishes them from a "standard" case.
 - Development of a process for simplified civil case processing (e.g. Colorado Simplified Process) and complex civil case processing (e.g. California) that would formalize rules that would make the processing of these cases more efficient and cost-effective. The processes should more closely match the

needs of litigation in terms of cost and resources appropriate to the specific nature of the litigation. Cases should be easily identified at initiation for differentiation, track assignment and differential management.

Conclusion

The Civil Justice Forum acknowledges that the Minnesota civil justice system could be improved. At the same time the group believes that changes in current practices, procedures and policies should not be implemented without a more in-depth review of the current system, proposed changes and the impact of the changes on the litigants and the system. As a result the Civil Justice Forum recommends that a work group be created to conduct the in-depth analysis and to make recommendations to the Supreme Court for changes that will facilitate more cost effective and efficient civil case processing.

APPENDIX A

Civil Justice Forum Roster

Group	Participants
MSBA	
	Patrick Costello Costello, Carlson & Butzon
	D. Clay Taylor D Clay Taylor PA
	H. Le Phan Felhaber, Larson, Fenlon & Vogt PA
	Mary Schwind Leonard, Street and Deinard Professional Association
	Thomas Kelly, III Dorsey & Whitney
	David Allgeyer Lindquist & Vennum
	Mary Vasaly Maslon, Edelman, Borman & Brand LLP
	Angela Brandt Larson King LLP
American Board of Trial Advocates	
	Jan Gunderson Bassford Remele
	John Patrick Brendel Brendel and Zinn
	John Vukelich Attorney at Law
Minnesota Association for Justice	
	Michael A. Bryant President, MAJ Bradshaw & Bryant, PLLC
Minnesota Defense Lawyers Association (1 member)	
	Thomas Marshall President, MDLA Jackson Lewis LLP
Legal Services Coalition (2 members)	
	Jerry Lane Legal Aid Society of Minneapolis
	David Lund North East Legal Services
County Attorneys	

Group	Participants
	David Hauser Ottertail County
	Doug Johnson Washington County
City Attorneys	
	Susan Segal Minneapolis City Attorney
Judges	
	Chief Justice Eric J. Magnuson
	Judge Jerome Abrams
	Judge Robert Awsumb
	Judge Fred Wellman
	Judge John McShane
	Judge Kurt Johnson
	Judge Eric Hylden
	Judge Susan Miles
Administrators	
	Sue K. Dosal State Court Administrator
	Mark Thompson 4th Judicial District Administrator
	Tim Ostby 8th Judicial District Administrator
	Dick Fasnacht 5th Judicial District Administrator
	LuAnn Blegen Court Administrator, Pine County
	Anna Lamb 4 th Judicial District Civil Manager
	Darrell Paske Court Administrator, Crow Wing County

Staff: Janet Marshall
State Court Administration
Janet.marshall@courts.state.mn.us

Appendix B: Rebecca Kourlis' Prepared Presentation to the Task Force, Including a
Summary of Reform Activity in Other Jurisdictions

RULES REFORM SPEECH – Minnesota, January 2011

Three score and twelve years ago, our forefathers adopted the Federal Rules of Civil Procedure. Ten years thereafter, they added Rule 1 in its present form to clarify the intent of the Rules.

The 'original intent' is clear. The plan was to assure that a claimant could get into court without having to use magic words or arcane claims for relief – but rather just by making a short and plain statement that gave notice to the other side. The second part of the plan was to assure that the parties had access to broad discovery so that they could learn the nature of the other parties' case. (just as an aside, the plan did not originally contemplate that discovery would serve to educate parties about their own cases, but it certainly has evolved to include that purpose).

For seventy two years, that has been our system. Everyone in this room grew up with the expectation (at least in the federal system and in any state following the federal system) that discovery of all information reasonably calculated to lead to the discovery of admissible evidence would be permitted, and, in fact expected.

I would suggest to you that with the advent of the information age where information multiples exponentially with every breath we take, this presumption is no longer workable. It leads to a system that is in danger of imploding – a system that is expensive, ponderous, lengthy and over-inclusive.

What was intended as a way to avoid trial by ambush has become a system of trial by discovery - or as Chief Justice John Broderick says, trial by attrition. We have litigators who never go to trial – some who never even go inside a courthouse. We have the vanishing jury trial phenomenon, which – from the perspective of a trial judge, is a travesty. I believe in jury trials, and trust juries. Without trials, we lose the benefit of involvement of citizens in our process, transparency of the system and the development of case law.

And, without a system that is truly accessible, affordable and trust-worthy, we lose the confidence of the American public. Alternative systems have sprung up over the last couple of decades: ADR, private judging, mandatory mediation, etc. - - but none can or should replace the effective functioning of the court system itself. Our way of life has

thrived in part because of an assumption that we have courts that work: courts that will protect individual rights, enforce contracts, resolve disputes between neighbors, business partners and family members..... in a fair, final and effective way.

So, my premise is that we must reexamine the assumptions we made seventy two years ago: we must begin with the goal of Rule 1 in mind and reconstruct our system - - in large ways or small ways to meet that goal.

And, I am not alone in the belief that the system takes too long and costs too much. To the contrary - - -

We have just come out of a flurry of surveys across the country to different bar groups and this is what we learned....

There were five nation-wide surveys conducted, using a variation on the same survey instrument. The groups surveyed were: the American College of Trial Lawyers, the ABA Litigation Section, Judges, both state and federal, the National Employment Lawyers' Association and Corporate Counsel. From each group, the response was statistically significant, and from some, it was overwhelming.

At the same time, there were a variety of other studies undertaken that fall more clearly into the category of empirical evidence-gathering. Our organization compiled a study of 7,700 federal civil cases from 7 federal judicial districts around the country and analyzed the data to determine what makes cases move more quickly and what slows them down. The Federal Judicial Center conducted a closed case study of cases terminated in the last quarter of 2008, and did a multivariate cost analysis of the cases in the study as well and surveying and doing follow up interviews of counsel. RAND has undertaken a study of the costs associated with e-discovery; and the Searle Center at Northwestern Law, in partnership with the Lawyers for Civil Justice, surveyed Fortune 200 companies in an effort to obtain data on the costs of lawsuits and litigation cost trends.

Here are the loud and clear themes from ALL of that data. First, the system costs too much. That conclusion brought in over 70% agreement – sometimes up to 90% agreement from the respondents to the surveys. On the empirical data collection front, the Searle/LCJ study documented that litigation costs per case continue to rise and are consuming an increasing percentage of corporate revenue. The RAND study suggests that the costs of production of e-discovery materials are very high and climbing.

The second loud and clear theme was that the system takes too long, and that the longer the case goes on, the more it costs. Again, there were high percentages of respondents to

the surveys who concurred with that conclusion. And, the empirical studies also documented that the problems of cost and delay are clearly interrelated. For example, the FJC closed case study shows that a 1% increase in case duration is associated with a .32% increase in costs to plaintiffs and a .26% increase in costs to defendants.

OK. So, it costs too much and takes too long. “Well, Duh.”

But, why?

The data points us to some answers on that front as well. One reason is discovery. The survey respondents identified discovery as the primary contributor to delay in civil litigation, and the time required to complete discovery (and requests for continuances in discovery cut-offs) was overwhelmingly cited by the judges as the factor responsible for delay. Our federal case study shows that cases in which a party sought the court’s permission to undertake late discovery were the cases that were likely to take the longest. That factor was one most highly correlated with overall time to disposition.

Even more persuasively, the FJC analysis found that higher levels of discovery in the closed cases led to greater costs. For example, for every additional non-expert deposition, defendants’ costs went up 5% and plaintiffs’ 11%.

So, cases cost too much and take too long – and discovery and discovery management is one of the reasons for that phenomenon.

E-discovery is partially to blame, according to the survey respondents. In the survey responses, more than 85% of the ABA and ACTL respondents, more than 60% of the NELA survey respondents agree that e-discovery increases the costs of litigation; and 75% of both agree that those increases are disproportionate to the underlying lawsuit.

Again, the FJC study concurs. Costs for plaintiffs rose from \$8,000 for discovery in cases with no e-discovery to \$30,000 in cases with e-discovery; and for defendants, it went from \$15,000 to \$40,000. By the way, the mean attorneys’ fees for the FJC cases studied was \$25,000, so many of those cases were not large cases.

The other area of consensus is that firms across the country turn down cases when it is not cost-effective to take them. Specifically, the most commonly cited monetary threshold for the decision to take a case is \$100,000. So, the middle class has no real access to the system, and many lawyers could not even afford themselves. In most of the surveys, a majority of respondents agrees that litigation costs also drove cases to settle for reasons unrelated to the substantive merits of the claims or defenses.

Thus, there is more than a low level buzz of dissatisfaction across the country - - there is something more akin to a roar.

The wonderful news is that solutions are in the air.

First, there are studies cropping up of innovations that seem to have promise. We have studied the Arizona and Oregon systems – neither of which tracked the Federal Rules of Civil Procedure – and we have input from the bench and the bar that is quite favorable. Arizona adopted Rules that front-loaded their system with disclosures, and then tamped down discovery. They adopted those changes over 15 years ago, so there is a great deal of data there about what works and what does not. The short take is that Arizona lawyers like that approach – they do think that it shortens the process and does not negatively impact fairness. The data is less certain about whether it saves money. Oregon has a more dramatic approach: fact-based pleading with quite limited discovery unless the case is designated as complex. The limits on discovery include NO disclosure or discovery of experts. In our work to date, the Oregon bench and bar like that approach too – although they would prefer a short expert report rather than radio silence on the expert front.

We have also studied a simplified civil procedure rule in Colorado that incorporates an expedited procedure for cases under \$100,000. The data suggest that for cases that use the system, the attorneys and the judges think that it works well – it makes the process shorter and less expensive without negatively impacting fairness. Interestingly, the judges and lawyers self-report that the trial rate for cases that proceed under that Rule is somewhere between 8 and 12 percent... rather than under 1% for cases in general civil dockets.

Innovative thinking is popping up across the nation. The Federal Judges held a conference in May of 2010 year dedicated to reviewing the Rules of Civil Procedure and thinking about ways in which they could be improved. Many of the surveys I have mentioned to you, and much of the empirical data was collected in anticipation of that Conference. The conference has a public website that includes all of the papers filed, summaries of some of the panels, video tape of all of the panels, and collections of the empirical data. If you are interested, the website is civilconference.uscourts.gov.

AND, now – closer at hand..... there are various states around the country that are experimenting with pilot projects that implement different rules. New Hampshire has a project that began on October 1 of 2010 that will track the ACTL/IAALS principles and Pilot Project Rules in two jurisdictions.

Oregon has its own (further) expedited jury trial pilot project with limited discovery and a trial date within four months. That pilot project is in effect now.

Colorado is considering pilot projects for medical malpractice cases AND for business cases that would include mandatory disclosures, specific procedures for the two different types of cases, and abbreviated discovery unless the court orders otherwise.

Utah is circulating a set of Rules that would revamp their state-wide system. They, too, emphasize disclosures. Boston has a voluntary business court pilot project that tracks our Principles.

Iowa has convened a Civil Justice Reform Task Force, charged with recommending changes to the system and reporting back to the Court next spring, and now your Chief Justice has convened you to examine the Minnesota system and make recommendations.

There are three schools of thought that play into the debate about what the changes should be. Let's assume the first school of thought is that the rules need to be changed. The second school of thought is that the rules are just fine – but judges need to enforce them more definitively AND judges need to manage cases better. The third school of thought is that attorneys need to cooperate with one another, and if they would do so, the problems would go away.

Although I would not discount the importance of any of those three ideas, it is our view that they are interconnected and interdependent, and that any one of the three cannot succeed without attention being paid to the other two as well. In short, do judges need to manage cases better? Yes. And, do attorneys need to cooperate? Yes. But, - again in our view – there must be clear and simple rules against which to manage cases; and attorneys must have both the protection and the expectations provided by rules that demand and enforce proportionality.

Threaded through this tapestry of innovative thinking and commitment to improvement is another very important concept: that of measurement. We who study the courts have finally gotten around to concluding that procedural changes should be measured.

The National Center for State Courts has agreed to weigh in and measure four of the pilot projects, with New Hampshire and Utah (if it adopts new rules) being among them. I believe that the National Center is also interested in helping you in Minnesota to measure any project that you might put in place. Our Institute and the National Center have finalized a Measurement Protocol that will provide a guideline for that measurement – whether undertaken by the National Center, the Institute or implementing courts – and we

are hopeful that the data generated through the projects will then be available nation-wide to help other states, and help the federal courts, to build upon success.

So..... that is the overview of what is now happening with our 72 year old rules schemes. We are looking a new ways to handle cases in the 21rst century that will assure that the courts remain open, relevant and effective.

I offer some brief closing observations...

1. Judicial leadership is key. In jurisdictions with visionary judges, change is happening.
2. Change cannot be dependent upon consensus. There will always be naysayers and we cannot allow the perfect to become the enemy of the good.
3. One of the ways to overcome naysayers is through the use of pilot projects and the gathering of data.
4. Ultimately, all of our attitudes have to change..... We have to commit ourselves to finding a system that works for today's litigants – on both sides of the 'v' and we have to be courageous enough to take educated risks in an effort to find the solutions to the current problems.

The truth is that we created THIS system in 1938, and we now have the responsibility to recreate it in a way that truly provides open, accessible and efficient JUSTICE in the 21rst century. Thank you.

[A summary of reform activity in other jurisdictions is set forth in the following five pages.]

Effective January 12, 2011

Overview of Problems and Challenges: There is a widespread perception among members of the bench and bar that the civil justice system takes too long and costs too much—at both the federal and state levels—and further that these problems are threatening citizens’ access to the courts.

- **2008 Litigation Survey of the Fellows of the American College of Trial Lawyers (ACTL)**

As part of a joint project, the ACTL Task Force on Discovery and the Institute for the Advancement of the American Legal System (IAALS) administered a survey of ACTL members (Fellows) from late April to late May of 2008. The survey was designed to examine whether there are problems in the civil justice system and, if so, to determine their dimensions. The survey results suggest that although the civil justice system is not broken, it is in serious need of repair and that the discovery system—which costs far too much and has become an end in itself—is, in fact, broken. Results were summarized in the *IAALS/ACTL Interim Report & 2008 Litigation Survey of the Fellows of the ACTL (Interim Report)*, available at <http://www.du.edu/legalinstitute/pubs/Interim%20Report%20Final%20for%20web1.pdf>.

- **American Bar Association (ABA) Section of Litigation Member Survey on Civil Practice***

From late July to early September of 2009, the Federal Judicial Center (FJC) administered a survey of ABA Section of Litigation members. The survey instrument was a variation of the ACTL Fellows survey instrument, and questioned Section members about their practice and satisfaction with the current system. The survey data suggest similar concerns to those expressed in the ACTL Fellows survey regarding disproportionate cost and delay—with respondents focusing on the primary role of discovery in causing delay. A summary, detailed and full report is available at <http://www.abanet.org/litigation/survey/1209-report.html>.

- **Survey of National Employment Lawyers Association (NELA) Members***

The FJC conducted a survey of NELA members in October and November of 2009, also using a survey instrument adapted from the ACTL Fellows survey. Shedding light on the unique perspective of plaintiffs’ attorneys, the survey data show that a majority of this respondent group indicated that their law firms turn down some cases because it is not cost-effective to take them. The most commonly cited monetary threshold for not taking a case was \$100,000—a figure consistent with the results of the ACTL Fellows survey and the ABA Section of Litigation member survey. The NELA report summarizing the survey results is available for download in the ‘Library’ section of the Advisory Committee on Civil Rules website for the 2010 Conference on Civil Litigation: <http://civilconference.uscourts.gov>.

- **Civil Litigation Survey of Chief Legal Officers and General Counsel***

From November 2009 to January 2010, IAALS conducted a survey of chief legal officers and general counsel belonging to the Association of Corporate Counsel—one per company—in an effort to capture how businesses experience the American civil justice process. Respondents reporting an increase in

litigation costs over the last five years most commonly cited discovery in general—electronic discovery in particular—as the reason for this trend, and a majority of respondents expressed concern about judicial familiarity with the technical issues inherent to electronic discovery. The report is available at <http://www.du.edu/legalinstitute/pubs/GeneralCounselSurvey.pdf>.

- **Trial Bench Views: Findings from a National Survey on Civil Procedure***

In collaboration with Northwestern University School of Law's Searle Center on Law, Regulation and Economic Growth (Searle Center), in April of 2010, IAALS conducted a survey of nearly 13,000 state and federal judges at both the trial and appellate levels to shed light on the unique judicial perspective on the civil justice process. The trial-judge respondents expressed concern about delay—identifying the time required to complete discovery as a significant cause—and also agreed that early judicial intervention in a case helps to narrow issues and limit discovery. The report on trial-bench responses to the survey is available at http://www.du.edu/legalinstitute/pdf/Trial_Bench_Views.pdf.

Unique State Approaches: The rules of procedure in many states offer innovative approaches to pretrial procedure not found in the federal system. These state rules provide valuable insight into the efficacy of potential procedural reforms.

- **Survey of the Arizona Bench and Bar on the Arizona Rules of Civil Procedure***

In September of 2009, IAALS surveyed judges and attorneys with civil litigation experience in Arizona Superior Court, to examine the innovative aspects of the Arizona Rules of Civil Procedure, which include expansive initial disclosure requirements and presumptive limits on discovery. A majority of survey respondents agreed that the extensive disclosure requirements under the Arizona rules reveal facts and help narrow issues in dispute early in a case. Furthermore, a majority of survey respondents indicated they would not raise the presumptive limit of 25 requests for admission; likewise, given the opportunity to modify the presumptive limit of one independent expert witness per side per issue, a significant majority would either maintain or lower this limit. The survey report can be downloaded from <http://www.du.edu/legalinstitute/pdf/IAALSArizonaSurveyReport.pdf>.

- **Survey of the Oregon Bench and Bar on the Oregon Rules of Civil Procedure***

IAALS surveyed judges and attorneys with civil litigation experience in Oregon Circuit Court, to examine the unique aspects of the Oregon Rules of Civil Procedure, which require fact pleading and do not provide for interrogatories or disclosure and discovery of independent expert witnesses. Administered in September and October of 2009, a majority of respondents to the survey indicated fact pleading reveals facts and narrows issues early, increases the ability to prepare for trial, increases efficiency of the litigation, decreases or has no effect on the overall time to disposition, and increases or has no effect on fairness. The survey report is available at <http://www.du.edu/legalinstitute/pdf/IAALSOregonSurvey.pdf>.

- **Civil Case Processing in the Oregon Courts: An Analysis of Multnomah County***

As a complement to the survey of the Oregon bench and bar, IAALS conducted a civil case processing study in Oregon state court by examining docket data from 500 contract and tort cases in Multnomah County Circuit Court that closed between October 1, 2005 and September 30, 2006 (the same timeframe as employed in a similar IAALS case processing study of eight United States District Courts). The Oregon study shows that despite Oregon's fact pleading requirement, the legal sufficiency of contract and tort complaints in Multnomah County was challenged much less frequently than for similar cases in federal court, and motions to dismiss were granted at a much lower rate in Oregon state court as compared to Oregon federal court. The report is available at <http://www.du.edu/legalinstitute/pubs/civilcase.pdf> and the IAALS federal court civil case processing study can be downloaded from <http://www.du.edu/legalinstitute/pubs/PACER%20FINAL%201-21-09.pdf>.

- **Surveys of the Colorado Bench and Bar on Colorado's Simplified Pretrial Procedure for Civil Actions***

In June and July of 2010, IAALS conducted a survey of the Colorado bench and bar to examine Colorado's simplified procedure for certain civil cases. Two survey instruments were administered—one tailored to judges and the other tailored to litigators. A majority of both respondent groups indicated that the application of the simplified rule shortens the time to resolve a case and decreases the parties' cost to litigate a case. The results of both surveys are summarized in a report available at <http://www.du.edu/legalinstitute/pdf/16.1FINALForWeb.pdf>.

National Proposals: Informed by state experience with unique rules of civil procedure, in addition to significant research on the history of the Federal Rules of Civil Procedure (FRCP) and comparative approaches, IAALS and the ACTL Task Force on Discovery and Civil Justice developed a comprehensive package of potential reforms to the FRCP and state rules that track the FRCP.

- **Final Report on the Joint Project of the ACTL Task Force on Discovery and IAALS**

The ACTL/IAALS *Final Report* includes 29 Principles—proposed solutions to address the problems identified in the *Interim Report*. The proposals include fact-based pleading, limits on discovery, and judicial involvement in managing a case from start to finish. This document has generated widespread interest and conversation and provided the foundation for the ACTL/IAALS *Pilot Project Rules* and IAALS *Civil Caseflow Management Guidelines* (see below). It is available at <http://www.du.edu/legalinstitute/pubs/ACTL-IAALS%20Final%20Report%20rev%208-4-10.pdf>.

- **21st Century Civil Justice System—A Roadmap for Reform: Pilot Project Rules**

The ACTL Task Force and IAALS transformed many of the Principles set forth in the *Final Report* into operational rules for jurisdictions across the country interested in testing the Principles. The *Pilot Project Rules* are intended to serve as a roadmap for consideration in creating and implementing a pilot project. They may be downloaded at http://www.du.edu/legalinstitute/pubs/pilot_project_rules.pdf.

- **21st Century Civil Justice System—A Roadmap for Reform: Civil Caseflow Management Guidelines**

As a supplement to the *Pilot Project Rules*, IAALS developed the *Civil Caseflow Management Guidelines*. The *Guidelines* transform many of the Principles relating to judicial management into guidelines and operational protocols to assist judges in effectively managing the flow of civil cases to ensure that all events in the life of a case are timely and meaningful. The *Guidelines* are available at http://www.du.edu/legalinstitute/pubs/civil_caseflow_management_guidelines.pdf.

- **21st Century Civil Justice System—A Roadmap for Reform: Measuring Innovation**

IAALS, in partnership with the National Center for State Courts (NCSC), developed *Measuring Innovation* as a tool for jurisdictions interested in implementing the *Pilot Project Rules* and/or *Civil Caseflow Management Guidelines*. *Measuring Innovation* provides a recommended approach to evaluating civil justice rules and caseflow management reforms—allowing courts to identify whether reforms are producing intended outcomes and, if not, to identify additional steps for refinement. It is available for download at <http://www.du.edu/legalinstitute/pdf/MeasuringInnovationforWeb.pdf>.

State Solutions and Proposals: In response to concerns over cost, delay and decreased access to justice, federal and state courts across the country are developing and implementing pilot projects to experiment with procedures designed to address these problems. Several of these efforts were undertaken in response to the release of the ACTL/IAALS *Final Report* and *Pilot Project Rules*.

- **Seventh Circuit Electronic Discovery Pilot Program
Illinois—Federal Court**

Originating as an outgrowth of widespread discussion about the rising burden and cost of electronic discovery, the project's Principles Relating to the Discovery of Electronically Stored Information (Principles) are intended to incentivize early information exchange and meaningful cooperation on commonly encountered issues relating to evidence preservation and discovery. Phase One was an initial testing period from October 1, 2009 to May 1, 2010. In response to the Phase One evaluation, the Committee revised the Principles slightly for Phase Two, a longer testing period running from August 1, 2010 to May 1, 2012. The Phase Two program is expanding to judges in Indiana and Wisconsin. An evaluation will follow this phase, and the results will be compared to a baseline survey administered beginning on July 29, 2010. Thereafter, the Committee will formally present its findings and issue final Principles. Information on the project is available at <http://www.7thcircuitbar.org/displaycommon.cfm?an=1&subarticlenbr=109>.

- **Business Litigation Session (BLS) Pilot Project
Massachusetts—State Court**

Influenced by the ACTL/IAALS *Final Report*, the BLS Pilot Project was developed as a joint effort of the BLS judges and the BLS Advisory Committee to address the increasing burden and cost of civil pretrial discovery, particularly electronic discovery. The pilot project was implemented on a voluntary basis, effective January 4, 2010, for all new cases in Suffolk Superior Court's BLS, and all cases that have not previously had an initial Rule 16 case management conference. The principles applied in the BLS Pilot Project are accessible through <http://www.mass.gov/courts/press/superior-bls-pilot-project.pdf>.

- **Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules Project
New Hampshire—State Court**

Taking its lead from the work of the ACTL Task Force and IAALS, the PAD Pilot Rules Project was launched in Strafford and Carroll County Superior Courts on October 1, 2010, and applies to all new cases filed in those courts after that date. The PAD Pilot Rules—temporarily approved by the New Hampshire Supreme Court for the pilot program—implement five changes to the Superior Court pleading and discovery rules, including replacing notice pleading with fact-based pleading, requiring early initial disclosures after which only limited additional discovery should be permitted, and assigning a single judge to each case who will stay with the case through its termination. The project will be monitored and the results measured by the NCSC. Detailed information on the project can be obtained at <http://www.courts.state.nh.us/superior/civilrulespp/index.htm>.

- **Pilot Project for Expedited Jury Trials**
Oregon—State Court

On May 6, 2010, Oregon Supreme Court Chief Justice Paul J. De Muniz signed an order implementing an expedited civil jury trial program in selected Oregon Circuit Courts. The goal of this program is to provide speedy and economical disposition and to increase the use of jury trials to decide civil cases. The process includes an initial case management conference with trial counsel no later than 10 days after the case is designated as appropriate for this track. At the initial conference the court will set a firm trial date, which is to be no later than four months from the date of the designation order. Six counties have implemented the program. Information on the program in Multnomah County is available at http://courts.oregon.gov/Multnomah/General_Info/Civil/Civil.page.

- **Proposed Civil Access Pilot Project Rules (CAPPR)**
Colorado—State Court

Developed by a group of local state court judges and practitioners, the proposed CAPPR focus on business and medical negligence actions and are designed to increase cooperation and decrease cost and delay in these cases. The CAPPR is under consideration by the Colorado Supreme Court, which has published the proposal for notice and public comment. The CAPPR and background on the project is available at <http://www.du.edu/legalinstitute>.

- **Iowa Supreme Court Civil Justice Reform Task Force**
Iowa—State Court

In December 2009, the Iowa Supreme Court established the Supreme Court Task Force for Civil Justice Reform to develop a blueprint for the reform of the state's civil justice system. The Task Force will develop proposals to make the system faster, less complex, more affordable, and better equipped to handle complex cases, such as complex business cases and medical malpractice matters. The Task Force intends to report out to the Supreme Court by June 30, 2011. Information on the Task Force is available at http://www.iowacourtsonline.org/Advisory_Committees/Civil_Justice_Reform_Task_Force.

Appendix C: Special Rules for a Pilot Expedited Civil Litigation Track

Preface

The purposes of the Expedited Litigation Track (ELT) are to promote efficiency in the processing of certain civil cases, reduce cost to the parties and the court system, maintain a system for resolution of claims that is relevant to the parties, and provide a quick and reduced-cost process for obtaining a jury trial when civil actions cannot be disposed of by judicial decision (dispositive motions) or by settlement.

The core principles that support the establishment of a mandatory Expedited Litigation Track include:

1. Most civil actions can be disposed of by court decision or settlement upon a sharing of basic facts regarding the claims and defenses of the parties;
2. Timely and assertive judicial attention to matters results in the resolution of actions that can be resolved through settlement and provide for customized discovery and trial procedures that will be most cost-effective for the court and the parties;
3. Attorneys and parties are hesitant to voluntarily elect expedited procedures, thus a mandatory system is required;
4. Extensive discovery through interrogatories, requests for production and depositions is often unnecessary, unproductive, and leads to protracted litigation and unnecessary litigation costs;
5. A compact discovery schedule and a firm day-certain trial date will reduce the time and cost of litigation;

6. Mandatory disclosure of relevant information, rigorously enforced by the court, will result in disclosure of facts and information necessary to evaluate the anticipated evidence for purposes of settlement and allow parties to prepare for trial; and
7. Expedited cases should be completed within 4-6 months.
8. Having a trial date or week certain is key to minimizing cost and delay.
9. Assignment of an expedited case to a single judge is also highly desirable, But district courts may need flexibility to ensure that trial dates are observed. This may involve assignment of a case to a pool of judges for trial or the use of adjunct judicial officers to handle case management conferences. Where possible district courts should avoid assigning judges on the day of trial to prevent last minute striking or removal of judges.

**RULE 1 MANDATORY ASSIGNMENT OF CERTAIN ACTIONS TO THE
EXPEDITED LITIGATION TRACK**

Subd. 1 Unless excluded by an order of the court made pursuant to Subd. 3 herein, all civil actions identified in Subd. 2 herein that are filed in the _____ Judicial Districts [one metro-area district and one greater Minnesota district that has a sufficient population and commercial base to generate civil cases] after [August 1, 2012] shall be assigned to the ELT and managed pursuant to these Special Expedited Litigation Track Rules. All parties, at the time of filing of an initial pleading or motion, shall certify that the action is or is not subject to assignment to the ELT. The ELT Certification shall be included in the civil cover sheet submitted under Gen. R. Prac. 104 [this cover sheet replaces the current certificate and representation of the parties]. All pleadings and papers filed in an action governed by these Special ELT Rules shall include the designation “ELT” after the court file number (i.e. 27-CV-10-1111-ELT).

Subd. 2 The following civil actions shall be assigned to the ELT, unless excluded pursuant to Subd. 3 herein:

(A) All civil matters involving a claim for damages, exclusive of interests, costs and disbursements, of up to and including \$100,000;

(B) Any action where all the parties voluntarily agree to be governed by the Special ELT Rules by including an “ELT Election” in the civil cover sheet.

Subd. 3 A party objecting to the mandatory assignment of a matter to the ELT must serve and file a motion setting forth the reasons that the matter should be removed from the ELT. Said motion papers must be served and filed within 30 days of the date the moving party is served with the ELT Certification. The motion shall be heard during the Case Management Conference [or at another time as determined by the court]. The factors that should be considered by the court in ruling on said motion include:

(A) Multiple parties or claims;

(B) Multiple or complex theories of liability, damages, or relief;

(C) Complicated facts that require the discovery options provided by the Minnesota Rules of Civil Procedure;

(D) Substantial likelihood of dispositive motions; or

(E) Any factor that demonstrates that assignment to the ELT would substantially affect a party’s right to a fair and just resolution of the matter (e.g., timing of obtaining discovery from a third party).

Subd. 4. After the time for bringing a motion under subdivision 3 of this rule has expired and no later than the trial date, a party may by motion request that the case be removed from the

ELT for good cause shown related to a new development that could not have been previously raised.

RULE 2 AUTOMATIC DISCLOSURES OF INFORMATION

Subd. 1 Each party shall prepare, serve and file an Automatic Disclosure of Information within 30 days after the ELT Certification or Election has been filed. The Automatic Disclosure of Information shall include the following:

(A) A statement summarizing each contention in support of every claim or defense which a party will present at trial and a brief statement of the facts upon which the contentions are based.

(B) The name, address and telephone number of each individual likely to have discoverable information – along with the subjects of that information and any statement from such individual – that the disclosing party may use to support its claims or defenses. However, no party shall be required to furnish any statement (written or taped) protected by the attorney/client privilege or work-product rule.

(C) A copy – or description, by category and location – of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses.

(D) If a claim for damages is being made, a description of the precise damages being sought by the party and the method for calculation of said damages. If the party has any liability insurance coverage providing coverage for the claims being made by another party, the name of the insurance company, the limits of coverage and the existence of any issue that could affect the availability of coverage.

(E) A brief summary of the qualifications of any expert witness the party may call at time of trial together with a report or statement of any such expert which sets forth the subject matter of the expert witness's anticipated testimony; the substance of the facts and opinions to which the expert is expected to testify, and a brief summary of the grounds for each opinion.

(F) Any offers of stipulation of any fact that is relevant to any claim or defense in the matter.

(G) An estimate of the number of trial days that it will take to complete trial of the matter.

RULE 3 CASE MANAGEMENT CONFERENCE

Within 30 days of the date of filing of an ELT Certification or Election, the court shall convene a Case Management Conference (CMC). All counsel and pro se parties must participate in the CMC. At the CMC, the court and the parties shall address the following subjects:

(A) Any motion to exclude the matter from the ELT Rules made pursuant to ELT Rule 1, Subd. 3;

(B) The prospects for settlement via mediation, arbitration, court conducted settlement conference, or other form of ADR;

(C) Any request for modification of the abbreviated discovery process required by the ELT Rules;

(D) The setting of a day or week certain trial date to begin no later than 120 to 180 days following filing of the ELT Certification or Election;

(E) The setting of a deadline for the filing of all trial documents, including witness lists, exhibit lists, jury instructions, special jury verdict forms, trial briefs and motions in limine; and

- (F) The setting of the date for completion of hearing of any motions.

RULE 4 LIMITATIONS ON DISCOVERY

Subd. 1 The period for conducting discovery shall begin on [the date the ELT Certificate or Election was filed] [the date of the CMC]¹⁸, and continue for a period of [60] [90] days. Upon a request of the parties, the court, for good cause shown, may extend the period for conducting discovery for up to an additional 30 days.

Subd. 2 Written discovery shall be limited to 15 interrogatories, 15 requests for production of documents and things, and 25 requests for admissions. Written discovery by each party must be served within 30 days of the date of the CMC and responses thereto must be served within 30 days of the date of service. Motions to compel responses to written discovery shall be made within 15 days of the date a response was due and shall be made pursuant to the modified discovery motion procedure set forth in Subd. 5 of this Rule.

Subd. 3 Depositions are permitted as a matter of right of the parties only but must be taken within the deadline established by the court. Except as otherwise ordered by the court, a deposition of a non-party witness shall be allowed only if the deposition is being taking in lieu of in-person trial testimony.

Subd. 4 Prior to any motion to compel discovery, the party proffering the discovery and the party from whom responses are being sought must, by and through their counsel (or a pro se litigant if unrepresented by counsel), confer in an attempt to resolve the dispute. If the dispute is not resolved, the party proffering the discovery shall contact the court and schedule a telephone conference with the court, and provide notice of the date and time of the telephone conference to

¹⁸ Options are set forth in brackets to permit some flexibility to the pilot districts.

all adverse parties. No later than 5 days prior to the date of the discovery dispute telephone conference, each party shall serve and file with the court a letter not exceeding 2 pages in length setting forth the party's position on the discovery dispute and providing copies of the disputed discovery. The court, in its discretion, may allow additional argument at the telephone conference. The court shall promptly rule on the discovery dispute.

Appendix D: Special Rules for a Complex Case Program

Preface¹⁹

The purposes of the Complex Case Program (“CCP”) are to promote effective and efficient judicial management of complex cases in the district courts, avoid unnecessary burdens on the court, keep costs reasonable for the litigants and to promote effective decision making by the court, the parties and counsel.

The core principles that support the establishment of a mandatory CCP include:

1. Early and consistent judicial management promotes efficiency;
2. Mandatory disclosure of relevant information, rigorously enforced by the court, will result in disclosure of facts and information necessary to avoid unnecessary litigation procedures and discovery;
3. Blocking complex cases to a single judge from the inception of the case results in the best case management.
4. Firm trial dates result in better case management and more effective use of the parties resources, with continuances granted only for good cause.
5. Education and training for both judges and court staff will assist with the management of complex cases.

RULE 1 DEFINITION OF A COMPLEX CASE

(a) Definition

A “complex case” is an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel.

(b) Factors

In deciding whether an action is a complex case under (a), the court must consider, among other things, whether the action is likely to involve:

- (1) Numerous hearings, pretrial and dispositive motions raising difficult or novel legal issues that will be time-consuming to resolve;

¹⁹ This proposal includes options that are set forth in brackets and are designed to provide flexibility to the pilot districts.

- (2) Management of a large number of witnesses or a substantial amount of documentary evidence;
- (3) Management of a large number of separately represented parties;
- (4) Multiple expert witnesses;
- (5) Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court;
- (6) Substantial post judgment judicial supervision; or
- (7) Legal or technical issues of complexity.

(c) Provisional designation

An action is provisionally a complex case if it involves one or more of the following types of claims:

- (1) Antitrust or trade regulation claims;
- (2) Intellectual property matters, such as trade secrets, copyrights, patents, etc.;
- (3) Construction defect claims involving many parties or structures;
- (3) Securities claims or investment losses involving many parties;
- (4) Environmental or toxic tort claims involving many parties;
- (5) Product liability claims;
- (6) Claims involving mass torts;
- (7) Claims involving class actions;
- (8) Ownership or control of business claims; or
- (9) Insurance coverage claims arising out of any of the claims listed in (c)(1) through (c)(8).

(d) Parties' designation

In any action not enumerated above, the parties can voluntarily agree to be governed by the Special CCP Rules by filing a "CCP Election," in a form to be

developed by the state court administrator and posted on the main state court website, to be filed along with the initial pleading.

(e) Motion to Exclude Complex Case Designation

A party objecting to the provisional assignment of a matter to the CCP must serve and file a motion setting forth the reasons that the matter should be removed from the CCP. Said motion papers must be served and filed within [20 days] of the date the moving party is served with the CCP Designation. The motion shall be heard during the Case Management Conference [or at said other time as determined by the court]. The factors that should be considered by the court in ruling on said motion include the factors set forth in Rule 1 (b) and (c) above.

RULE 2 SINGLE JUDGE BLOCKED TO COMPLEX CASES

A single judge shall be assigned to all designated complex cases within [30] [45] days of filing in accordance with Rule 113 of the General Rules of Practice. In making the assignment the assigning judge should consider, among other factors, the needs of the court, the judge's ability, interest, training, experience (including experience with complex cases) and willingness to participate in educational programs related to the management of complex cases.

RULE 3 MANDATORY CASE MANAGEMENT CONFERENCES

- (a)** Within [30] [45] days of assignment, the judge assigned to a complex case shall hold a mandatory case management conference. Counsel for all parties and pro se parties shall attend the conference. At the conference, the court will discuss all aspects of the case as contemplated by Minn. R. Civ. P. 16.01.
- (b)** The Court will hold a Second Case Management conference [half way through] [at the close of] fact discovery;
- (c)** The Court will schedule a Pretrial Conference at the [close expert discovery] [after all motions have been heard].

RULE 4 CASE MANAGEMENT ORDER AND SCHEDULING ORDER

In all complex cases, the Judge assigned to the case shall enter a Case Management Order and a Scheduling Order (together or separately) addressing the matters set forth in Minn. R. Civ. P. 16.02 and 16.03, and including without limitation the following:

- (a)** The dates for subsequent Case Management Conferences in the case;
- (b)** the deadline for the parties to meet and confer regarding discovery needs;

- (c) the deadline for joining other parties;
- (d) the deadline for amending the pleadings;
- (e) the deadline by which fact discovery will close and provisions for disclosure or discovery of electronically stored information;
- (f) the deadlines by which parties will make expert witness disclosures and deadline for expert witness depositions;
- (g) the deadlines for non-dispositive and dispositive motions;
- (h) any modifications to the extent of discovery, such as, among other things, limits on:
 - (i) the number of fact depositions each party may take;
 - (ii) the number of interrogatories each party may serve;
 - (iii) the number of expert witnesses each party may call at trial;
 - (iv) the number of expert witnesses each party may depose; and
- (i) a date certain for trial subject to continuation for good cause only, and a statement of whether the case will be tried to a jury or the bench and an estimate of the trial's duration.

RULE 5 AUTOMATIC DISCLOSURES

Each party shall prepare, serve and file an Automatic Disclosure of Information within [30] [45] days after the CCP Provisional Designation or Election has been filed. The Automatic Disclosure of Information shall include the following:

- (a) A statement summarizing each contention in support of every claim or defense which a party will present at trial and a brief statement of the facts upon which the contentions are based.
- (b) The name, address and telephone number of each individual likely to have discoverable information – along with the subjects of that information and any statement from such individual – that the disclosing party may use to support its claims or defenses. However, no party shall be required to furnish any statement (written or taped) protected by the attorney/client privilege or work-product rule.

- (c) A copy – or description, by category and location – of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses.
- (d) If a claim for damages is being made, a description of the precise damages being sought by the party and the method for calculation of said damages. If the party has any liability insurance coverage providing coverage for the claims being made by another party, the name of the insurance company, the limits of coverage and the existence of any issue that could affect the availability of coverage.
- (e) The number and type of expert witnesses each party expects to call at trial.
- (f) An estimate of the number of trial days that it will take to complete trial of the matter.

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The Sedona Conference[®] Cooperation Proclamation

The Sedona Conference[®] launches a coordinated effort to promote cooperation by all parties to the discovery process to achieve the goal of a “just, speedy, and inexpensive determination of every action.”

The costs associated with adversarial conduct in pretrial discovery have become a serious burden to the American judicial system. This burden rises significantly in discovery of electronically stored information (“ESI”). In addition to rising monetary costs, courts have seen escalating motion practice, overreaching, obstruction, and extensive, but unproductive discovery disputes – in some cases precluding adjudication on the merits altogether – when parties treat the discovery process in an adversarial manner. Neither law nor logic compels these outcomes.

With this Proclamation, The Sedona Conference[®] launches a national drive to promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery. This Proclamation challenges the bar to achieve these goals and refocus litigation toward the substantive resolution of legal disputes.

Cooperation in Discovery is Consistent with Zealous Advocacy

Lawyers have twin duties of loyalty: While they are retained to be zealous advocates for their clients, they bear a professional obligation to conduct discovery in a diligent and candid manner. Their combined duty is to strive in the best interests of their clients to achieve the best results at a reasonable cost, with integrity and candor as officers of the court. Cooperation does not conflict with the advancement of their clients’ interests it enhances it. Only when lawyers confuse *advocacy* with *adversarial conduct* are these twin duties in conflict.

Lawyers preparing cases for trial need to focus on the full cost of their efforts – temporal, monetary, and human. Indeed, all stakeholders in the system – judges, lawyers, clients, and the general public – have an interest in establishing a culture of cooperation in the discovery process. Overcontentious discovery is a cost that has outstripped any advantage in the face of ESI and the data deluge. It is not in anyone’s interest to waste resources on unnecessary disputes, and the legal system is strained by “gamesmanship” or “hiding the ball,” to no practical effect.

The effort to change the culture of discovery from adversarial conduct to cooperation is not utopian.¹ It is, instead, an exercise in economy and logic. Establishing a culture of cooperation will channel valuable advocacy skills toward interpreting the facts and arguing the appropriate application of law.

¹Gartner RAScore Research Note G00148170, *Cost of eDiscovery Threatens to Skew Justice System*, 1D# G00148170, (April 20, 2007), at <http://www.h5technologies.com/pdf/gartner0607.pdf>. (While noting that “several . . . disagreed with the suggestion [to collaborate in the discovery process] . . . calling it ‘utopian’”, one of the “takeaway’s” from the program identified in the Gartner Report was to “[s]trive for a collaborative environment when it comes to eDiscovery, seeking to cooperate with adversaries as effectively as possible to share the value and reduce costs.”).

Cooperative Discovery is Required by the Rules of Civil Procedure

When the first uniform civil procedure rules allowing discovery were adopted in the late 1930s, “discovery” was understood as an essentially cooperative, rulebased, partydriven process, designed to exchange relevant information. The goal was to avoid gamesmanship and surprise at trial. Over time, discovery has evolved into a complicated, lengthy procedure requiring tremendous expenditures of client funds, along with legal and judicial resources. These costs often overshadow efforts to resolve the matter itself. The 2006 amendments to the Federal Rules specifically focused on discovery of “electronically stored information” and emphasized early communication and cooperation in an effort to streamline information exchange, and avoid costly unproductive disputes.

Discovery rules frequently compel parties to meet and confer regarding data preservation, form of production, and assertions of privilege. Beyond this, parties wishing to litigate discovery disputes must certify their efforts to resolve their difficulties in good faith.

Courts see these rules as a mandate for counsel to act cooperatively.³ Methods to accomplish this cooperation may include:

- 1 Utilizing internal ESI discovery “point persons” to assist counsel in preparing requests and responses;
- 2 Exchanging information on relevant data sources, including those not being searched, or scheduling early disclosures on the topic of Electronically Stored Information;
- 3 Jointly developing automated search and retrieval methodologies to cull relevant information;
- 4 Promoting early identification of form or forms of production;
- 5 Developing caselong discovery budgets based on proportionality principles; and
- 6 Considering courtappointed experts, volunteer mediators, or formal ADR programs to resolve discovery disputes.

The Road to Cooperation

It is unrealistic to expect a *sua sponte* outbreak of pretrial discovery cooperation. Lawyers frequently treat discovery conferences as perfunctory obligations. They may fail to recognize or act on opportunities to make discovery easier, less costly, and more productive. New lawyers may not yet have developed cooperative advocacy skills, and senior lawyers may cling to a longheld “hide the ball” mentality. Lawyers who recognize the value of resources such as ADR and special masters may nevertheless overlook their application to discovery. And, there remain obstreperous counsel with no interest in cooperation, leaving even the bestintentioned to wonder if “playing fair” is worth it.

³See, e.g., *Board of Regents of University of Nebraska v BASF Corp.* No. 4:04CV3356,2007WL3342423, at *5 (D. Neb. Nov. 5,2007)(“The overriding theme of recentamendments tothediscoveryrules has been open and forthright sharing of information by allparties to a case with the aim of expediting caseprogress, minimizing burdenandexpense, andremovingcontentiousnessas muchaspracticable. [citations omitted]. Ifcounsel fail in this responsibility—willfully or not—these principlesofan opendiscovery process are undermined,coextensively inhibiting the courts’ability to objectively resolve their clients’disputes and the credibility of its resolution.”).

This “Cooperation Proclamation” calls for a paradigm shift for the discovery process; success will not be instant. The Sedona Conference[®] views this as a threepart process to be undertaken by The Sedona Conference[®] Working Group on Electronic Document Retention and Production (WG1):

Part I: Awareness Promoting awareness of the need and advantages of cooperation, coupled with a call to action. This process has been initiated by The Sedona Conference[®] Cooperation Proclamation.

Part II: Commitment Developing a detailed understanding and full articulation of the issues and changes needed to obtain cooperative factfinding. This will take the form of a “Case for Cooperation” which will reflect viewpoints of all legal system stakeholders. It will incorporate disciplines outside the law, aiming to understand the separate and sometimes conflicting interests and motivations of judges, mediators and arbitrators, plaintiff and defense counsel, individual and corporate clients, technical consultants and litigation support providers, and the public at large.

Part III: Tools Developing and distributing practical “toolkits” to train and support lawyers, judges, other professionals, and students in techniques of discovery cooperation, collaboration, and transparency. Components will include training programs tailored to each stakeholder; a clearinghouse of practical resources, including form agreements, case management orders, discovery protocols, etc.; courtannexed e-discovery ADR with qualified counselors and mediators, available to assist parties of limited means; guides for judges faced with motions for sanctions; law school programs to train students in the technical, legal, and cooperative aspects of ediscovery; and programs to assist individuals and businesses with basic erecord management, in an effort to avoid discovery problems altogether.

Conclusion

It is time to build upon modern Rules amendments, state and federal, which address ediscovery. Using this springboard, the legal profession can engage in a comprehensive effort to promote pretrial discovery cooperation. Our “officer of the court” duties demand no less. This project is not utopian; rather, it is a tailored effort to effectuate the mandate of court rules calling for a “just, speedy, and inexpensive determination of every action” and the fundamental ethical principles governing our profession.

Judicial Endorsements

as of September 30, 2010

Alabama

Hon. John L. Carroll Retired Birmingham

Hon. William E. Cassady
U.S. District Court for the Southern District of
Alabama Mobile

Arizona

Hon. Andrew D. Hurwitz Vice Chief Justice,
Arizona Supreme Court Phoenix

Arkansas

Hon. Barry A. Bryant
U.S. District Court for the Western District
of Arkansas Texarkana

Hon. Jerry W. Cavaneau
U.S. District Court for the Eastern District of
Arkansas Little Rock

California

Hon. Robert N. Block
U.S. District Court for the Central District of
California Santa Ana

Hon. Susan Y. Illston
U.S. District Court for the Northern District
of California San Francisco

Hon. Elizabeth D. Laporte
U.S. District Court for the Northern District
of California San Francisco

Hon. Louisa S. Porter
U.S. District Court for the Southern District of
California San Diego

Hon. David C. Velasquez
Orange County Superior
Court Santa Ana

Hon. Carl J. West Los Angeles County Superior
Court Los Angeles

Colorado

Hon. Morris B. Hoffman Colorado 2nd Judicial
District Court Denver

Hon. Craig B. Shaffer
U.S. District Court for the District of
Colorado Denver

District of Columbia

Hon. Francis M. Allegra
U.S. Court of Federal
Claims Washington

Hon. Herbert B. Dixon, Jr. Superior Court of the
District of Columbia Washington

Hon. John M. Facciola
U.S. District Court for the District of
Columbia Washington

Hon. Alan Kay
U.S. District Court for the District of Columbia
Washington

Chief Judge Royce C. Lamberth
U.S. District Court for the District of Columbia
Washington

Hon. Gregory E. Mize Retired Washington

Florida

Hon. Barry L. Garber
U.S. District Court for the Southern District of
Florida Miami

Hon. Thomas E. Morris
U.S. District Court for the Middle District of
Florida Jacksonville

Hon. Richard A.
Nielsen 13th Judicial
Circuit Tampa

Hon. Robin S. Rosenbaum
U.S. District Court for the Southern District of
Florida Fort Lauderdale

Hon. Thomas B.
Smith Ninth Judicial
Circuit Orlando

Georgia

Hon. Joseph C. Iannazzone
State Court of Gwinnett County Lawrenceville

Illinois

Hon. Martin C. Ashman
U.S. District Court for the Northern District
of Illinois Chicago

Hon. David G. Bernthal
U.S. District Court for the Central District of
Illinois Urbana

Hon. Geraldine Soat Brown
U.S. District Court for the Northern District
of Illinois Chicago

Hon. Jeffrey Cole
U.S. District Court for the Northern District
of Illinois Chicago

Hon. Susan E. Cox
U.S. District Court for the Northern District of
Illinois Chicago

Hon. Morton Denlow
U.S. District Court for the Northern District of
Illinois Chicago

Chief Judge Carol A. Doyle
U.S. Bankruptcy Court for the Northern
District of Illinois Chicago

Hon. Peter A. Flynn
Illinois Superior Court Chicago

Hon. Allen S. Goldberg
Cook County Circuit Court
Chicago

Hon. John A. Gorman
U.S. District Court for the Central District of
Illinois Peoria

Chief Judge James F. Holderman
U.S. District Court for the Northern District of
Illinois Chicago

Hon. Arlander Keys
U.S. District Court for the Northern District of
Illinois Chicago

Hon. P. Michael Mahoney
U.S. District Court for the Northern District of
Illinois Rockford

Hon. Michael T. Mason
U.S. District Court for the Northern District of
Illinois Chicago

Hon. Richard Mills
U.S. District Court for the Central District of
Illinois Springfield

Hon. Nan R. Nolan
U.S. District Court for the Northern District of
Illinois Chicago

Hon. Sidney I. Schenkier
U.S. District Court for the Northern District
of Illinois Chicago

Hon. Susan P. Sonderby
U.S. Bankruptcy Court for the Northern
District of Illinois Chicago

Hon. Maria Valdez
U.S. District Court for the Northern District
of Illinois Chicago

Indiana

Hon. Kenneth H. Johnson
Marion County Superior
Court Indianapolis

Iowa

Hon. Celeste F. Bremer
U.S. District Court for the Southern District of
Iowa Des Moines

Kansas

Hon. Gerald J. Elliott Johnson County District
Court Olathe

Hon. J. Thomas Marten
U.S. District Court for the District of Kansas
Wichita

Hon. James P. O'Hara
U.S. District Court for the District of Kansas
Kansas City

Hon. Gerald L. Rushfelt
U.S. District Court for the District of Kansas
Kansas City

Hon. K. Gary Sebelius
U.S. District Court for the District of Kansas
Topeka

Hon. David Waxse

U.S. District Court for the District of Kansas
Kansas City

Louisiana

Hon. Eldon E. Fallon
U.S. District Court for the Eastern District of
Louisiana New Orleans

Hon. Sally Shushan

U.S. District Court for the Eastern District of
Louisiana New Orleans

Maryland

Hon. Lynne A. Battaglia
Maryland Court of Appeals
Annapolis

Hon. Stuart R. Berger Circuit Court for Baltimore
City Baltimore

Hon. Paul W. Grimm
U.S. District Court for the District of Maryland
Baltimore

Hon. Michael D. Mason
Montgomery County Circuit Court
Rockville

Hon. Albert J. Matricciani, Jr.
Maryland Court of Special Appeals
Baltimore

Hon. Steven I. Platt Retired Upper Marlboro

Massachusetts

Hon. Robert B. Collings
U.S. District Court for the District of
Massachusetts Boston

Hon. Timothy S. Hillman

U.S. District Court for the District of
Hon. Allan van Gestel Retired Boston

Michigan

Hon. Virginia M. Morgan
U.S. District Court for the Eastern District of
Michigan Ann Arbor

Mississippi

Hon. Jerry A. Davis
U.S. District Court for the Northern District of
Mississippi Aberdeen

Nevada

Hon. Elizabeth Gonzalez Nevada Eighth
Judicial District Court Las Vegas

New Jersey

Hon. Katharine S. Hayden
U.S. District Court for the District of New
Jersey Newark

Hon. John J. Hughes Retired Trenton

New York

Hon. Leonard B. Austin New York Supreme
Court, Commercial Division Mineola Hon.
Carolyn E. Demarest New York Supreme
Court, Commercial Division Brooklyn

Hon. Helen E. Freedman New York State
Court, Appellate Division New York

Hon. Marilyn D. Go
U.S. District Court for the Eastern District of
New York Brooklyn

Hon. Richard B. Lowe III New York Supreme
Court, New York County New York

Massachusetts Worcester

Hon. Frank Maas
U.S. District Court for the Southern District of
New York New York

Hon. Andrew J. Peck
U.S. District Court for the Southern District of
New York New York

Hon. David E. Peebles
U.S. District Court for the Northern District of
New York Syracuse

Hon. Shira A. Scheindlin
U.S. District Court for the Southern District of
New York New York

Hon. Lisa Margaret Smith
U.S. District Court for the Southern District of
New York White Plains

Hon. Richard J. Sullivan
U.S. District Court for the Southern District of
New York New York

Hon. Ira B. Warshawsky New York Supreme
Court, Commercial Division Mineola

North Carolina

Hon. Albert Diaz North Carolina Business Court
Charlotte

Hon. John R. Jolly, Jr. North Carolina Business
Court Raleigh

Hon. Ben F. Tennille North Carolina Business
Court Greensboro

Ohio

Hon. William H. Baughman, Jr.
U.S. District Court for the Northern District of
Ohio Cleveland

Hon. Sandra S. Beckwith
U.S. District Court for the Southern District of

Ohio Cincinnati

Hon. John P. Bessey Franklin County Court of
Common Pleas Columbus

Hon. Richard A. Frye Franklin County Court
of Common Pleas Columbus

Hon. Thomas H. Gerken Hocking County
Common Pleas Court Logan

Hon. George J. Limbert
U.S. District Court for the Northern District of
Ohio Youngstown

Hon. Michael R. Merz
U.S. District Court for the Southern District of
Ohio Dayton

Hon. Kathleen McDonald O'Malley

U.S. District Court for the Northern District of
Ohio Cleveland

Oklahoma

Hon. Robert E. Bacharach
U.S. District Court for the Western District of
Oklahoma Oklahoma City

Hon. Robin J. Cauthron
U.S. District Court for the Western District of
Oklahoma Oklahoma City

Hon. Stephen P. Friot
U.S. District Court for the Western District of
Oklahoma Oklahoma City

Oregon

Hon. John V. Acosta
U.S. District Court for the District of Oregon
Portland

Hon. Dennis J. Hubel
U.S. District Court for the District of Oregon
Portland

Pennsylvania

Hon. Linda K. Caracappa
U.S. District Court for the Eastern District of
Pennsylvania Philadelphia

Hon. Joy Flowers Conti
U.S. District Court for the Western District of
Pennsylvania Pittsburgh

Hon. Lisa P. Lenihan
U.S. District Court for the Western District of
Pennsylvania Pittsburgh

Hon. Christine A. Ward Allegheny Court of
Common Pleas Pittsburgh

South Carolina

Hon. Clifton Newman South Carolina Circuit
Court, AtLarge Kingstree

Tennessee

Hon. Joe B. Brown
U.S. District Court for the Middle District of
Tennessee Nashville

Hon. Diane K. Vescovo
U.S. District Court for the Western District of
Tennessee Memphis

Texas

Hon. Andrew W. Austin
U.S. District Court for the Western District of
Texas Austin

Hon. Martin Hoffman
68th Civil District Court
Dallas

Hon. Martin L. Lowy
101st Civil District
Court Dallas

Hon. Nancy S. Nowak
U.S. District Court for the Western District of
Texas San Antonio

Washington

Hon. James P. Donohue
U.S. District Court for the Western District of
Washington Seattle Hon. Barbara Jacobs
Rothstein
U.S. District Court for the Western District of
Washington Seattle

Hon. Karen L. Strombom
U.S. District Court for the Western District of
Washington Seattle

Wisconsin

Hon. Aaron E. Goodstein
U.S. District Court for the Eastern District of
Wisconsin Milwaukee

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Complex Litigation and Business Court Systems:

(Alphabetical by State)

Alabama

Commercial Docket

Arizona

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<http://www.superiorcourt.maricopa.gov/SuperiorCourt/CivilDepartment/complexLitigation.asp>

California

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Connecticut

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Delaware

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Florida

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Georgia

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Illinois

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Maine

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Maryland

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Baltimore: <http://www.baltocts.sailorsite.net/civil/BTCMP/BTCMP.html>

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New Jersey

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Oregon Second Judicial District (Eugene), Commercial Court Program:

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Pennsylvania

Philadelphia Court of Common Pleas, Commerce Case Management Program,

<http://www.courts.phila.gov/common-pleas/trial/civil/>

Allegheny County Court of Common Pleas, Commerce and Complex Litigation Center,
http://www.alleghenycourts.us/civil/commerce_complex_litigation.asp

Rhode Island Superior Court, Business Calendar

South Carolina Circuit Court, Business Court Pilot Program:

<http://www.judicial.state.sc.us/busCourt/>

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