Recommendations of the

Idaho Supreme Court Civil Justice Reform Task Force

Final Report

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I. Introduction

Idaho Rule of Civil Procedure (IRCP) 1 states: "These rules should be construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding." Because of some troubling signs that the Idaho court system might not be delivering on the promise of IRCP 1, the Idaho Supreme Court issued an Order on November 21, 2016, establishing the Civil Justice Reform Task Force (Task Force). (Appendix 1) The Court charged the Task Force with examining the civil justice system, determining problem areas, and recommending appropriate solutions.

One concern of the Court was the increasing cost of civil litigation. The Court had recently been presented with several appeals where the attorney fees incurred by the parties substantially exceeded the amount in controversy. For example, the attorney fees exceeded $100,000 in a $1,600 timber trespass case,[1] over $1 million per side for a $367,000 construction dispute case,[2] and in excess of $20,000 per side in a dispute over a $4,385 skid loader.[3] The Task Force's judges and trial attorneys recognize that cases where the dollar amount of attorney fees dwarfs the amount in controversy are becoming more frequent. These cases indicate problems with the system.

Another indicator of potential problems was the decline in civil case filings in Idaho between 2006 and 2015. This was a trend for filings at both the trial and appellate level. Since 2006, district court civil filings have fallen by 22 percent. New case filings and re-openings totaled 7,500 in 2006, increased to a high of 10,087 in 2009, and then steadily declined to a total of 5,820 in 2015. Magistrate division civil filings, including re-openings, dropped from 119,484 in 2006 to 96,547 in 2015, a decline of 19 percent. Civil appeals totaled 230 in 2006, reached a high of 259 in 2010, and then declined to 189 in 2015, a reduction of 18 percent. Many observers attributed the decline to increasing costs and delays in our civil courts.

Idaho's experience is not unique. States across the country have similarly experienced declining civil caseloads brought about by lengthy and costly litigation. The national phenomenon has been studied in many quarters and solutions have been suggested. One

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1 *Stevens v. Eyer*, 161 Idaho 407, 413, 387 P.3d 75, 81 (2016).

2 *City of Meridian v. Petra, Inc.*, 154 Idaho 425, 432-34, 299 P.3d 232, 239-41 (2013).

3 *Edged in Stone, Inc. v. Northwest Power Systems, LLC*, 156 Idaho 176, 179, 321 P.3d 726, 729 (2014).

organization on the leading edge of this effort is the IAALS, the Institute for the Advancement of the American Legal System at the University of Denver. The founder and executive director of that organization, Rebecca Love Kourlis, who served on the Colorado Supreme Court for ten years, traveled to Idaho twice to talk about IAALS's proposals to reform the civil justice system. Former Justice Kourlis first presented at the Idaho Supreme Court's Darrington Lecture in February 2016 and again at the annual Idaho Judicial Conference in September 2016. Her presentation in February planted the seed that lead to the formation of the Task Force.

Later that year, the Conference of Chief Justices (CCJ) issued *Call to Action: Achieving Civil Justice for All*. (Appendix 2) This publication documented a comprehensive study of problems confronting civil courts across the country. *Call to Action* made thirteen recommendations for improving the civil courts and restoring public confidence in them. In 2016, the CCJ adopted and endorsed all of the recommendations.

The recommendations called for initial disclosures in almost all cases, greater involvement of court personnel and technology in following the progress of cases, notification of civil rule violations, and strict enforcement of deadlines. The study also suggested that cases be assigned into one of three pathways or tiers. One tier would be a streamlined pathway for the great majority of cases that are simple in nature. The streamlined pathway would have limited and proportional discovery, a scheduling order with a firm trial date, and disposition in six to eight months. A second pathway, the complex pathway, would apply to the small number of cases involving complicated factors such as multiple parties, or complex issues, or complicated case types, like medical malpractice, construction defects, or product liability. The complex pathway would include an early case management plan, intensive judicial oversight, and more generous proportional discovery. A third pathway, called the general pathway, would encompass those cases that fall between the other two pathways. The general pathway would be a hybrid of the other two types with more flexibility in permitted discovery than simple cases and a recommended time to disposition of twelve to eighteen months. *Call to Action* has served as a roadmap for the work of the Task Force.

The Idaho Supreme Court appointed a Task Force chaired by Judge Molly Huskey and comprised of lawyers and judges from across the State and many practice areas to review, analyze, and make recommendations regarding Idaho's civil justice system. The Task Force began meeting on a monthly basis in February 2017 and received funding from the National

Center for State Courts (NCSC) and IAALS under a grant from the State Justice Institute. Some Task Force members attended the CCJ/Conference of State Court Administrators (COSCA) Western Region Civil Justice Reform Summit meeting in Utah in the spring of 2017 to learn about the reforms and resulting experiences in other states including Utah, which implemented a successful reform plan in 2011. During its deliberations, the Task Force initially determined what problems, if any, existed in Idaho. This was done to avoid crafting a solution for a problem that did not exist. Then, the Task Force considered reform plans from a number of other states to see what solutions have worked best. Finally, the Task Force examined Idaho's practices and adopted the recommendations and reforms that would best fit the needs of Idaho.

The Task Force realized that the success of any reform plan would require the input and support of Idaho's judges and lawyers and so Task Force members publicized the reform project and obtained input from judges and lawyers around the State. For example, Task Force members presented information at Idaho State Bar meetings, judicial conferences, and Inns of Court meetings. The Task Force also published articles explaining the Task Force's work in The Advocate, the magazine of the Idaho State Bar.

In order to determine what problems existed in Idaho and to learn how Idaho's experience compared with other states' experiences, a twenty-page survey was submitted to all Idaho judges and lawyers. The survey received 826 responses, constituting a statistically valid response and representing a cross-section of those involved in the civil justice process.[4] The survey identified potential problems and possible solutions. For example, a substantial majority of respondents believed that litigation costs should be proportionate to the value of the case (61%),[5] initial disclosures should be required (65%),[6] and smaller cases should have limited discovery (63%).[7]

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[4] Attached is the Civil Justice Reform-Attorney Survey responses which provides the results of the survey. (Appendix 3)

[5] Sixty-four percent of respondents believe litigation costs should be proportional to the value of the case.

[6] Forty-one percent of respondents agreed and 24 percent strongly agreed that Idaho state courts should require initial disclosures similar to those required by Federal Rule of Civil Procedure 26(a)(1).

[7] Sixty-three percent of respondents believe discovery should be limited in certain lower value cases.

The Task Force also conducted a review of randomly sampled cases filed in each of Idaho's seven judicial districts to analyze the types of cases, the amounts at issue, the length of time to resolution, and related information. The purpose of this civil case landscape analysis was to obtain a broad view of Idaho's civil justice system and compare it to the national civil justice data summarized in the *Call to Action* recommendations.[8] [9]

Both the survey results and the civil case landscape analysis corresponded in salient respects with the CCJ findings, indicating that the CCJ recommendations would be relevant to Idaho. For instance, the national experience is that 90 percent of judgments are for $25,000 or less. The civil case landscape analysis disclosed that 88 percent of Idaho judgments fall within that amount.

After understanding the reform efforts in the federal and other state courts, the Task Force adopted the CCJ recommendations and recommends revision of relevant rules of civil procedure. The most significant revisions are to IRCP 26 and call for, among other things: mandatory initial disclosures; three separate tiers for case assignment--simple, standard, and complex--each with its own discovery limits; and stronger enforcement of disclosure requirements. The proposed revisions are intended to streamline the civil justice system in Idaho, which also requires a variety of scheduling changes in IRCP 16. Further, the Task force recommends changes to other relevant civil rules to reflect the changes to IRCP 16 and 26.

The Task Force recommendations are not intended to supplant other on-going court improvement efforts and are compatible with the work of other relevant Supreme Court committees and offices.

For example, the Idaho Supreme Court's Advancing Justice Committee has been working for several years to develop case flow management plans to streamline the processing of discreet case types. Other committees have made similar changes in family law, child protection, parental termination, and small claims cases. As a result of relevant committee work, the Idaho Supreme Court implemented the Idaho Rules of Family Law Procedures in 2013 and the Idaho Rules for Small Claim Actions in 2016. In fiscal year 2015, family law cases accounted for 14 percent of Idaho's civil actions, while small claims cases accounted for 11

[8] Attached is the Civil Justice Reform-Baseline Summary Report which summarily describes the landscape analysis. (Appendix 4)

[9] The full report is available at https://www.ncsc.org/~/media/Files/PDF/Research/Civil JusticeReport-2015.ashx

percent. Similarly, the Court Assistance Office has been improving service in the Court Assistance Offices by updating its website and developing forms that will assist self-represented litigants.

The suggested changes to the civil rules are intended to provide more timely and cost-effective justice in approximately 70 percent of the general cases filed in Idaho courts. These cases include collections, contracts, real estate disputes, employment, personal injury, and medical malpractice, but exclude family law and small claims cases. The Task Force recommendations are designed to fulfill the promise of IRCP 1 "to secure the just, speedy and inexpensive determination" of these types of civil cases.

II. The Task Force Encourages the Idaho Supreme Court to Adopt the Civil Justice Reform Recommendations Endorsed by the Council for Chief Justices

The Task Force reviewed the recommendations adopted by the CCJ. These recommendations were published in *Call to Action* by the NCSC. The publication "provides a roadmap for restoring function and faith in a system that is too important to lose." As a result of its work, the Task Force recommends the Idaho Supreme Court adopt the following recommendations of the CCJ as set forth in *Call to Action*.

A. Task Force Individual Recommendations

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

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

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

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

The Idaho Supreme Court has already adopted this recommendation and began the implementation of this recommendation several years ago through the work of the Advancing Justice Committee. The Advancing Justice Committee developed case flow plans, fine-tuned the time standards, and began drafting uniform court orders. The time standards set by the Idaho Supreme Court adequately address sections 1.1 and 1.2. The Task Force complied with section

1.3 by conducting a landscape analyses. In that analysis, the Idaho Supreme Court research division identified a representative sample of cases from each of the seven judicial districts and compiled statistical information on various elements of each of the cases. (Appendix 4)

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

This recommendation is designed to address the "one size does not fit all" problem of current civil case business practices, discovery processes, and court rules. The current civil rules do not reflect the current types of civil cases filed in Idaho courts. The civil rules are more applicable to the complex cases which are only a small percentage of the total number of cases. Most civil cases are not complex yet the litigants can, and often do, undertake extensive and expensive discovery. Consequently, the current civil rules do not reflect the discovery needs for a majority of civil cases. As a result, the Task Force recommends a tiered case system based on complexity, dollar value, and other relevant factors as set out in the revised version of IRCP 26. The Task Force recognizes the need for the civil justice system to evolve in ways that reflect the appropriate use of resources, including technological advancements and efficiencies.

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

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

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

3.3 *Courts should make the pathway assignments mandatory upon filing.*

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

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

The rationale for adopting Recommendations 3, 4, 5, and 6 are set forth after Recommendation 6.

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

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

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

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

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

CCJ RECOMMENDATION 5: Courts should implement a Complex Pathway for cases that present multiple legal and factual issues, involve many parties, or otherwise are likely to require close court supervision.

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

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

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

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

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

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

CCJ RECOMMENDATION 6: Courts should implement a General Pathway for cases whose characteristics do not justify assignment to either the Streamlined or Complex Pathway.

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

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

6.3 *Courts should require mandatory disclosures and tailored additional discovery.*

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

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

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

Recommendations 3, 4, 5, and 6 are reflected in the Task Force's recommended changes to IRCP 16, 26, 29, 30, 31, 34, 36, and 37. The landscape analysis revealed that the vast majority of cases in Idaho can be resolved more quickly, efficiently, and less expensively if the cases have proportional discovery and initial disclosures related to the complexity of the case. That said, the dollar value alone should not be the singular factor to determine the case tier assignment because multiple factors affect the most appropriate case tier assignment. The Task Force has suggested changes to the relevant civil rules to allow for the adoption of a three-tiered system. This tiered system links the amount of discovery to a case tier assignment. The case tier assignment includes various factors to be weighed by the court when assigning a newly filed case to a tier. The Task Force notes that Recommendations 5.5 and 6.5 reference "informal communications." While the communications may be informal, they should be memorialized in some fashion to both document the content of the communication and to establish a record of case activity. Courts must also be careful to avoid improper ex parte communications.

CCJ RECOMMENDATION 7: Courts should develop civil case management teams consisting of an assigned judge supported by appropriately trained staff.

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

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

The Task Force reviewed Idaho's civil case business practices. There are three broad categories of duties: the judges; the judge's assistant or secretary; and those of the clerk's office, both in and out of court. Business practices vary from district to district and sometimes between counties within a district. For example, some counties assign a specific clerk to a specific judge and some do not. Similarly, some judges have additional administrative support, others do not. Because of the disparate practices and workloads in the districts, the Task Force does not believe it should recommend a "one size fits all" solution. Whether law clerks, in-court clerks, or judicial assistants are assigned routine tasks depends on numerous factors. What tasks a judge does or does not assign should be left to the discretion of the judge, in consideration with the administrative district judge, the trial court administrator, and the elected clerk. Regardless of the practices, the Task Force recommends the Idaho Supreme Court adopt this recommendation but the Task Force does not suggest changes in current practices. To the extent there is a training deficit, that circumstance can be addressed on a case-by-case basis.

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

On-going judicial and court staff training is and has been an integral part of the Idaho Supreme Court's function. Additionally, the Idaho Supreme Court and the Idaho State Bar have historically partnered to deliver quality training and education programs. To the extent there is special training necessary to implement the tiered system, such education can be included in the current training agendas for the judges and attorneys.

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

District court judges in Idaho are general jurisdiction judges. The Task Force does not recommend specialization in specific civil case types for several reasons. First, there are too few specialized cases to justify assignment to a specific judge. Second, the administrative district judges, in conjunction with the trial court administrators, are in the best position to allocate resources to assist a district court judge to whom an exceptionally complex case has been assigned. Third, the random assignment of cases has proven to be successful in balancing caseloads, avoiding judge shopping, and allowing all judges to hone their skills in different case types. Finally, the current system of random assignments of judges is objective and transparent. Thus, Idaho's current practices reflect a commitment to this recommendation.

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

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

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

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

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

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

Idaho's geography and resources have historically created funding and resource allocation challenges for the Supreme Court. For example, some counties are geographically large, but have small populations and so do not have the base to fund necessary infrastructure changes. In some counties, older courthouses do not comply with modern accessibility requirements or incorporate modern technology or building design standards, but serve a small percent of Idaho's population, resulting in a very high per capita cost for courthouse renovations. To address some of these concerns, the Idaho Supreme Court amended IRCP 7.2 to permit telephonic and video conferencing for designated hearings. Additionally, in 2018, the Idaho Supreme Court completed a statewide implementation of the Odyssey software system. The

Odyssey software system is a statewide electronic case management system that creates and utilizes electronic or digital files instead of paper files and is another example of utilizing technology to increase access to courts and reduce costs. The Task Force recommends that the Idaho Supreme Court continue to analyze the data available through the Odyssey software system to inform future case management improvements. The Task Force has no additional recommendations in relation to this recommendation.

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

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

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

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

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

Idaho courts have implemented a system through the adoption of Odyssey, judicial education, and standardized forms in accordance with 11.1 and 11.2. In order to provide information to citizens and parties, the Idaho Supreme Court has a website on which it has made available the Idaho Court rules, documents and videos generally describing the Idaho court system and specific practice areas, and standardized pleading forms for parties and judges.

While the Task Force recommends the adoption of this recommendation, generally, it does so with some reservation for 11.3 and 11.4 as the Task Force finds it beyond its mandate to address 11.3 and 11.4. Idaho courtrooms, particularly in counties with a high volume caseload, will likely be busy and distracting during those hearings. The Odyssey software system allows electronic filing but there currently is no uniformly permitted substitute for mandatory in-person appearances at hearings. Courtroom layout, access, acoustics, scheduling, and any other issues relevant to significant sensory impact is beyond the mandate and expertise of the Task Force.

Although the Task Force makes no specific recommendations on 11.3 and 11.4, courtroom processes are always reviewed and future changes may address the concerns raised in these recommendations.

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

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

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

The Idaho Supreme Court has implemented various case management tools for some time and adopted its own time standards in the mid-1980's. Thereafter, the NCSC developed and adopted uniform time standards. The Advancing Justice Committee refined the NCSC time standards and recommended the new time standards to the Idaho Supreme Court, which adopted the recommendations in 2013. Because that work has already been done, the Task Force makes no further recommendation in this regard.

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

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

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

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

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

The Idaho Supreme Court created a Court Assistance Office to address a concern regarding the number of self-represented litigants involved in civil matters, especially in family law cases. The first Court Assistance Offices were staffed in 1999. Currently, each county courthouse has a Court Assistance Office. In 2005, the Court Assistance Office partnered with Idaho Legal Aid Services to launch the Interactive A2J Court Forms Project. This online document assembly platform is similar to Turbo Tax and through plain language questions,

gathers the relevant information from filers to complete and generate the necessary forms for various court filings including divorce and civil protection orders. Many of these interviews were also made available in Spanish.

In early 2018, the Court Assistance Office launched the updated interactive interviews to the Guide and File platform for use with Odyssey, and the completed forms can now be directly e-filed with the court. Litigants can now file these forms without the need to visit the courthouse and can file anywhere Internet access is available.

The Court Assistance Office has always endeavored to communicate information in plain language, and in 2013 renewed their efforts to improve instructions and forms. It provided plain language training to Court Assistance officers and contracted with a company to complete a plain language translation of the instructions for small claims cases. The Court Assistance Office now has a new plain language template and has begun the process of updating all of its forms and instructions.

Each courthouse now has an iCourt Portal kiosk where all litigants can e-file their paperwork and access public court records. The kiosks provide access to the iCourt Portal, File and Serve, and Guide and File programs. The kiosks are paired with a scanner and public records can be printed for a fee. Additionally, the File and Serve kiosk gives users a cash payment option completed through the clerk's office, which avoids a three percent convenience fee when paying with a credit card.

The Court Assistance Office recently launched a redesigned website with the most requested information prominently located on the website. Court forms are located front and center on the new website, navigation has improved, and redundancies have been eliminated. The website can be accessed from the iCourt Portal kiosk in each of the county courthouses.

To assist self-represented litigants, each Court Assistance Office has an assigned staff person who provides access to the forms, brochures, and informational videos. Some counties and districts have a full-service Court Assistance Officer to provide additional services including form review, file review, forms workshops, and legal clinics. These full-service offices have regular office hours where self-represented individuals can receive assistance.

As noted above, the Idaho Supreme Court revised IRCP 7.2 to permit telephonic and video appearances in designated hearing types. The Task Force recommends the use of

technology be periodically reviewed to address both geographical limitations and technological advancements.

III. The Task Force Recommends the Idaho Supreme Court Adopt the Proposed Changes to the Idaho Rules of Civil Procedure 16, 26, 29, 30, 31, 33, 34, 36, and 37

A. Introduction

Based on its research and discussion, the Task Force proposes modifications to IRCP 16, 26, 29, 30, 31, 33, 34, 36, and 37. (Appendices 5 - 13) The broad changes to the civil rules that the committee proposes include: (1) Creating three case tier types: simple (Tier 1), standard (Tier 2), and complex (Tier 3). The case tier type would be assigned by the court after initial disclosures are served and after consideration of a number of factors set out in IRCP 16. (2) Limiting discovery to "nonprivileged matters relevant to any party's claim or defense" and requiring that the information sought be proportional in light of a number of factors. The scope and proportionality limits are the same as currently embodied in the recently amended federal rules of civil procedure. (3) Requiring that early in the case, the parties make initial disclosures similar to those required in federal court. This mirrors the practice in federal court and should reduce the need for and cost of additional discovery. (4) Requiring parties to disclose brief summary information about their retained experts. After the disclosures, the party opposing the expert may choose between a written report signed by the expert that includes all of the information currently required to be disclosed by IRCP 26(b)(4) or a deposition of the expert, but not both. In Tier 1 cases, the expert discovery will be by report, unless good cause is shown for the need for a deposition. (5) Formalizing and standardizing case management timelines, including early and continued involvement by the judge. This will encourage the parties to identify discovery issues earlier in the case and allow the court to manage the case progression more efficiently.

The reasons for the proposed changes are discussed in greater detail below.

B. Recommendations and Rationale for Changes

1. Discovery Based on a Tiered System

The Task Force proposes to incorporate proportionality into the Idaho discovery rules by assigning each civil case to one of three possible tiers. The Task Force drew upon the model recommended by the CCJ and implemented in Utah, which limits the number and frequency of discovery procedures based on a tier designation. Utah's case analysis data demonstrates that the vast majority of cases are valued at $50,000 or less and do not require extensive discovery. Utah

adopted its tier system in 2011, along with mandatory initial disclosures and other discovery changes. A study of the impact of Utah's Rule 26 revisions found: (1) a decreased time to complete discovery; (2) a decrease in time to disposition in contested cases; (3) a decrease in the frequency of discovery disputes; (4) an increase in the percentage of cases settled rather than be disposed by judgment (trial or summary judgment); and (5) financial cost savings.[10] The Task Force hopes that by adopting a similar case tier system, more cases will be resolved more quickly, efficiently, and cost effectively and enable a greater number of litigants to retain attorneys to assist in navigating the complexities of litigation.

Idaho's proposed tier model is similar, but not identical, to Utah's model. The Task Force decided that Utah's tier designation, based only on the plaintiff's designation of the dollar amount in controversy, would not be as effective in Idaho as a case tier designation based on an analysis of numerous factors. Based on the analysis of civil caseloads in Idaho and in other states, the vast majority of civil cases will be designated to Tier 1. However, the Task Force recognized that because there are complex cases with a lower value of damages at stake and simple cases that have significant damages at stake, it is best to let the court weigh a number of factors in setting the case tier type. The tier type will be set by the court at or following the initial scheduling conference. The parties would be required to provide information through the use of a standard form that would assist the court in setting the case tier type. If a party is content with a Tier 1 designation, the party need not submit a form. The Task Force recommends that the Idaho Supreme Court review current business practices and make any necessary changes to implement the Task Force recommendations. Once a case is designated as a Tier 1 case, it is expected to go to trial quickly, typically within six months. The cost of litigating Tier 1 cases should decrease by limiting the amount and frequency of discovery.

2. Requiring a Proportionality Standard in Discovery

Proportional discovery is designed to limit discovery based on the needs of a case. Proportionality standards have been adopted by the federal courts and some state courts to limit the expense of discovery, resulting in a more efficient, inexpensive, and just determination of every action. A significant number of Idaho survey respondents felt placing limits on depositions, interrogatories, production requests, and admissions was needed. For example, 58

[10] Benefits and Costs of Civil Justice Reform, Paula Hannaford-Agor, Court Review, Volume 54, page 28; http://aja.ncsc.dni.us/publications/courtrv/cr54-1/CR54-1Hannaford.pdf.

percent of respondents agreed that discovery should be proportionate to the value of a case. Although not assessed in the survey, there is significant anecdotal evidence that currently much of the requested written discovery is overly broad and burdensome while meaningful written discovery responses are frustrated by objections and non-answers. The Task Force believes that data developed by the NCSC, Utah, California, and other states supports a conclusion that the traditional discovery procedures significantly contribute to the cost of litigation.

The Task Force proposes that Idaho incorporate a proportionality standard into the Idaho discovery process. The proposed amendment to IRCP 26(b)(1) eliminates the long-standing and outdated standard that all discovery "relevant to the subject matter" is permissible. The Task Force believes this standard has been abused and has resulted in discovery processes which discourage or deny litigants their day in court. The federal courts and many state courts have abandoned the "relevant to the subject matter" standard in favor of a proportionality standard similar, if not identical, to the one the Task Force proposes. The Task Force proposes mandatory initial disclosures and expert testimony disclosures without the necessity of a discovery request. These mandatory disclosures, combined with limiting the number and frequency of written discovery procedures, will encourage litigants to use written discovery in a way that focuses on the issues to be litigated. The proposed proportionality standard will allow discovery that is relevant to a party's claim or defense, but will also require that discovery be proportional to the needs of the case, considering the importance of the issues, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

The amount of discovery is proportional to and defined for each case type--simple, standard, or complex--and set forth in the proposed changes to IRCP 16. The tier type provides each party a limited amount of discovery, which the court may either further limit or expand based on a showing of good cause. The limitations by tier type are:

DISCOVERY TYPE	Tier 1	Tier 2	Tier 3
Interrogatories	5	10	20
Requests for Production	5	10	20
Requests for Admissions	10	20	40
Total Hours of Fact Depositions	5	15	30

3. Requiring Initial Disclosures

Mandatory initial disclosures require litigants to automatically disclose certain information to opposing parties to accelerate the exchange of basic information and eliminate the need for written discovery to request such information. A significant majority of Idaho attorneys responding to the survey agreed that Idaho state courts should require initial disclosures. Many Idaho attorneys are familiar with initial disclosures because the federal courts have required initial disclosures since 1993 and Utah and Wyoming now require initial disclosures in most state court actions.

The proposed amendment to IRCP 26(a)(1) on initial disclosure changes the timing for disclosures. The amendment proposes that at the outset of the case, litigants must disclose the identity of individuals likely to have discoverable information; identify and/or produce documents which may be used to support claims or defenses; provide a computation of damages claimed by the disclosing party; produce applicable insurance agreements; and provide a copy of any documents referred to in the pleadings filed by the responding party. A proposed amendment to IRCP 26(f)(1) and (3) requires the initial disclosures to be supplemented in a timely manner. Failure to do so will result in exclusion of the testimony or evidence not disclosed.

4. Adoption of Limits on Expert Discovery

The anecdotal evidence, survey results, and case analysis data support the conclusion that in Idaho expert discovery is a major contributor to the increasing cost of litigation. According to the survey, 41 percent of those taking the survey agreed (often and/or almost always) that expert witness costs are a determining factor in the decision to settle a case. Forty-two percent of respondents agreed (often and/or almost always) that client concerns about expert witness costs prompt the attorneys to seek or acquiesce to mediation processes. While it is impractical to eliminate the use of experts in litigation, the Task Force anticipates that certain improvements to the discovery rules will help control the costs related to expert discovery. The proposed amendments to IRCP 26(a)(2) will require litigants who use an expert in a case to disclose, without the need for a discovery request, basic information about the expert's qualifications, opinions, and basis for his/her opinion. Following such basic disclosure, the party opposing the expert may elect either a more robust and detailed written report signed by the expert or a deposition of the expert, but not both. If a party fails to make a timely election, the written report

will be the default method of discovery. Similar provisions are made for the disclosure of rebuttal expert testimony. If a written report is elected, the party offering the expert must pay for the report. If a deposition is elected, the party taking the deposition must pay the expert's reasonable fees for attending the deposition which will be limited to seven hours. A simplified disclosure provision for non-retained experts is also proposed. Expert testimony at trial will be limited to that fairly disclosed in the report or deposition.

5. Scheduling and Trial Setting

The survey results indicate that Idaho courts perform well in advancing cases through the civil litigation system from date of filing to date of disposition. This high level of performance is advanced by early judicial intervention and early trial settings. For example, 45 percent of survey respondents agreed (often and/or almost always) that involvement by judges early in a case helps to narrow discovery to the information necessary for case resolution. Forty-eight percent of the respondents agreed (often and/or almost always) that when a judge is involved early in a case and stays involved, clients are more satisfied with the litigation process. In other words, judges play a critical role in case processing. To obtain the full benefit of the proposed rule changes, a judge must ensure compliance with the civil rules. Requiring parties to define the dispute for the judge and disclose to the judge what discovery they need should result in the lawyers having a better understanding of their case earlier in the proceedings and may result in an earlier and less expensive resolution.

The proposed amendments to IRCP 16 will further formalize and standardize case management timelines and provide clear expectations for the parties and the judges. For example, setting scheduling conferences within thirty days after the defendant's initial disclosures are due is a way the judge can keep the case moving forward. Requiring a party to file a civil tier worksheet seven days prior to the initial scheduling conference if the party requests a case tier designation other than Tier 1 (and thus, additional discovery), will mandate that the parties define what discovery they need and why. The court can also more efficiently manage discovery disputes. Parties may request that the court quickly and informally review a discovery dispute before it is fully briefed. If the court proposes a resolution that is rejected by a party, motions may be filed and formally briefed and a hearing held. After that hearing, if the party opposing the resolution does not prevail to an extent greater than the proposed resolution,

the court may award the non-moving party its costs and fees against the opposing party as a sanction for taking the dispute to hearing.

The Task Force recognizes these proposed amendments to the civil rules will require attorneys and judges to change their respective business practices. However, the goal of these rule changes is to assist the court and litigants in accomplishing the expeditious resolution of civil lawsuits and the changes are necessary to accomplish that goal.

IV. Additional Support and Resources for Current Programs

A. Work by the Court Assistance Office

The Task Force recommends that the Idaho Supreme Court provide additional support and resources for the work done by the Court Assistance Offices. These offices provide an important and far-reaching resource to Idahoans. For example, with additional resources, the Court Assistance Office could explore and develop on-line, asynchronous small claims resolution as outlined in the Online Dispute Resolution Project Resources. (Appendix 14) A preliminary description of the project lists the various resources that would be needed to fully implement it. (Appendix 14) In this model, used effectively in Utah and Ohio, parties can participate in small claims actions through a computer or mobile device as their schedule permits. For example, parties can upload documents, complete and file pleadings, and take part in other court activities, while on their lunch breaks or at home, thus limiting the number of days of missed work and reducing the real challenge of scheduling transportation and child care. This would increase the efficiency of the court calendar and the resolution of cases.

B. Case Statistic Reports for Judges

The Idaho Supreme Court collects data on individual cases through the Odyssey program. The Court uses this data, among other purposes, to create monthly caseload reports for judges. Judges can access the caseload reports either by generating the report him or herself or by asking the Supreme Court Data and Evaluation Department to generate and transmit the report. The Supreme Court has provided education, reminders, and information to the judges on how to access the reports but it appears some judges are not utilizing the reports as a tool for managing caseloads. The underutilization of these reports may be due to several factors. First, there has been significant turnover in magistrate and district court judges since the Odyssey implementation. New judges may not be aware of these reports or how to generate and use them. Second, the transition from the old data management system to the Odyssey system makes

the reports available in a different way. The Supreme Court used to deliver a hard copy of the judge's individual caseload report to the judge's chambers. Thereafter, the Supreme Court would generate district caseload reports, which were sorted alphabetically by judges' last names within the report and sent electronically to all judges in the district. The judge would have to sort through the entire district report to find the individually relevant information.

Currently, reports are entirely electronic, and the judge must initiate the generation and transmission of the report either individually or by a request to the Supreme Court. Third, the new reports do not display the data in the same fashion as the old reports. Consequently, it is likely that judges are not utilizing this report to its fullest extent. The Task Force understands that the Data and Evaluation Department in collaboration with Tyler Technology (the creator of the Odyssey software) is currently working to refine the reports but the Data and Evaluation Department is limited because of its lack of resources and its dependence on Tyler Technology with regard to these reports.

The Task Force recommends that judges, judicial assistants, court clerks, and law clerks be provided with training on how to generate and extract the caseload reports from the Odyssey system so the reports are readily available for all judges. The training should also include how to use the report so that a judge is cognizant of the status of his or her cases and understands how to manage the status of the cases. The Task Force also recommends the caseload reports be analyzed to determine if the report provides sufficient, relevant data for a judge to manage his or her caseload in a way that complies with the recommended time standards.

V. Changes Discussed But Not Recommended

A. Introduction

Early in its formation, the Task Force discussed issues that may lead to the perception that Idaho courts were increasingly not accessible to regular people to resolve ordinary disputes like contractor problems, smaller personal injury cases, or neighborhood issues. These discussions touched on areas that the Task Force ultimately decided were beyond the mission of the Task Force. The Task Force includes this information to advise the Idaho Supreme Court of other areas that may be impacting access to the courts, but the Task Force specifically makes no recommendations in these areas. Some of those areas include:

B. Areas with Specialized Rules or Procedures

Some practice areas have specialized rules or procedures. One such area is family law. The Task Force specifically excluded family law cases from both the survey and the landscape analysis for two reasons. First, the NCSC did not include family law cases in its data analysis and the Task Force wanted to be sure to have relevant data comparisons. Second, family law cases are governed by the Idaho Rules of Family Procedure, which have specialized discovery requirements, including initial disclosures. While there may be a need for more individuals to be represented by counsel in family law cases, because this area was excluded from the Task Force's analysis, the Task Force makes no recommendations on increasing representation of self-represented litigants in this case type.

C. Jurisdictional Limit of the Magistrate Division and Small Claims Court

Based on the recommendations of the CCJ and the NCSC, some jurisdictions have increased the case jurisdictional amount for magistrate court cases. The Task Force reviewed the reasons behind doing so, and while that may be appropriate in other jurisdictions, the Task Force did not believe this was an appropriate solution for Idaho. The goal of the Task Force was not to increase the number of cases filed in magistrate court, but rather to provide parties access to an effective and efficient resolution of civil cases, regardless of which court the case was filed. As recognized in other states, by increasing the efficiency of the less complex cases, the number of self-represented litigants decreases while case resolution increases.

D. Small Lawsuit Resolution Act

By enacting Idaho Code §§ 7-1501-1512, the Idaho Legislature established a process "to reduce the cost and expense of litigation and encourage the swift, fair and cost-effective resolution of disputes . . . ." Idaho Code § 7-1502. The Task Force shares this objective. However, based on the data gathered, the Task Force is not convinced the Small Lawsuit Resolution Act has been effective or efficient. The Task Force chose not to explore changes to or elimination of the Small Lawsuit Resolution statutes, instead focusing on changes in the Idaho Rules of Civil Procedure that would achieve similar results.

E. Attorney Fee Structure

The Task Force recognized that Idaho may be unique in its broad possibilities for attorney fee recovery. However, addressing under what circumstances a prevailing party could or should recover attorney fees was beyond the scope of the Task Force's mission. Any changes

to the numerous statutes addressing these issues are best addressed by an independent committee in partnership with the Legislature. Further, some Task Force members are hopeful that the changes will make the cost of litigation less expensive and more predictable, particularly among Tier 1 cases. As such, attorneys may be more open to experimenting with alternate fee arrangements, such as flat, fixed fees. Such innovations may encourage law firms to give less experienced lawyers an opportunity to manage these cases and obtain trial experience, a diminishing skill among the newer generation of lawyers.

VI. Anticipated Results

If the Idaho Supreme Court adopts the recommendations of the Task Force, it anticipates results similar to those observed in other states. For example, Utah's data looked much like the national data that formed the basis of the CCJ recommendations. The data in Idaho mirrored both the CCJ data and Utah's data. Additionally, the Task Force has recommended many of the same changes to Idaho's civil rules as made in Utah. In general, Utah found that:

> For cases in which an answer was filed, the IRCP 26 revisions appear to have had a positive impact on civil case management in the form of fewer discovery disputes in cases other than debt collection and domestic relations, as well as reductions in time to disposition across all case types and tiers. Compliance with the standard discovery restrictions appears to be high, although there are suggestions that some parties may be stipulating around the restrictions without seeking court approval.

Utah: Impact of the Revisions to Rule 26 on Discovery Practice in Utah District Courts, 6 (2015). The study also concluded that the additional discovery requirements provided evidence that parties engaged in more productive settlement negotiations. *Id*. Cases also reached a final disposition more quickly and there was not a statistically meaningful increase in amended pleadings (less than 1 %). *Id*. The parties also sought extraordinary discovery in only a small minority of cases (.9 %), while contested motions for extraordinary discovery was filed in only .4 percent of cases. *Id*. at 7. Moreover, in the cases in which there were discovery disputes, those disputes were occurring about four months earlier in the case proceedings than pre-implementation of the IRCP 26 revisions. *Id*. The changes did not seem to impact the ability of self-represented litigants to comply with the discovery requirements. *Id*. Moreover, the proportion of non-debt collection cases in the Tier 1 category in which both parties were represented increased from 42 percent to 61 percent, and the proportion of non-domestic Tier 2 cases in which both parties were represented increased from 60 percent to 72 percent. *Id*. While

the Task Force recommendations will not resolve all issues affecting civil justice, they should address many accessibility and cost concerns while providing a baseline from which to measure and analyze future cases.

VII. Conclusion

The Idaho Supreme Court and the Administrative Office of the Courts have developed and implemented programs that increase Idahoan's access to the courts. From its initial work in adopting time standards in the mid-1980's, to developing its Court Assistance Offices, to implementing the Odyssey software system, these recommended changes to the Idaho Rules of Civil Procedure are just another step in a familiar journey. These recommendations will benefit the parties, the judges, and the court system. The Task Force requests that the Supreme Court implement the suggested changes.

TABLE OF APPENDICES

Appendix 14

In the Supreme Court of the State of Idaho

IN RE FORMATION OF A CIVIL JUSTICE REFORM TASK FORCE) ORDER

WHEREAS, the Idaho Constitution guarantees that Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, and right and justice shall be administered without sale, denial, delay, or prejudice;

WHEREAS, runaway costs, delays, and complexity in civil litigation can undermine public confidence in the courts and deny people the justice that they seek;

WHEREAS, effective rules, procedures, and business practices are especially critical to ensure just, speedy, and inexpensive resolutions to cases;

NOW, THEREFORE IT IS HEREBY ORDERED that a special task force on Civil Justice Reform be appointed to be chaired by Judge Molly J. Huskey.

IT IS FURTHER ORDERED that the Committee shall:

1. Rethink longstanding orthodoxies about the process for resolving civil cases in light of evidence derived from applicable research and pilot projects in both state and federal courts;

2. Review current court procedures to identify areas of delay and the causes thereof;

3. Review current court rules, procedures, and business practices, as well as the use of technology;

4. Consider making recommendations for change which will protect, support, and preserve litigants' constitutional rights to a speedy remedy, to a jury trial, to due process, and to justice administered without sale, denial, delay or prejudice;

IT IS FURTHER ORDERED that the following persons are appointed as members of the task force, to serve until further order of the Court:

Justice Jim Jones
Idaho Supreme Court

Judge Steven Hippler
District Judge

Judge Stephen Dunn
District Judge

Judge Gregory Moeller
District Judge

Judge Rick Bollar
Magistrate Judge

Brian Wonderlich
Partner, Holland & Hart

Lori Nakaoka
Law Office of Andrew Parnes

John Janis
Partner, Hepworth, Janis & Kluksdal

Richard C. Boardman
Partner, Perkins Coie

Michael Henderson, Reporter
Legal Counsel
Idaho Supreme Court

Dated this 21st day of November, 2016.

By Order of the Supreme Court

Jim Jones, Chief Justice

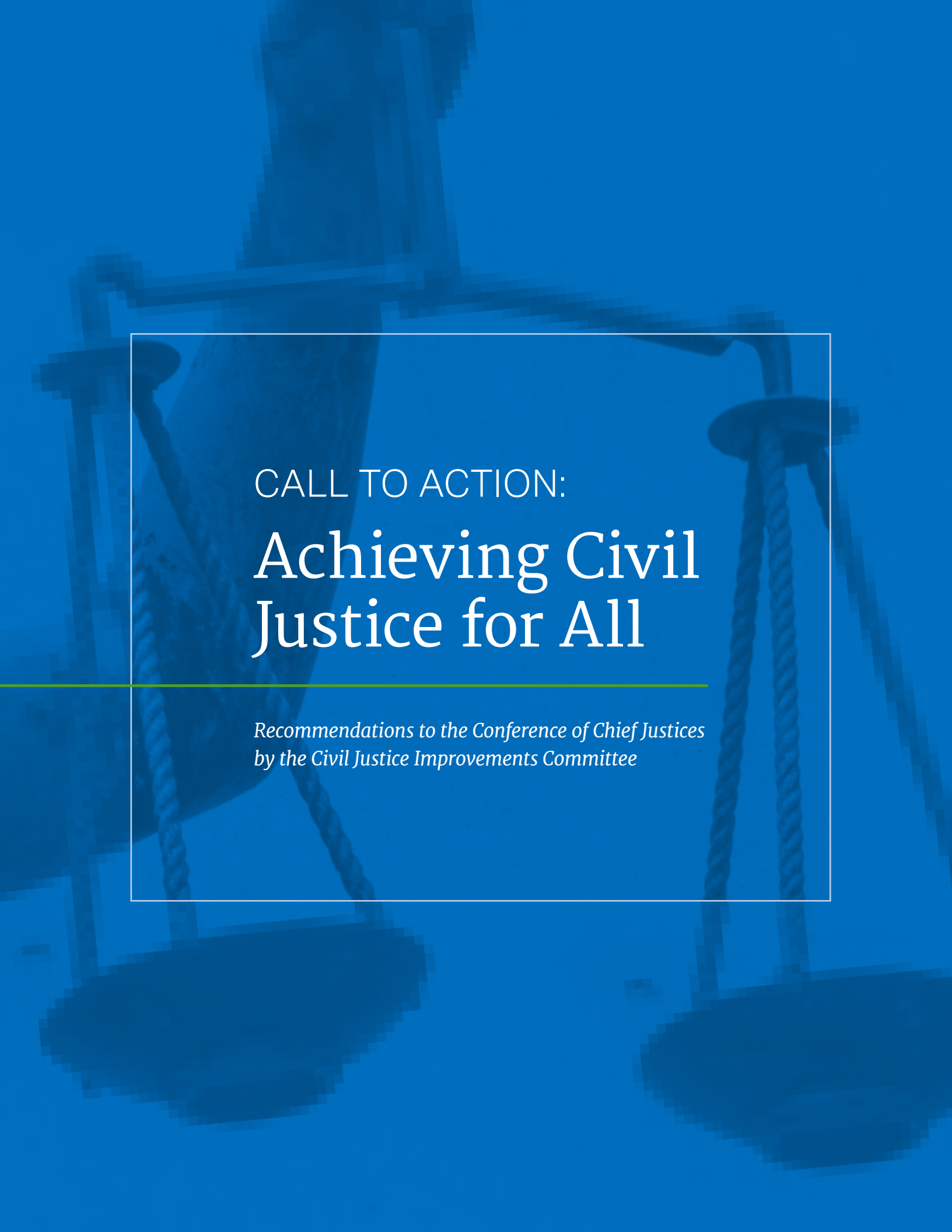
ATTEST:

Stephen W. Kenyon, Clerk

I, Stephen W. Kenyon, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the Order entered in the above entitled cause and now on record in my office.
WITNESS my hand and the Seal of this Court 11.22.16

Stephen Kenyon Clerk

By: Dina D. Arnold Deputy



CALL TO ACTION:

Achieving Civil Justice for All

Recommendations to the Conference of Chief Justices by the Civil Justice Improvements Committee

CALL TO ACTION:

Achieving Civil Justice for All

Recommendations to the Conference of Chief Justices by the Civil Justice Improvements Committee

300 Newport Avenue
Williamsburg, VA 23185

ncsc.org/civil

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Rebecca Love Kourlis
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United State District Court Judge
Northern District of Georgia

ABA TIPS SECTION LIAISON

Robert S. Peck
President
Center for Constitutional
Litigation, PC

The Call

Civil justice touches every aspect of our lives and society, from public safety to fair housing to the smooth transaction of business.

Americans deserve a civil legal process that can fairly and promptly resolve disputes for everyone—rich or poor, individuals or businesses, in matters large or small. Yet our civil justice system often fails to meet this standard. Runaway costs, delays, and complexity are undermining public confidence and denying people the justice they seek. This has to change.

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

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

Meanwhile, private entities are filling the void. Individuals and businesses today have many options for resolving disputes outside of court, including private judges for hire, arbitration and online legal services, most of which do not require an attorney to navigate. But these alternatives can't guarantee a transparent and impartial process. These alternative forums are not necessarily bound by existing law nor do they contribute to creating new law and shaping 21st century justice. In short, they are not sufficiently democratic.

Civil justice touches every aspect of our lives and society, from public safety to fair housing to the smooth transaction of business. For centuries, Americans have relied on an impartial judge or jury to resolve conflicts according to a set of rules that govern everyone equally. This framework is still the most reliable and democratic path to justice—and a vital affirmation that we live in a society where our rights are recognized and protected. Which is why our legal community has a responsibility to fix the system while preserving the best of our 200-year tradition.

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

It's time for our system to evolve. Our citizens deserve it. Our democracy depends on it.

For centuries, Americans have relied on an impartial judge or jury to resolve conflicts according to a set of rules that govern everyone equally.

A Strategic Response

This Report of the Civil Justice Improvements (CJI) Committee provides a roadmap for restoring function and faith in a system that is too important to lose.

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

WHY THE CIVIL JUSTICE IMPROVEMENTS COMMITTEE AND THIS REPORT?

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

Second, on a more positive note, dedicated and inventive court leaders from a handful of states recently have taken concrete steps toward change. They are updating court rules and procedures, using technology to empower litigants and court staff, and rethinking longstanding orthodoxies about the process for resolving civil cases. States (including Arizona, Colorado, New Hampshire, Minnesota, and Utah) have changed their civil rules and procedures to require

mandatory disclosure of relevant documents, to curb excessive discovery, and to streamline the process for resolving discovery disputes and other routine motions. A dozen other states have implemented civil justice reforms over the past five years, either on a "pilot" or statewide basis. Many of those reforms have now received in-depth evaluations to assess their impact on cost, disposition time, and litigant satisfaction. Most of those efforts, however, have focused on discrete stages of litigation (pleading, discovery) or on specific types of cases (business, complex litigation), rather than on the civil justice process overall.

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

THE CJI COMMITTEE MEMBERS AND GUIDING PRINCIPLES

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

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

The time was right to examine the civil justice system … and develop a comprehensive set of recommendations for civil justice reform to meet the needs of the 21st century.

THE WORK OF THE COMMITTEE, SUBCOMMITTEES, AND STAFF

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

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

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

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

The subcommittees held monthly conference calls to discuss discrete issues related to their respective work. Individual committee members circulated white papers, suggestions, and discussion documents. Spirited conversations led members to reexamine long-held views about the civil justice system, in light of the changing nature of the civil justice caseload, innovations in procedures and operations from around the country, the rise of self-represented litigants, and the challenge and promise of technology. The full CJI Committee met in four

plenary sessions to share insights and preliminary proposals. Gradually, Committee members reached a solid consensus on the Recommendations set out in this Report.

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

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

Respectfully submitted by the Civil Justice Improvements Committee, July 2016

FUNDAMENTAL FRAMEWORK/PRINCIPLES FOR CJI COMMITTEE RECOMMENDATIONS

1. Recommendations should aim to achieve demonstrable improvements with respect to the expenditure of time and costs to resolve civil cases.
2. Outcomes from recommendations should be consistent with existing substantive law.
3. Recommendations should protect, support, and preserve litigants' constitutional right to a civil jury trial and honor procedural due process.
4. Recommendations should be capable of implementation within a broad range of local legal cultures and practices.
5. Recommendations should be supported by data, experiences of Committee members, and/or "extreme common sense."
6. Recommendations should not systematically favor plaintiffs or defendants, types of litigants, or represented or unrepresented litigants.
7. Recommendations should promote effective and economic utilization of resources while maintaining basic fairness.
8. Recommendations should enhance public confidence in the courts and the perception of justice.

Underlying Realities

The reality of litigation costs routinely exceeding the value of cases explains the relatively low rate of dispositions involving any form of formal adjudication.

THE CIVIL LITIGATION LANDSCAPE

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

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

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

remained fairly flat over the past 30 years. Tort cases, in contrast, have largely evaporated.

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

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

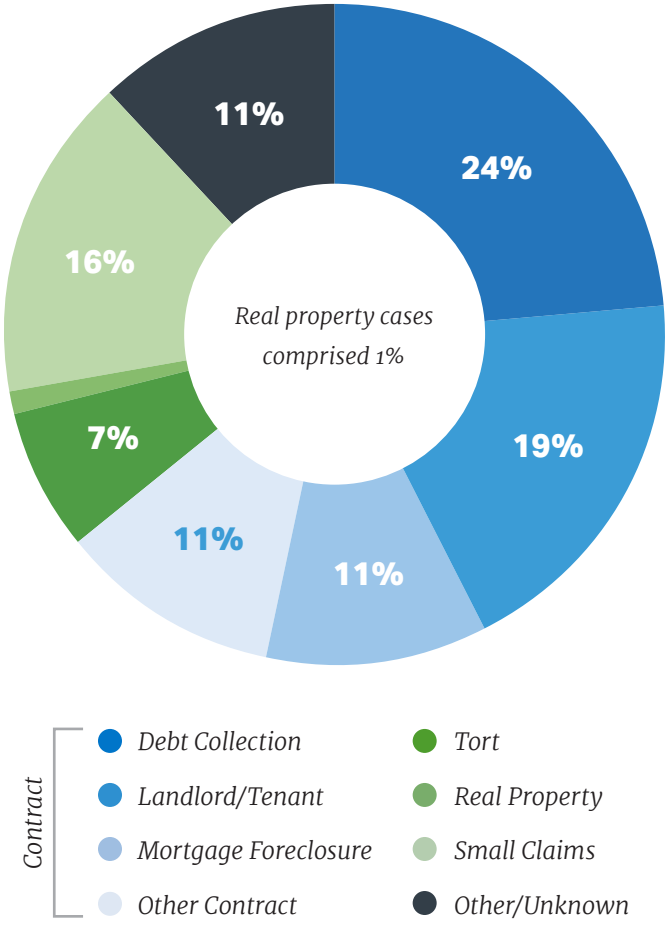
Most cases were disposed through a non-adjudicative process. A judgment was entered in nearly half (46 percent) of the *Landscape* cases, most of which were likely default judgments. One-third of cases were dismissed (possibly following a settlement, although only 10 percent were explicitly coded by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

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

forum of choice for attorney-represented plaintiffs in debt collection cases.

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

CASELOAD COMPOSITION



Source: *NCSC Landscape of Civil Litigation in State Courts (2015).*

IMPLICATIONS FOR STATE COURTS

The picture of civil litigation that emerges from the *Landscape* dataset confirms the longstanding criticism that the civil justice system takes too long and costs too much. Some litigants with meritorious claims and defenses are effectively denied access to justice in state courts because it is beyond their financial means to litigate. Others, who have the resources and legal sophistication to do so, are opting for alternatives to the civil justice system either preemptively through contract provisions (e.g., for consumer products and services, employment, and health care) or, after filing a case in court, through private ADR services. In response to these realities, courts must improve in terms of efficiency, cost, and convenience to the public so that those we serve have confidence that the court system is an attractive option to achieve justice in civil cases.

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

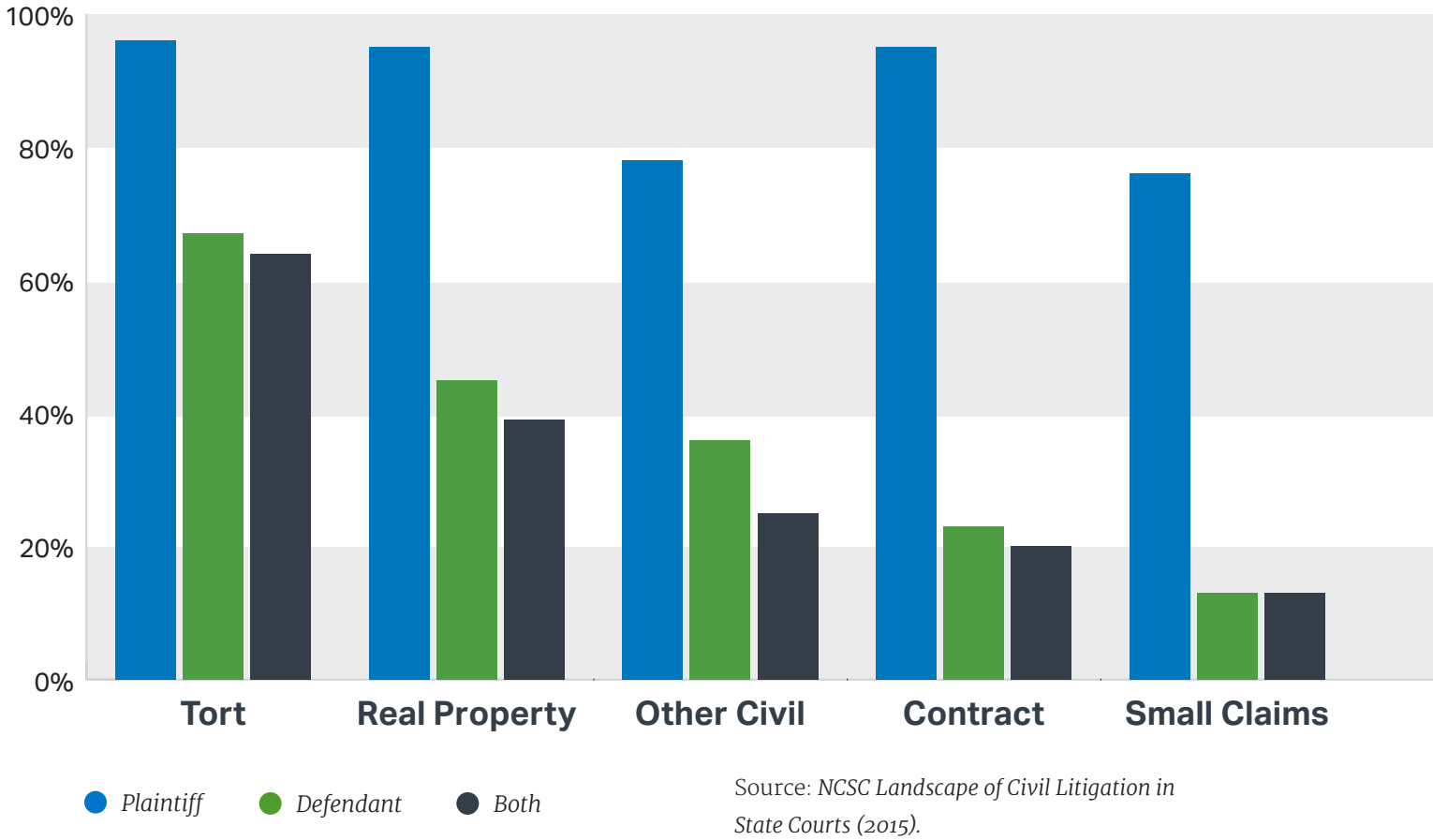
State court budgets experienced dramatic cuts during the economic recessions both in 2001–2003 and in 2008–2009, and there is no expectation among state court policymakers that state court

budgets will return to pre-2008 recession levels. These budget cuts, combined with constitutional and statutory provisions that prioritize criminal and domestic cases over civil dockets, have undermined courts' discretion to allocate resources to improved civil case management. As both the quantity and quality of adjudicatory services provided by state courts decline, it is unlikely that state legislators will be persuaded to augment budgets to support civil caseloads.

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

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

PERCENTAGE OF CASES WITH ATTORNEY REPRESENTATION



Source: *NCSC Landscape of Civil Litigation in State Courts (2015).*

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

IMPERATIVE RESPONSES

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

THE ENTIRE COURT MUST LEAD CASE MANAGEMENT

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

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

ONE-SIZE-FITS-ALL IS NOT WORKING

The Recommendations also recognize that uniform rules that apply to all civil cases are not optimally designed for most civil cases. They provide too much process for the vast majority of cases, including uncontested cases. And they provide too little management for complex cases that comprise a small proportion of civil caseloads, but which inevitably require a disproportionate amount of attention from the court.[2] Instead, cases should be "right-sized" and triaged into appropriate pathways at filing. However, those pathways should be flexible enough to permit reassignment if the needs of the case change over time.

TRADITIONAL DIFFERENTIATED CASE MANAGEMENT IS NOT ENOUGH

The pathway approach described in the Recommendations improves existing court structures and differentiated case management (DCM) systems. Many court systems are currently characterized by a tiered structure of general and limited jurisdiction courts that limit where civil cases can be filed based on case type or amount-in-controversy or both. DCM is a rule-based system that, at varying times after filing, assigns civil cases to case-processing tracks, usually based on case type or amount-in-controversy. Each DCM track features its own case-processing rules concerning presumptive deadlines for case events.

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

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

Furthermore, experience has found that case type and amount-in-controversy—the two factors most often used to define the jurisdiction of courts in tiered systems or DCM procedures—do not reliably forecast the amount of judicial management that each case demands. In Utah, for example, an answer was filed in less than half of cases in which the amount-in-controversy exceeded $300,000; the remaining cases were uncontested and thus did not require a great deal of court involvement.[3] Although case type and amount-in-controversy were both significant predictors of the likelihood of future discovery disputes during the litigation (often cited as time-consuming case events for judges), other factors, including the representation status of the litigants, were stronger predictors of the need for court involvement in the case.

It is imperative that courts develop rules and procedures for promptly assigning all cases to pathways designed to give each case the amount of attention that properly fits the case's needs.

For these reasons it is imperative that courts develop rules and procedures for promptly assigning all cases to pathways designed to give each case the amount of attention that properly fits the case's needs. As importantly, courts must implement business practices that ensure that rules and procedures are enforced. Rules and procedures for each pathway should move each case toward resolution in an expeditious manner. For example, empirical research shows that fact-pleading standards and robust mandatory disclosures induce litigants to identify key issues in dispute more promptly and help inform litigants about the merits of their respective claims and defenses.[4] Other rules and procedures that have been shown to be effective

are presumptive restrictions on the scope of necessary discovery and strictly enforced deadlines. These promote completion of key stages of litigation up to and including trials.[5]

CLOSE ATTENTION TO HIGH-VOLUME DOCKETS

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

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

Recommendations

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

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

The Recommendations aim to create a future where:

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

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

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

EXERCISE ULTIMATE RESPONSIBILITY

RECOMMENDATION 1

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

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

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

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

COMMENTARY

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

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

RE: 1.1

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

RE: 1.2

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

Surely, whenever it is customary to ignore compliance with rules "designed to secure the just, speedy, and inexpensive determination of every action and proceeding,"[7] cost and delay in civil litigation will continue.

RE: 1.3

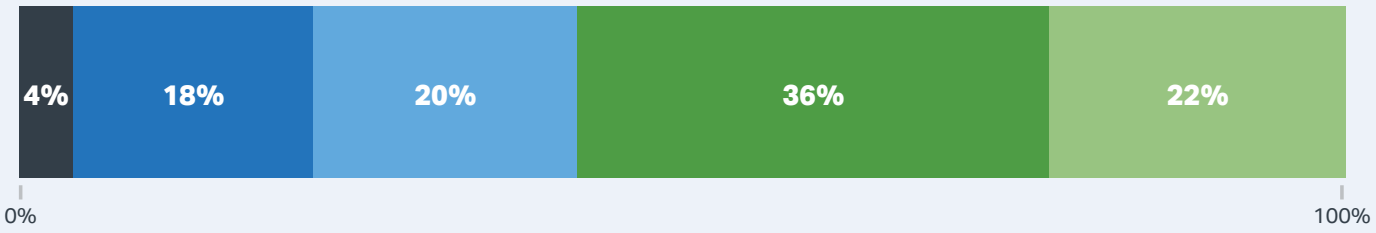
Courts cannot meaningfully address an issue without first knowing its contours. Analyzing the existing civil caseload provides these contours and gives court leaders a basis for informed decisions about what needs to be done to ensure civil docket progression.

KEY RESOURCES FOR RECOMMENDATION 1

Task Force on the Escalating Costs of Civil Litigation, Washington State Bar Ass'n, Final Report to the Board of Governors (2015).

Inst. for Advancement of the Am. Legal Sys., Survey of the Arizona Bench & Bar on the Arizona Rules of Civil Procedure (2010).

COURT ENFORCEMENT OF DISCLOSURE RULES (N=691*)



*Responses for judges and lawyers with experience with the Rules. Source: *IAALS Survey of the Arizona Bench and Bar on the Arizona Rules of Civil Procedure (2010).*

RECOMMENDATION 2

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

COMMENTARY

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

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

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

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

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

KEY RESOURCES FOR RECOMMENDATION 2

Victor E. Flango & Thomas M. Clarke, Reimagining Courts: A Design for the Twenty-First Century (2015).

Inst. for Advancement of the Am. Legal Sys. & Am. Coll. of Trial Lawyers, Reforming our Civil Justice System: A Report on Progress and Promise (2015).

Brian Ostrom & Roger Hanson, National Center for State Courts, Achieving High Performance: A Framework for Courts (2010).

Corina D. Gerety & Logan Cornett, Inst. for the Advancement of the Am. Legal Sys., Momentum for Change: The Impact of the Colorado Civil Access Pilot Project (2014).

Paula Hannaford-Agor & Cynthia G. Lee, Utah: Impact of the Revisions to Rule 26 on Discovery Practice in the Utah District Courts, Final Report (2015).

TRIAGE CASE FILINGS WITH MANDATORY PATHWAY ASSIGNMENTS

RECOMMENDATION 3

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

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

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

3.3 Courts should make the pathway assignments mandatory upon filing.

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

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

COMMENTARY

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

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

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

THE PATHWAY APPROACH

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

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

RE: 3.2

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

RE: 3.3

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

RE: 3.4

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

RE: 3.5

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

KEY RESOURCES FOR RECOMMENDATION 3

Victor E. Flango & Thomas M. Clarke, Reimagining Courts: A Design for the Twenty-First Century (2015).

Inst. for the Adv. of the Am. Legal Sys. & American College of Trial Lawyers, Reforming Our Civil Justice System: A Report on Progress and Promise (2015).

Corina D. Gerety & Logan Cornett, Inst. for the Adv. of the Am. Legal Sys., Momentum for Change: The Impact of the Colorado Civil Access Pilot Project (2014).

RECOMMENDATION 4

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

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

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

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

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

COMMENTARY

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

STREAMLINED PATHWAY CASE CHARACTERISTICS

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

RE: 4.1

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

RE: 4.2

Too many simple cases languish on state court dockets, without forward momentum or resolution. At or soon after filing, the court should send the parties notice of the presumptive deadlines for key case stages, including a firm trial date. The parties

may always come to the court to fashion a different schedule if there is good cause. This pathway contemplates conventional fact finding by either the court or a jury, with a judgment on the record and the ability to appeal. Because this process is intended for the vast majority of cases in the state courts, it is important that the process ensure a final judgment and right to appeal to safeguard the rights of litigants and to gain buy-in from attorneys.

RE: 4.3

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

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

RE: 4.4

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

KEY RESOURCES FOR RECOMMENDATION 4

Paula Hannaford-Agor & Cynthia G. Lee, Utah: Impact of the Revisions to Rule 26 on Discovery Practice in the Utah District Courts, Final Report (2015).

Corina D. Gerety & Logan Cornett, Inst. for the Advancement of the Am. Legal Sys., Momentum for Change: The Impact of the Colorado Civil Access Pilot Project (2014).

Paula Hannaford-Agor, et al., Nat'l Ctr. for State Courts, Civil Justice Initiative, New Hampshire: Impact of the Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules (2013).

RECOMMENDATION 5

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

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

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

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

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

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

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

COMMENTARY

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

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

RE: 5.1

To ensure proportionality for complex cases, a single judge should be assigned for the life of these cases. Judges can do much to prevent undue cost and delay. A one-judge-from-filing-through-resolution policy preserves judicial resources by avoiding the need for a fresh learning curve whenever a complex case

returns to court for a judicial ruling. The parties are also better served if a single judge is engaged on a regular basis. During the course of the case, attorneys can build upon prior communications rather than repeat them.

COMPLEX PATHWAY CASE CHARACTERISTICS

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

RE: 5.2

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

RE: 5.3

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

RE: 5.4

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

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

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

RE: 5.5

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

RE: 5.6

Judges must lead the effort to avoid unnecessary time consumption during trials. A robust pretrial conference should address outstanding motions and evidentiary issues so that the trial itself is conducted as efficiently as possible. The court and the parties should consider agreeing to time limits for

trial segments. Once a trial begins, the trial judge should give top priority to trial matters, making presentation of evidence and juror time fit into full and consecutive days of business.

KEY RESOURCES FOR RECOMMENDATION 5

Nat'l Ctr. for State Courts, Dimensions of Complexity, Civil Action, Vol. 3, No. 1 (Winter 2004).

Jordan Singer, Suffolk Superior Court Business Litigation Session Pilot Project: Final Report on the 2012 Attorney Survey (2012).

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

Corina D. Gerety & Logan Cornett, Inst. for the Advancement of the Am. Legal Sys., Momentum for Change: The Impact of the Colorado Civil Access Pilot Project (2014).

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

RECOMMENDATION 6

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

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

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

6.3 Courts should require mandatory disclosures and tailored additional discovery.

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

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

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

COMMENTARY

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

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

RE: 6.1 to 6.3

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

A court's consistent and clear application of proportionality principles early in cases can have a leavening affect on discovery decisions made in law offices. Parties and attorneys typically make their decisions about what discovery to do next without court involvement. A steady court policy with respect to proportionality provides deliberating parties and attorneys with guidance.

RE: 6.4 to 6.5

As in the Complex Pathway, courts should utilize informal processes, such as conference calls with counsel, to encourage narrowing of the issues and concise briefing that in turn can promote more efficient and effective rulings by the court. In addition, an in-person case management conference can play a critical role in reducing cost and delay by affording the judge and parties the opportunity to have an in-depth discussion regarding the issues and case needs.

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

RE: 6.6

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

KEY RESOURCES FOR RECOMMENDATION 6

Paula Hannaford-Agor & Cynthia G. Lee, Utah: Impact of the Revisions to Rule 26 on Discovery Practice in the Utah District Courts, Final Report (2015).

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

STRATEGICALLY DEPLOY COURT PERSONNEL AND RESOURCES

RECOMMENDATION 7

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

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

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

COMMENTARY

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

Team case management works. Utah's implementation of team case management resulted in a 54 percent reduction in the average age of pending civil cases from 335 days to 192 days (and a 54 percent reduction for all case types over that same period) despite considerably higher caseloads. In Miami,

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

RE: 7.1

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

RE: 7.2

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

KEY RESOURCES FOR RECOMMENDATION 7

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

Fulton County Superior Court, Business Court: 2014 Annual Report (2014).

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

RECOMMENDATION 8

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

COMMENTARY

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

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

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

KEY RESOURCES FOR RECOMMENDATION 8

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

Report of the Iowa Civil Justice Reform Task Force: Reforming the Iowa Civil Justice System (2012).

RECOMMENDATION 9

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

COMMENTARY

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

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

FACTORS TO CONSIDER IN JUDICIAL ASSIGNMENT CRITERIA

- Demonstrated case management skills
- Civil case litigation experience
- Previous civil litigation training
- Specialized knowledge
- Interest in civil litigation
- Reputation with respect to neutrality
- Professional standing with the trial bar

KEY RESOURCE FOR RECOMMENDATION 9

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

USE TECHNOLOGY WISELY

RECOMMENDATION 10

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

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

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

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

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

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

COMMENTARY

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

RE: 10.1

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

RE: 10.2

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

RE: 10.3

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

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

KEY FUNCTIONS OF CASE MANAGEMENT AUTOMATION

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

and reduce unnecessary costs and delay. This can be accomplished by enlisting court system actors at different levels and positions in developing the measurement program, by communicating the purpose and importance of the information to all court staff, and by appointing a responsible oversight officer to ensure accuracy and consistency.

Courts must systematically collect data on two types of measures. The first is descriptive information about the court's cases, processes, and people. The second is court performance information, dictated by defined goals and desired outcomes.

To promote comparability and analytical capacity, courts must use standardized performance measures, such as CourTools, as the presumptive measures, departing from them only where there is good reason to do so. Consistency—in terms of what data are collected, how they are collected, and when they are collected—is essential for obtaining valid measures upon which the court and its stakeholders can rely.

RE: 10.4

As mentioned above, one cannot manage what is unknown. This is true at both the macro the micro levels. A "30,000 foot" view allows court personnel to consider the reality of their caseload when making management decisions. As the *Landscape of Civil Litigation* provided the CJI Committee a representative picture of civil caseloads nationally, each court system should gain a firm understanding of its current civil case landscape. Using technology for this purpose will increase the ability of courts to take an active, even a proactive, approach to managing for efficiency and effectiveness.

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

RE: 10.5

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

KEY RESOURCES FOR RECOMMENDATION 10

John Matthias & Larry Webster, Business Process Case Automation Studies (2013).

James Cabral et al., Using Technology to Enhance Access to Justice, 26 Harv. J.L. & Tech. 241 (2012).

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

Dan Becker, Reengineering: Utah's Experience in Centralized Transcript Management, Future Trends (2012).

Nat'l Center for St. Cts., Why Measure Performance? (2005).

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

John Greacen, Backlog Performance Measurement–A Success Story in New Jersey, 46 Judges J. (2007).

Nat'l Center for St. Cts. & Just. at Stake, Funding Justice: Strategies and Messages for Restoring Court Funding (2013).

FOCUS ATTENTION ON HIGH-VOLUME AND UNCONTESTED CASES

RECOMMENDATION 11

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

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

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

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

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

COMMENTARY

State court caseloads are dominated by lower-value contract and small claims cases rather than high-value commercial or tort cases. Many courts assign these cases to specialized court calendars such as landlord/tenant, consumer debt collection, mortgage

foreclosure, and small claims dockets. Many of these cases exhibit similar characteristics. For example, few cases are adjudicated on the merits, and almost all of those are bench trials. Although plaintiffs are generally represented by attorneys, defendants in these cases are overwhelmingly self-represented, creating an asymmetry in legal expertise that, without effective court oversight, can easily result in unjust case outcomes. Although most cases would be assigned to the Streamlined Pathway under these Recommendations, courts should attend to signs that suggest a case might benefit from additional court involvement. Indicators can include the raising of novel claims or defenses that merit closer scrutiny.

RE: 11.1

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

RE: 11.2

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

RE: 11.3

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

RE: 11.4

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

KEY RESOURCES FOR RECOMMENDATION 11

Federal Trade Commission, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation (2010).

Mary Spector, Defaults and Details Exploring the Impact of Debt Collection Litigation on Consumers and Courts, 6 Va. L. & Bus. Rev. 257 (2011).

Paris R. Baldacci, Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigation in Litigating Their Cases in New York City's Housing Court, 3 Cardozo Pub. Pol'y & Ethics J. 659 (2006).

New York County Law. Ass'n., The New York City Housing Court in the 21st Century: Can It Better Address the Problems Before It? (2005).

Russell Engler, Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiation with Self-represented Poor Persons, 85 Cal. L. Rev. 79 (1997).

RECOMMENDATION 12

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

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

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

COMMENTARY

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

RE 12.1

To resolve uncontested matters promptly yet fairly requires focused court action. Case management systems should be configured to identify uncon-

tested cases shortly after the deadline for filing an answer or appearance has elapsed. If the plaintiff fails to file a timely motion for default or summary judgment, the court should order the plaintiff to file such a motion within a specified period of time. If such a motion is not filed, the court should dismiss the case for lack of prosecution. The court should monitor compliance with the order and carry out enforcement as needed.

RE 12.2

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

KEY RESOURCES FOR RECOMMENDATION 12

Fed. Trade Commission, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation (2010).

Mary Spector, Defaults and Details Exploring the Impact of Debt Collection Litigation on Consumers and Courts, 6 Va. L. & Bus. Rev. 257 (2011).

Press Release, The Office [Minnesota] Attorney General Lori Swanson, Attorney General Swanson Sues Legal Process Server for Engaging in "Sewer Service" (Nov. 6, 2014).

Press Release, Attorney General Cuomo Announces Arrest of Long Island Business Owner for Denying Thousands of New Yorkers Their Day in Court (Apr. 14, 2009).

Press Release, New York State Unified Court System, Chief Judge Announces Comprehensive Reforms to Promote Equal Justice for New York Consumers in Debt Cases (April 30, 2014).

Fairfax County [Virginia] General District, Court Best Practices: Default Judgments/Debt Buyers (2009).

PROVIDE SUPERIOR ACCESS FOR LITIGANTS

RECOMMENDATION 13

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

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

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

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

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

COMMENTARY

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

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

RE: 13.1

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

RE: 13.2

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

RE: 13.3

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

RE: 13.4

Vast numbers of self-represented litigants navigate the civil justice system every year. However, travel costs and work absences associated with attending a court hearing can deter self-represented litigants from effectively pursuing or defending their legal rights. The use of remote hearings has the potential to increase access to justice for low-income individuals who have to miss work to be at the courthouse on every court date. Audio or videoconferencing

can mitigate these obstacles, offering significant cost savings for litigants and generally resulting in increased access to justice through courts that "extend beyond courthouse walls."

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

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

KEY RESOURCES FOR RECOMMENDATION 13

Tom Clarke, Building a Litigant Portal: Business and Technical Requirements (2015).

Legal Services Corporation, Report of the Summit on the Use of Technology to Expand Access to Justice (2013).

James Cabral et al., Using Technology to Enhance Access to Justice, 26 Harv. J.L. & Tech. 241 (2012).

World Bank Index, Doing Business 2015: Going Beyond Efficiency (2015).

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

Oregon Judicial Department, 2011–2014 Oregon Judicial Branch: A Four-Year Report (2014).

Administrative Conference of the United States, Handbook on Best Practices for Using Video Teleconferencing in Adjudicatory Hearings (2015).

Bench and Bar Leaders Hold the Key

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

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

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

> "We like comfortable old shoes out of style and worn through as they may be and dread having a new pair.... None of us like to learn new ways of doing things (but) the convulsive change in society confronts our profession with the urgent challenge to get our house in order if we are to renew the public's confidence in the American Justice system that safeguards and protects individual rights and liberties."
>
> —*Justice William J. Brennan, Jr.*
>
> *Improving the Administration of Justice Today, address to the Section of Judicial Administration, American Bar Association, 1958.*

COURT STRATEGIES

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

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

STAKEHOLDER STRATEGIES

As the Chief Justice suggested, court improvement efforts must involve the bar. The Washington State Bar provides a prime example of lawyers, sobered by evidence of growing civil litigation costs, taking bold actions to improve the fair resolution of cases. After four years of labor, the Bar's Task Force on the Escalating Costs of Civil Litigation last year issued a series of recommendations to make courts affordable and accessible. The principles of proportionality and cooperation infuse the recommendations. Significantly, the report closes by saying, "The Task Force urges the Board [of Governors] not only to adopt these recommendations, but to help educate the ***judges and lawyers*** who will be responsible for making the recommendations a reality." [8]

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

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

FUTURE ASSISTANCE

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

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

KEY RESOURCES FOR TAKING NEXT STEPS

Brittany K.T. Kauffman, Change the Culture, Change the System: Top Ten Cultural Shifts Needed to Create the Courts of Tomorrow (2015).

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

Eric T. Washington & Lisa R. VanDeVeer, Court Governance—The Critical Role of Strategic Management (2013).

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

John P. Kotter, Leading Change— Why Transformation Efforts Fail, Harv. Bus. Rev. (Jan. 2007).

Nat'l Center for St. Cts. & Just. at Stake, Funding Justice: Strategies and Messages for Restoring Court Funding (2013).

APPENDICES

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

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

Appendix B: NCSC Business Rules Visualization Tool

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

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

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

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

Appendix G: Remote Conferencing—Findings and Recommendations

Appendix H: Judicial Assignment Criteria for Pathway Dockets

Appendix I: Problems and Recommendations for High-Volume Dockets

Appendix J: Best Practices for Trial Management

NOTES

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

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

3. Paula Hannaford-Agor & Cynthia G. Lee, Utah: *Impact of the Revisions to Rule 26 on the Discovery Practice in the Utah District Courts 9* (April 2015).

4. *Id. at* 24-25, 36-38,53-56; Paula Hannaford-Agor et al., *New Hampshire: Impact of the Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules* 17-18 (Aug. 19, 2013); Peggy E. Bruggman, *Reducing the Costs of Civil Litigation: Discovery Reform* 29-46

5. *Hannaford-Agor & Lee, supra* note 3, at 14-21.

6. Hannah E. M. Lieberman, Linda Sandstrom Simard & Ed Marks, *Problems and Recommendations for High Volume Dockets: A Report of the High Volume Case Subcommittee to the CCJ Civil Justice Improvements Committee* (2016).

7. *Rule 1, Federal Rules of Civil Procedure.*

8. *Task Force on the Escalating Costs of Civil Litigation, Final Report to the Board of Governors* 45 (June 15, 2015) *(emphasis added).*

ACKNOWLEDGEMENTS

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FUTURE ASSISTANCE

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

DISCLAIMER

This project was supported by a grant from the State Justice Institute (SJI-13-P-201). Points of view or opinions in this document are those of the authors and do not necessarily reflect the official position or policies of the State Justice Institute, the Conference of Chief Justices, the National Center for State Courts, or IAALS.

Cover photo by Rae Allen

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ncsc.org/civil

NCSC
National Center for State Courts

IAALS
Institute for the Advancement of the American Legal System

Conference of Chief Justices 1949

SJI
State Justice Institute

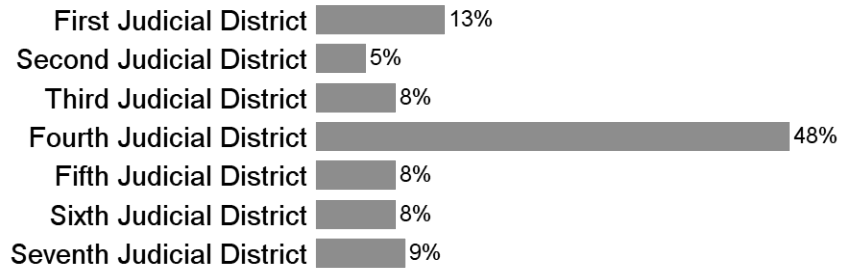
Civil Justice Reform- Attorney Survey

Fall 2017

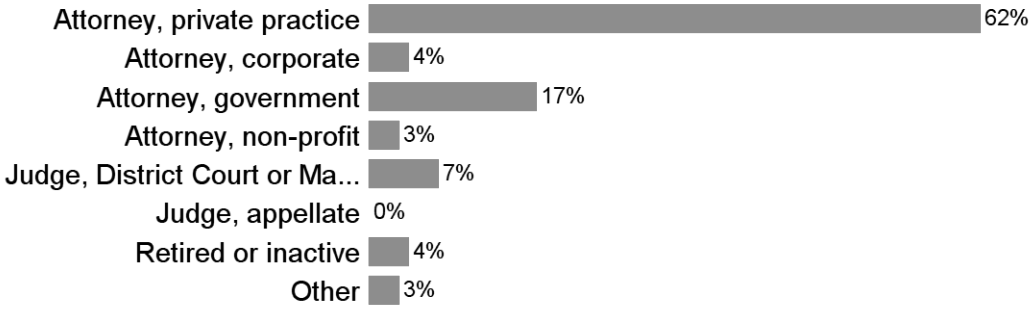
Survey Responses **826**

Attorney Information

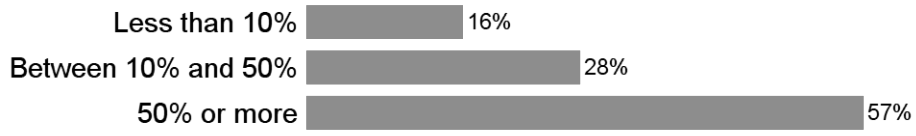
In which Judicial District in Idaho do you practice law?



Which of the following best describes your current position?



Which percentage of practice best describes your experience in civil litigation?



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

Attorneys in Firm- Average 8

How many years of experience do you have in civil litigation, including years serving as a judge?

Number of years- Average 20

To the best of your ability, please estimate the number of cases in each category in which you served as **attorney of record or presided over** as a judicial officer in the last five (5) years.

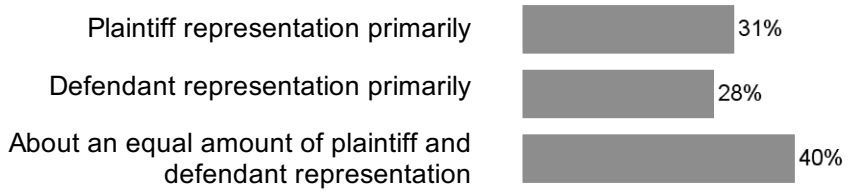
Number of cases- Civil Jury Trials- Average 15

Number of cases- Civil Bench Trials- Average 43

To the best of your ability, please estimate the number of cases in each category in which you have been **involved** as attorney in the last five (5) years.

Number of cases- Civil Jury Trials- Average	14
Number of cases- Civil Bench Trials- Average	35

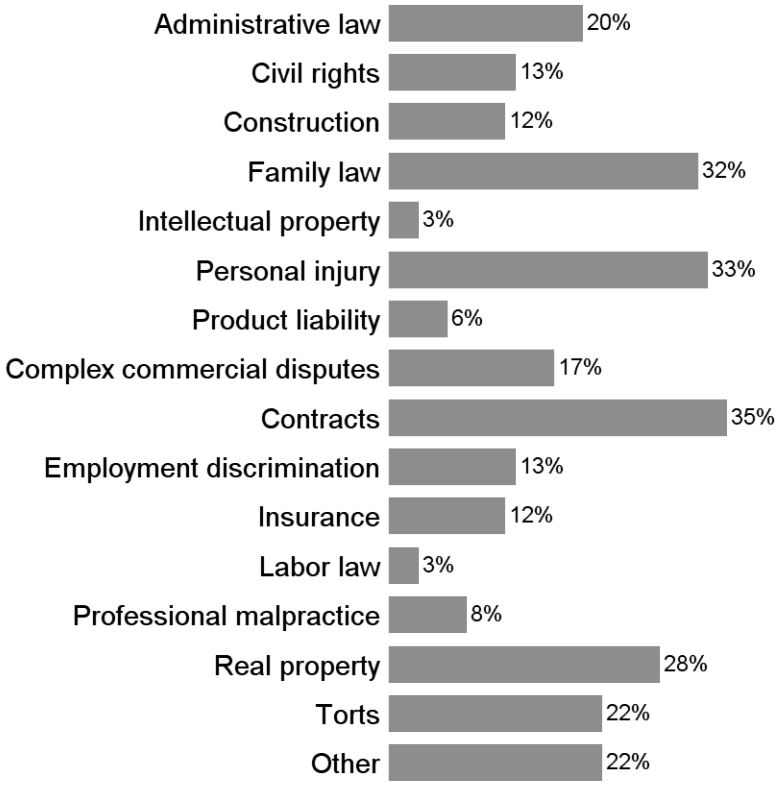
In the civil cases in which you have participated as an attorney within the last five (5) years, have you primarily represented plaintiffs, defendants, or about an equal number of each?



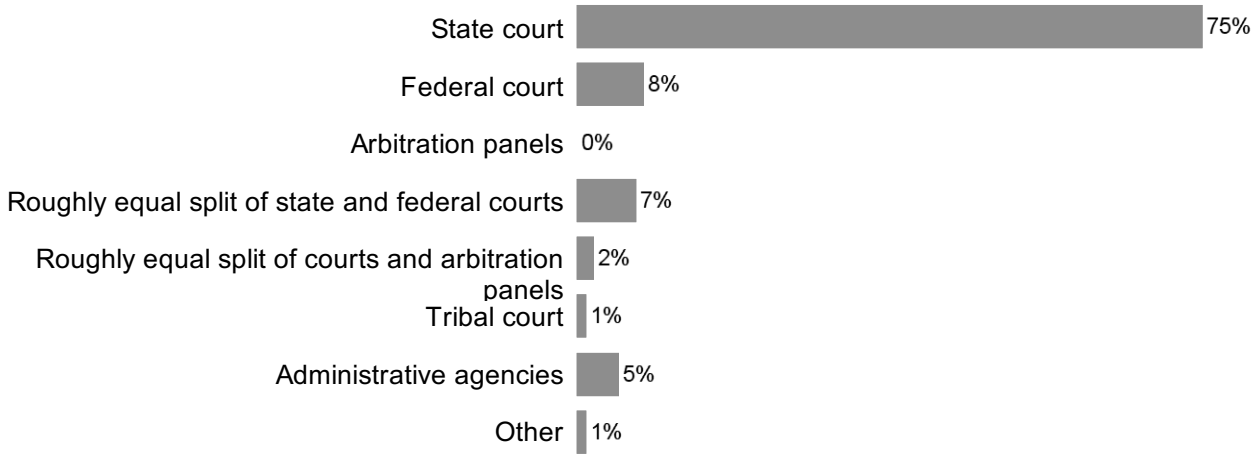
Please estimate to the best of your ability the number of civil cases (excluding small claims) you have litigated or presided over in the last five (5) years in which one or more parties were self-represented (pro se).

Number of cases	68

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

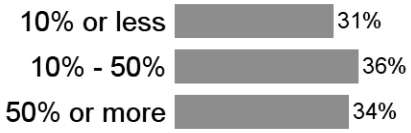


In which forum during the last five (5) years has most of your civil litigation experience taken place?



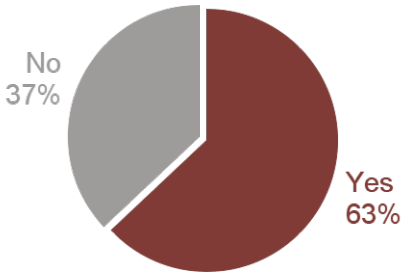
What percentage of your cases is resolved through arbitration in lieu of the civil court process?

What percentage of your cases is resolved through mediation in lieu of the civil court process?

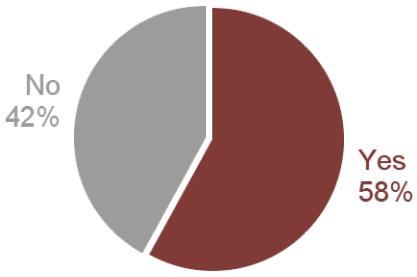


Case Value

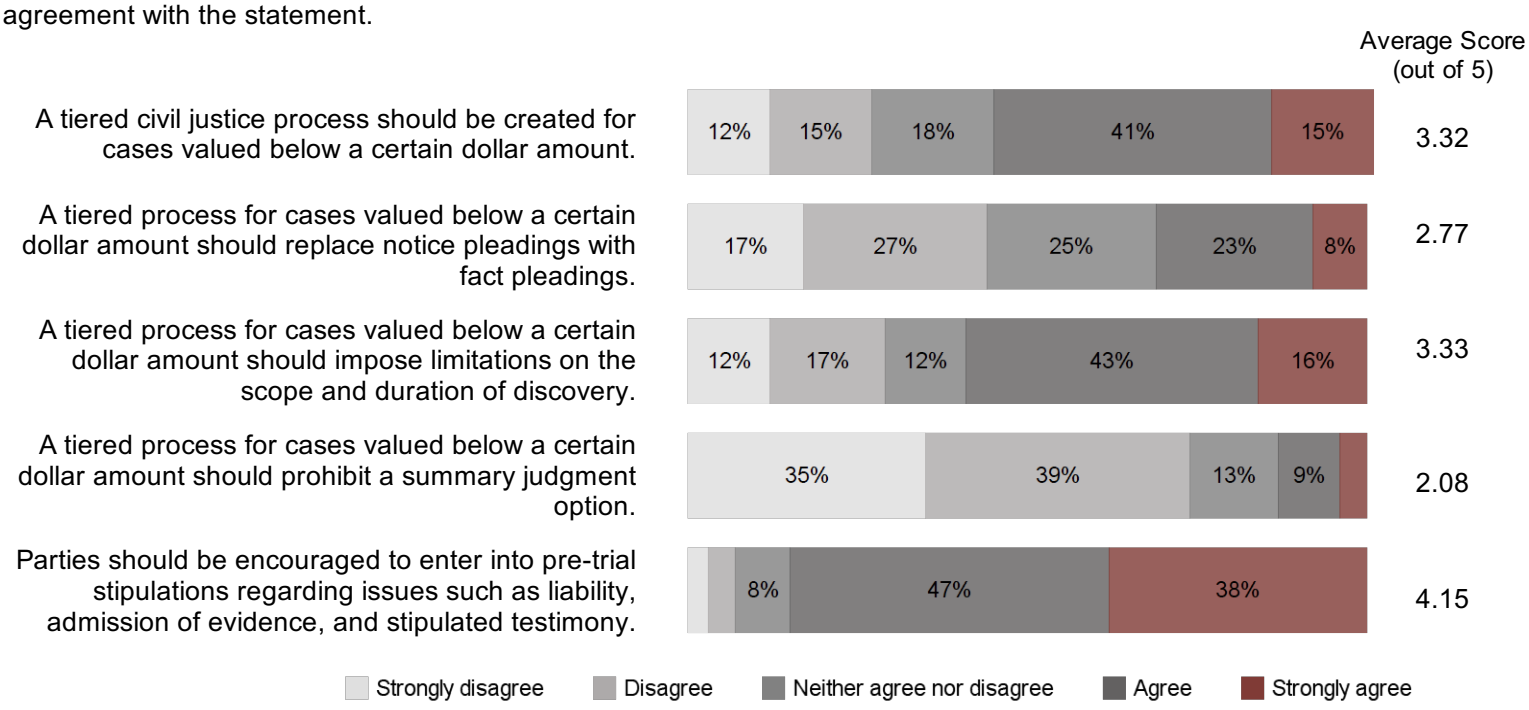
Do you think discovery should be limited in certain lower value cases?



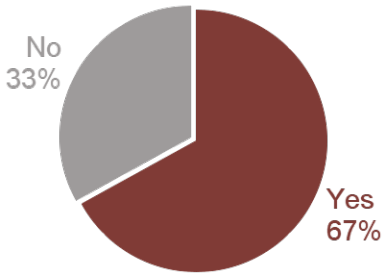
Do you think there should be proportionate discovery relative to the value of the case?



Below is a list of statements describing potential changes to the civil justice system. For each, please indicate your level of agreement with the statement.



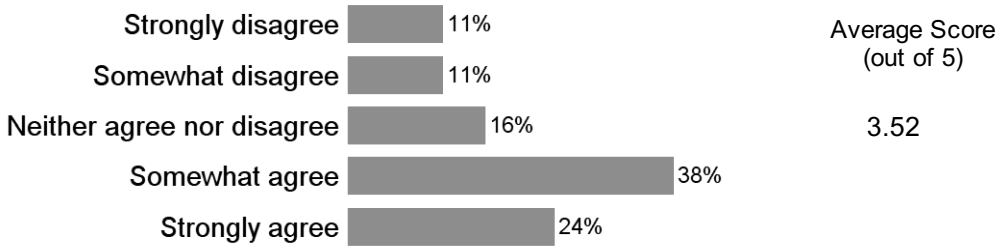
Should parties be required to identify in which tier the case would lie?



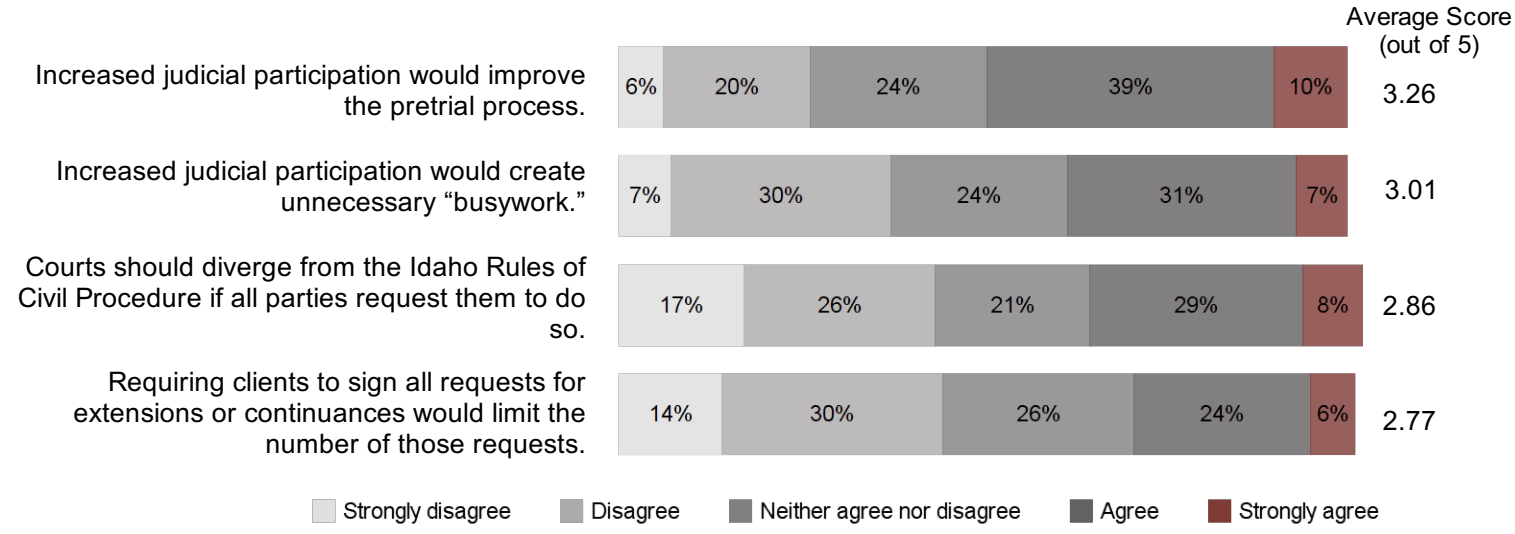
If Idaho were to implement separate civil rules to expedite the process for cases valued at a certain dollar amount and below, what do you suggest should be the dollar value limitation?

Dollar value limitation	Average	$ 43,869
	Minimum	$ 0
	Maximum	$ 5,000,000

Do you agree or disagree with the following statement: It would be beneficial to develop specialty courts for specific kinds of disputes.

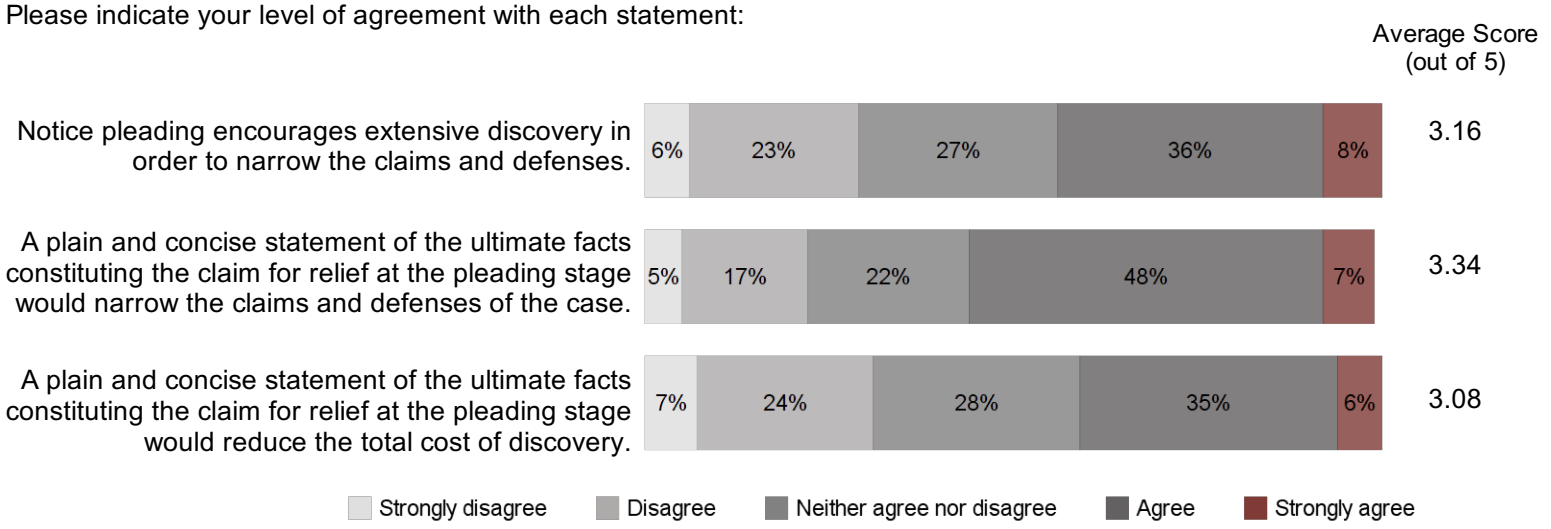


For each statement please indicate your level of agreement.

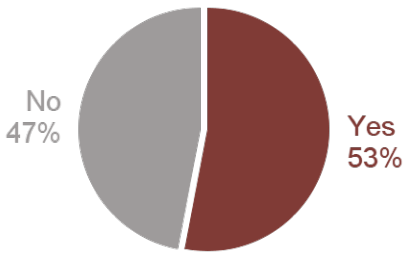


Pleadings

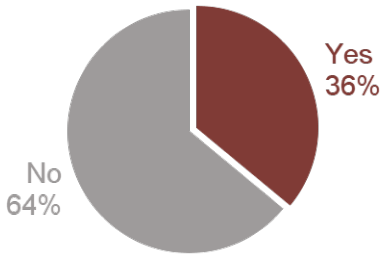
Please indicate your level of agreement with each statement:



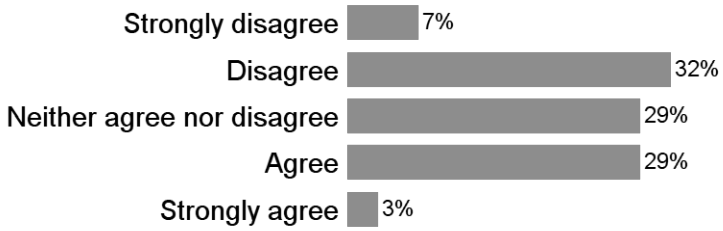
Should the civil rules be amended to reflect different pleading requirements for claims **less** than $10,000?



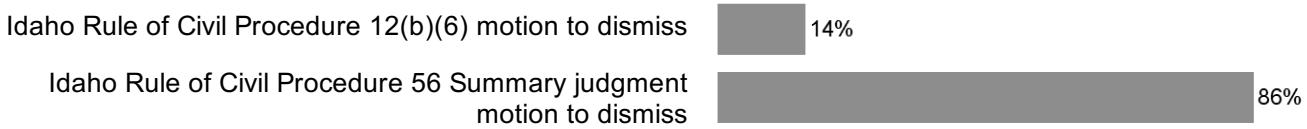
Should the civil rules be amended to reflect different pleading requirements for claims **greater** than $10,000?



Do you agree or disagree with this statement: Idaho Rule of Civil Procedure 12(b)(6) is an effective tool to narrow claims in litigation?

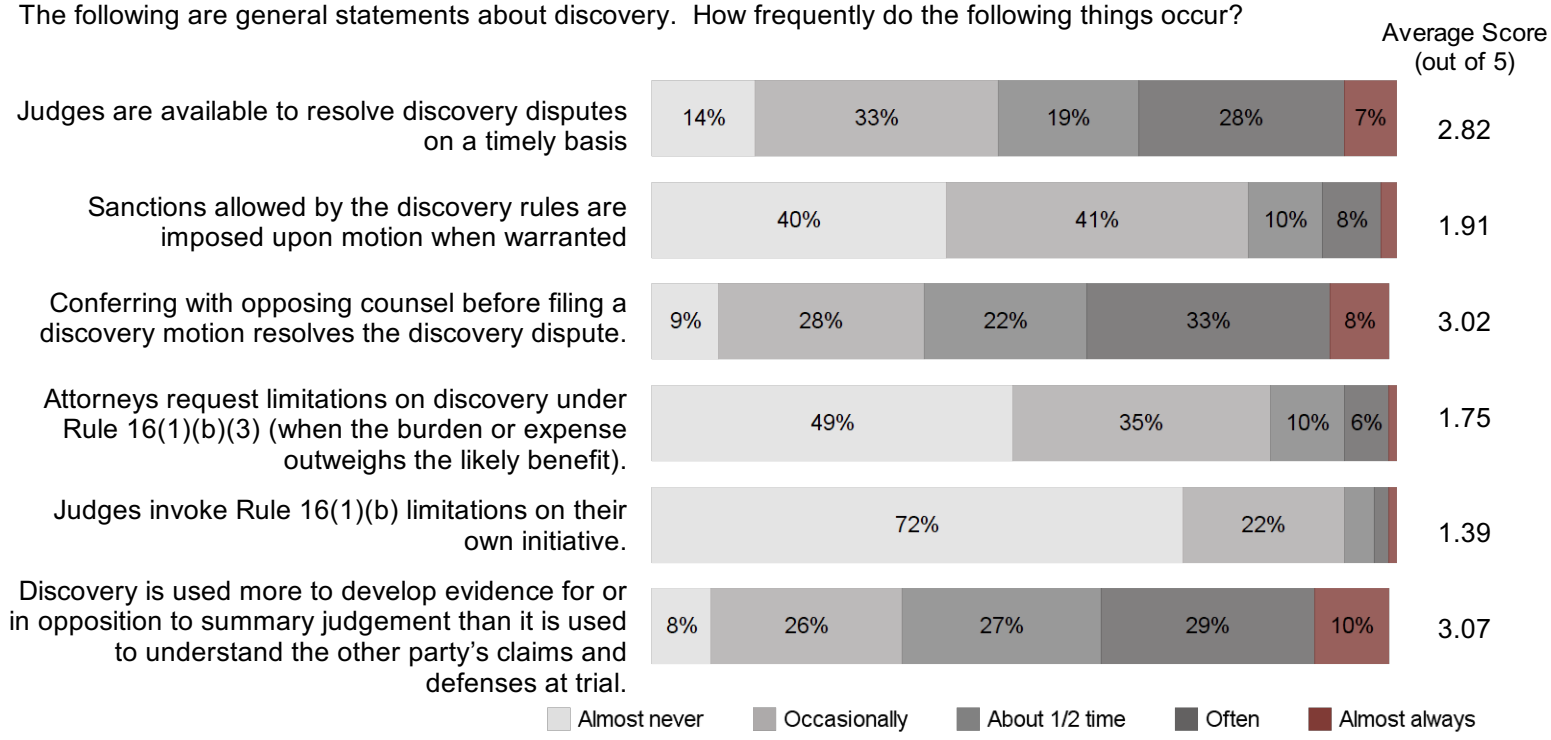


Which of the following civil motions are a more effective tool to narrow claims in litigation?

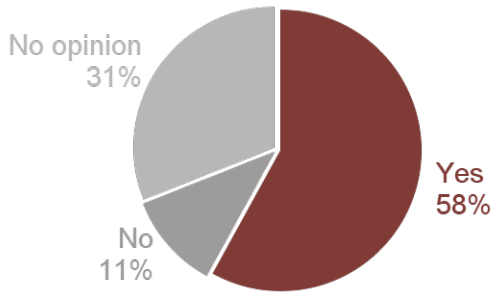


Discovery

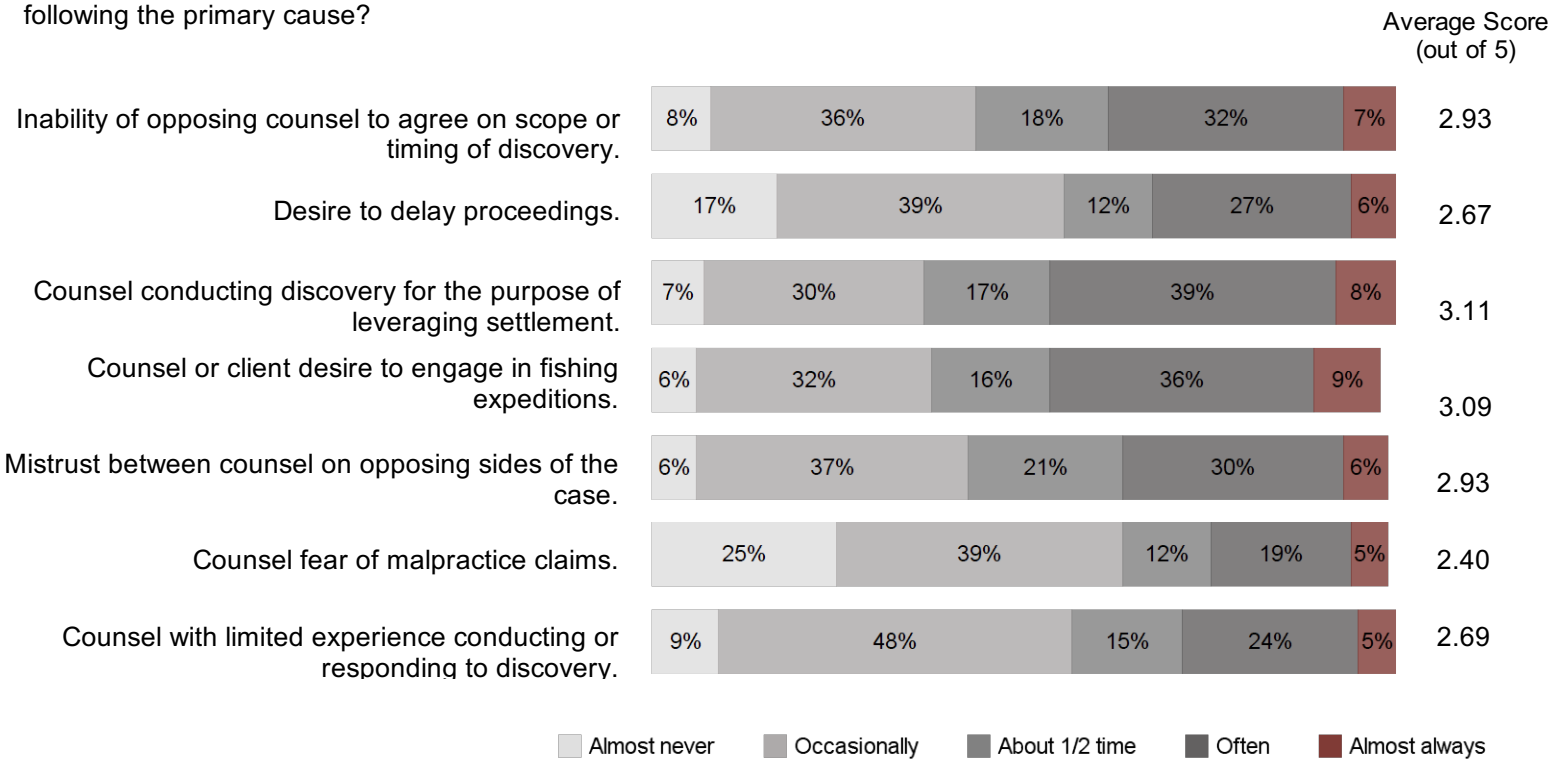
The following are general statements about discovery. How frequently do the following things occur?



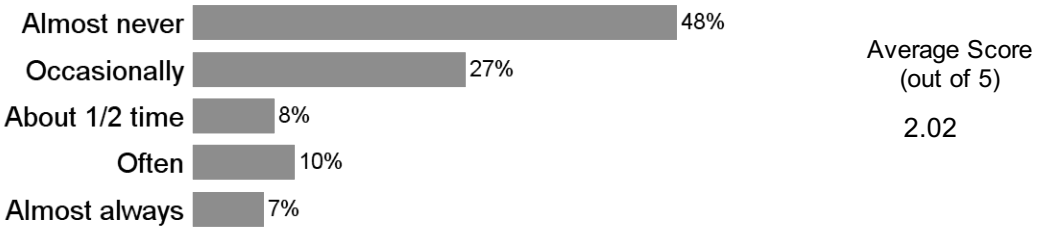
Should judges be more available to resolve discovery disputes?



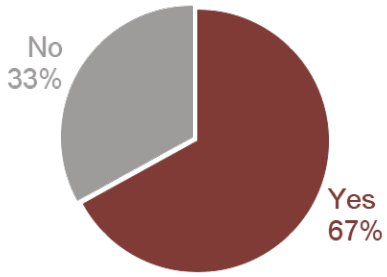
When discovery that is excessive relative to the size of case or scope of issues occurs, how frequently is each of the following the primary cause?



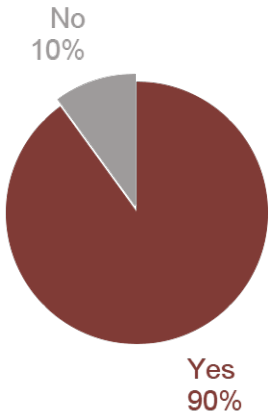
In the cases in which you have been involved that included one or more self-represented (pro se) parties within the last five (5) years, how often did the involvement of the self-presented party cause excessive discovery relative to the size of case or scope of issues?



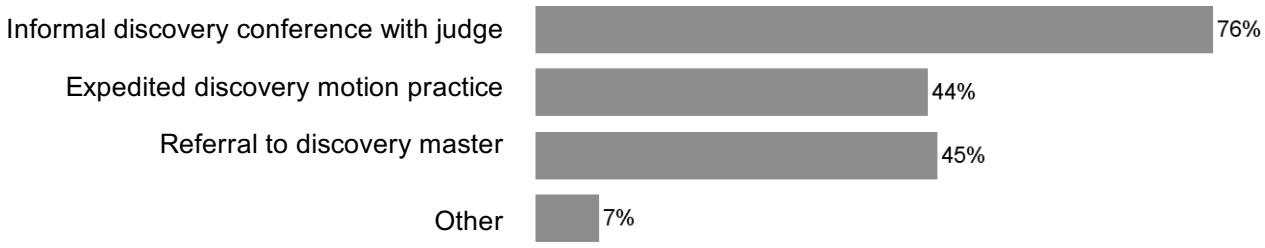
In non-personal injury, should plaintiffs be required to plead in good faith a specific amount of damages or explain why a specific amount isn't included?



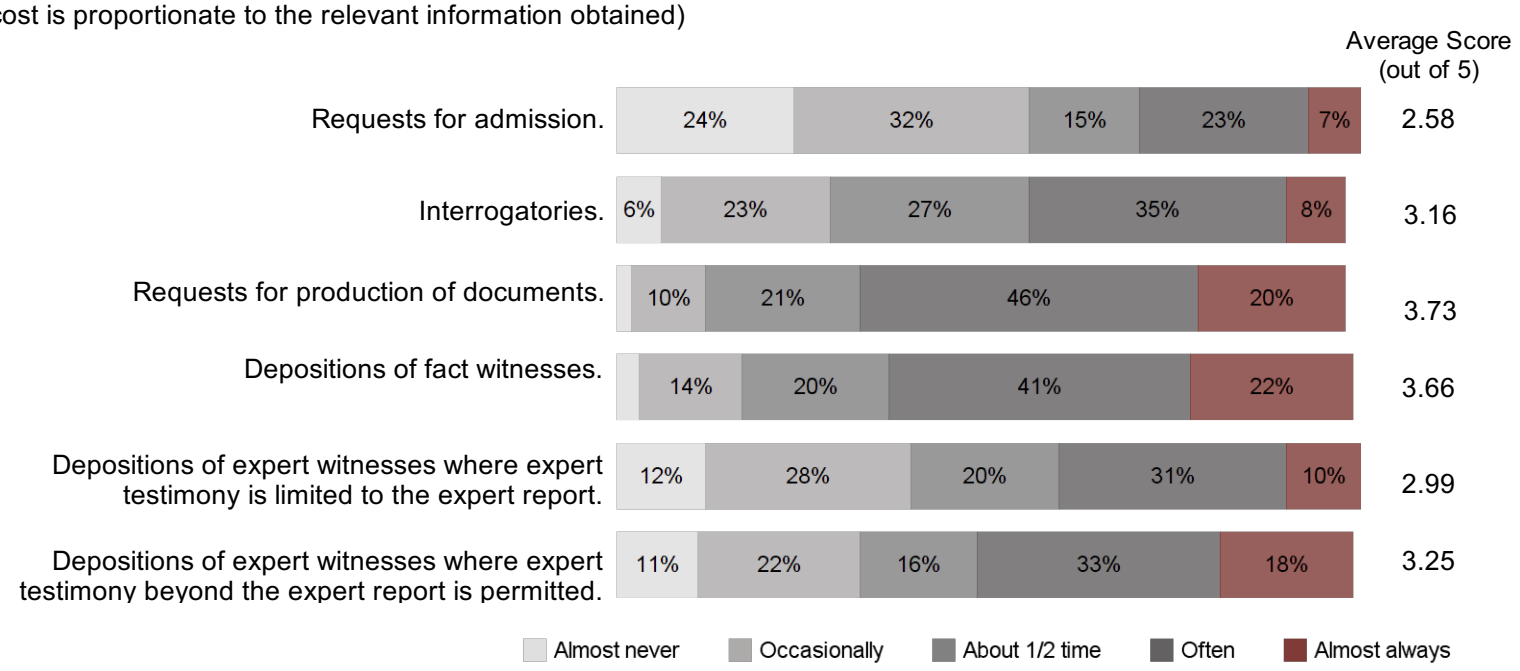
Should there be an expedited process to resolve discovery dispute?



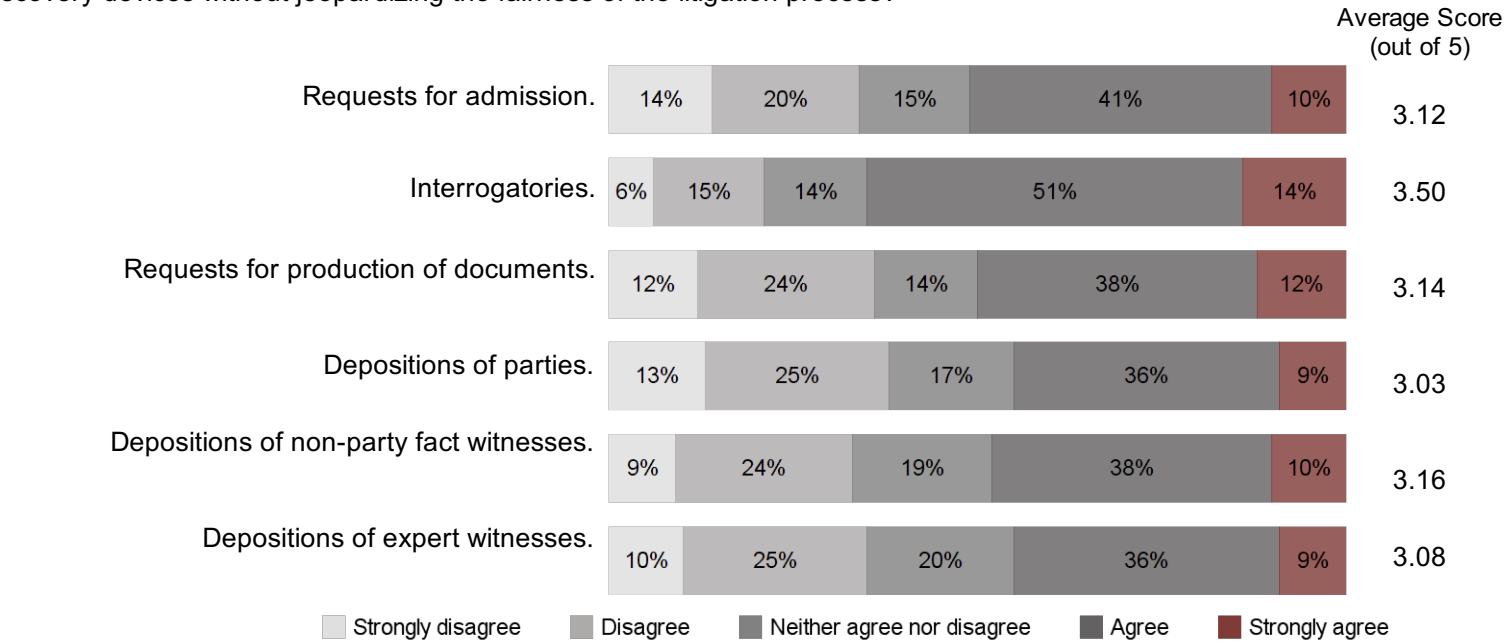
Which, if any, of the below options do you recommend as an expedited process to resolve discovery dispute? Select all that apply.



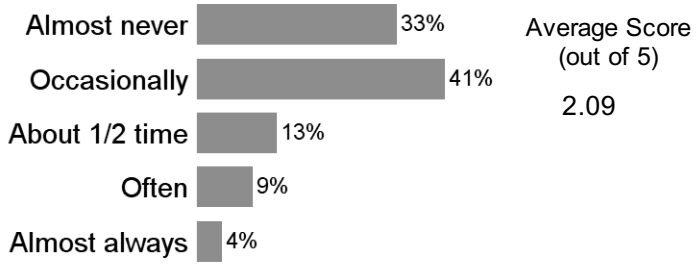
In your experience, how often is each of the following discovery mechanisms a cost-effective tool for litigants? (i.e., the cost is proportionate to the relevant information obtained)



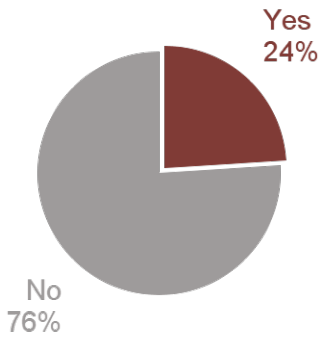
Do you agree or disagree that limitations could be placed on the number, frequency, timing, or duration of the following discovery devices without jeopardizing the fairness of the litigation process?



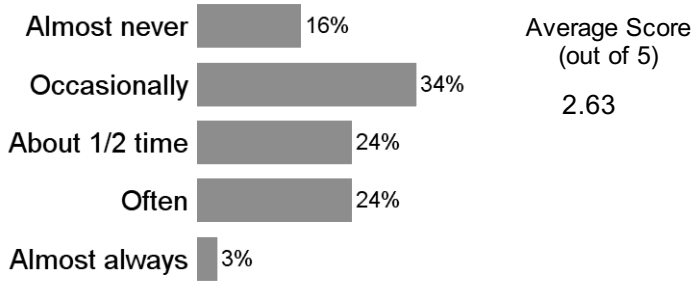
In your state court cases, how often do Rule 16 discovery conferences occur?



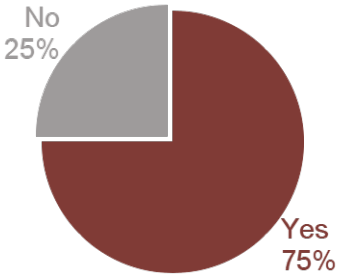
In state court, should the civil rules be amended to remove the requirement for Rule 16 discovery conferences?



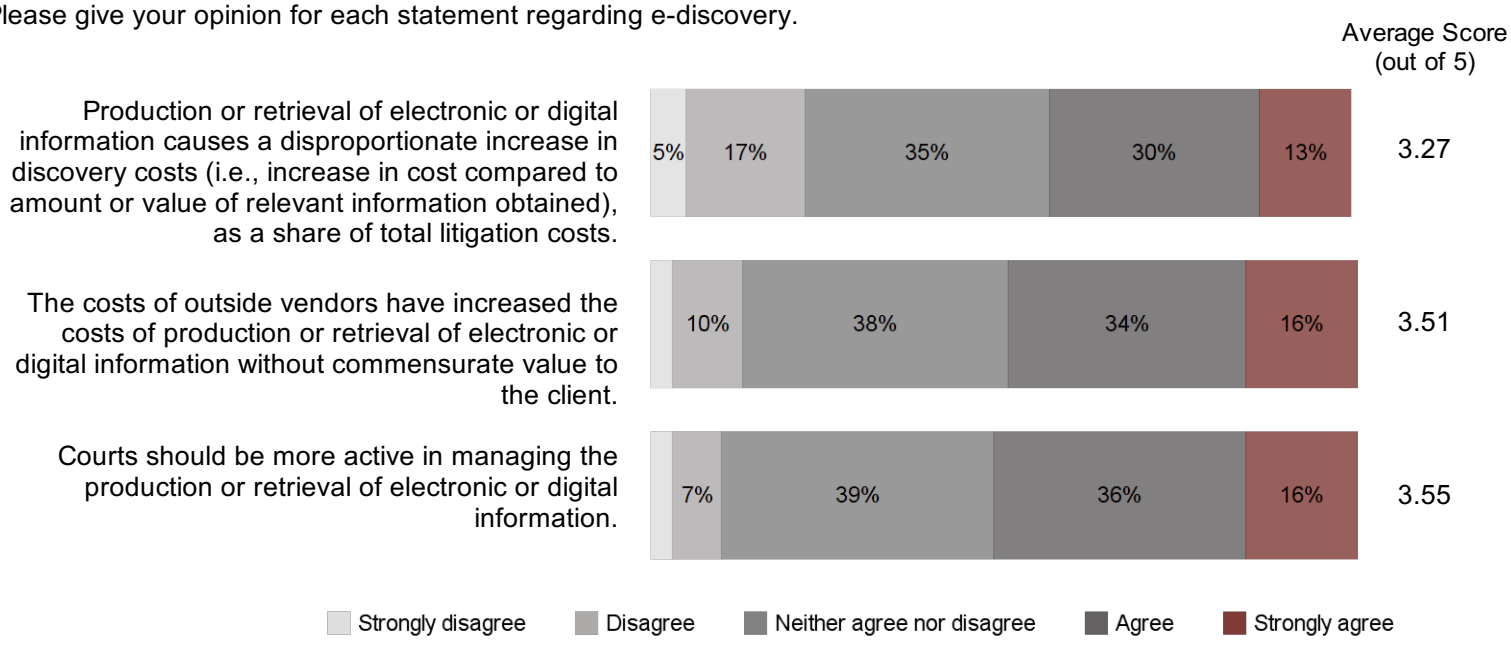
In your experience, when Rule 16 discovery conferences occur, how often do they promote overall efficiency in the discovery process for the course of litigation?



Have you requested or tried to retrieve electronic or digital information as part of discovery (e-discovery)?

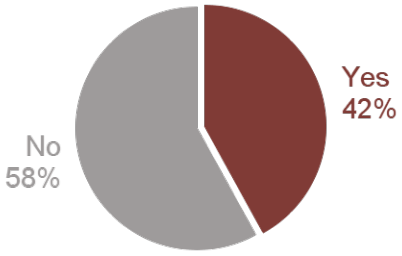


Please give your opinion for each statement regarding e-discovery.

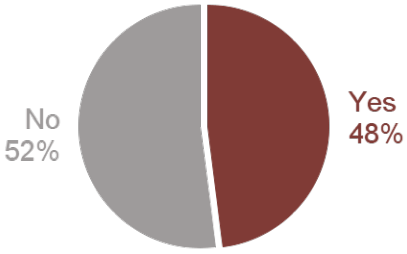


Have you had a request for electronic or digital information in the form of meta data?

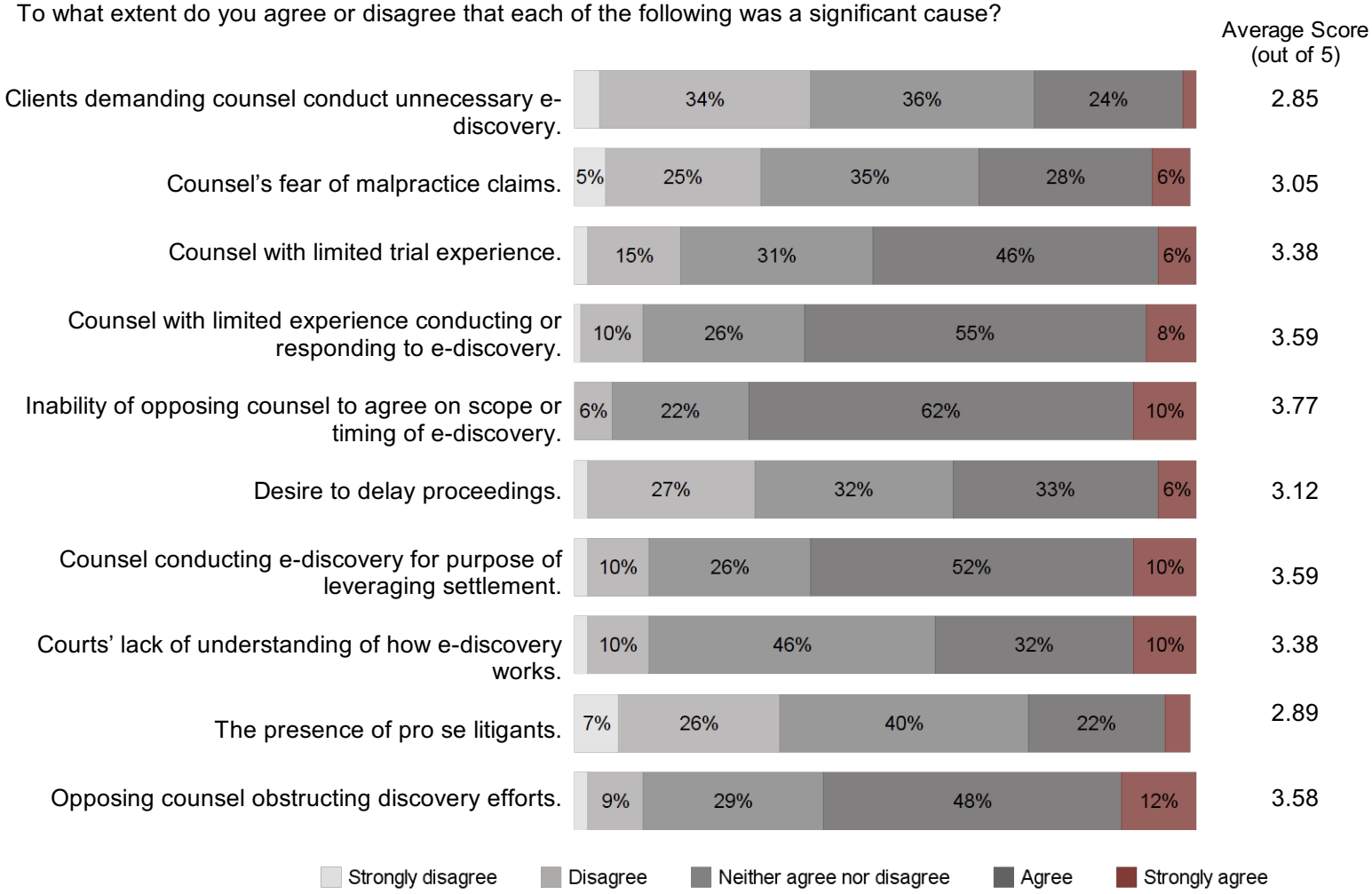
If you have had a discovery request for meta data, did your response delay the discovery process?



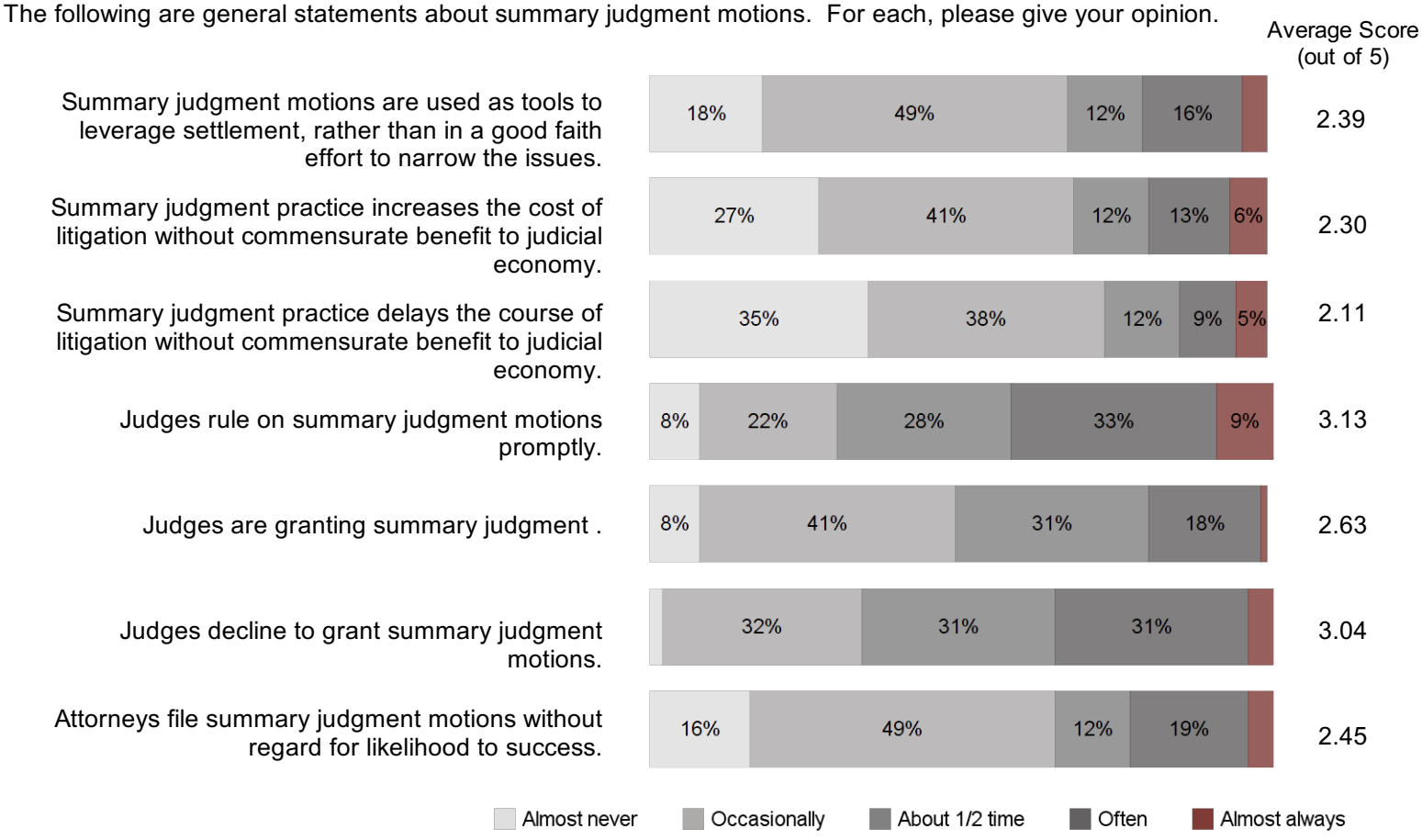
Have you had experience with the production or retrieval of electronic or digital information that was excessive relative to the value of the case or scope of issues?



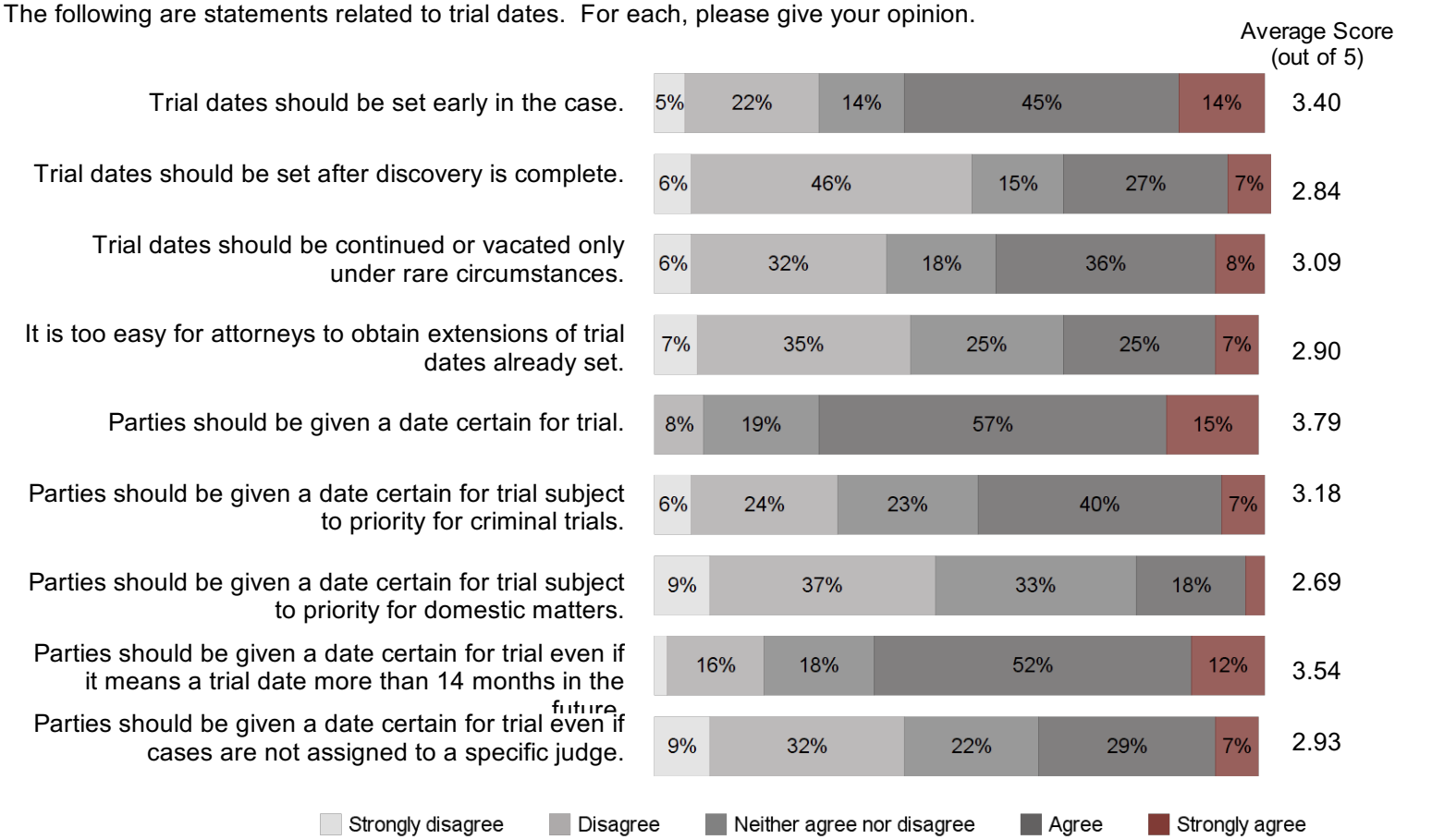
To what extent do you agree or disagree that each of the following was a significant cause?



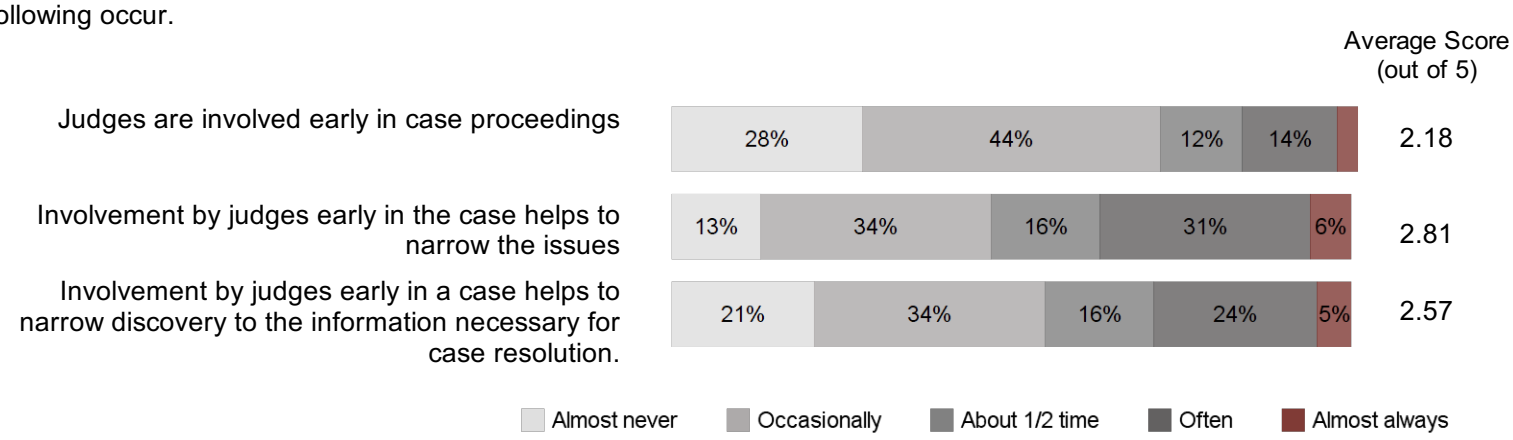
The following are general statements about summary judgment motions. For each, please give your opinion.



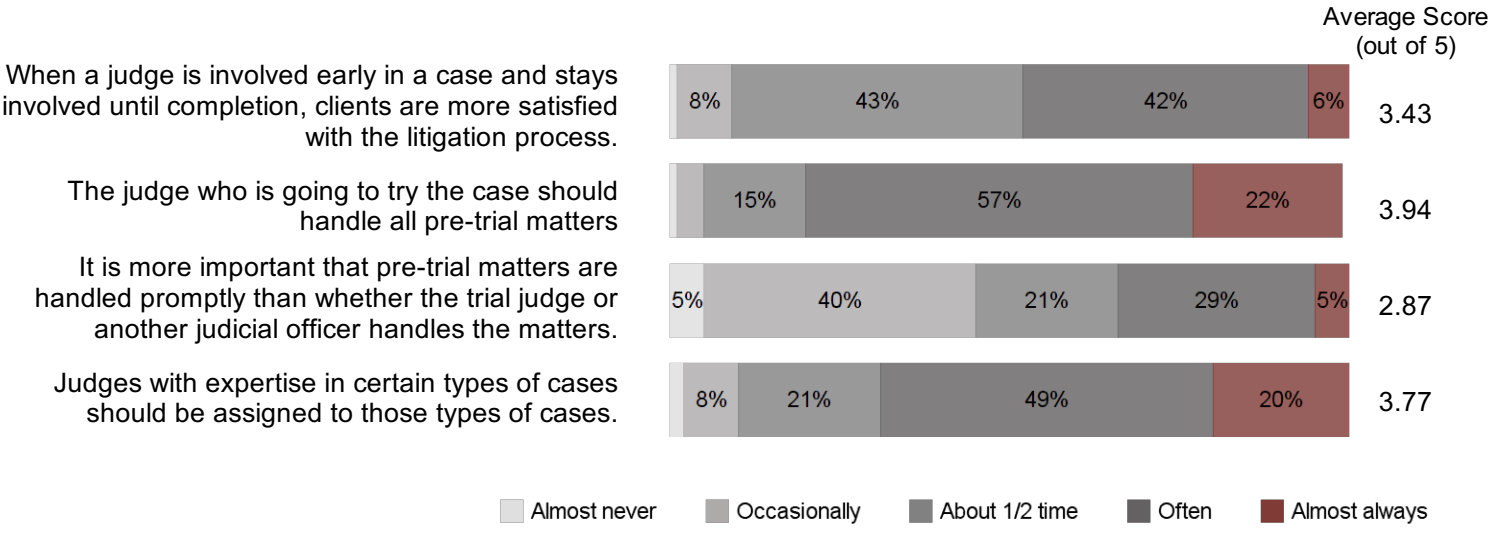
The following are statements related to trial dates. For each, please give your opinion.



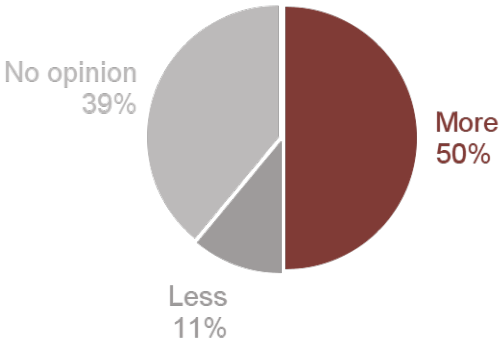
The following are statements about judicial role in the discovery stages of litigation. Please consider how often the following occur.



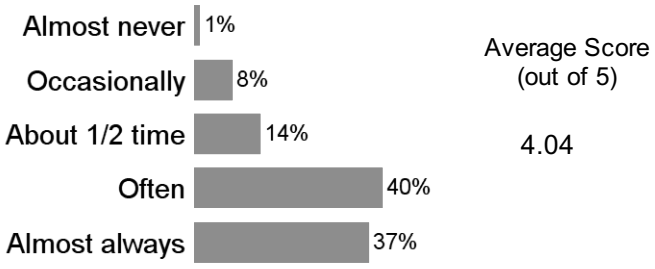
The following are statements about judicial role in litigation. For each please give your opinion.



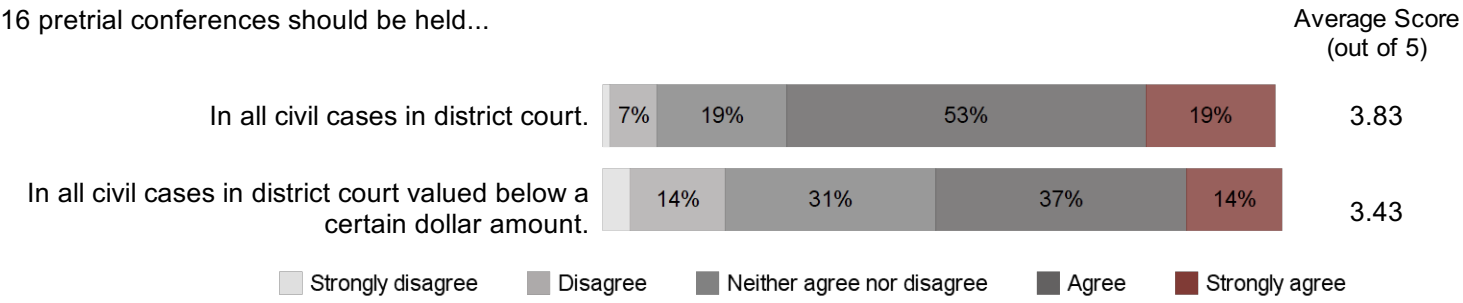
In your opinion, should Idaho judges do more or less to encourage parties to settle cases?



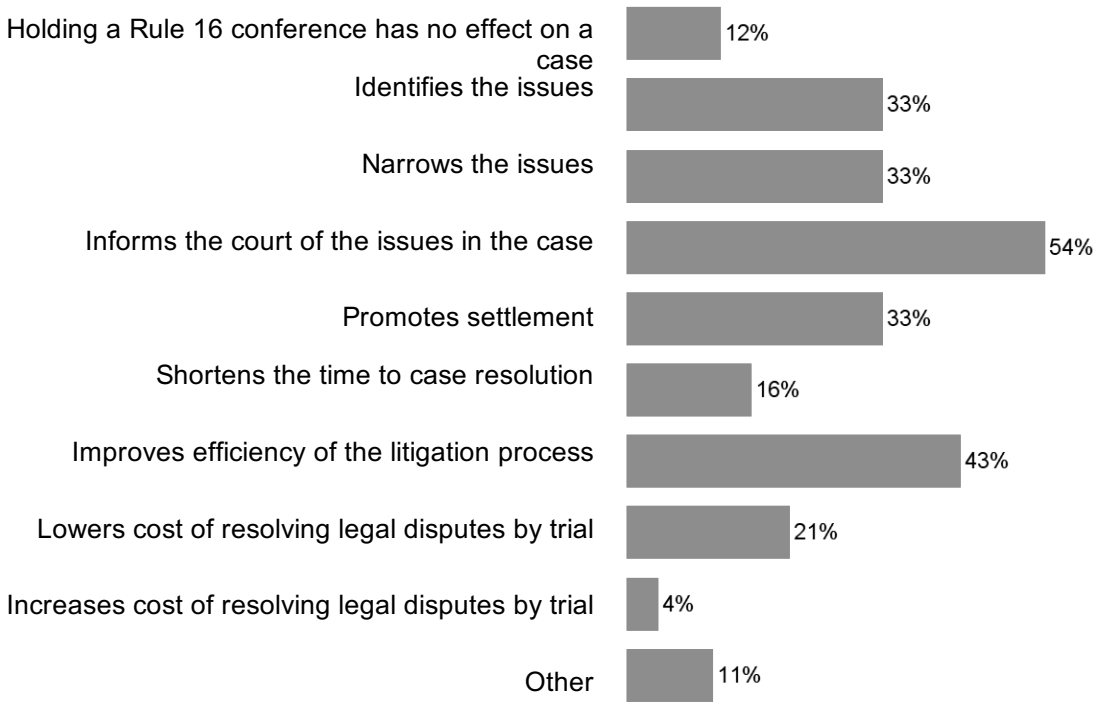
In your experience, how often are pretrial conferences held?



Rule 16 pretrial conferences should be held...



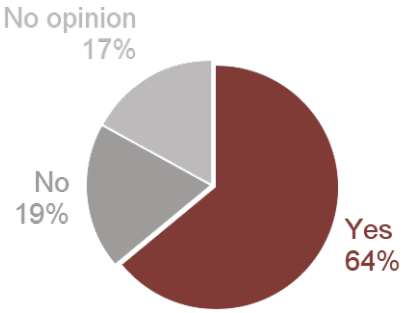
What effect does holding a Rule 16 pretrial conference have on a case? Select all that apply.



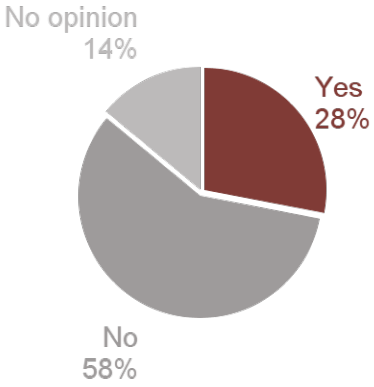
In the last five (5) years, in what percentage of civil cases in which you were involved were pretrial conferences or hearings held by telephone, video conferences, or in person?

Held by Telephone	Average	30 %
	Minimum	0 %
	Maximum	100 %
Held by Video Conferencing	Average	0.5 %
	Minimum	0 %
	Maximum	40 %
Held In Person	Average	57 %
	Minimum	0 %
	Maximum	100 %

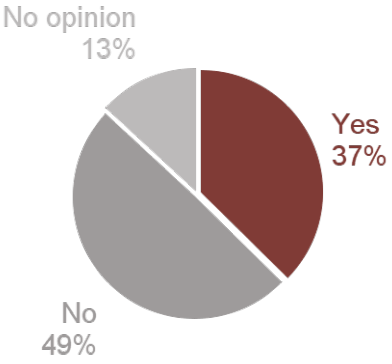
Do you favor amending the Idaho rules to allow video conference for pretrial matters?



In bench trials, when there are limited issues of liability, do you favor allowing the court to enter a verdict similar to a jury verdict and/or judgment without making findings of fact and conclusions of law?

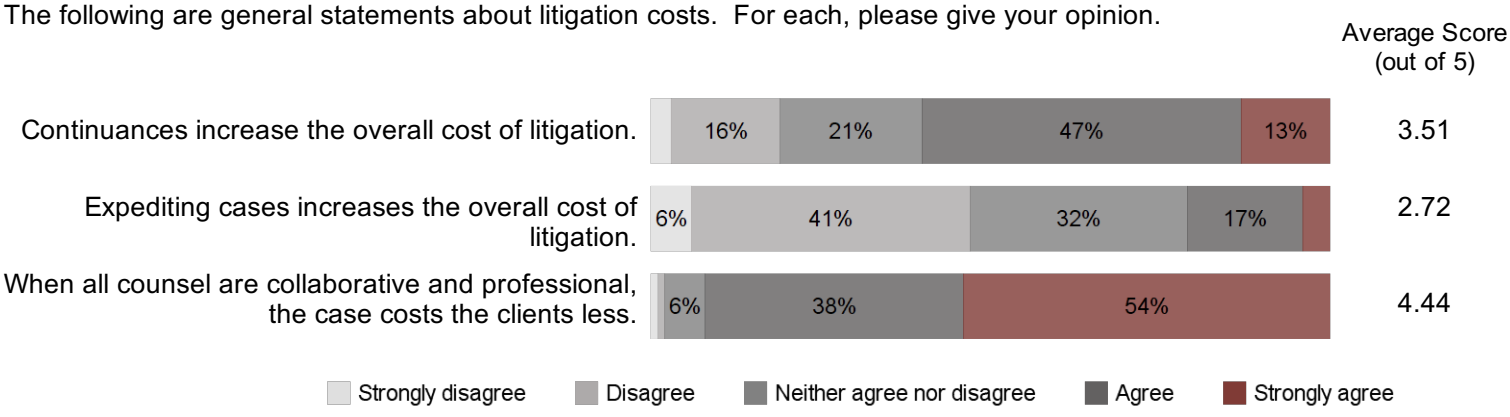


In bench trial cases involving limited amounts in controversy, do you favor allowing the court to enter a verdict and/or judgment without making findings of fact and conclusions of law?

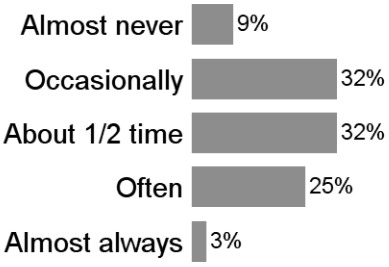


Litigation Costs & Delay

The following are general statements about litigation costs. For each, please give your opinion.



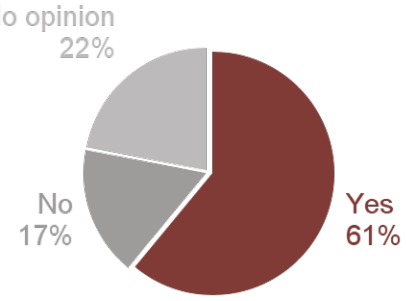
In your experience how often are litigation costs proportional to the value of the case?



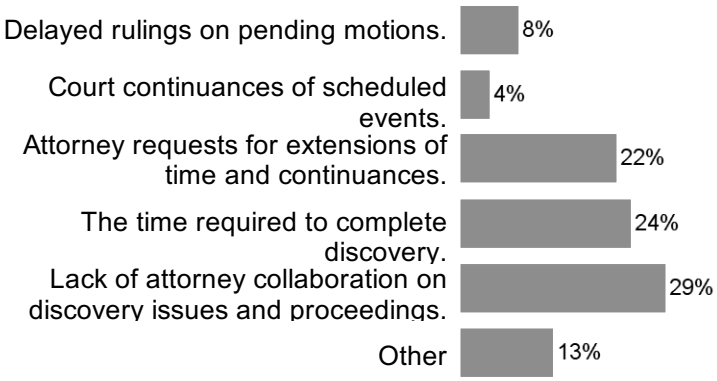
Average Score (out of 5)

2.81

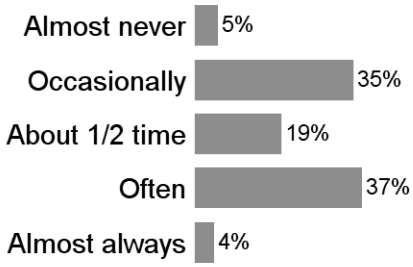
Should litigation costs be proportional to the value of the case?



The primary cause of delay in the litigation process is:



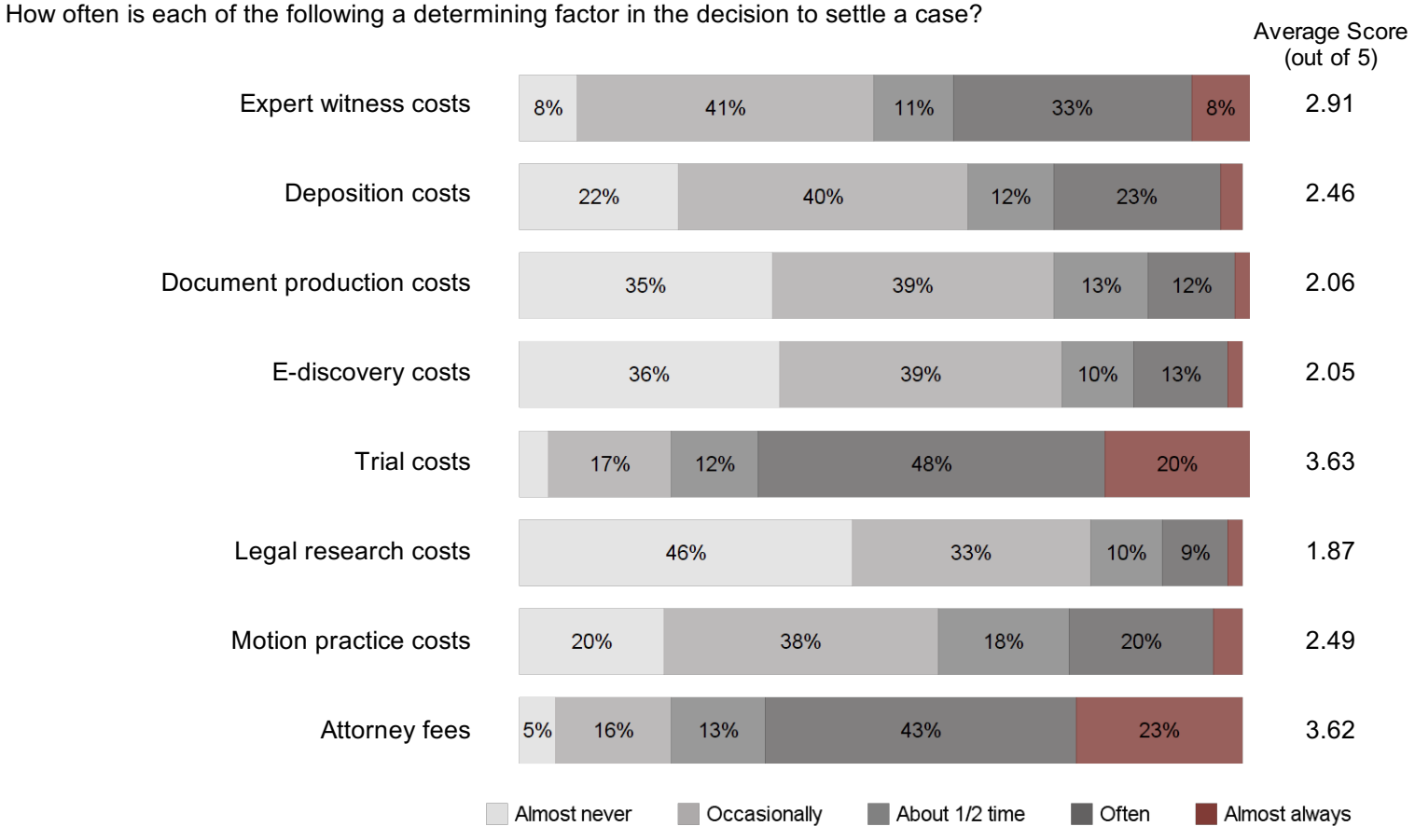
How often does the cost of litigation force cases to settle that should not settle based on the merits.



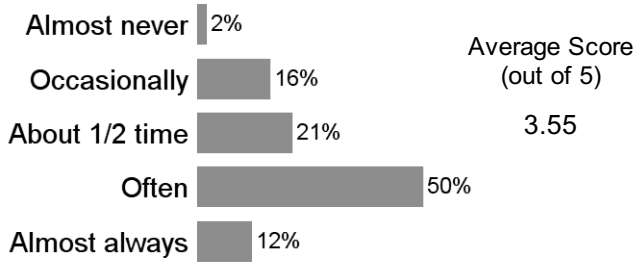
Average Score (out of 5)

3.01

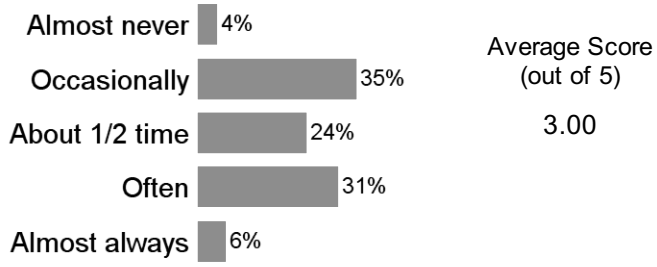
How often is each of the following a determining factor in the decision to settle a case?



How often is the unpredictability of a jury's verdict a determining factor in the decision to settle a case?



How often is the unpredictability of the judge a determining factor in the decision to settle a case tried to the court?

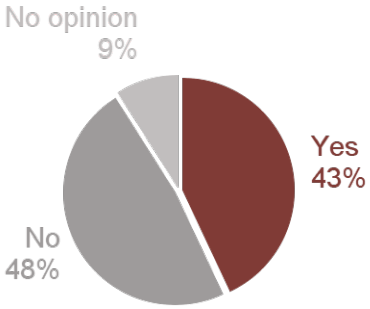


If you bill clients for your time, what is your usual hourly rate? Please round to the nearest whole dollar.

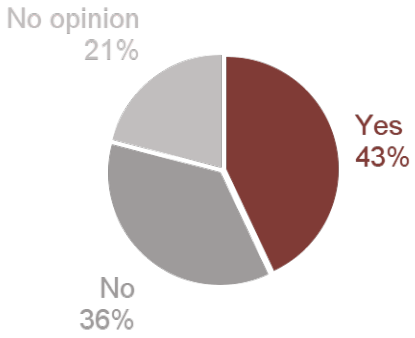
Average	$ 157
Minimum	$ 0
Maximum	$ 450

Mediation & Arbitration

Should Idaho require mandatory mediation in civil cases before a party can have access to a trial?



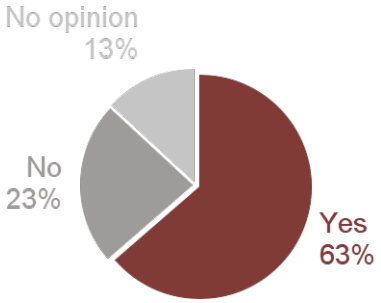
If Idaho were to require mandatory mediation for some cases, would you approve a value-of-the-case dollar limitation below which mediation would be required?



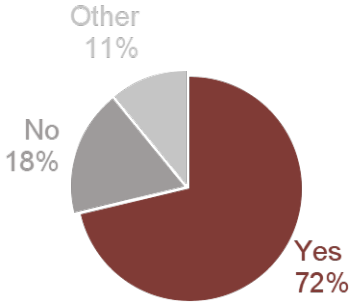
If Idaho were to require mandatory mediation for cases valued at a certain dollar amount and below, what should be the dollar limitation?

Average	$ 1,870,840,523
Minimum	$ 0
Maximum	$ 999,000,000,000

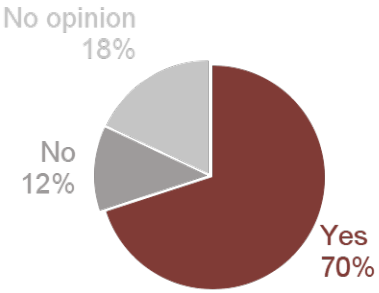
If mediation is mandatory or court ordered, should mediators be certified?



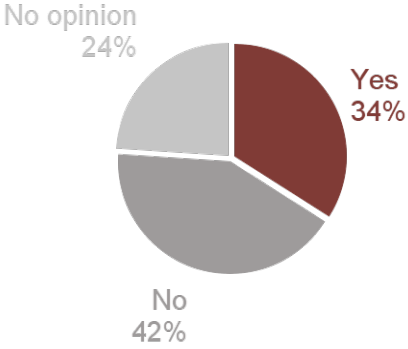
State's requiring mediators to be certified generally require 40 hours of training. Do you believe this would be appropriate for Idaho?



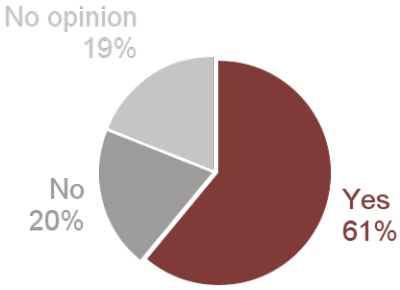
Do you perceive most mediators to be well-qualified in terms of the substantive issues involved in mediations?



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



If mediation is mandated, should the state provide free mediation services for the indigent?



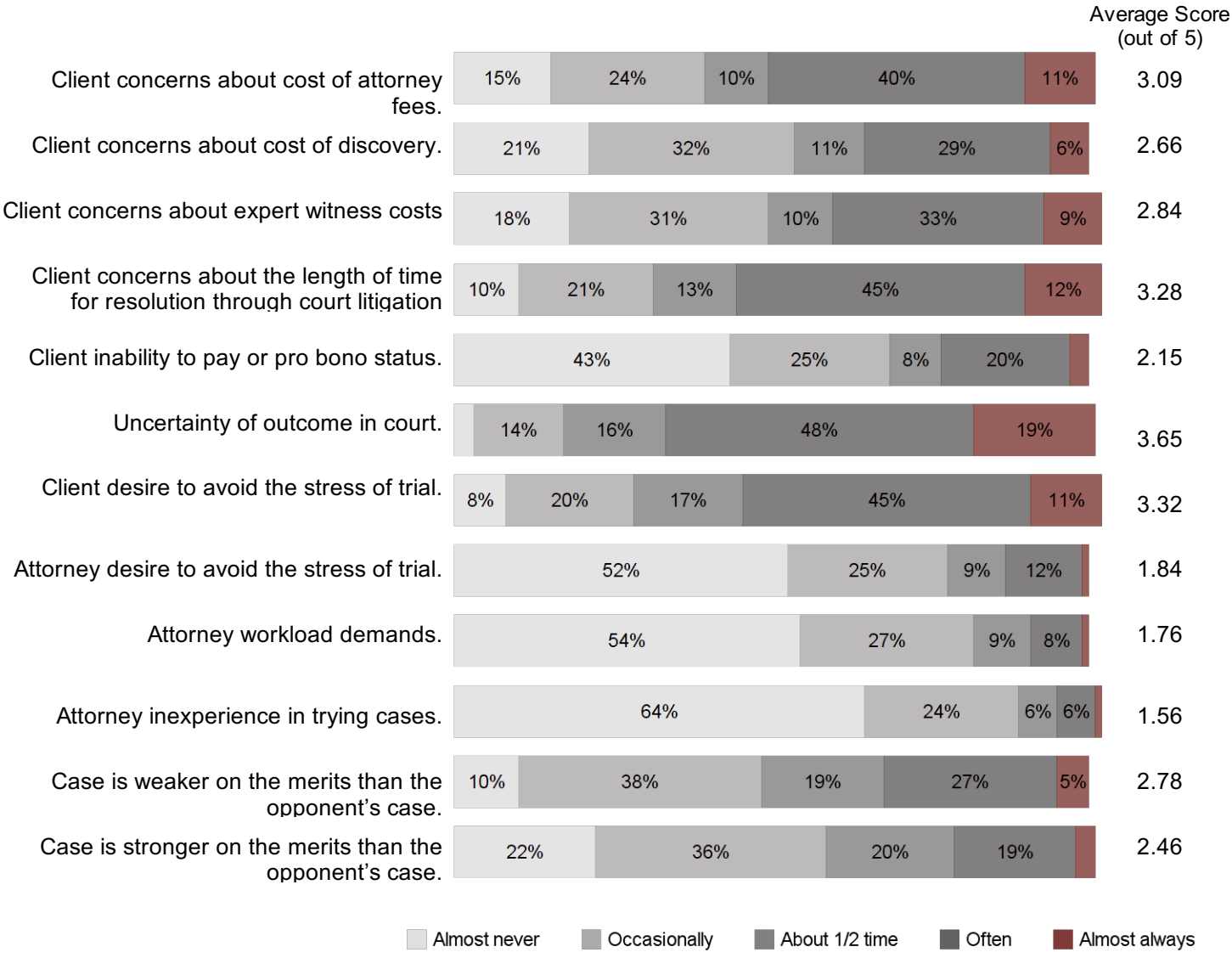
What percentage of your mediated cases are resolved through the mediation process?

Average	52	%
Minimum	0	%
Maximum	100	%

What percentage of your mediated cases are resolved through the arbitration process?

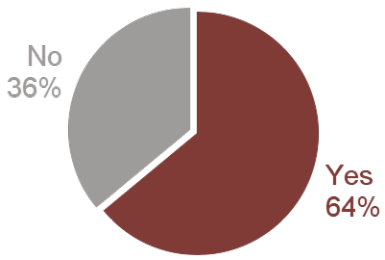
Average	3	%
Minimum	0	%
Maximum	100	%

What factors prompt you to seek or acquiesce to mediation processes in a case?



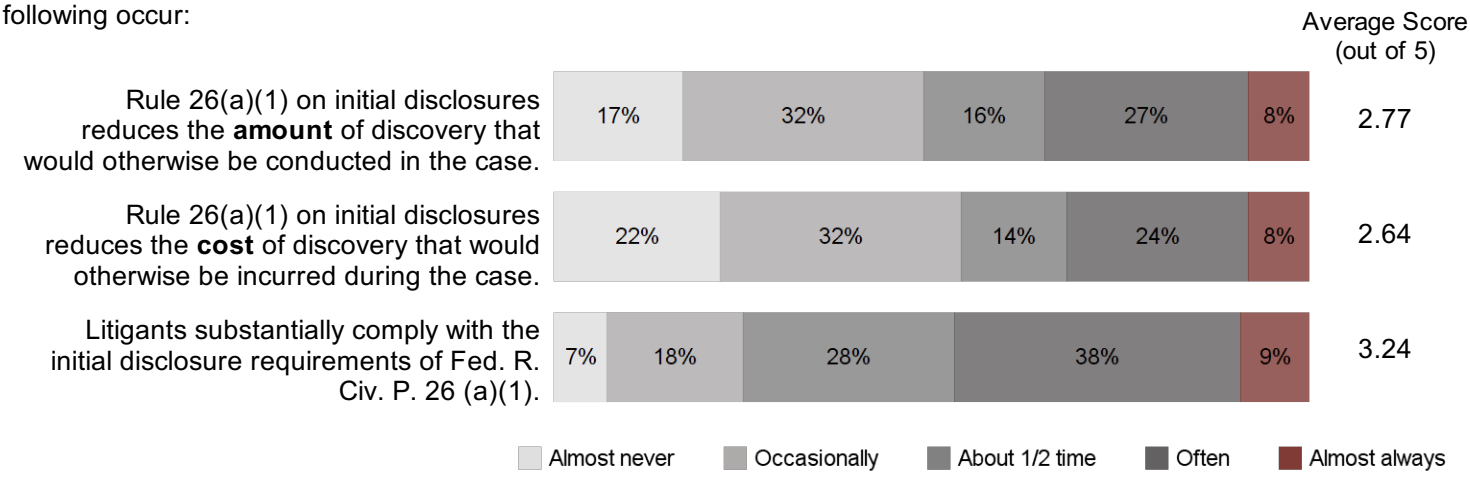
Civil Litigation in Federal Court

Do you have civil litigation experience in federal court?

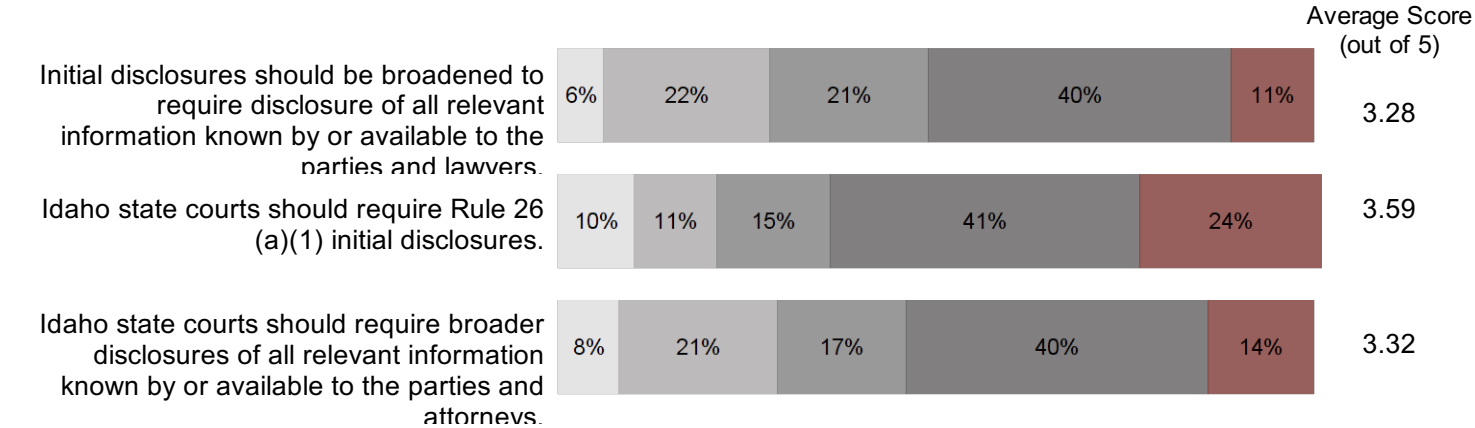


The following questions were only shown to those who said "yes", they had civil litigation experience in federal court (n=346)

If you have experience in federal court, please consider federal rule 26(a)(1) initial disclosures and how often the following occur:



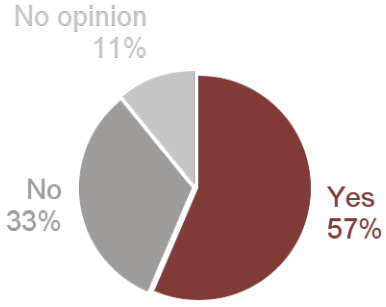
Please give your opinion regarding each of the following statements about initial disclosures.



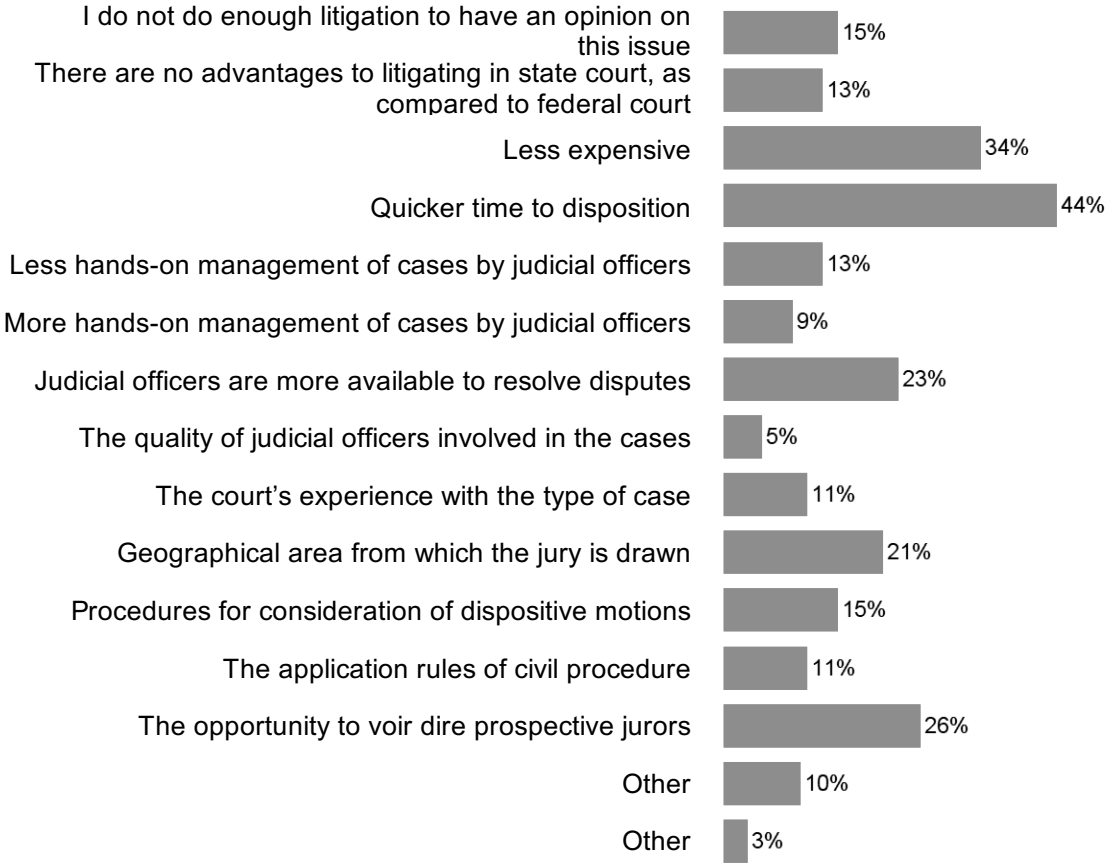
What percentage of your federal court cases require discovery Fed. R. Civ. P. 26(a)(1) initial disclosures?

Average	69	%
Minimum	0	%
Maximum	100	%

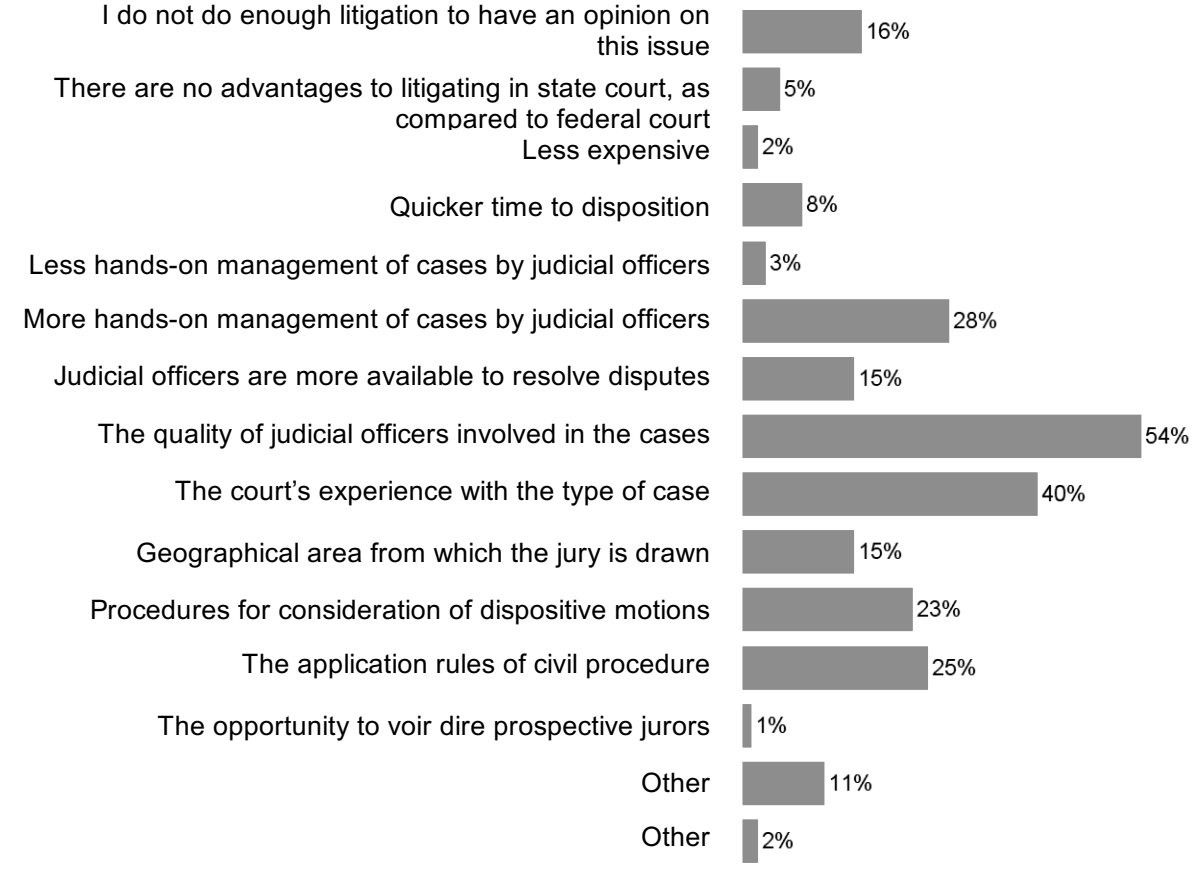
Do initial discovery disclosure requirements reduce further discovery?



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



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



Civil Justice Reform- Baseline

Summary Report

Other Claims- By Type

	Magistrate		District		Total	
	#	%	#	%	#	%
Contract	364	75%	216	60%	580	69%
Tort	3	1%	65	18%	68	8%
Real_property	2	0%	26	7%	28	3%
Small Claims	95	20%	2	1%	97	11%
Other_civil	23	5%	50	14%	73	9%
	487		**359**		**846**	

Contract- By Type

	Magistrate		District		Total	
	#	%	#	%	#	%
Debt collection	323	89%	156	73%	479	83%
Employment dispute	1	0%	6	3%	7	1%
Fraud	0	0%	3	1%	3	1%
Landlord/ Tenant	33	9%	6	3%	39	7%
Mortgage foreclosure	2	1%	25	12%	27	5%
Other	5	1%	19	9%	24	4%
	364		**215**		**579**	

Tort- By Type

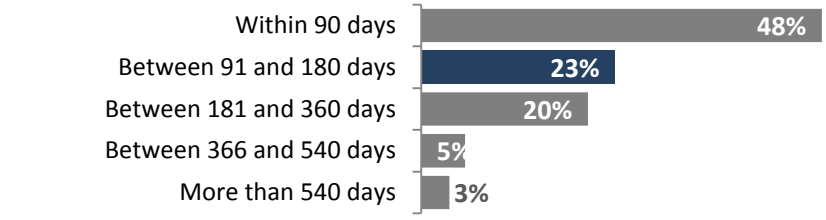
	Magistrate		District		Total	
	#	%	#	%	#	%
Automobile tort	1	33%	40	62%	41	60%
Intentional tort	2	67%	2	3%	4	6%
Medical malpractice	0	0%	5	8%	5	7%
Other malpractice	0	0%	1	2%	1	1%
Premises liability	0	0%	6	9%	6	9%
Product liability	0	0%	1	2%	1	1%
Slander/ libel/ demation	0	0%	1	2%	1	1%
Other	0	0%	9	14%	9	13%
	3		**65**		**68**	

Other Civil- By Type

	Magistrate		District		Total	
	#	%	#	%	#	%
Non-domestic relations restraining order	0	0%	1	2%	1	2%
Post judgment enforcement	2	12%	6	13%	8	12%
Tax	0	0%	1	2%	1	2%
Writ	0	0%	9	19%	9	14%
Other_civil	15	88%	31	65%	46	71%
	17		**48**		**65**	

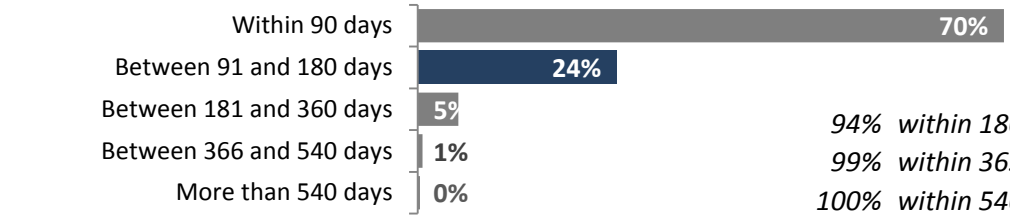
Days to Disposition

All Civil Cases Combined



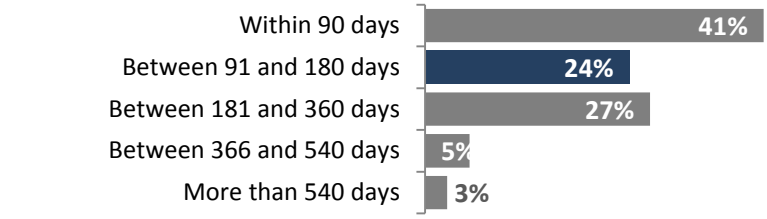
71% within 180 days
91% within 365 days
97% within 540 days

Small Claims



94% within 180 days
99% within 365 days
100% within 540 days

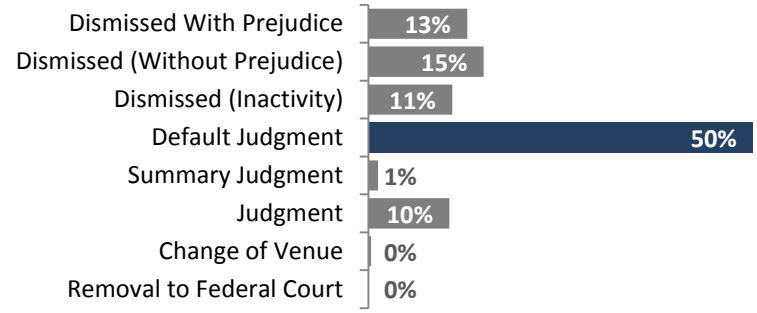
Other Claims- Contract



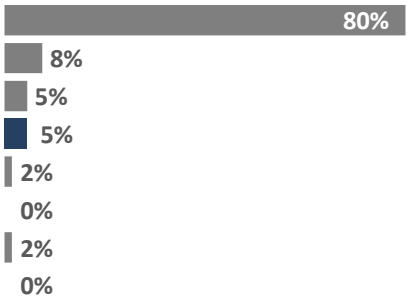
65% within 180 days
92% within 365 days
97% within 540 days

Disposition

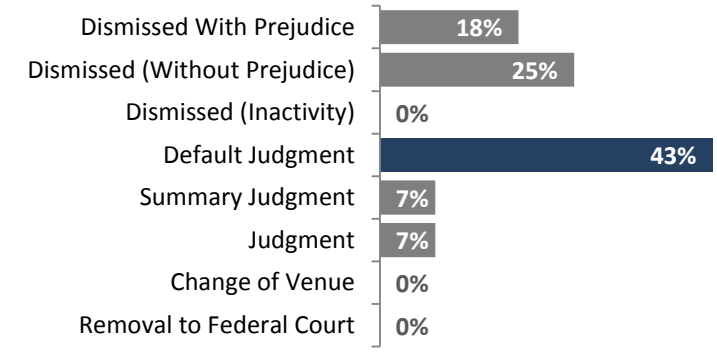
Contract *565*



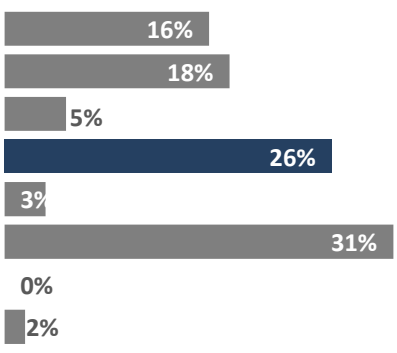
Tort *66*



Real Property *28*

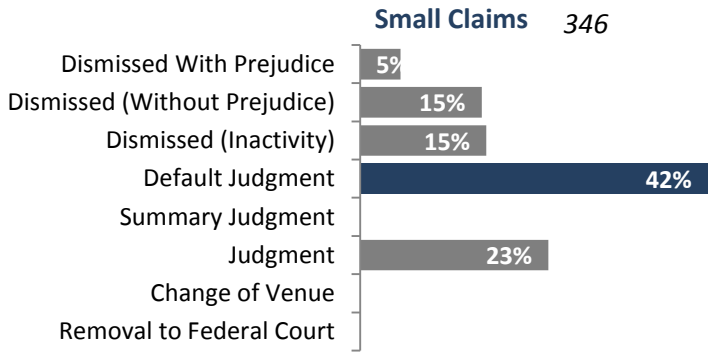


Other Civil *62*

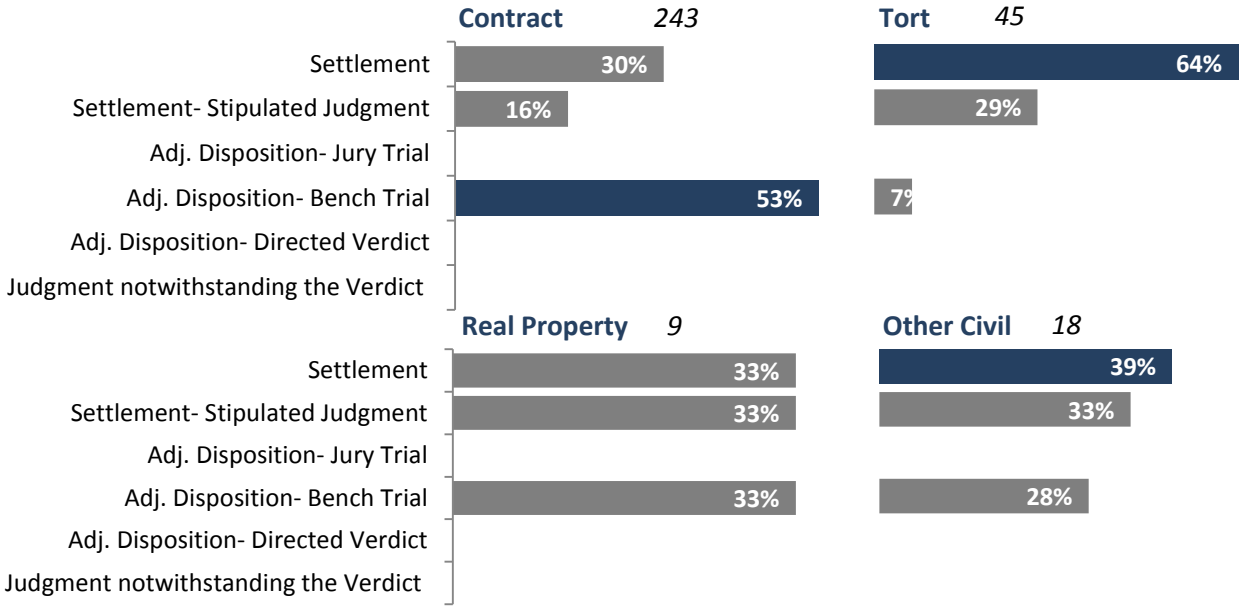


Bankruptcy Stay?

Yes: 10 Cases, or 1% of Cases

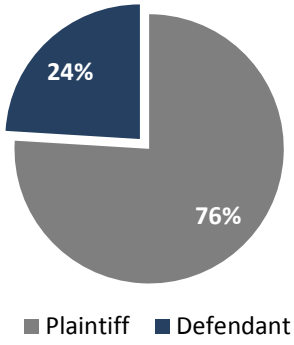


Method of Resolution



Adjudicated Disposition- Bench Trial

In Favor Of:



Judgment Awards

Exceeding $0- All Civil Except Small Claims	N	%
Less than $5,000	230	65%
$5,000 to $9,999	24	7%
$10,000 to $24,999	56	16%
$25,000 to $49,999	19	5%
$50,000 to $99,999	6	2%
$100,000 to $249,999	15	4%
$250,000 or more	2	1%

Rule 16. Setting Case Tier Type; Pretrial Conferences; Scheduling; Management.

(a) Civil Tier Worksheet. A party who wishes a discovery designation other than Tier 1 as set forth in Rule 26(b)(2)(D) must file a civil case tier worksheet at least 7 days prior to the initial scheduling conference. The parties may request to be heard at the initial scheduling conference as to the tier type to be designated**.**

(b) Case Tier Type. Unless exempted by Rule 26(a)(1)(B), the court must assign to the case a tier type for purposes of discovery and case management, as provided in Rule 26(a)(2) and 26(b)(2)(D). In determining the case tier type, the court must consider:

(1) Any stipulation by the parties;
(2) The initial disclosures of the parties
(3) The nature of the claims and defenses, including cross, counter and third party claims;
(4) The amount in controversy;
(5) The extent and type of discovery likely to be needed;
(6) The extent to which retained expert testimony will be necessary;
(7) The extent to which electronic discovery will be necessary;
(8) The nature of the relief sought, including injunctive or other equitable relief;
(9) The number of witnesses;
(10) The extent of likely motion practice, including dispositive motions;
(11) Whether the case primarily presents legal or factual issues to be decided;
(12) The number of parties;
(13) The number of days needed for trial;
(14) The importance of the issues at stake in the litigation;
(15) The hostility of the parties; and
(16) Any other factors the court determines to be relevant.

(c) Order Setting Case Tier Type. Within 14 days after the initial scheduling conference, the court must issue a written scheduling order setting the case for trial. In the order, the court must also assign the case a tier type, together with any initial exceptions further limiting or expanding the discovery allowed. Thereafter, on motion of a party, or on its own, after notice and opportunity to be heard, the court may reconsider the tier level assigned to the case. Tier 1 cases should be set for trial to be held as soon as reasonably possible following the entry of the order setting the case for trial.

(d) Scheduling Conferences and Orders.

(1) Scheduling Conferences; When Held. Within 30 days after any defendant's initial disclosures are due, a court must take action, by setting a scheduling conference, requesting available trial dates and designating a tier type, or by such other means that results in the filing of a scheduling order and tier type designation as soon as practicable.

(2) Scheduling Order. The scheduling order must address:

(A) the tier type designation;
(B) the setting of date(s) for trial and any pre-trial conferences;

(C) the setting of deadlines for joining other parties and amending the pleadings; for filing and hearing dispositive motions; for completing discovery; and, for disclosing expert witnesses;

(D) the advisability of ordering mediation or ADR;

(E) the need for a special master where appropriate; and

(F) any other matter which would aid in the speedy, fair and efficient disposition of the case.

(3) Modification of Scheduling Order. The dates set by the court in Rule 16(d) must not be modified except by leave of the court on a showing of good cause.

(e) Request for Trial Setting or Tier Type Determination by a Party.

(1) In General. If the court does not timely set the matter for scheduling conference or otherwise to set the matter for trial, or does not designate a tier type to the case, after all defendants have appeared, a party may request that the court set the matter for trial, designate a tier type, and that any other deadlines and pretrial conferences be established.

(2) Information to be Included. The request must indicate:

(A) the nature of the case;

(B) whether a jury trial has been demanded;

(C) whether referral to alternative dispute resolution would be beneficial;

(D) an estimate of the time required for trial;

(E) the name of the attorney who will appear at trial;

(F) the dates upon which the attorney and party would not be available for trial; and

(G) a requested tier type designation, accompanied by a tier type worksheet if a designation other than Tier 1 is requested.

(3) Response to the Request by Other Parties. A response must be filed and served within 7 days after being served with the request. The response must contain the information required in subsection (e)(2) of this rule.

(4) Action by the Court. After the time for filing a response to the request has passed, the court must either issue a scheduling order pursuant to subsection (d)(2) of this rule or set the request for hearing.

(f) Final Pretrial Conference and Order.

(1) Final Pretrial Procedure. Prior to trial, the court must engage in a pretrial process, which may include a formal pretrial conference, a pretrial memorandum submitted by the parties, pretrial submissions by stipulation of the parties, or other methods within the discretion of the court, by which the parties are required to confirm that the matter is proceeding to trial in the manner required by the scheduling order. If a formal pretrial conference is held, at least one attorney for each represented party participating in the pretrial conference must have authority to enter into stipulations and to make admissions regarding all matters that may be reasonably anticipated. If a formal pretrial conference is held, it must be on the record.

(2) Subjects to be Discussed at Pretrial Conference. At a pretrial conference, the court may consider and resolve the following:

(A) the status of mediation or ADR;

(B) the disposition of any pending motions;

(C) the possibility of obtaining admissions of fact;

(D) stipulations regarding the authenticity of exhibits;

(E) the advisability of any advanced rulings from the court concerning the admissibility of evidence;

(F) the avoidance of unnecessary proof and of cumulative evidence;

(G) the necessity of amendments to the pleadings pursuant to Rule 15(b);

(H) the formulation and simplification of the issues to be presented at trial, including the elimination of abandoned or unsustainable claims and defenses;

(I) the identification of witnesses and exhibits;

(J) the pre-marking of exhibits and procedures for the handling of exhibits, in conformance with Idaho Court Administrative Rule 71;

(K) jury instructions and jury selection issues;

(L) the need for an interpreter for any party or witness;

(M) the need for pre-trial briefing, and filing deadlines, if necessary;

(N) the availability and use of any technology in the courtroom; and

(O) any other matter which would aid in the fair and efficient resolution of the case.

(g) Exhibits and Witnesses.

(1) Disclosure Required. A party must, without waiting for a discovery request, serve on the other parties the following information about the evidence that it may present at trial other than solely for impeachment:

(A) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises, and a brief summary of their expected testimony;

(B) the page and line designation of those witnesses whose testimony the party expects to present by deposition; and

(C) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

(2) Timing for Pretrial Disclosures; Objections.

(A) Timing. Unless the court orders otherwise, these disclosures must be made at least 28 days before trial.

(B) Objections. Within 14 days after they are made, unless the court sets a different time, a party must serve and promptly file a list of the following objections, which if not so made—except for one under Rule 402 or 403—are waived unless excused by the court for good cause:

(i) any objections to the use under Rule 32(a) of a deposition, or any part thereof, designated by another party under Rule 16(g)(1)(B), and the counter-designation, by page and line number, if the deposition testimony should be allowed; and

(ii) any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 16(g)(1)(C).

(h) Sanctions.

(1) Grounds. The court may sanction any party, or attorney if a party or attorney:

(A) fails to obey a scheduling or pretrial order;

(B) fails to appear at a scheduling or pretrial conference; however a party need not appear unless self-represented or ordered to appear;

(C) is substantially unprepared to participate in a scheduling or pretrial conference; or

(D) fails to participate in good faith.

(2) Sanctions Allowed. The court may make such orders as are just, and may, along with any other sanction, make any of the orders allowed under Rule 37(b)(2)(A). In addition to or in the place of any other sanction, the court must require the party or the party's attorney, or both, pay any expenses incurred because of noncompliance with this rule, including attorney's fees, unless the court finds noncompliance was substantially justified or that circumstance are such that such an award of expenses would be unjust.

Rule 26. Duty to Disclose; General Provisions Regarding Discovery.

(a) Required Disclosures.

(1) Initial Disclosure.

(A) In General. Except as exempted by Rule 26 (a)(1)(B) or as otherwise ordered by the court, a party must, without awaiting a discovery request, file and serve to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;
(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered;
(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment; however, an application for insurance is not subject to disclosure as part of an insurance agreement as provided by this rule unless otherwise relevant to the issues in the litigation; and**(v)** a copy of all documents to which the producing party refers in the pleadings.

The supporting documents or materials referred to in the initial disclosures must be served on the parties but not filed unless required by the court.

(B) Proceedings Exempt from Initial Disclosure. The following proceedings are exempt from initial disclosure, unless ordered by the court:

(i) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;
(ii) a petition for habeas corpus or post-conviction relief;
(iii) to enforce an arbitration award;
(iv) for a general adjudication of water rights;
(v) which are covered by other subject-specific procedural rules; and
(vi) a proceeding ancillary to a proceeding in another court.

(C) Time for Initial Disclosures—In General. A party must make the initial disclosures at or within 35 days from the date the first responsive pleading is due, or as otherwise ordered by the court. In ruling on an objection to or motion for relief from the requirements of initial disclosure, the court must determine what disclosures, if any, are to be made and must set the time for disclosure. If counterclaims are filed, the parties have 35 days to respond and file supplemental initial disclosures, unless a different time is set by court order.

(D) Time for Initial Disclosures—For Parties Served or Joined Later. A party that is first served or otherwise joined after the date the first initial disclosures are due must make

the initial disclosures within 28 days after being served or joined, unless a different time is set by court order.

(E) Basis for Initial Disclosure; Unacceptable Excuses. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In General—Experts Specially Retained or Employed. A party must disclose to the other parties, without the need for a discovery request, the identity of any witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony—who the party may use at trial to present evidence under Idaho Rule of Evidence 702, 703 or 705, the following information:

(i) the witness's name and business address;

(ii) a brief statement of the witness's qualifications;

(iii) a brief summary of the witness's opinions; and,

(iv) a list of the materials reviewed and relied upon.

(B) Limits on Expert Discovery. Further discovery may be obtained from an expert witness either by deposition or by written report. For Tier 1 cases, the expert discovery must be by written report. For Tier 2 and 3 cases, discovery may be either by deposition or written report but not both unless exceptional circumstances are shown.

(i) Written Report. A written report must be signed by the expert. It must contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for the opinions. An expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. The party offering the expert must pay the costs for the report. The written report must contain:

- The witness's qualifications, including a list of all publications authored in the previous 10 years;
- a list of all other cases in which, during the previous four (4) years, the witness testified as an expert at trial or by deposition;
- a detailed statement of all of the witness's opinions;
- the facts or data considered by the witness in forming them;
- any exhibits that will be used to summarize or support them ;
- a statement of the compensation to be paid for the study and testimony in the case.

(ii) Deposition. A deposition must not exceed seven 7 hours. The party taking the deposition must pay the expert's reasonable fees for attendance at the deposition.

(iii) Failure to Disclose. An expert must not testify in a party's case-in-chief concerning any opinion or matter not fairly disclosed in the written disclosure or in deposition, if elected, unless during the deposition the deponent identified the opinion but the party taking the deposition failed to reasonably inquire

further about the opinion and basis for it. A party has a duty to seasonably supplement expert disclosures.

(C) Timing for Expert Discovery.

(i) Plaintiff's Expert Disclosures. The Plaintiff must file and serve the information required by Rule 26(a)(2)(A) no later than 150 days before trial.

(ii) Discovery of Plaintiff's Expert. Within 7 days thereafter, any party opposing the Plaintiff's expert may serve written notice electing either a deposition of the expert pursuant to Rule 26(a)(2)(B)(ii) and Rule 30, or a written report pursuant to Rule 26(a)(2)(B)(i). The deposition must occur, or the report must be served, within 28 days after the election is served. If no election is served, the advancing party is required to provide a written report pursuant Rule 26(a)(2)(B)(i) within 28 days of the date the election had been due, and no further discovery of the expert is permitted.

(iii) Defendant's Expert Disclosures. The Defendant must file and serve the information required by Rule 26(a)(2)(A) for the experts it expects to use within 49 days after the Plaintiff's Rule 26(a)(2)(A) disclosures were served.

(iv) Discovery of Defendant's Expert. Within 7 days thereafter, the party opposing the Defendant's expert may serve written notice electing either a deposition of the Defendant's expert pursuant to Rule 26(a)(2)(B)(ii) and Rule 30, or a written report pursuant to Rule 26(a)(2)(B)(i). The deposition must occur, or the report must be served, within 28 days after the election is served. If no election is served, the Defendant is required to provide a written report pursuant Rule 26(a)(2)(B)(i) within 28 days of the date the election had been due, and no further discovery of the expert is permitted.

(v) Plaintiff**'s Rebuttal Expert**. A Plaintiff who wishes to use rebuttal experts must file and serve the information required by Rule 26(a)(2)(A) for the rebuttal experts within 42 days after the Defendant's Rule 26(a)(2)(A) disclosures were served.

(vi) Discovery of Plaintiff's Rebuttal Expert. Within 7 days thereafter, the Defendant may serve written notice electing either a deposition of the rebuttal expert pursuant to Rule 26(a)(2)(B)(ii) and Rule 30, or a written report pursuant to Rule 26(a)(2)(B)(i). The deposition must occur, or the report must be served, within 21 days after the election is served. If no election is served, the Plaintiff is required to provide a written report pursuant Rule 26(a)(2)(B)(i) within 21 days of the date the election had been due, and no further discovery of the expert is permitted.

(D) Multiparty Actions. Unless otherwise ordered, in multiparty actions, all parties opposing an expert must agree on either a report or a deposition. If all parties opposing the expert do not agree, then further discovery of the expert may be obtained only by deposition pursuant to paragraph Rule 26(a)(2)(B)(ii) and Rule 30.

(E) Non- Retained Experts; Required Disclosure.

(i) Non-Retained Expert. A non-retained expert is a person whom a party intends to have present evidence at trial under Rule 702 of the Idaho Rules of Evidence and is neither an expert who is retained or specially employed to provide testimony in the case, nor a person whose duties as an employee of the party regularly involve giving expert testimony.

(ii) Required Disclosure. A party wishing to present expert testimony from a non-retained expert—consistent with the time frames provided for in Rule 26(a)(2)(C)—must file and serve a written disclosure; this disclosure must state:

(a) the subject matter on which the witness is expected to present evidence under Idaho Rule of Evidence 702, 703 and 705; and

(b) a summary of the facts and opinions to which the witness is expected to testify

(iii) Time and Cost of Deposition. A deposition of a non-retained expert must not exceed 7 hours. The party taking the deposition must pay the expert's reasonable fees for attendance at the deposition.

(3) Modification of Time Frames. The court may set different times other than those provided for in Rule 26 upon a showing of good cause.

(b) Discovery Scope, Methods and Limits.

(1) General Scope of Discovery. Except as otherwise limited by the court, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the following:

(A) the importance of the issues at stake in the action;

(B) the amount in controversy;

(C) the parties' relative access to relevant information;

(D) the parties' resources;

(E) the importance of the discovery in resolving the issues; and

(F) whether the burden or expense of the proposed discovery outweighs its likely benefit.

Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) Discovery Methods; Limitations.

(A) Discovery Methods. Except as limited by these Rules, or order of the court, discovery may be made by:

(i) deposition upon oral examination or written questions;

(ii) written interrogatories;

(iii) production of documents, electronically stored information or tangible things;

(iv) entry upon land or other property for inspection or other purposes;

(v) physical and mental examinations; and

(vi) requests for admission.

(B) Specific Limits on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(1). The court may specify conditions for the discovery.

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

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by disclosures made or discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

(D) Case Type Limits on Frequency and Extent of Discovery. Except as ordered by the court upon a showing of good cause, discovery limits for cases determined by the court to be simple (Tier 1), standard (Tier 2), or complex (Tier 3) are:

(i) for simple cases (Tier 1), each party is limited to 5 interrogatories, including subparts, 10 requests for admission, including subparts, 5 requests for production, including subparts, and 5 total hours of fact witness depositions.

(ii) for standard cases (Tier 2), each party is limited to 10 interrogatories, including subparts, 20 requests for admission, including subparts, 10 requests for production, including subparts, and 15 total hours of fact witness depositions.

(iii) for complex cases (Tier 3), each party is limited to 20 interrogatories, including subparts, 40 requests for admission, including subparts, 20 requests for production, including subparts, and 30 total hours of fact witness depositions.

(iv) The limitations for discovery depositions of fact witnesses in subsections (i)-(iii) do not apply to depositions taken solely in lieu of live testimony at trial or hearing of witnesses unavailable to testify as defined by Rule 32(a)(4).

(v) Deposition time spent examining a witness by a party other than the one that noticed the deposition must be charged to that other party.

(E) Multiparty Actions. Parties whose interests are closely aligned, or who are represented by the same attorney, must be required to share the discovery limited pursuant to Rule 26(b)(2)(D), except as otherwise ordered by the court, for good cause shown.

(3) Trial Preparation: Materials.

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for

another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to the limitations of Rule 26(a)(2), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) Previous Statement. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, digital, electrical, or other recording, or a transcription of it, that recites substantially verbatim the person's oral statement.

(4) Limitation on Contact with Expert. A party must not contact a retained expert disclosed by another party pursuant to Rule 26(a)(2)(A) without first obtaining the permission of the party who retained the expert or by the court.

(5) Trial-Preparation Protection for Draft Reports or Disclosures. A draft disclosure or draft report prepared in anticipation of litigation by any witness disclosed under 26(a)(2)(A) is protected from disclosure.

(6) Trial-Preparation Protection for Communications Between a Party's Attorney and an Expert Witness. Communications between the party's attorney and any witness required to be disclosed under 26(a)(2)(A), regardless of the form of the communications, is protected from disclosure, except to the extent that the communications:

(A) state the amount of compensation for the expert's services;

(B) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(C) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(7) Expert Employed Only for Trial Preparation.

(A) In General. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(B) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery or preparing a report under Rule 26(a)(2)(B);

(ii) or if by deposition of an expert pursuant to Rule 26(a)(2)(B), pay the expert a reasonable fee for time spent testifying at the deposition; and

(iii) for discovery allowed under Rule 26(b)(7), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(8) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed, and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it, and must preserve the information until the claim is resolved. After being notified, a party:

(i) must promptly return, sequester, or destroy the specified information and any copies it has;

(ii) must not use or disclose the information until the claim is resolved;

(iii) must take reasonable steps to retrieve the information if the party disclosed it before being notified; and

(iv) may promptly present the information to the court under seal for a determination of the claim.

(c) Protective Orders; Informal Resolution and Planning.

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

(A) forbidding or requiring the disclosure or discovery;

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

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, or sealed electronic filings, to be opened as the court directs.

(2) Ordering Discovery. If a motion for a protective order is wholly or partly denied, the court may order that any party or person provide or permit the discovery, and the court may specify conditions for the discovery.

(3) Awarding Expenses. Rules 37(a)(5) and 26(d)(3) apply to the award of fees and expenses.

(d) Informal Discovery Planning and Discovery Dispute Resolution Conferences.

(1) In General. On request of a party, or on its own initiative, the court may hold an informal discovery conference—either before a motion is filed pursuant to Rule 26(c) or 37, or after such motion is filed but before it is heard—to expeditiously resolve discovery disputes or assist the parties in discovery planning and scheduling.

(2) Conference Required. Before seeking a conference pursuant to this Rule, a party must submit an affidavit attesting that the parties have meaningfully conferred in a good faith attempt to resolve the dispute.

(3) Rejection of Proposed Resolution; Fees and Costs. A party that resists an informal resolution proposed by the court may take the matter to formal resolution pursuant to Rule 26(c) or 37. Should the party not obtain relief beyond the relief informally proposed, the party, or its attorney, or both, may be ordered to pay the other party's fees and costs associated with the motion.

(e) Timing and Sequence of Discovery.

(1) Timing. A party may not seek discovery from any source before providing initial disclosures required by Rule 26(a)(1)(A), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) Sequence. Except as provided for in Rule 26, or unless the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

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

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

(f) Supplementing Disclosures and Responses.

(1) In General. A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) Expert Witnesses. For an expert who must be disclosed under Rule 26(a)(2), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Supplementation must be seasonably made. A party must also seasonably supplement the information required to be disclosed by Rule 26(a)(2)(E), pertaining to non-retained experts the party intends to call at trial.

(3) Sanction for Failure to Supplement. Absent good cause, the court must exclude the testimony or evidence not disclosed by a supplementation required by this rule.

(g) Signing Disclosures and Discovery Requests, Responses and Objections.

(1) Signature Required; Effect of Signature. Every disclosure under Rule 26(a)(1) and (a)(2) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address and e-mail address. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) Failure to Sign. Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) Sanction for Improper Certification. If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

(h) Additional Discovery. Upon good cause shown, or stipulation of the parties, the court may allow additional specified discovery, including beyond that permitted based on tier type.

Rule 29. Stipulations about Discovery Procedure. Unless the court orders otherwise, and subject to the limitations of Rules 26(a)(2) and (b)(2), the parties may stipulate that:

(a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified, in which event it may be used in the same way as any other deposition; and

(b) other procedures governing or limiting discovery be modified, but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for trial or court approval is required by other order of the court.

. . .

Rule 30. Depositions by Oral Examination.

(a) When a Deposition May Be Taken.

(1) Without Leave. A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2), and subject to the limitations of Rules 26(a)(2) and (b)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) With Leave. A party must obtain leave of court if:

(A) the deponent is confined in prison; or

(B) the party seeks to take the deposition before otherwise permitted pursuant to Rule 26(e). However leave of court is not required if:

(i) the party or the attorney for the party certifies in the notice of deposition, with supporting facts, to the best of his or her knowledge, that the deponent is expected to leave the district where the action is pending and go more than 100 miles from the place of trial or leave the United States before the expiration of the 30 day period or the time permitted for initiating discovery under Rule 2(e), and will be unavailable for examination after the time set for the deposition. The certification is subject to the sanctions provided by Rule 11. If a party shows that when the party was served with notice under this subdivision (a)(2)(B)(i)—and less than 30 days of notice of the deposition was given—the party was unable through the exercise of diligence to obtain counsel to represent the party at the taking of the deposition, the deposition may not be used against the party.

. . .

Rule 31. Depositions by Written Questions.

(a) When a Deposition may be Taken.

(1) Without Leave. A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2) and subject to the limitations of Rules 26(a)(2) and (b)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

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

(A) the parties have not stipulated to the deposition and the deponent has already been deposed in the case; or

(B) the deponent is confined in prison.

(3) Service; Required Notice. A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken.

(4) Questions Directed to an Organization. A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with Rule 30(b)(6).

(5) Questions from Other Parties. Any questions to the deponent from other parties must be served on all parties as follows: cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The court may, for good cause, extend or shorten these times.

. . .

Rule 33. Interrogatories to Parties.

(a) In General.

(1) Number. Unless otherwise stipulated or ordered by the court for good cause allowing specific additional number of interrogatories, a party may serve on any other party no more than the number of interrogatories allowed pursuant to Rule 26(b)(2) based on the tier type assigned to the case, including all discrete subparts.

(2) Scope. An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

(3) When May be Served. Interrogatories may be served after such time as permitted by Rule 26(e), or otherwise as ordered by the court.

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

(a) In General. Requests may be served after such time as permitted by Rule 26(e), or otherwise as ordered by the court. Subject to the limitations of Rules 26(a)(2) and (b)(2), a party may serve on any other party a request within the scope of Rule 26(b)(1);

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information, including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations, stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

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Rule 36. Requests for Admission.

(a) Scope and Procedure.

(1) Scope. Subject to the limitations of Rules 26(a)(2) and (b)(2), a party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:

(A) facts, the application of law to fact, or opinions about either; and

(B) the genuineness of any described documents.

(2) Form; Copy of a Document. Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

(3) When May be Served. Requests for admission may be served after such time as permitted by Rule 26(e), or otherwise as ordered by the court.

Rule 37. Failure to Cooperate in Discovery; Sanctions.

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

(1) In General. On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has meaningfully conferred or attempted to confer with the person or party failing to make disclosure or discovery in a good faith effort to obtain it without court action.

. . .

(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Production or for Inspection.

(1) In General.

. . .

(B) Certification. A motion for sanctions for failing to answer or respond must include a certification that the movant has in meaningfully conferred or attempted to confer with the party failing to act in a good faith effort to obtain the answer or response without court action.

Online Dispute Resolution

Project Resources

Introduction and Scope

Online Dispute Resolution (ODR) is a new tool that makes resolving lawsuits more accessible and reduces the costs to parties and courts.

It improves access to justice by allowing parties to resolve their disputes at their convenience via mobile phone or email without the need to visit a courthouse. Parties who would have previously defaulted on a lawsuit to avoid the cost of attending a court hearing now have an additional opportunity to appear and resolve their case.

An added benefit is the improvement in case processing times, especially where ODR can be used in case types beyond Small Claims, including: traffic citations, evictions, divorce, custody, child support and modifications. Even beyond lawsuits, such a system could be made accessible to parties to resolve their disputes prior to a lawsuit being filed with the court.

Project Resources

Development Team	Responsibilities
Project Manager	Develop and implement project plan; create and manage project timeline; act as design leader.
Developer/IT Support	Complex software/website developer; link system to Odyssey/CMS and websites; and provides ongoing support.
Planning Committee	Make recommendations, develop policies, involve necessary stakeholders, propose rules, and recommend evaluation plan.
Mediators	Volunteer or paid mediators to assist in resolving disputes and drafting settlement agreements.
Court Management	Coordination with court management on implementation, linking to CMS, training court staff on the process.
Platform	
	Web-based program or software that allows online dispute resolution, proposes options for resolution, links to CMS, allows payment (if any).
Funding	
Hardware	Phone, tablet, or laptop for mediators.
Software/Webpage	Initial and ongoing monthly costs.
Mediators	Volunteer or paid mediators (ongoing cost).
Marketing	Statewide communication plan.