Appendix Contents

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B. Iowa Civil Justice Reform Task Force Survey

Iowa Task Force for Civil Justice Reform Survey

SurveyMonkey

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

	Response Percent	Response Count
State court	**78.1%**	**586**
Federal court	3.3%	25
Roughly equal split of state and federal courts	9.2%	69
Roughly equal split of courts and arbitration panels	1.2%	9
Arbitration panels	0.3%	2
Tribal court	0.0%	0
Administrative agencies	5.7%	43
Other (please specify)	2.1%	16
	answered question	**750**
	skipped question	**433**

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

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

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

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

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

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

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

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

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

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

20. How often during the last five (5) years have you consulted the local rules of any given judicial district in the State of Iowa?			
		Response Percent	Response Count
Almost never		25.2%	180
Occasionally		**45.3%**	**324**
About 1/2 time		6.2%	44
Often		16.9%	121
Almost always		6.4%	46
		answered question	**715**
		skipped question	**468**

21. If you could change any one rule of the Iowa Rules of Civil Procedure in order to achieve a more timely and cost-effective court process for litigants, what would it be and why?		
		Response Count
		255
	answered question	**255**
	skipped question	**928**

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

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

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

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

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

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

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

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

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

30. Limitations could be placed on the number, frequency, timing, or duration of the following discovery devices without jeopardizing the fairness of the litigation process:

	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree	Response Count
a. Request for admission.	11.7% (71)	**30.8% (187)**	16.6% (101)	23.5% (143)	17.4% (106)	608
b. Interrogatories.	14.3% (87)	**42.0% (256)**	14.3% (87)	19.5% (119)	9.9% (60)	609
c. Requests for production of documents.	13.0% (79)	**37.6% (228)**	13.3% (81)	24.4% (148)	11.7% (71)	607
d. Depositions of parties.	9.4% (57)	**30.7% (186)**	17.3% (105)	28.9% (175)	13.7% (83)	606
e. Depositions of non-party fact witnesses.	10.4% (63)	**35.4% (215)**	18.3% (111)	27.0% (164)	8.9% (54)	607
f. Depositions of expert witnesses.	9.8% (59)	**33.8% (203)**	17.1% (103)	29.0% (174)	10.3% (62)	601
					answered question	**609**
					skipped question	**574**

31. In your cases, how often do Rule 1.507 discovery conferences occur?

	Response Percent	Response Count
Almost never	**70.2%**	**403**
Occasionally	23.2%	133
About 1/2 time	4.2%	24
Often	2.1%	12
Almost always	0.3%	2
	answered question	**574**
	skipped question	**609**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

	Response Average	Response Total	Response Count
Hourly rate $	**188.39**	**77,807**	413
		answered question	**413**
		skipped question	**770**

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

	Response Percent	Response Count
Yes	34.7%	199
No	**57.0%**	**327**
No opinion	8.4%	48
	answered question	**574**
	skipped question	**609**

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

	Response Percent	Response Count
Yes	**49.5%**	**281**
No	34.9%	198
No opinion	15.7%	89
	answered question	**568**
	skipped question	**615**

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

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

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

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

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

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

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

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

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

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

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

	Response Percent	Response Count
Yes	**55.2%**	**313**
No	28.2%	160
No opinion	16.6%	94
answered question		**567**
skipped question		**616**

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

	Response Average	Response Total	Response Count
Cases resolved through mediation: %	**55.49**	**27,080**	488
answered question			**488**
skipped question			**695**

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

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

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

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

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

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

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

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

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

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

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

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

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

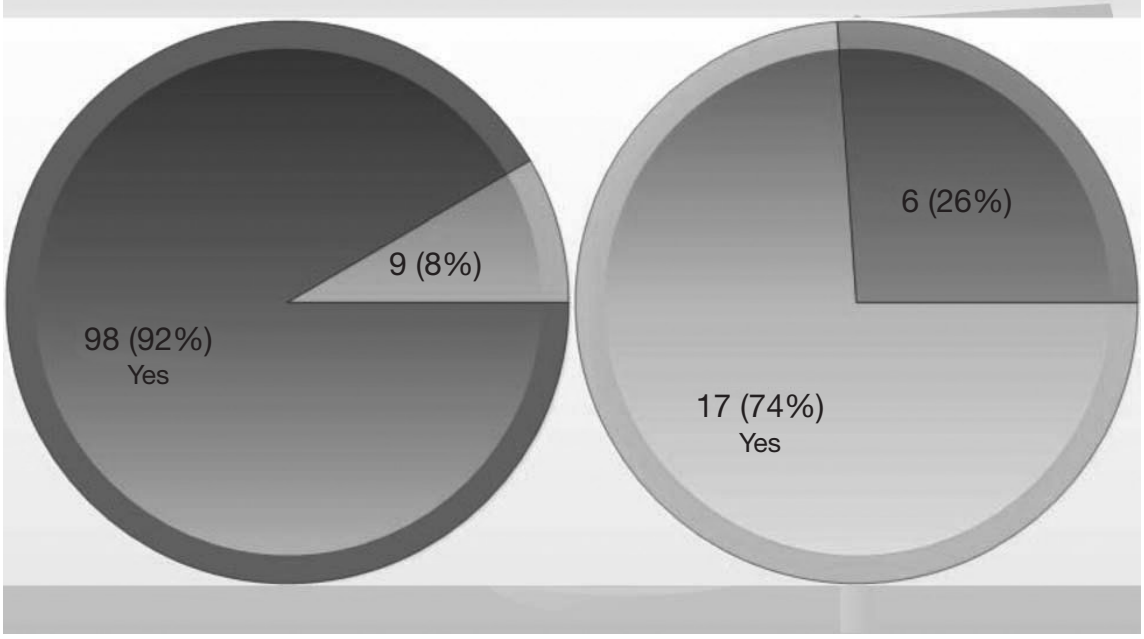
76. Please add any additional comments you may have regarding efforts to achieve a more timely and cost effective process for litigants in Iowa courts.	
	Response Count
	151
answered question	151
skipped question	1,032

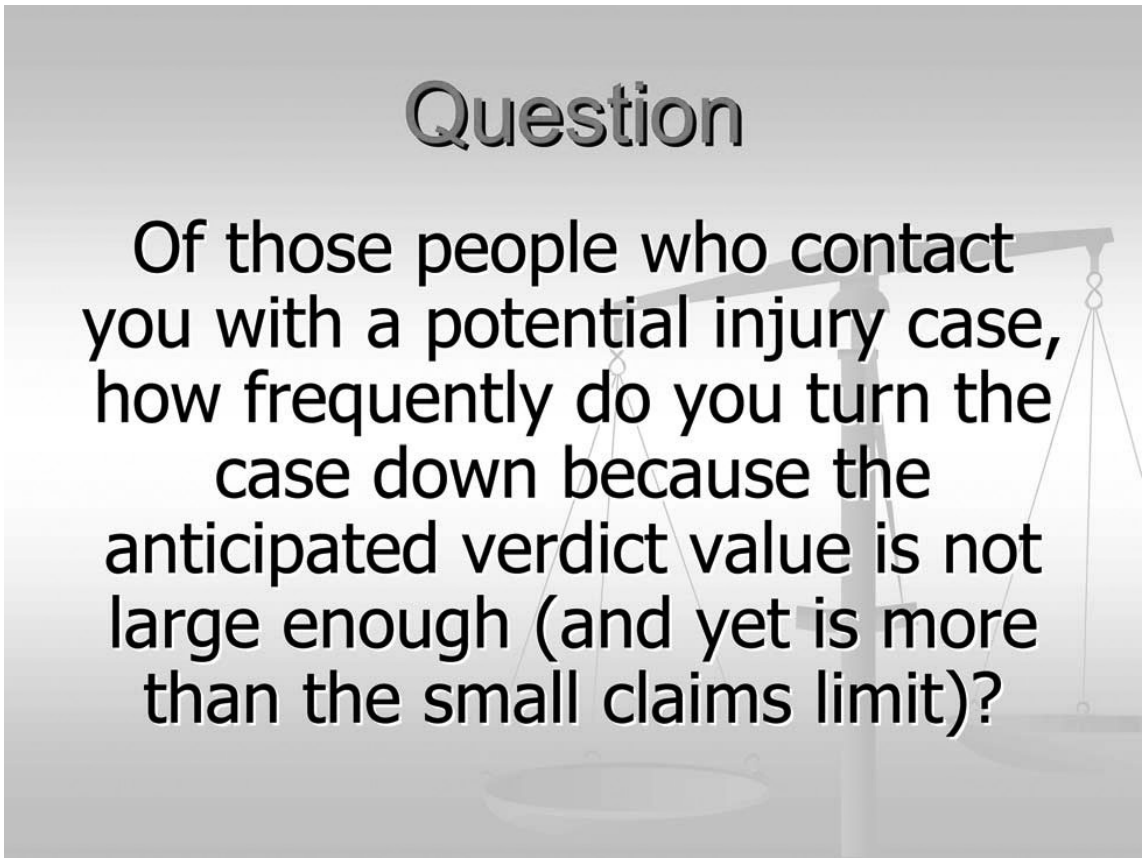
C. Access to Courts Survey Results

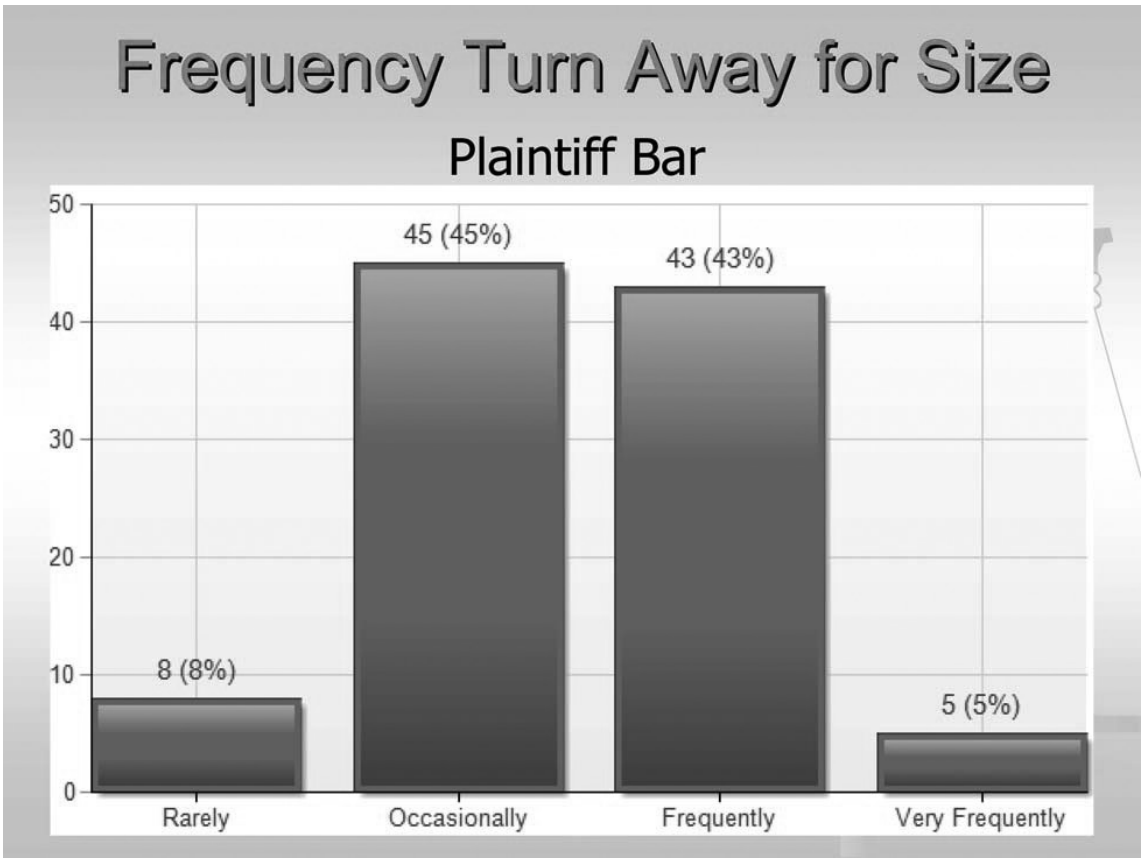
Question

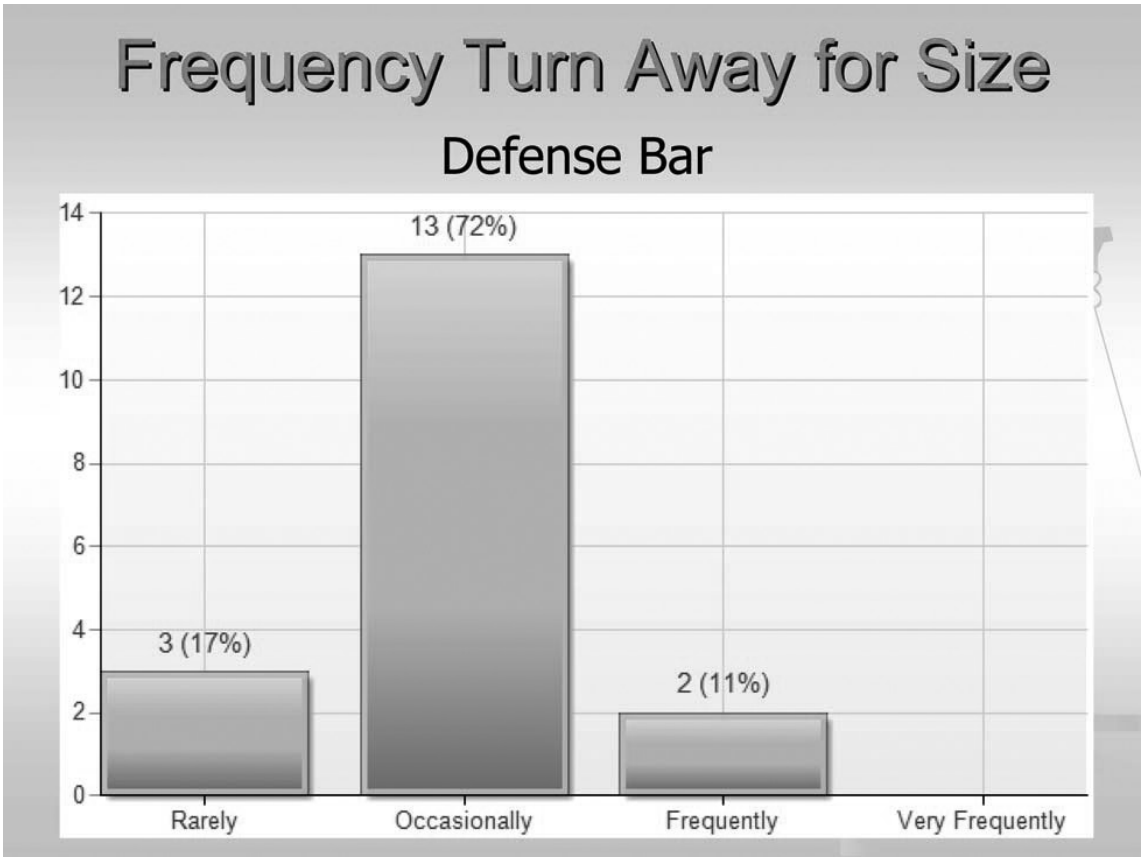
Have you turned away a case because the anticipated verdict value was not large enough and yet was more than the small claims limit ($5000)?

Turned Away a Case




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


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

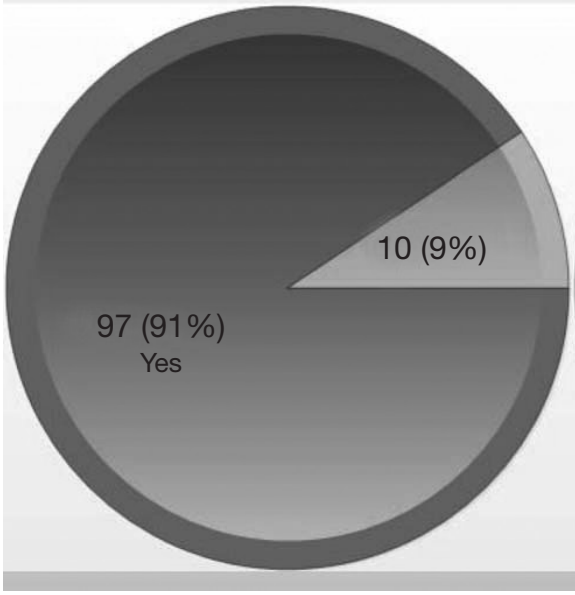

Frequency Turn Away for Size
Defense Bar
14
12
10
8
6
4
2
0
13 (72%)
3 (17%)
2 (11%)
Rarely
Occasionally
Frequently
Very Frequently

Question

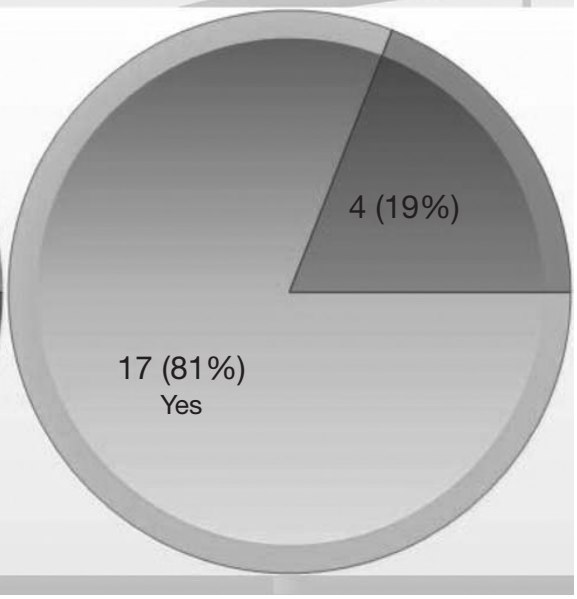
Is the type of case (motor vehicle, premise liability, medical malpractice, etc.) a factor in your determination to turn down a case because of the anticipated verdict value?

Type of Case is Factor

Plaintiff Bar



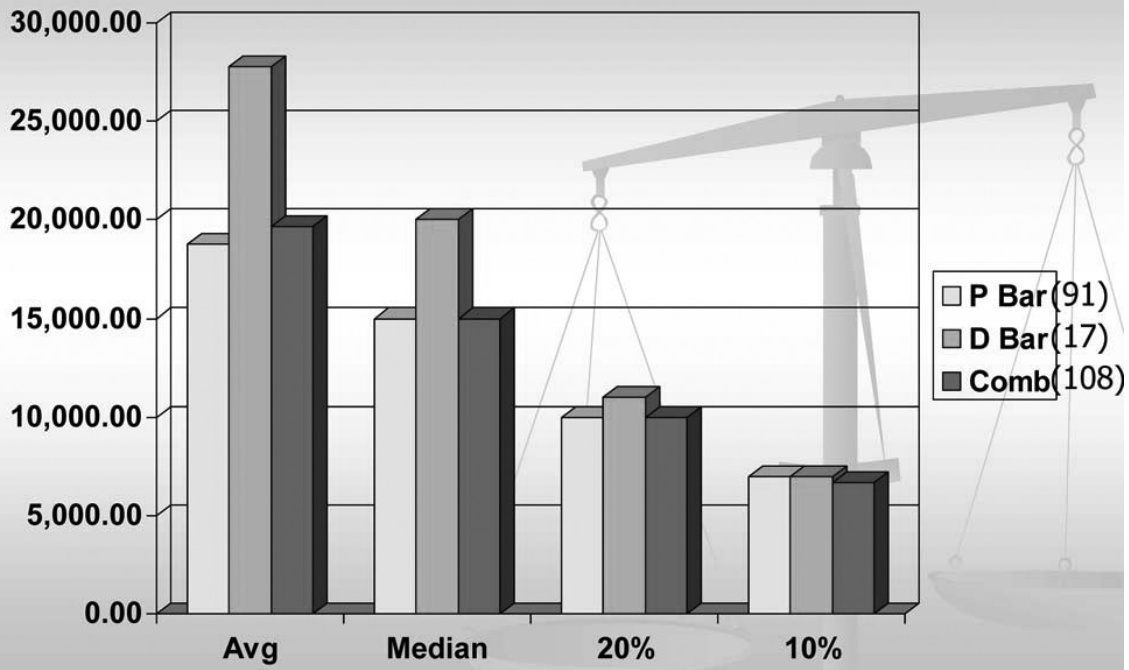
Defense Bar

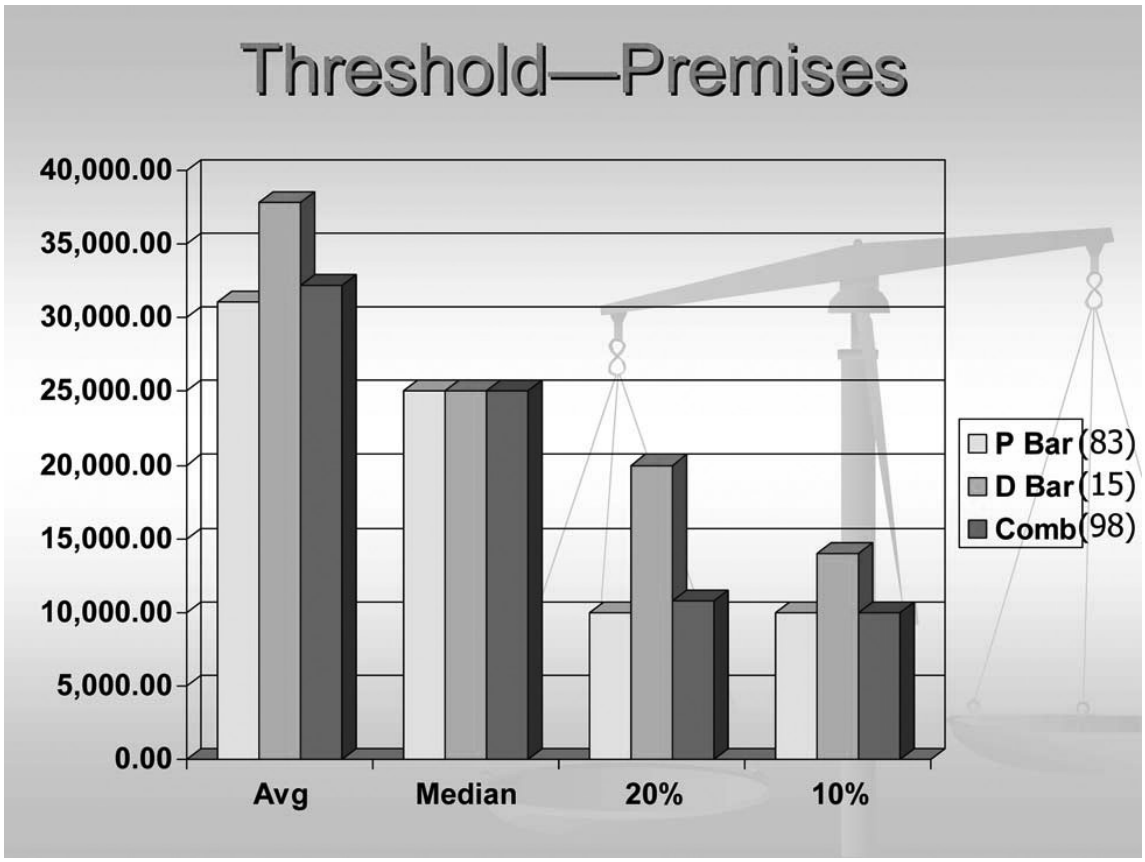


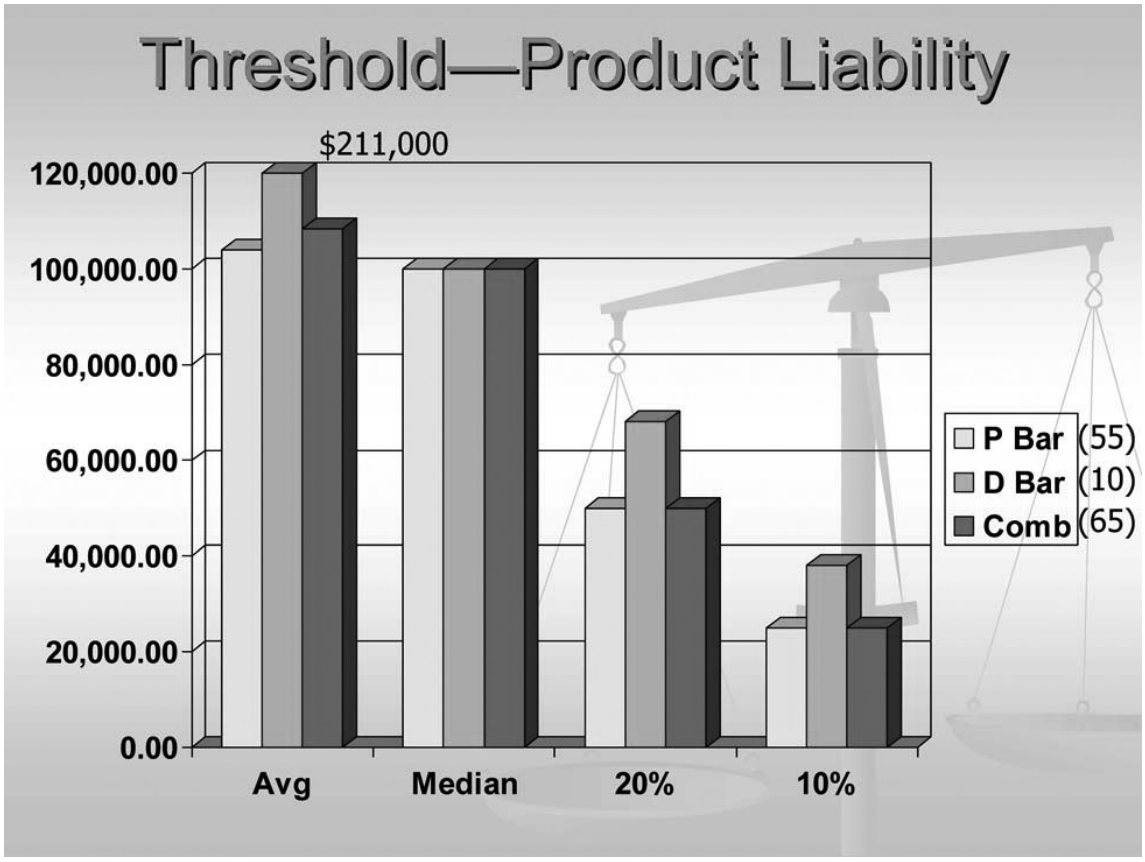
Question

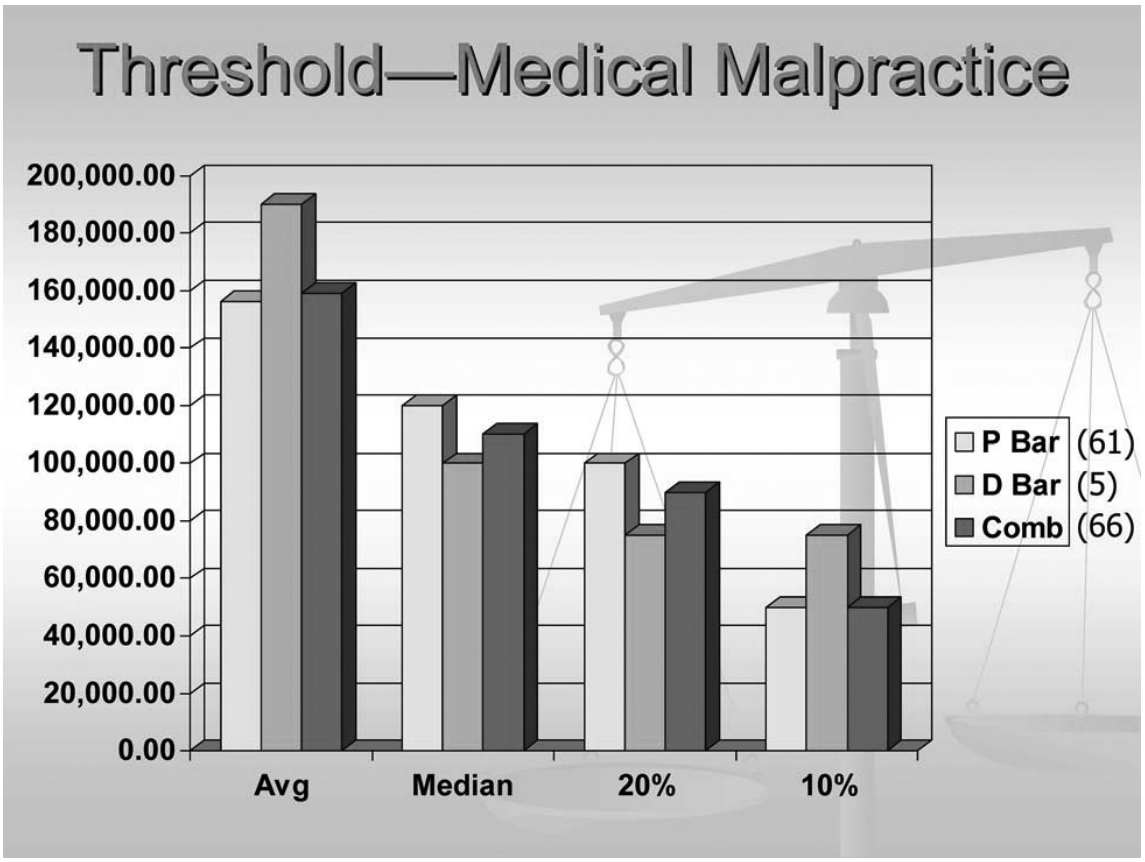
Set forth the approximate anticipated verdict value below which you generally will turn down a case for each of the following types of cases that you handle.

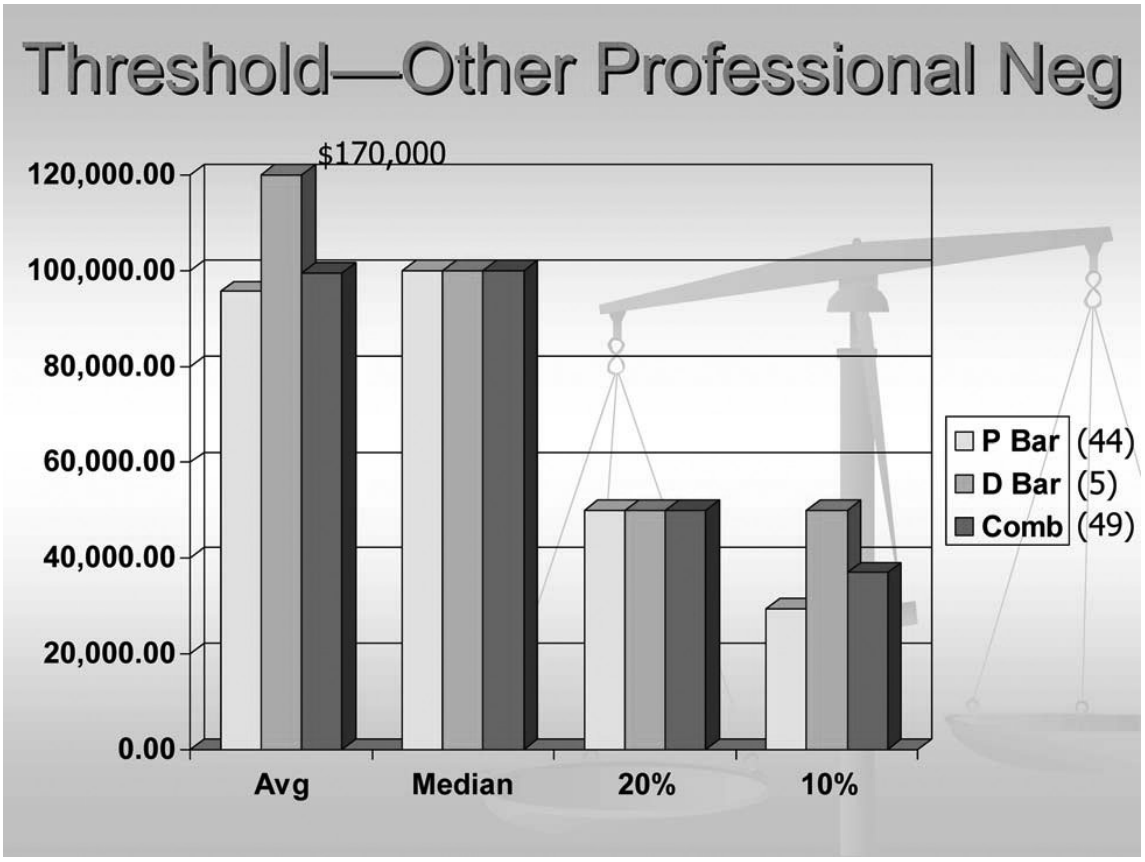
Threshold—Motor Vehicle

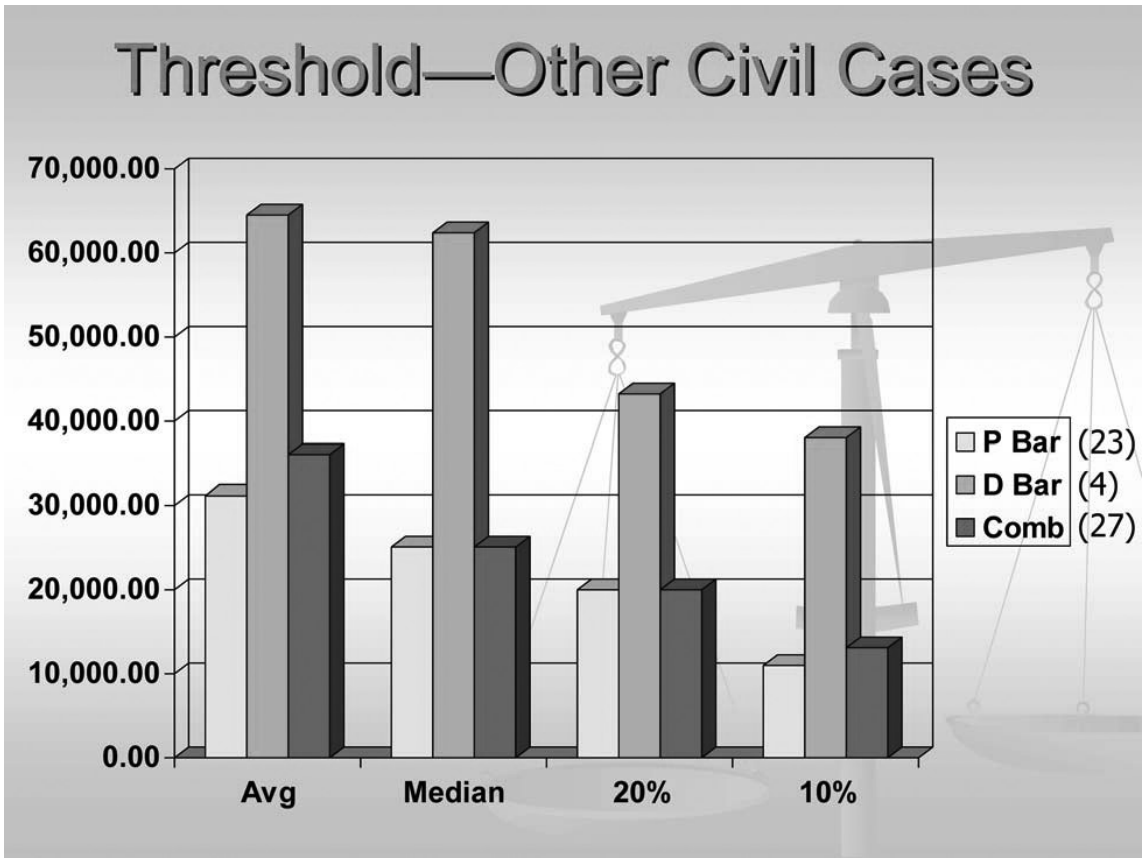


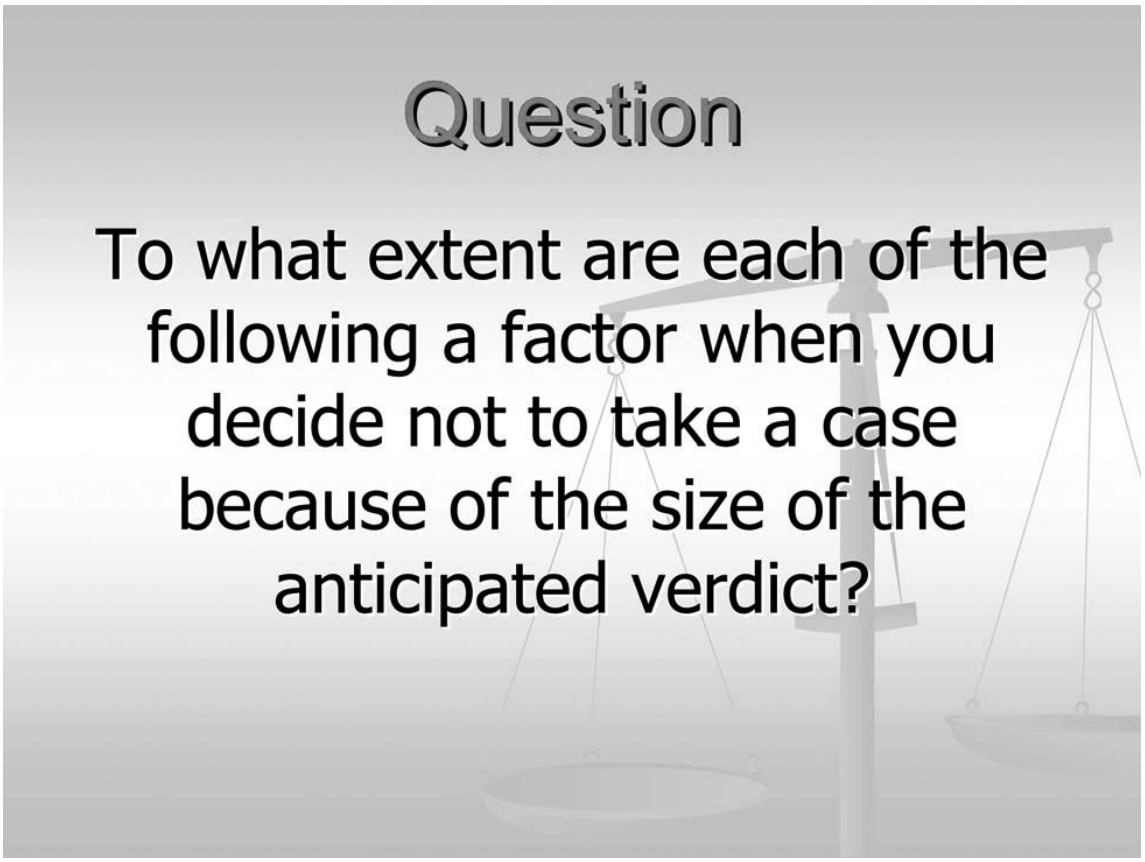

Threshold—Premises
40,000.00
35,000.00
30,000.00
25,000.00
20,000.00
15,000.00
10,000.00
5,000.00
0.00
Avg
Median
20%
10%
P Bar (83)
D Bar (15)
Comb (98)

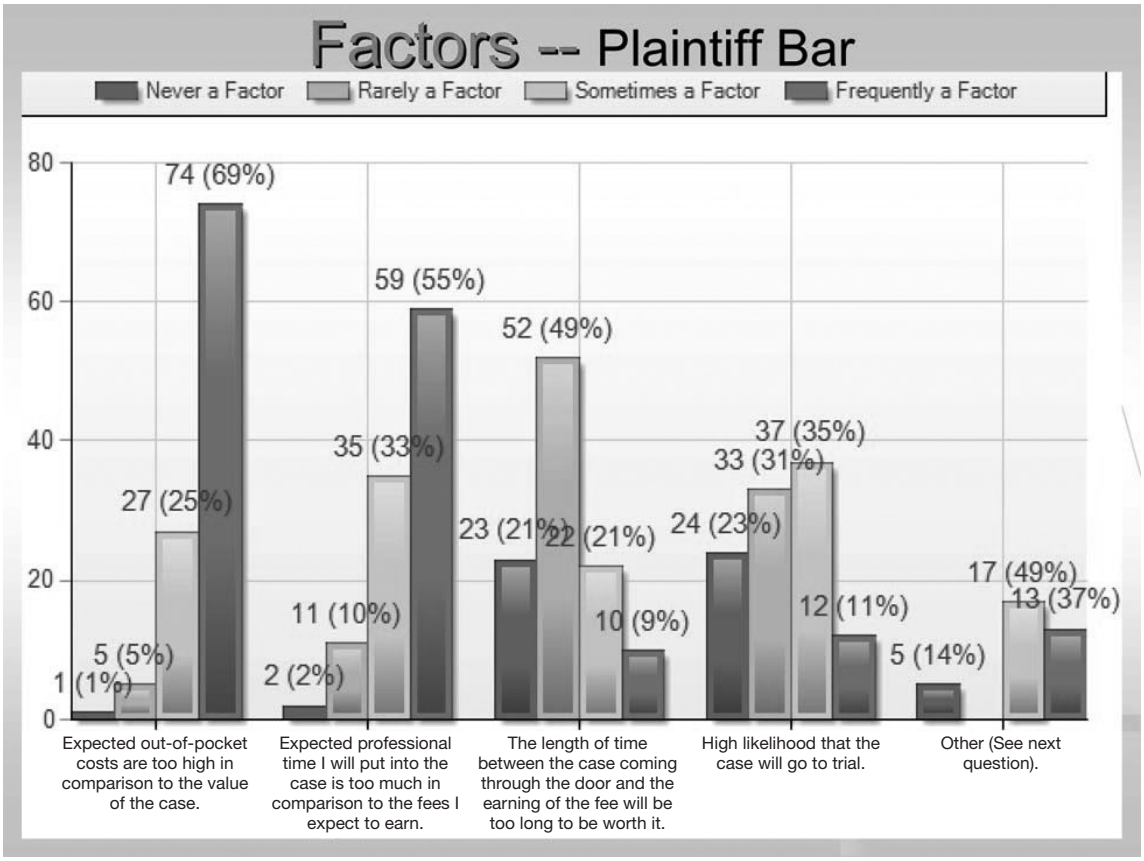

Threshold—Product Liability
$211,000
120,000.00
100,000.00
80,000.00
60,000.00
40,000.00
20,000.00
0.00
Avg
Median
20%
10%
P Bar (55)
D Bar (10)
Comb (65)

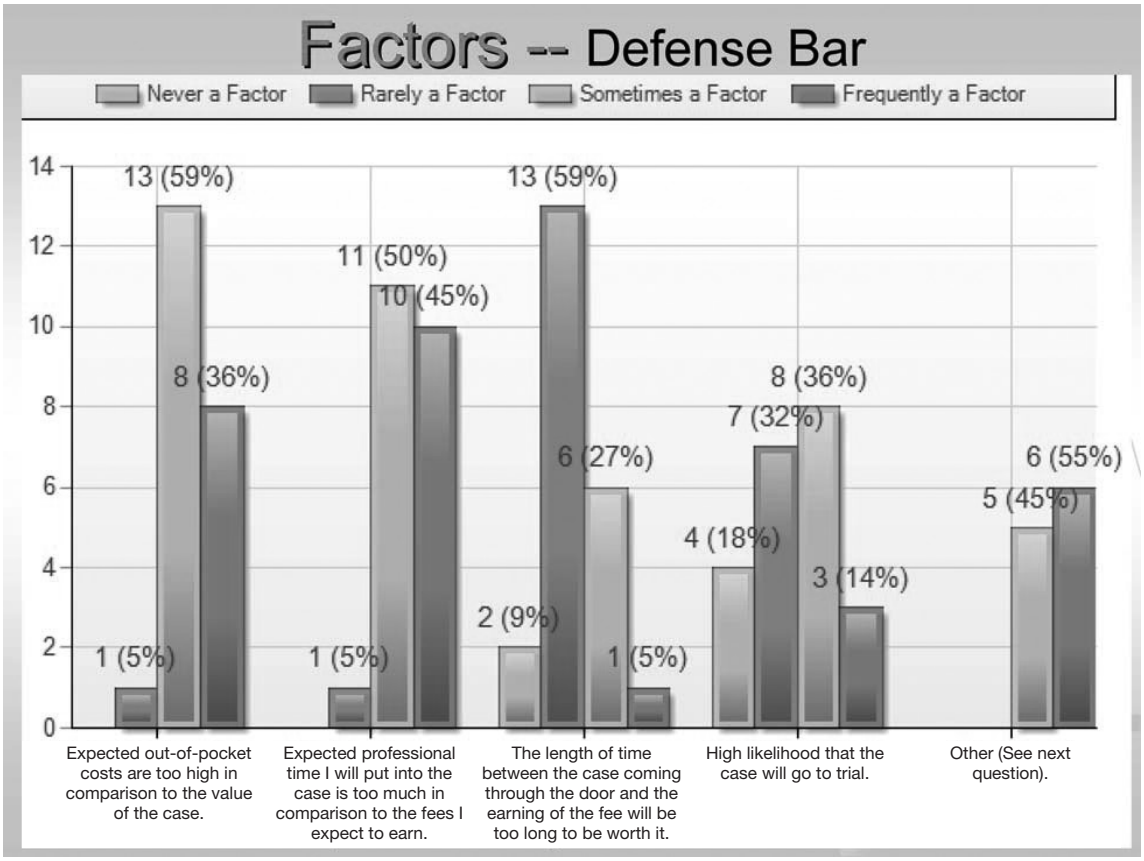

Threshold—Medical Malpractice
200,000.00
180,000.00
160,000.00
140,000.00
120,000.00
100,000.00
80,000.00
60,000.00
40,000.00
20,000.00
0.00
Avg
Median
20%
10%
P Bar (61)
D Bar (5)
Comb (66)


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


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


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


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


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

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D. 2009 ACTL/IAALS REPORT

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

Final Report

ON THE JOINT PROJECT OF

THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY

AND

THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM

March 11, 2009

Revised April 15, 2009

AMERICAN COLLEGE OF TRIAL LAWYERS

The American College of Trial Lawyers, founded in 1950, is composed of the best of the trial ba from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and those whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of 15 years' experience before they can be considered for Fellowship. Membership in the College cannot exceed 1% of the total lawyer population of any state or province. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases; those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice. The College strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession.

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www.actl.com

AMERICAN COLLEGE OF TRIAL LAWYERS
TASK FORCE ON DISCOVERY

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INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM

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

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

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

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

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E. Osborne Ayscue, Jr., Charlotte, North Carolina, a member of the Institute's Board of Advisor and a Fellow of the American College of Trial Lawyers, participated as the Institute's liaison to the project.

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

FINAL REPORT[1]

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

THE PROCESS

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

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

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

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

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

SURVEY RESULTS

Three major themes emerged from the Survey:

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

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

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

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

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

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

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

PROPOSED PRINCIPLES

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

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

RECOMMENDED ACTION

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

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

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

PRINCIPLES

The Purpose of Procedural Rules: Procedural rules should be designed to achieve the just resolution of every civil action. The concept of just resolution should include procedures proportionate to the nature, scope and magnitude of the case that will produce a reasonably prompt, reasonably efficient, reasonably affordable resolution.

1. GENERAL

- **The "one size fits all" approach of the current federal and most state rules is useful in many cases but rulemakers should have the flexibility to create different sets of rules for certain types of cases so that they can be resolved more expeditiously and efficiently.**

When the Federal Rules of Civil Procedure became effective in 1938 they replaced the common law forms of actions at law and the differing sets of procedures for those actions required by the Conformity Act of 1872 (each distric court used the procedures of the state in which it was located) as well as the Equity Rules of 1912, which had governed suits in equity in all of the district courts. The intent was to adopt a single, uniform set of rules that would apply to all cases. Uniform rules made it possible for lawyers to appear in any federal jurisdiction knowing that the same rules would apply in each.

It is time that the rules generally reflect the reality of practice. This Principle supports a single system of civil procedure rules designed for the majority of cases while recognizing that this "one size fits all" approach is not the most effective approach for all types of cases. Over the years, courts have realized this and have informally developed special rules and procedures for certain types of cases. Examples include specific procedures to process patent and medical malpractice cases. Congress also perceived the need for different rules by enacting the Private Securities Litigation Reform Act for securities cases.[3]

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

The concern that the development of different rules will preclude lawyers from practicing across districts is no longer a reality of present-day practice, as advances in technology allow for almost instant access to local rules and procedures.

We are not suggesting a return to the chaotic and overly-complicated pre-1938 litigation environment, nor are we suggesting differential treatment across districts. This Principle is based on a recognition that the rules should reflect the reality that there are case types that may require different treatment and provide for exceptions where appropriate. Specialized rules should be the exception but they should be permitted.

2. PLEADINGS

The Purpose of Pleadings: Pleadings should notify the opposing party and the court of the factual and legal basis of the pleader's claims or defenses in order to define the issues of fact and law to be adjudicated. They should give the opposing party and the court sufficient information to determine whether the claim or defense is sufficient in law to merit continued litigation. Pleadings should set practical limits on the scope of discovery and trial and should give the court sufficient information to control and supervise the progress of the cas to trial or other resolution.

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

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

One of the primary criticisms of notice pleading is that it leads to more discovery than is necessary to identify and prepare for a valid legal dispute. In our survey, 61 percent of the respondents said that notice pleading led to more discovery in order to narrow the claims and 64 percent said that fact pleading can narrow the scope of discovery. Forty-eight percent of our respondents said that frivolous claims and defenses are more prevalent than they were five years ago.

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

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

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

Fact-based pleading must be accompanied by rules for responsive pleading that require a party defending a claim to admit that which should be admitted. Although it is not always possible to understand complex fact situations in detail at an early stage, an answer that generally denies all facts in the complaint simply puts everything at issue and does nothing to identify and eliminate uncontested matters from further litigation. Discovery cannot be framed to address the facts i controversy if the system of pleading fails to identify them.[4]

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

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

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

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

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

3. DISCOVERY

The Purpose of Discovery: Discovery should enable a party to procure in admissible form through the most efficient, nonredundant, cost-effective method reasonably available, evidence directly relevant to the claims and defenses asserted in the pleadings. Discovery should not be an end in itself; it should be merely a means of facilitating a just, efficient and inexpensive resolution of disputes.

- **Proportionality should be the most important principle applied to all discovery.**

Discovery is not the purpose of litigation. It is merely a means to an end. If discovery does not promote the just, speedy and inexpensive determination of actions, then it is not fulfilling its purpose.

Unfortunately, many lawyers believe that they should—or must—take advantage o the full range of discovery options offered by the rules. They believe that zealou advocacy (or fear of malpractice claims) demands no less and the current rules certainly do not dissuade them from that view. Such a view, however, is at best a symptom of the problems caused by the current discovery rules and at worst a cause of the problems we face. In either case, we must eliminate that view. It is crippling our civil justice system.

The parties and counsel should attempt in good faith to agree on proportional discovery at the outset of a case but failing agreement, courts should become involved. There simply is no justification for the parties to spend more on discovery than a case requires. Courts should be encouraged, with the help of the parties, to specify what forms of discovery will be permitted in a particular case. Courts should be encouraged to stage discovery to insure that discovery related to potentially dispositive issues is taken first so that those issues can be isolated and timely adjudicated.

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

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

This Principle is similar to Rule 26(a)(1)(ii) of the Federal Rules of Civil Procedure's requirement for initial disclosures but it is slightly broader. Whereas the current Rule permits description of documents by category and location, we

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

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

To those charged with applying such a Principle, we suggest that the plaintiff could be required to produce such documents very shortly after the complaint is served and that the defendant, who, unlike the plaintiff, may not be presumed to have prepared for the litigation beforehand, be required to produce such documents within a somewhat longer period of time, say 30 days after the answer is served.

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

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

- **Discovery in general and document discovery in particular should be limited to documents or information that would enable a party to prove or disprove a claim or defense or enable a party to impeach a witness.**

The current rules permit discovery of all documents and information relevant to a claim or defense of any party. As a result, it is not uncommon to see discovery requests that begin with the words "all documents relating or referring to . . .". Such requests are far too broad and are subject to abuse. They should not be permitted.

Especially when combined with notice pleading, discovery is very expensive and time consuming and easily permits substantial abuse. We recommend changing the scope of discovery so as to allow only such limited discovery as will enable a party to prove or disprove a claim or defense or to impeach a witness.

Until 1946, document discovery in the federal system was limited to things "which constitute or contain evidence material to any matter involved in the action" and then only upon motion showing good cause. The scope of discovery was changed for depositions in 1946 to the "subject matter of the action". It was not until 1970 that the requirement for a motion showing good cause was eliminated for document discovery. According to the Advisory Committee Notes the "good cause" requirement was eliminated "because it has furnished an

uncertain and erratic protection to the parties from whom production [of documents] is sought . . ." The change also was intended to allow the system to operate extrajudicially but the result was to afford virtually no protection at all to those parties. Ironically, the change occurred just as copying machines were becoming widely used and just before the advent of the personal computer.

The "extrajudicial" system has proved to be flawed. Discovery has become broa to the point of being limitless. This Principle would require courts and parties to focus on what is important to fair, expeditious and inexpensive resolution of civil litigation.

- **There should be early disclosure of prospective trial witnesses.**

Identification of prospective witnesses should come early enough to be useful within the designated time limits. We do not take a position on when this disclosure should be made but it should certainly come before discovery is closed and it should be subject to the continuing duty to update. The current federal rule that requires the identification of persons who have information that may be used at trial (Rule 26(a)(1)(A)(i)) probably comes too early in most cases and often leads to responses that are useless.

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

This is a radical proposal. It is our most significant proposal. It challenges the current practice of broad, open-ended and ever-expanding discovery that was a hallmark of the federal rules as adopted in 1938 and that has become an integral part of our civil justice system. This Principle changes the default. Up to now, the default is that each party may take virtually unlimited discovery unless a cour says otherwise. We would reverse the default.

Our discovery system is broken. Fewer than half of the respondents thought that our discovery system works well and 71 percent thought that discovery is used as a tool to force settlement.

The history of discovery-reform efforts further demonstrates the need for radical change. Serious reform efforts began under the mandate of the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, commonly referred to as the Pound Conference. Acting under the conference's mandate, the American Bar Association's Section of Litigation created a Special Committee for the Study of Discovery Abuse, which published report in 1977 recommending numerous specific changes in the rules to correct the abuse identified by the Pound Conference. The recommendations, which included narrowing the subject-matter-of-the-action scope, resulted in substantial

controversy and extensive consideration by the Advisory Committee on Civil Rules and numerous professional groups. In a long process lasting about a quarte of a century, many of the recommendations were eventually adopted in one form or another.

There is substantial opinion that all of those efforts have accomplished little or nothing. Our survey included a request for expressions of agreement or disagreement with a statement that the cumulative effect of the 1976-2007 changes in the discovery rules significantly reduced discovery abuse. Only about one third of the respondents agreed; 44 percent disagreed and an additional 12 percent strongly disagreed.

Efforts to limit discovery must begin with definition of the type of discovery that is permissible, but it is difficult, if not impossible, to write that definition in a way that will satisfy everyone or that will work in all cases. Relevance surely is required and some rules, such as the International Bar Association Rules of Evidence, also require materiality. Whatever the definition, broad, unlimited discovery is now the default notwithstanding that various bar and other groups have complained for years about the burden, expense and abuse of discovery.

This Principle changes the default while still permitting a search, within reason, for the "smoking gun". Today, the default is that there will be discovery unless it is blocked. *This Principle permits limited discovery proportionately tied to the claims actually at issue, after which there will be no more.* The limited discovery contemplated by this Principle would be in addition to the initial disclosures that the Principles also require. Whereas the initial disclosures would be of documents that may be used to support the producing party's claims or defenses, the limited discovery described in this Principle would be of documents that support the requesting party's claims or defenses. This Principle also applies to electronic discovery.

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

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

(2) limitations on persons from whom discovery can be sought;

(3) limitations on the types of discovery (e.g., only document discovery, not interrogatories);

(4) numerical limitations (e.g., only 20 interrogatories or requests for admissions; only 50 hours of deposition time);

(5) elimination of depositions of experts where their testimony is strictly limited to the contents of their written report;

(6) limitations on the time available for discovery;

(7) cost shifting/co-pay rules;

(8) financial limitations (i.e., limits on the amount of money that can be spent—or that one party can require its opponent to spend—on discovery); and

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

For this Principle to work, the contours of the limited discovery we contemplate must be clearly defined. For certain types of cases, it will be possible to develop standards for the discovery defaults. For example, in employment cases, the standard practice is that personnel files are produced and the immediate decisionmaker is deposed. In patent cases, disclosure of the inventor's notebooks and the prosecution history documents might be the norm. The plaintiff and defense bars for certain types of specialized cases should be able to develop appropriate discovery protocols for those cases.

We emphasize that the primary goal is to change the default from unlimited discovery to limited discovery. No matter how the limitations are defined, there should be limitations. Additional discovery beyond the default limits would be allowed only on a showing of good cause and proportionality.

We hasten to note again that this Principle should be read together with the Principles requiring fact-based pleading and that each party forthwith should produce at the beginning of litigation documents that may be used to support that party's claims or defenses. We expect that the limited discovery contemplated by this Principle and the initial-disclosure Principle would be swift, useful and virtually automatic.

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

- **All facts are not necessarily subject to discovery.**

This is a corollary of the preceding Principle. We now have a system of discovery in which parties are entitled to discover all facts, without limit, unless and until courts call a halt, which they rarely do. As a result, in the words of one respondent, discovery has become an end in itself and we routinely have "discovery about discovery". Recall that our current rules were created in an era before copying machines, computers and e-mail. Advances in technology are overtaking our rules, to the point that the Advisory Committee Notes to Rule 26(b)(2)(B) of the Federal Rules of Civil Procedure state that "It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information."

There is, of course, a balance to be established between the burdens of discovery on the one hand and the search for evidence necessary for a just result on the other hand. This Principle is meant to remind courts and litigants that discovery is to b

limited and that the goal of our civil justice system is the "just, speedy, and inexpensive determination of every action and proceeding".

Discovery planning creates an expectation in the client about the time and the expense required to resolve the case. Additional discovery issues, which may have been avoidable, and their consequent expense may impair the ability of the client to afford or be represented by a lawyer at trial.

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

Discovery should be a mechanism by which a party discovers evidence to suppor or defeat a valid claim or defense.[5] It should not be used for the purpose of enabling a party to see whether or not a valid claim exists. If, as we recommend, the complaint must comply with fact-based pleading standards, courts should have the ability to test the legal sufficiency of that complaint in appropriate cases before the parties are allowed to embark on expensive discovery that may never be used.

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

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

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

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

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

material that may prove relevant during a civil action, including electronic information. That is very difficult, if not impossible, to accomplish in an environment in which litigants maintain enormous stores of electronic records. Electronic recordkeeping has led to the retention of information on a scale not contemplated by the framers of the procedural rules, a circumstance complicated by legitimate business practices that involve the periodic erasure of many electronic records.

Often the cost of preservation in response to a "litigation hold" can be enormous, especially for a large business entity.

Under Federal Rule of Civil Procedure 16(b), which was amended in 2006 to include planning for the discovery of electronic information, the initial pretrial conference, if held at all, does not occur until months after service of the complaint. By that time, the obligation to preserve all relevant documents has already been triggered and the cost of preserving electronic documents has already been incurred. This is a problem.

It is desirable for counsel to agree at the outset about electronic-information preservation and many local rules require such cooperation. Absent agreement o counsel, this Principle requires prompt judicial involvement in the identification and preservation of electronic evidence. We call on courts to hold an initial conference promptly after a complaint is served, for the purpose of making an order with respect to the preservation of electronic information. In this regard, w refer to Principle 5 of the Sedona United States *Principles for Electronic Document Production*.[6]

We are aware of cases in which, shortly after a complaint is filed, a motion is made for the preservation of certain electronic documents that otherwise would b destroyed in the ordinary course. See, e.g., *Keir v. Unumprovident Corp.*, No. 02 Civ. 8781, 2003 WL 21997747 (S.D.N.Y. Aug. 22, 2003) (counsel told court tha simply preserving all backup tapes from 881 corporate servers "would cost millions of dollars" and court fashioned a very limited preservation order after requiring counsel to confer).

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

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

be a safe harbor for routine, benign destruction, so long as it is not done deliberately in order to destroy evidence.

The issue here is not the scope of electronic discovery; rather the issue is what must be preserved before the scope of permissible electronic discovery can be determined. It is the preservation of electronic materials at the outset of litigation that engenders expensive retention efforts, made largely to avoid collateral litigation about evidence spoliation. Litigating electronic evidence spoliation issues that bloom after discovery is well underway can impose enormous expense on the parties and can be used tactically to derail a case, drawing the court's attention away from the merits of the underlying dispute. Current rules do not adequately address this issue.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

At a minimum, courts making decisions about electronic discovery should fully understand the technical aspects of the issues they must decide, including the feasibility and expense involved in complying with orders relating to such discovery. Accordingly, we recommend workshops for judges to provide them with technical knowledge about the issues involved in electronic discovery. We also recommend that trial counsel become educated in such matters. An informed bench and bar will be better prepared to understand and make informed decisions about the relative difficulties and expense involved in electronic discovery. Such education is essential because without it, counsel increasingly will be constrained to rely on third-party providers of electronic-discovery services who include judgments about responsiveness and privilege among the services they provide, a trend we view with alarm.

- **Requests for admissions and contention interrogatories should be limited by the Principle of proportionality. They should be used sparingly, if at all.**

Requests for admission can be abused, particularly when they are used in large numbers to elicit admissions about immaterial or trivial matters. Used properly, they can focus the scope of discovery by eliminating matters that are not at issue, presumably shortening depositions, eliminating substantial searches for documentary proof and shortening the trial. We recommend meaningful limits on the use of this discovery tool to ensure that it is used for its intended purposes. For example, it could be limited to authentication of documents or numerical and statistical calculations.

Even greater abuse seems to arise with the use of contention interrogatories. They often seek to compel an adversary to summarize its legal theories and then itemize evidence in support of those theories. Just as frequently, they draw lengthy objections that they are premature, seek the revelation of work-product and invite attorney-crafted answers so opaque that they do little to advance the efficient resolution of the litigation. This device should be used rarely and narrowly.

4. EXPERTS

- **Experts should be required to furnish a written report setting forth their opinions, and the reasons for them, and their trial testimony should be strictly limited to the contents of their report. Except in extraordinary cases, only one expert witness per party should be permitted for any given issue.**

The federal rules and many state rules require written expert reports and we urge that the requirement should be followed by all courts. The requirement of an expert report from an expert should obviate the need for a deposition in most cases. In fact, some Task Force members believe that it should obviate altogether the need for a deposition of experts.

We also endorse the proposed amendment to Federal Rule of Civil Procedure 26(b)(4)(B) and (C) and recommend comparable state rules that would prohibit discovery of draft expert reports and some communications between experts and counsel.

5. DISPOSITIVE MOTIONS

The Purpose of Dispositive Motions: Dispositive motions before trial identify an dispose of any issues that can be disposed of without unreasonable delay or expense before, or i lieu of, trial.

Although we do not recommend any Principle relating to summary judgment motions, we report that there was a disparity of views in the Task Force, just as there was a disparity of views among the respondents. For example, nearly 64 percent of respondents who represent primarily plaintiffs said that summary judgment motions were used as a tactical tool rather than in a good-faith effort to narrow issues. By contrast, nearly 69 percent of respondents who represent primarily defendants said that judges decline to grant summary judgment motions even when they are warranted. This subject deserves further careful consideratio and discussion.

6. JUDICIAL MANAGEMENT

- **A single judicial officer should be assigned to each case at the beginning of a lawsuit and should stay with the case through its termination.**

The survey respondents agreed overwhelmingly (89 percent) that a single judicial officer should oversee the case from beginning to end. Respondents also agreed overwhelmingly (74 percent) that the judge who is going to try the case should handle all pretrial matters.

In many federal districts, the normal practice is to assign each new case to a singl judge and that judge is expected to stay with the case from the beginning to the end. Assignment to a single judge is the most efficient method of judicial management. We believe that the principal role of the judge should be to try the case. Judges who are going to try cases are in the best position to make pretrial rulings on evidentiary and discovery matters and dispositive motions.

We are aware that in some state courts, judges are rotated from one docket to another and that in some federal districts, magistrate judges handle discovery matters. We are concerned that such practices deprive the litigants of the consistency and clarity that assignment to a single docket, without rotation, bring to the system of justice.

We are also cognizant of the fact that in some courts, the scarcity of judicial resources will not allow for the assignment of every case to a single judge, but in those cases, we recommend an increase in judicial resources so that this Principle can be consistently followed.

- **Initial pretrial conferences should be held as soon as possible in all cases and subsequent status conferences should be held when necessary, either on the request of a party or on the court's own initiative.**

In most systems, initial pretrial conferences are permissible but not mandatory. This Principle would require such conferences in all cases. Sixty-seven percent o our respondents thought that such conferences inform the court about the issues i the case and 53 percent thought that such conferences identified and, more important, narrowed the issues. More than 20 percent of the respondents reporte that such conferences are not regularly held.

Pretrial conferences are a useful vehicle for involving the court at the earliest possible time in the management of the case. They are useful for keeping the judge informed about the progress of the case and allowing the court to guide the work of counsel. We are aware that there are those who believe that judges should not become involved in litigation too early and should allow the parties to control the litigation without judicial supervision. However, we believe that, especially in complex cases, the better procedure is to involve judges early and often.

Early judicial involvement is important because not all cases are the same and because different types of cases require different case management. Some, such as complex cases, require more; some, such as relatively routine or smaller cases, require less. The goal is the just, cost-effective and expeditious resolution of disputes.

Seventy-four percent of the Fellows in the survey said that early intervention by judges helped to narrow the issues and 66 percent said that it helped to limit discovery. Seventy-one percent said that early and frequent involvement of a judicial officer leads to results that are more satisfactory to the client.

We believe that pretrial conferences should be held early and that in those conferences courts should identify pleading and discovery issues, specify when they should be addressed and resolved, describe the types of limited discovery that will be permitted and set a timetable for completion. We also believe the conferences are important for a speedy and efficient resolution of the litigation because they allow the court to set directions and guidelines early in the case.

- **At the first pretrial conference, the court should set a realistic date fo completion of discovery and a realistic trial date and should stick to them, absent extraordinary circumstances.**

There has been a good deal of debate about the benefits of the early setting of a trial date.

In 1990, the Federal Judicial Center asked the Advisory Committee on Civil Rules to consider amending Rule 16 to require the court to set a trial date at the Rule 16 conference. The Advisory Committee chose not to do so "because the docket conditions in some districts would make setting a realistic trial date early in the case unrealistic". R. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 Tulane J. of Int'l & Comp Law 153, 179 (1999).

A majority of our respondents (60 percent) thought that the trial date should be se early in the case.

There can be significant benefits to setting a trial date early in the case. For example, the sooner a case gets to trial, the more the claims tend to narrow, the more the evidence is streamlined and the more efficient the process becomes. Without a firm trial date, cases tend to drift and discovery takes on a life of its own. In addition, we believe that setting realistic but firm trial dates facilitates th settlement of cases that should be settled, so long as the court is vigilant to ensure that the parties are behaving responsibly. In addition, it will facilitate the trials of cases that should be tried.

In Delaware Chancery Court, for example, where complex, expedited cases such as those relating to hostile takeovers are heard frequently, the parties know that in such cases they will have only a limited time within which to take discovery and get ready for trial. The parties become more efficient and the process can be mor focused.

A new IAALS study provides strong empirical support for early setting of trial dates. Based on an examination of nearly 8,000 closed federal civil cases, the IAALS study found that there is a strong positive statistical correlation between the overall time to resolution of the case and the elapsed time between the filing of the case and the court's setting of a trial date. *See* Institute for the Advancement of the American Legal System, *Civil Case Processing in the Federal Courts: A Twenty-First Century Analysis* (forthcoming January 2009).

We also believe that the trial date should not be adjourned except under extraordinary circumstances. The IAALS study found that trial dates are routinely adjourned. Over 92 percent of motions to adjourn the trial date were granted and less than 45 percent of cases that actually went to trial did so on the trial date that was first set. The parties have a right to get their case to trial expeditiously and if they know that the trial date will be adjourned, there is no point in setting a trial date in the first place. It is noteworthy that the IAALS study also found that in courts where trial dates are expected to be held firm, the parties seek trial adjournments at a much lower rate and only under truly extraordinary circumstances.

- **Parties should be required to confer early and often about discovery and, especially in complex cases, to make periodic reports of those conferences to the court.**

Discovery conferences work well and should be continued. Over half (59 percent) of our respondents thought that conferences are helpful in managing the discovery process; just over 40 percent of the respondents said that discovery conferences ─ although they are mandatory in most cases ─ frequently do not occur.

Cooperation of counsel is critical to the speedy, effective and inexpensive resolution of disputes in our civil justice system. Ninety-seven percent of our respondents said that when all counsel are collaborative and professional, the cas costs the client less. Unfortunately, cooperation does not often occur. In fact, it i argued that cooperation is inconsistent with the adversary system. Professor Stephen Landsman has written that the "sharp clash of proofs presented by adversaries in a highly structured forensic setting" is key to the resolution of disputes in a manner that is acceptable to both the parties and society. S. Landsman, ABA Section of Litigation, *Readings on Adversarial Justice: The American Approach to Adjudication*, 2 (1988).

However, Chief Magistrate Judge Paul W. Grimm of the United States District Court for the District of Maryland, referring specifically to Professor Landsman's comment, responded that

> However central the adversary system is to our way of formal dispute resolution, there is nothing inherent in it that precludes cooperation between the parties and their attorneys during the litigation process to achieve orderly and cost effective discovery of the competing facts on which the system depends. *Mancia v. Mayflower Textile Servs. Co. et al.*, Civ. No. 1:08-CV-00273-CCB, Oct. 15, 2008, p. 20.

Involvement of the court is key to effective cooperation and to a productive discovery conference. Even where the parties agree, the court should review the results of the agreement carefully in order to ensure that the results are conducive to a just, speedy and inexpensive resolution of the dispute. Unlike earlier studies and literature, the survey revealed that experienced trial lawyers increasingly see the role of the judge as a "monitor" whose involvement can critically impact the cost and time to resolution of disputes.

- **Courts are encouraged to raise the possibility of mediation or other form of alternative dispute resolution early in appropriate cases. Courts should have the power to order it in appropriate cases at the appropriate time, unless all parties agree otherwise. Mediation of issues (as opposed to the entire case) may also be appropriate.**

This is a controversial principle; however, it recognizes reality.

Over half (55 percent) of the respondents said that alternative dispute resolution was a positive development. A surprisingly high 82 percent said that court-ordered alternative dispute resolution was a positive development and 72 percent said that it led to settlements without trial.

As far as expense was concerned, 52 percent said that alternative dispute resolution decreased the expense for their clients and 66 percent said that it shortened the time to disposition.

Three conclusions could be drawn. First, this could be a reflection of the extent t which alternative dispute resolution has become efficient and effective. Second, it could be a reflection of how slow and inefficient the normal judicial process ha become. Third, it could be a reflection of the fact that ADR may afford the parties a mechanism for avoiding costly discovery.

Whatever the reason, we acknowledge the results and therefore recommend that courts be encouraged to raise mediation as a possibility and that they order it in appropriate cases. We note, however, that if these Principles are effective in reducing the cost of discovery, parties may opt more often for judicial trials, as opposed to ADR. That is, at least, our hope.

We also note that under the Alternative Dispute Resolution Act of 1998 (28 USC § 651, et seq.), federal courts have the power to require parties to "consider" alternative dispute resolution or mediation and are required to make at least one such process available to litigants. We are aware that many federal district courts require alternative dispute resolution and that some state courts require mediation or other alternative dispute resolution in all cases. Some courts will not allow discovery or set a trial date until after the parties mediate. While we believe that mediation or some other form of alternative dispute resolution is desirable in many cases, we believe that the parties should have the ability to say "no" in appropriate cases where they all agree. This is already the practice in many courts.

- **The parties and the courts should give greater priority to the resolution of motions that will advance the case more quickly to trial or resolution.**

Judicial delay in deciding motions is a cause ─ perhaps a major cause ─ of delay in our civil justice system.[7] We recognize that our judges often are overworked and without adequate resources. Judicial delay in deciding certain motions that would materially advance the litigation has a materially adverse impact on the

[7] One of our respondents described a case in which it took the court two years to decide a summary judgment motion. Such a delay is unacceptable and greatly increases the cost of litigation.

ultimate resolution of litigation.[8] In this respect, we endorse Section 11.34 of the Manual For Complex Litigation (Fourth) 2004:

> It is important to decide [summary judgment] motions promptly; deferring rulings on summary judgment motions until the final pretrial conference defeats their purpose of expediting the disposition of issues.

It would be appropriate to discuss such motions at a Rule 16 conference so that the court could be alerted to the importance of a prompt resolution of such motions, since delay in deciding such motions almost certainly adds to the expense of litigation.

- **All issues to be tried should be identified early.**

There is often a difference between issues set forth in pleadings and issues to be tried. Some courts require early identification of the issues to be tried and in international arbitrations, terms of reference at the beginning of a case often require that all issues to be arbitrated be specifically identified. Under the Manua For Complex Litigation (Fourth), Section 11.3, "The process of identifying, defining, and resolving issues begins at the initial pretrial conference." We applaud such practices and this Principle would require early identification of the issues in all cases. Such early identification will materially advance the case and limit discovery to what is truly important. It should be carefully done and should not be merely a recapitulation of the pleadings. We leave to others the descriptio of the form that such statement of issues should take.[9]

- **These Principles call for greater involvement by judges. Where judicial resources are in short supply, they should be increased.**

This Principle recognizes the position long favored by the College. Judicial resources are limited and need to be increased.

- **Trial judges should be familiar with trial practice by experience, judicial education or training and more training programs should be made available to judges.**

[8] At present, the Civil Justice Reform Act and current Judicial Conference policy require each federal district court to report on (1) motions and certain other matters pending for over six months and (2) cases pending for over three years, broken out by judicial officer. These reports are available for a fee only on the PACER Service Center web site. We strongly encourage that CJRA reports be made available at no cost on the United States Courts offici web site (www.uscourts.gov), as well as on each district court's individual web site within a reasonable time period after the reports are completed. We also encourage state court systems to provide similar information if they are no already doing so.

[9] Section 11.33 of the Manual For Complex Litigation (Fourth) 2004, identifies six possible actions that can help identify, define and resolve issues.

Knowledge of the trial process is critical for judges responsible for conducting th trial process. We urge that consideration of trial experience should be an important part of the judicial selection process. Judges who have trial or at least significant case management experience are better able to manage their dockets and to move cases efficiently and expeditiously. Nearly 85 percent of our respondents said that only individuals with substantial trial experience should be chosen as judges and 57 percent thought that judges did not like taking cases to trial. Accordingly, we believe that more training programs should be made available so that judges will be able more efficiently to manage cases so that they can be tried effectively and expeditiously.

NEXT STEPS

There is much more work to be done. We hope that this joint report will inspire substantive discussion among practicing lawyers, the judiciary, the academy, legislators and, most importantly, clients and the public. In the words of Task Force member The Honourable Mr. Justice Colin L. Campbell of the Superior Court of Justice, Toronto, Ontario:

> Discovery reform . . . will not be complete until there is a cultural change in the legal profession and its clients. The system simply cannot continue on the basis that every piece of information is relevant in every case, or that the 'one size fits all' approach of Rules can accommodate the needs of the variety of cases that come before the Courts.

With financial support provided by IAALS, the members of the Task Force and the IAALS staf have applied their experience to a year-and-a-half-long process in which they collectively invested hundreds of hours in analyzing the apparent problems, studying the history of previous reform attempts and in debating and developing a set of Proposed Principles. The participants believe that these Principles may one day form the bedrock of a reinvigorated civil justice process; a process that may spawn a renewal of public faith in America's system of justice.

These men and women whose collective knowledge of these issues may be critical to future reform efforts and the organizations they represent, are committed to participating in discussion and activities engendered by the release of this Report.

Our civil justice system is critical to our way of life. In good times or bad, we must all believe that the courts are available to us to enforce rights and resolve disputes – and to do so in a fair and cost-effective way. At present, the system is captive to cost, delay, and in many instances, gamesmanship. As a profession, we must apply our experience, our differing perspectives and our commitment to justice in order to devise meaningful reforms that will reinstate a trustworth civil justice system in America.

APPENDIX A

IAALS REVIEW OF PROCEDURAL REFORMS IN FOREIGN JURISDICTIONS AND IN SOME STATES IN THE UNITED STATES

The Principles set forth in this report were not developed in a vacuum. Many are part of routine civil practice and procedure in a wide variety of civil law and common law jurisdictions around the world. While some have recently been developed in foreign jurisdictions in response to concerns about cost and delay, others have had a long and successful history of minimizing thos concerns. The Principles have been developed in recognition of these practices and procedures. We summarize below the application of both the Principles and the march toward comprehensiv reform in several foreign and state jurisdictions.

The Nature of Reform in Foreign Jurisdictions

There is a growing trend in foreign jurisdictions toward fact pleading, limited discovery and active case management. Where recent reforms have been adopted, they have been systemic an sweeping—not nibbles around the edges. Some of the jurisdictions have measured their reforms and our Principles build on that information as well.

In 1997, England and Wales undertook a complete overhaul of the civil justice system, resulting in a rewrite of the rules of civil procedure. The new rules instituted a number of pre-action protocols, a more detailed pleading requirement, defined limits on disclosure and discovery, strict limits on expert witnesses and a track system in which cases are treated with different procedures depending on complexity and amount in controversy. To ensure the success of the new rules in practice, the English reforms granted courts broad case management powers and encouraged judges to play an active role in the progression of a case.

In 2007, a review of the Scottish civil justice system began with a commitment to considering widespread reform proposals, however radical. In the area of judicial management, Scotland ha already been experimenting with the use of a single judicial officer to handle a case from filing to disposition—a practice that users have hailed as increasing consistency and facilitating agreement.

More recently, Spain has made significant reforms to its code of civil procedure that established greater judicial control and limits on the parties' use and presentation of evidence. Germany is presently engaged in a second round of procedural reforms, also employing increased case management powers and a focus on simplifying procedure.

Canada, too, is taking a new look at its civil justice system. Drafts of revised civil procedure rules are currently under consideration in the Canadian provinces of Alberta, British Columbia and Ontario. Alberta's standard of relevance in the context of discovery has already been narrowed and the draft rules in Ontario and British Columbia would do the same. A comprehensive reform proposal was recently released in New Zealand, part of which also proposes to narrow the standard of relevance.

Practices and Procedures in Foreign Jurisdictions

Specialized Rules. In recognition of the fact that trans-substantive rules are not necessarily the most effective approach, many foreign jurisdictions have developed specialized rules and procedures to deal with specific types of cases. Special procedures and case management practices for commercial cases have been developed in England and Wales, Scotland, New Zealand, and Toronto, Canada. In Scotland, practices and procedures have also been developed in the area of personal injury litigation.

Fact-Based Pleading. Outside of the United States, fact pleading is largely the standard practice Foreign jurisdictions differ in the level of detail required by the pleadings; however, even in common law countries like Canada, Australia and the United Kingdom, pleadings must at the very least give a summary of the material facts. Many civil law countries have more stringent pleading requirements. For example, Spain requires a complete narrative of the claim's factual background and German complaints must contain a definite statement of the factual subject matter of the claim. French and Dutch pleadings must contain all the relevant facts and Dutch rules further require that plaintiffs articulate anticipated defenses. The Transnational Principles and Rules of Civil Procedure—drafted in part by the American Law Institute—specifically reject notice pleading, opting instead for a fact-based pleading standard that applies to the claim, denials, affirmative defenses, counterclaims and third-party claims.

Initial Disclosures. In most foreign countries, the initial disclosure requirements are closely related to the pleading standard. The jurisdictions with the strictest pleading standards also usually require parties to supplement the pleadings with documents or evidence that propose an appropriate means of proof for the factual assertions made in the pleadings. This is the practice in The Netherlands, Spain, Germany, France and Scotland and under the Transnational Principles. In the jurisdictions with more lax fact-pleading standards—generally common law countries—parties are usually not required to supplement the pleadings with documentary evidence; however, initial disclosures must be made at a specified time shortly after the close of the pleadings.

Discovery. Unbridled discovery is almost solely a hallmark of the United States civil justice system. Many civil law countries do not have discovery at all as we understand it in the United States, and even foreign common law jurisdictions have defined limits on the practice and tools of discovery. In Australia, New Zealand, England, Wales and Scotland and under the Transnational Principles, depositions are allowed only in limited circumstances or with court approval. Scotland similarly limits interrogatories to specific circumstances, as does Australia with the further restriction that interrogatories must relate to a matter in question. Recent rule changes in Nova Scotia place presumptive limits on depositions where the amount in controvers is under $100,000 and a draft proposal in Ontario would allow the court to develop a discovery plan in accordance with the principle of proportionality.

The scope of permissible discovery in many jurisdictions is directly tied to the issues set forth in the pleadings. "Relevant documents" in England and Wales are those that obviously support or undermine a case; specifically excluded are documents that may be relevant as background information or serve as "train of enquiry". Courts in New South Wales, Australia, and the Transnational Principles similarly reject the "train of enquiry" approach. Courts in Queensland

and South Australia employ a "directly relevant" standard under which the fact proved by the document must establish the existence or nonexistence of facts alleged in the pleading. In Queensland, this approach has been recognized as having substantially reduced the expense of discovery.

Related Civil Justice Reforms in the United States. Some state jurisdictions in the United States have also moved, or are moving, in a similar direction. State rules of civil procedure in Oregon, Texas and Arizona—the last of which traditionally modeled state rules on their federal counterparts—show that practices like fact pleading, early initial disclosures and presumptive limits on discovery are not inconsistent with the style of civil justice in the United States. At the federal level, the Private Securities Litigation Reform Act and recent Supreme Court decisions also illustrate the perceived shortcomings of notice pleading in today's complex litigation environment.

Specialized rules and procedures have also been developed in United States courts for certain case types, including commercial, patent and medical malpractice cases. Some state jurisdictions have simplified procedures for claims under a certain amount in controversy or in which the parties elect a more streamlined process—e.g., Rule 16.1 in Colorado.

APPENDIX B

The Sedona Principles for Electronic Document Production
Second Edition

1. Electronically stored information is potentially discoverable under Fed. R. Civ. P. 34 or its state equivalents. Organizations must properly preserve electronically stored information that can reasonably be anticipated to be relevant to litigation.

2. When balancing the cost, burden, and need for electronically stored information, courts and parties should apply the proportionality standard embodied in Fed. R. Civ. P. 26(b)(2)(C) and its state equivalents, which require consideration of the technological feasibility and realistic costs of preserving, retrieving, reviewing, and producing electronically stored information, as well as the nature of the litigation and the amount in controversy.

3. Parties should confer early in discovery regarding the preservation and production of electronically stored information when these matters are at issue in the litigation and seek to agree on the scope of each party's rights and responsibilities.

4. Discovery requests for electronically stored information should be as clear as possible, while responses and objections to discovery should disclose the scope and limits of the production.

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

6. Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.

7. The requesting party has the burden on a motion to compel to show that the responding party's steps to preserve and produce relevant electronically stored information were inadequate.

8. The primary source of electronically stored information for production should be active data and information. Resort to disaster recovery backup tapes and other sources of electronically stored information that are not reasonably accessible requires the requesting party to demonstrate need and relevance that outweigh the costs and burdens of retrieving and processing the electronically stored information from such sources, including the disruption of business and information management activities.

9. Absent a showing of special need and relevance, a responding party should not be required to preserve, review, or produce deleted, shadowed, fragmented, or residual electronically stored information.

10. A responding party should follow reasonable procedures to protect privileges and objections in connection with the production of electronically stored information.

11. A responding party may satisfy its good faith obligation to preserve and produce relevant electronically stored information by using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify data reasonably likely to contain relevant information.

12. Absent party agreement or court order specifying the form or forms of production, production should be made in the form or forms in which the information is ordinarily maintained or in a reasonably usable form, taking into account the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party where appropriate or necessary in light of the nature of the information and the needs of the case.

13. Absent a specific objection, party agreement or court order, the reasonable costs of retrieving and reviewing electronically stored information should be borne by the responding party, unless the information sought is not reasonably available to the responding party in the ordinary course of business. If the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the costs of retrieving and reviewing such electronic information may be shared by or shifted to the requesting party.

14. Sanctions, including spoliation findings, should be considered by the court only if it finds that there was a clear duty to preserve, a culpable failure to preserve and produce relevant electronically stored information, and a reasonable probability that the loss of the evidence has materially prejudiced the adverse party.

The Sedona Canada Principles

Addressing Electronic Discovery

Principle 1: Electronically stored information is discoverable.

Principle 2: In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account (i) the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at stake; (ii) the relevance of the available electronically stored information; (iii) its importance to the court's adjudication in a given case; and (iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information.

Principle 3: As soon as litigation is reasonably anticipated, parties must consider their obligation to take reasonable and good faith steps to preserve potentially relevant electronically stored information.

Principle 4: Counsel and parties should meet and confer as soon as practicable, and on an ongoing basis, regarding the identification, preservation, collection, review and production of electronically stored information.

Principle 5: The parties should be prepared to produce relevant electronically stored information that is reasonably accessible in terms of cost and burden.

Principle 6: A party should not be required, absent agreement or a court order based on demonstrated need and relevance, to search for or collect deleted or residual electronically stored information.

Principle 7: A party may satisfy its obligation to preserve, collect, review and produce electronically stored information in good faith by using electronic tools and processes such as data sampling, searching or by using selection criteria to collect potentially relevant electronically stored information.

Principle 8: Parties should agree as early as possible in the litigation process on the format in which electronically stored information will be produced. Parties should also agree on the format, content and organization of information to be exchanged in any required list of documents as part of the discovery process.

Principle 9: During the discovery process parties should agree to or, if necessary, seek judicial direction on measures to protect privileges, privacy, trade secrets and other confidential information relating to the production of electronic documents and data.

Principle 10: During the discovery process, parties should anticipate and respect the rules of the forum in which the litigation takes place, while appreciating the impact any decisions may have in related actions in other forums.

Principle 11: Sanctions should be considered by the court where a party will be materially prejudiced by another party's failure to meet any obligation to preserve, collect, review or produce electronically stored information. The party in default may avoid sanctions if it demonstrates the failure was not intentional or reckless.

Principle 12: The reasonable costs of preserving, collecting and reviewing electronically stored information will generally be borne by the party producing it. In limited circumstances, it may be appropriate for the parties to arrive at a different allocation of costs on an interim basis, by either agreement or court order.

E. Uniform Jury Summons and Questionaire

JURY SUMMONS

DO NOT DISCARD!

PLEASE NOTE:

1. **YOU MUST CALL OUR VOICE MAIL AT 589-4419 (JURORS CALLING FROM OUTSIDE THE CITY OF DUBUQUE MAY CALL TOLL FREE AT 866-282-5816) AFTER 5:00 P.M. ON EACH SUNDAY OF YOUR TWO-WEEK TERM OF SERVICE TO DETERMINE IF YOUR APPEARANCE DATE OR TIME HAS CHANGED OR IF ATTENDANCE IS STILL REQUIRED FOR EACH WEEK!**

2. **PLEASE READ ALL INFORMATION ON THE REVERSE OF THIS JURY SUMMONS BEFORE COMPLETING THE QUESTIONNAIRE BELOW.**

COMPLETE THE QUESTIONNAIRE BELOW, DETACH ALONG DOTTED LINE, FOLD IN HALF, AND MAIL IT USING THE ENCLOSED ENVELOPE OR SEE REVERSE FOR AN ONLINE REPLY OPTION.
BRING THIS REMAINING PORTION WITH YOU WHEN YOU REPORT FOR JURY DUTY.

Pursuant to Iowa Code chapter 607A: You have been randomly selected to appear as a juror in the
You are required to appear at the

JUROR

Group Number	Juror Badge Number

Term of Service	TIME & DATE TO REPORT!
TWO WEEKS SEE "JURY TERM" ON REVERSE SIDE	**8:30 A.M.**

Complete questionnaire, detach, fold in half, and mail (in envelope provided) within 7 calendar days of receipt, or you may respond online at https://ejuror.iowa.gov/ejuror/ Please see reverse for details.

NAME (IF INCORRECT)_____

DATE OF BIRTH: MAILING ADDRESS (IF INCORRECT)_____

HOME PHONE:_____ E-MAIL ADDRESS:_____ RESIDENT OF _____COUNTY

WORK PHONE:_____ CELL PHONE:_____ `___ NUMBER OF MILES **(ROUNDTRIP)** FROM HOME TO THE COURTHOUSE: _____

QUESTIONNAIRE **(If you need additional space, please use additional paper and attach it to this form before mailing.)**

1. ARE YOU A UNITED STATES CITIZEN? YES NO
2. ARE YOU ABLE TO UNDERSTAND THE ENGLISH LANGUAGE IN A WRITTEN, SPOKEN OR MANUALLY SIGNED MODE? YES NO
3. ARE YOU ABLE TO RECEIVE AND EVALUATE INFORMATION TO ACCOMPLISH SATISFACTORY JURY SERVICE? YES NO
4. HAVE YOU EVER BEEN CONVICTED OF A CRIME OTHER THAN A TRAFFIC OFFENSE? YES NO
   IF YES, PLEASE EXPLAIN:_____
5. HAVE YOU OR ANY CLOSE FRIEND OR RELATIVE BEEN A PARTY OR WITNESS IN A COURT CASE OTHER THAN A DIVORCE PROCEEDING? YES NO
   IF YES, PLEASE EXPLAIN:_____
6. DO YOU HAVE A CLOSE FRIEND OR RELATIVE EMPLOYED AS A LAW ENFORCEMENT OFFICER? YES NO
   IF YES, PLEASE EXPLAIN:_____
7. HAVE YOU OR ANY CLOSE FRIEND OR RELATIVE BEEN A VICTIM OF A SERIOUS CRIME? YES NO
   IF YES, PLEASE EXPLAIN:_____

HAVE YOU SERVED AS A JUROR BEFORE? YES NO

LEVEL OF EDUCATION:_____

OCCUPATION:_____

EMPLOYER:_____

MARITAL STATUS:_____

NUMBER OF CHILDREN:_____ AGES OF CHILDREN:_____

SPOUSE'S NAME:_____

SPOUSE'S OCCUPATION:_____

SPOUSE'S EMPLOYER:_____

THE FOLLOWING IS OPTIONAL: PLEASE HELP DETERMINE WHETHER OUR JURIES REPRESENT A CROSS SECTION OF THE TOTAL POPULATION BY INDICATING WHICH OF THE FOLLOWING APPLIES TO YOU:

RACE: CAUCASIAN AFRICAN AMERICAN
NATIVE AMERICAN HISPANIC AMERICAN
ASIAN OTHER

GENDER: MALE FEMALE

Automatic exemptions are not allowed for reasons of inconvenience, hardship, or public necessity. Documentation from a physician or a health care provider is required if you wish to be excused for reasons of mental or physical disability. Juror service may be deferred to a different term for reasons of good cause.
DEFERRAL/EXCUSAL/DISQUALIFICATION REQUEST:

_____
_____
_____

I CERTIFY THAT THE FOREGOING INFORMATION IS TRUE AND CORRECT: _____
Your Signature

TIME AND DATE TO REPORT - You must call our voice mail at 589-4419 after 5:00 p.m. on the SUNDAY IMMEDIATELY BEFORE YOUR INITIAL TIME AND DATE TO REPORT AND AGAIN ON THE FOLLOWING SUNDAY for a message that will indicate if your appearance date or time has been changed or if your attendance is still required each week of your TWO-WEEK JURY TERM (see JURY TERM below)! Payment for jury service will not be made for reporting on days when your jury service has been canceled via our voicemail message. You will need to refer to the JUROR ID NUMBER on your JURY SUMMONS while listening to the VOICE MAIL message. (If this is a toll call you may use our toll free number: 866-282-5816. Please do NOT use the toll free number if you are calling from Dubuque or toll free surrounding exchanges.)

COURTHOUSE SECURITY – The Dubuque County Courthouse has a security system consisting of metal detectors and x-ray machines. Anything considered to be a weapon or is deemed to be unacceptable will be confiscated and/or dealt with accordingly. No knives, chemical control agents (such as pepper spray), firearms, or other dangerous weapons are allowed. PLEASE ENTER THE BUILDING VIA THE CENTRAL AVENUE DOOR AND ALLOW EXTRA TIME WHEN PLANNING YOUR ARRIVAL FOR JURY SERVICE. THE SCREENING PROCESS MAY TAKE A FEW EXTRA MINUTES. Also, smoking or use of any tobacco product is prohibited at the Dubuque county Courthouse and on all public grounds used in connection with the courthouse, including sidewalks, sitting or standing areas, courtyards and parking lots.

JURY TERM – A two-week jury term is in use in this county. This means that you are only required to appear for jury selection for the trials scheduled to begin during the two consecutive work weeks that begin with the DATE TO REPORT listed on your JURY SUMMONS. If all trials are canceled for both weeks you are summoned, you will be dismissed without reporting and your jury service will be complete. If you are required to report and are not selected as a juror after all juries necessary for the two weeks have been selected you will be dismissed and your jury service will be complete. If you are selected as a juror you will be dismissed and your service will be complete at the conclusion of the trial unless you are told you are needed for trials scheduled later in your term.

PLEASE NOTE: If assistance of auxiliary aids or services is required to participate in court due to a disability such as hearing impaired, call the Americans with Disabilities coordinator at 319-833-3332. If you are in need of dual party telephone relay services, call Relay Iowa TTY at 1-800-735-2942.

PARKING – When you report for jury service, please park your vehicle in the IOWA STREET PARKING RAMP. Park only on the shaded areas indicated in the diagram below. Bring your "time-in" ticket to the court attendant or the Clerk of Court's office for validation. If this ramp is full, proceed south on Iowa Street, past the Holiday Inn Parking Ramp and park anywhere in the 4TH STREET PARKING RAMP. There is no attendant at the 4th Street Ramp, so you will need to pay to get out and bring us your receipt so that you can be reimbursed.

--DISABLED DRIVERS WHO ARE UNABLE TO TRAVEL FROM THE PARKING RAMP TO THE COURTHOUSE – Please park in any available public parking space in the vicinity of the courthouse within your movement range and pay the parking meter. If your meter expires while serving and you receive a citation PLEASE PAY the citation immediately. Within one week of your service, provide a written statement of your expenses to clerk of court staff (include copies of any citations). PARKING OTHER THAN IN APPROVED LOCATIONS MAY BE AT YOUR OWN EXPENSE!

COMPENSATION, REIMBURSEMENT, AND WAIVER - Iowa Code and Iowa Court Rules mandate that jurors shall be compensated at the rate of $30 per day, for the first seven days of service on a case, or $50 per day for the eighth and subsequent days of service on a case. In addition, Iowa Code and Iowa Court Rules mandate that jurors shall be reimbursed for mileage expense for each day traveled from their residence to the courthouse at a rate of $0.35 per mile. (If jurors carpool, only the driver may receive reimbursement for mileage. If you ride with another juror, please so indicate to the court attendant or at the Clerk of Court's office.)

Iowa Code allows jurors to choose to waive the juror compensation, the juror mileage reimbursement, or both.

If you choose to waive your juror compensation please sign your name here: _____

If you choose to waive your juror mileage reimbursement, please sign your name here: _____

ALTERNATE TRANSPORTATION REIMBURSEMENT FOR PERSONS WITH A DISABILITY - If you are a person with a disability you may receive reimbursement for the costs of alternate transportation from your residence to the courthouse.

If you are disabled and wish to be reimbursed for alternate transportation please sign your name on the line below. (If so, please bring an invoice or receipt to the court attendant of Clerk of Court's office indicating the amount of the alternate transportation.)

_____

ONLINE EJUROR SERVICE - An online service of the Iowa Judicial Branch enables citizens summoned for jury service in the Iowa District Court to use the internet to obtain information about serving on a jury in the Iowa District Court and/or perform a number of jury-related tasks, such as to:

- complete a juror questionnaire
- update your personal information
- confirm your juror status
- request to be excused or disqualified from jury service
- request a one-time option to reschedule your jury service
- contact the court regarding your jury service

All of this can be done from the Iowa Judicial Branch ejuror website: https://ejuror.iowa.gov/ejuror/

When you access the ejuror website you will need to enter your 9-digit Juror ID Number, found directly under the bar code on your Jury Summons, and your date of birth. All of your responses, requests, and questions will be electronically directed to the office of the Clerk of District Court for Dubuque County, where they will be recorded, forwarded to the court, and/or responded to as appropriate.

If you have any questions or suggestions regarding ejuror or your jury service, please contact the Clerk of District Court for Dubuque County at 563-589-4419.

S:D131Dubuque/juryforms/jurysummonsBACK2AMEND1(8-12-10)

The information given in this questionnaire is only to assist with jury selection in this case.

JUROR NAME: _____ AGE: _____ JUROR #: _____

What is the highest grade that you completed in school? If college, please list any degrees received:	Where do you work and what is your job title? What jobs have you held in the past? Where does your spouse or significant other work and what is their job title? What jobs has your spouse or significant other held in the past?	Circle any of the following in which you have received training or education: Business Law Engineering Psychology Health/Medicine Statistics Insurance Teaching
What are your feelings or opinions about people who bring personal injury lawsuits? Do you or a family member have a CDL? _____ Yes _____ No	If you were seriously hurt or injured by the fault of another, would you sue? Please explain your answer.	If supported by the evidence, could you consider awarding money damages for: a. Pain and suffering __Yes __No b. Mental anguish __Yes __No c. Disfigurement __ Yes __No d. Future medical bills __Yes __No If you answered NO to any of the above, please explain:
Do you use any types of social media like Facebook, twitter, blobbing, or others? If yes, please explain.	Have you ever been the plaintiff (the party suing) or a defendant (the party being sued) in a lawsuit? _____ Yes _____No If YES, please explain:	Have you ever served as a juror? _____ Yes _____No If YES, what type of case was it? What was the verdict in the case? Were you the foreperson? _____Yes _____No
What are your 3 favorite TV shows? 1. 2. 3. What newspaper, magazines, or journals do you read regularly?	What groups or organizations, including unions or religious groups, do you belong to?	List 3 character traits you admire the most: 1. 2. 3. List 3 character traits you admire the least: 1. 2. 3
Which of the following words would you use to describe yourself? Please check all that apply: __Analytical __Old-fashioned __Care __Open-minded __Compassionate __ Pro-business __Detail-oriented __Pro-consumer __Emotional __Sensitive __Frugal __Skeptical __Generous __Suspicious __Impulsive __Visual __Judgmental __Worrier	What do you enjoy doing in your spare time? Do you consider yourself to be: __Conservative __Moderate __Liberal Who makes the financial decisions in your home? Who writes the checks or pays the bills in your home?	Do you want to serve as a juror in this case? ___Yes ___No If No, please explain: Add any comments you wish to make:

I hereby swear or affirm that all the answers contained in this juror questionnaire are true and correct.

_____

Juror's signature Date

F. Court-Affiliated ADR State Comparison

CIVIL JUSTICE TASK FORCE

Court-Affiliated ADR

Arizona, Colorado, Florida, Nebraska, North Carolina

And Oregon

For purposes of this analysis, the court-affiliated family law, criminal law, and other specialty law ADR provisions have not been reviewed or analyzed in detail. This annotation will make reference to the existence of these ADR modes in each state. In all states there is extensive use of ADR in all aspects of family and juvenile matters. Generally, discussion is limited to general civil litigation ADR options.

ARIZONA

1. Court or State Office of Court ADR. Arizona does not have such an office available.

2. Court-Affiliated ADR Processes Used. Civil litigation has both mandatory arbitration and discretionary court ordered mediation available. Arizona utilizes mediation of appellate matters that are under the jurisdiction of the Arizona Court of Appeals, but not the Supreme Court. Mini trials, settlement conferences, and summary jury trials are all available at the civil trial level. Arbitration, conciliation, mediation, and settlement conferences are used in the domestic and family law courts.

3. Funding. There is a statewide dispute resolution fund administered by the Treasurer of the State of Arizona. It is funded with 0.35% of all filing fees collected in Arizona's Superior Court Clerks' offices, i.e. the equivalent of the Iowa District Court, and 0.35% of the Notary Bond Fees that are deposited in the Superior Court. Justice of the Peace Courts participate to the extent of 1.85-2.05%, depending on the size of their respective counties.

   The Board of Supervisors of each county may establish a fee for alternative dispute resolution services provided by the

court in that county. This local alternative dispute resolution fund is handled by the respective county Treasurers of each Superior Court.

4. Principal Statutes/Court Rules. Arizona Revised Statutes 12-133-12-135.01, inclusive, establish the parameters of the court affiliated arbitration and mediation ADR. Pursuant to these provisions:

   a. Arbitration. The Superior Court in each county is to establish jurisdictional limits, not to exceed $65,000, for the submission of civil disputes to mandatory arbitration. Arbitration is mandatory in all cases in which either the court finds or the parties agree that the amount in controversy does not exceed the jurisdictional limit.

   The court maintains a list of qualified persons "who have agreed to serve as arbitrators." The Clerk of the Superior Court assigns arbitration cases to a panel of three arbitrators, or one at the clerk's discretion.

   Prior to suit, by an Agreement of Reference may proceed to arbitration. The agreement of reference takes the place of pleadings and is filed with the Clerk of Court.

   The arbitrators are to be paid a reasonable fee, not to exceed $140 per day, by the county clerk. An appeal, trial de novo may be pursued in the Circuit Court. If the appellant's position is not bettered by 23% there are punitive costs assessed against the appellant.

   b. Mediation. The trial court may refer any case to mediation or other alternative dispute resolution procedures to promote disposition of cases filed in the superior court. In such instances, the Board of Supervisors of each county establishes what a reasonable fee for alternative dispute resolution services is. It appears there is little other restriction on mediation.

COLORADO

1. Court or State Office of Court ADR. Colorado has an Office of Dispute Resolution which has been very active since the enactment Colorado's Dispute Resolution Act passed in 1983. This office oversees the implementation of the ADR Act. It contracts with mediators and establishes their fees. Parties are not compelled to use the mediators contracted with the Office

of Dispute Resolution. However, it presently has over sixty mediators under contract.

2. Court-Affiliated ADR Processes Used. Mediation appears to be the preferred method for alternative dispute resolution in the Colorado Judicial System. In addition to civil suits of all types, court ordered or party requested mediation is made available to resolve appellate matters, attorney/client fee disputes, bankruptcy, child custody and visitation, and child protection in dependency matters.

3. Funding. Virtually all of the ADR in Colorado is paid by the parties. No state or local funds have been established. However, grants are from time to time obtained. If the matter is mediated through the Colorado Office of Dispute Resolution, fees are set or established. They range from $75 per hour per party in a District Court civil matter to $30 per hour per party in a Small Claims matter.

4. Principal Statutes/Court Rules. The Dispute Resolution Act is found in Colorado Revised Statute 13-22-301, et seq. Generally, it is provided that the head of the Office of Dispute Resolution is appointed by the Chief Justice of the Colorado Supreme Court. The director of ADR is an employee of the Judicial Department.

   This ADR act establishes that reference of a case for mediation services or dispute resolution programs is at the discretion of the court. The court has discretion to refer a case to any ancillary form of alternative dispute resolution and is not limited to mediation. The parties ordered to mediation are allowed to select the mediator regardless if the mediator is contracted with the Office of Dispute Resolution. Upon completion of mediation, the mediator is to verify or certify that they have met. If the mediator and parties agree and inform the court that they are engaging in good faith mediation, any pending hearing in the action is continued to a date certain.

   There is appended to this document a form of order used in Colorado ordering the matter be referred to mediation.

   Another section of the Colorado Revised Statute Section 13-3-111, commonly referred to as a private trial or trial by appointment act provides that, upon the agreement of all parties to a civil action, a retired or resigned Justice of the Supreme Court or Judge of the court assigned to hear the action may be assigned to try it. The prerequisites are that the parties agree to pay the salary of the selected Justice or Judge, along with all other salaries and expenses incurred in the trial. Whether a Judge is so assigned is entirely within the discretion of the Chief Justice of the Supreme Court. The orders, decrees, verdicts, and judgments rendered have the

same force and effect as those of a hearing or trial presided over by a regularly serving Judge, and may be appealed in the same manner.

FLORIDA

1. Court or State Office of Court ADR. The ADR programs in the State of Florida are administered through the Florida Dispute Resolution Center with its offices in the Supreme Court Building in Tallahassee, Florida. The Florida Dispute Resolution Center was established in 1986 by the then Chief Justice of the Florida Supreme Court in conjunction with the Florida State University College of Law Dean. It was the first statewide center for education, training, and research in the field of ADR.

   The Department of the Dispute Resolution Center provides staff assistance to four Supreme Court of Florida Mediation Boards and Committees; certifies mediators and mediation training programs; sponsors an annual conference for mediators and arbitrators; publishes a newsletter and an annual compendium; and provides basic and advanced mediation training to volunteers and assists the local court systems throughout the state as needed.

   There is a Florida Supreme Court Committee on ADR Rules and Policies. It has also established a mediator qualifications board, a mediator ethics advisory committee, mediation training and review board and has an experienced staff.

2. Court-Affiliated ADR Processes Used. Mandatory and court discretionary mediation and arbitration are both used extensively in Florida. Mediation is available in child protection and dependency, bankruptcy and appellate matters. Both arbitration and mediation are available in general civil matters. Otherwise, mediation is available in virtually all other civil matters, i.e., family, foreclosure, juvenile, and small claims.

3. Funding. Court-affiliated mediation and arbitration programs are funded by a filing fee of $1 levied on all proceedings filed in the Circuit or County Courts. The fees collected are deposited in the state court's Mediation and Arbitration Trust Fund, administered by Florida's Department of Revenue. In addition, in family law mediation an additional $60 - $120 per person may be collected in family mediation matters. Each Clerk of Court submits a quarterly report specifying the amount of funds collected and remitted to the Trust Fund and identifying the total aggregate collections and remissions from all

statutory sources. This report is submitted to the Office of the State's Court Administrator.

4. Principal Statutes/Court Rules. The ADR statute in Florida is Ch. 44 of Florida Statutes: Mediation Alternatives to Judicial Action. Under rules adopted by the Florida Supreme Court, if requested by a party, the trial court is required to refer to mediation any filed civil action for monetary damages if a requesting party is willing and able to pay the cost of the mediation or the cost can be equitably divided between the parties. There are eight statutorily prescribed exceptions to this. Otherwise the court has discretion to refer any filed dispute to mediation.

   Similarly, the court may refer any contested civil action to non-binding arbitration. Arbitrators are compensated in accordance with the Supreme Court Rules. In no event is an arbitrator allowed to charge more than $1,500 per diem, unless the parties agree otherwise.

   Otherwise, two or more opposing parties involved in a civil dispute may agree in writing to submit their controversy to voluntary binding arbitration or voluntary trial resolution, in lieu of litigation. In that event, the arbitrator or trial resolution Judge is compensated by the parties according to their agreement.

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

   Florida is unique. Its ADR act provides that the Chief Judge of a Judicial Circuit, in consultation with the Board of County Commissioners, may establish a Citizen Dispute Settlement Center, upon approval of the Chief Justice of the Florida Supreme Court. There is a seven-person council appointed for each dispute settlement center. The council's responsibility is to formulate and implement a plan for creating an informal forum for the mediation and settlement of disputes. Guidelines for its procedure are set forth in the statute.

FLORIDA RULES OF CIVIL PROCEDURE

There are several Rules of Civil Procedure that have been mandated in Florida relating to ADR. They relate to the whole spectrum of civil, appellate, juvenile, and family mediation. They are Florida Rules of Civil Procedure 1.700-1.830; Rule 7.090; 8.290, 9.70-9.740, and Rules 12.10, 12.610, and 12.740-741.

Similarly, the Florida Supreme Court has established a variety of rules relating to certified and court appointed mediators, including their qualification and conduct. To be certified a mediator needs to obtain a total of 100 points. The points are allocated for general education, mediation education, experience, and mentorship. The various components are weighted depending on the court to which the mediator is certified. Thereafter a mediator must adhere to the standards of professional conduct established by the Supreme Court.

An arbitrator must be a member of the Florida Bar unless otherwise agreed upon by the parties. There are additional qualifications for arbitrators, but certification is not among them.

NEBRASKA

1. Court or State Office of Court ADR. There is an Office of Dispute Resolution in Nebraska which has been in operation for twenty years. The Office of Dispute Resolution director is a State Judicial Employee. The director is hired by the Supreme Court of Nebraska to administer the Dispute Resolution Act. The Office of Dispute Resolution reports annually to the Chief Justice, the Governor, and the Legislature.

   Among its other duties, the ODR is to award grants to approved dispute resolution centers around the State of Nebraska. An approved center can accept cases referred to it by a court, an attorney, a law enforcement officer or a social service agency or school. Mediators of approved centers are to have completed at least thirty hours of training in conflict resolution techniques, neutrality, and ethics. To be a Family Law mediator there must be an additional thirty hours in family law mediation and mentorship mediations with an experienced mediator.

2. Court-Affiliated ADR Processes Used. Mediation appears to be the preferred method of court affiliated ADR, regardless of its origin. However, arbitration is available in general civil litigation. In 2009-2010, the mediation centers in Nebraska opened 2,190 new mediation cases. Fifty-five percent (55%) of the cases were family law cases. Juvenile neglect cases accounted for approximately 19%. Virtually all the family law cases were court referred. It appears that most civil cases that are resolved through ADR are done so in the private as opposed to court referred mediation arena.

3. Funding. The primary source of funding is from fees. The Director of the ADR program develops sliding-scale fees annually.

4. Principal Statutes/Court Rules. There are two statutes in Nebraska governing court affiliated ADR. They are both mediation statutes.

   One is referred to as The Nebraska Resolution Act and the other is the Nebraska Uniform Mediation Act. Neither of these acts is as comprehensive as most states that have state affiliated programs. However, virtually all of the rules and statistics maintained in Nebraska relate to specialty mediations. Family law mediation is by far the most used. Also, special mediation procedures are established for special education students, juveniles, and other social service institution issues.

NORTH CAROLINA

1. Court or State Office of Court ADR. In 1995 the North Carolina Legislature established the North Carolina Dispute Resolution Commission. The commission is charged with administering mediator and mediator training programs for certification. Oversight includes regulating the conduct of mediators and training program personnel. It supports the court-based mediation and settlement conference programs in the North Carolina's courts. Further, the Commission recommends policy, rules, and rule revisions to the alternative Dispute Resolution Committee of the State Judicial Council.

   The Commission is a sixteen member body. It includes five judges, A Clerk of the Superior Court, five mediators, two certified in family and financial settlement conferences, two certified to conduct mediation settlement conferences in Superior Court and one certified to conduct criminal district court mediations; two practicing attorneys who are not mediators, one of whom must be a family law specialist and three citizens knowledgeable about mediation.

2. Court-Affiliated ADR Processes Used. Mediation is the preferred mode of ADR in the North Carolina judicial system. However, mediated settlement conferences appear are widely used. Arbitration, early neutral evaluation and summary jury trials are used as well.

   All cases involving claims for money damages of $15,000 or less are eligible for arbitration. The cost of arbitration is $100 to each arbitrator for each hearing. This is paid by the court, but a fee of $100 is imposed on each of the parties. The hearings are limited to one hour and take place at the courthouse. The arbitrator's ruling can be appealed and tried as a trial de novo.

The court mediation program is generally referred to as a "Clerk Mediation Program." The Clerk of each Superior Court in the State of North Carolina may refer any eligible matter to mediation. It is designed as what is called a "party pay" program. The parties compensate the mediator for his or her services. The parties are given an opportunity to select their mediator. If the matter involves estate or guardianship disputes, the parties must choose a mediator who has been trained to mediate estate and guardianship cases. Otherwise, the parties can select any mediated settlement conference or family financial settlement mediator who has been certified.

A "mediated" settlement conference program is viewed as something other than general mediation. The object of the program is to promote early settlement of cases that are filed in the Superior Court or trial court. The parties who are court referred to a mediated settlement conference are required to meet with their attorneys, a representative of any insurance carrier involved in the litigation, and a mediator to discuss their dispute to try and resolve it. No settlement agreement reached at the mediation is enforceable unless it has been reduced in writing and signed by the parties.

3. Funding. The North Carolina Dispute Resolution Commission budget is comprised of fees collected from mediators and mediation training programs for certifications and renewal of certifications. This generated approximately $200,000 in revenue in the fiscal year for 2009-2010. For court mandated arbitration a fee of $100 imposed on each of the parties. Costs of a court mediated settlement conference are born by the parties.

4. Principal Statutes/Court Rules. North Carolina General Statutes 7A-37.1, 7A-38.3B and related Supreme Court Rules, are the principle authorities for court affiliated ADR in North Carolina.

OREGON

1. Court or State Office of Court ADR. There is no state court ADR office or commission in Oregon.

2. Court-Affiliated ADR Processes Used. Oregon utilizes both discretionary court ordered mediation and mandatory arbitration in certain cases as its preferred, court-affiliated ADR processes.

3. Funding. There is a dispute resolution account established in the State Treasury in Oregon. The money is generally raised through surcharges in civil litigation and court costs. In court

mandated arbitration, the parties are responsible for the fees and expenses. Under Oregon law, the Dean of the University of Oregon School of Law has the power to allocate much of the resources, develop rules and regulations for programs, and terminate dispute resolution programs.

4. Principal Statutes/Court Rules. Mediation and arbitration are governed by the provisions of Oregon Revised Statute §36.100-700. Those provisions that relate to civil litigation ADR are 36.100-36.238, inclusive, for general mediation, and 36.400-36.425 for court arbitration programs.

In Oregon, a Judge of any Circuit Court can refer a civil dispute to mediation. However, if a party files a written objection to mediation with the court, the action then proceeds in a normal fashion. The parties select their own mediators or the mediators are selected by the court from the court's panel of mediators, if the civil litigants fail to do so. Each circuit court establishes a panel of mediators. Unless instructed otherwise, the Clerk of Court selects three individuals from the panel, submits them to the parties. Within five days the parties are to select a mediator from these three. If they fail to do so, the Clerk will select one. However, the parties are free at their option and expense to obtain the mediation services from other than those suggested by the court and enter into a private mediation agreement.

Attorneys participate in the mediation only upon the written agreement of the parties. If settlement is reached in mediation the mediators are commanded by statute to encourage the disputing parties to obtain individual legal counsel to review the mediated agreement prior to signing it.

The court arbitration program is mandatory. Each circuit court requires arbitration in matters involving $50,000 or less. There are exceptions for certain class of cases to this rule. Although the arbitration may proceed, an arbitrator is by statute not allowed to let any party appear or participate in the arbitration proceeding unless the party pays the arbitrator a fee established by the court prior to that time. A party cannot be compelled to arbitration if they have already participated in a mediation program offered by the court. The arbitration hearing is open to the public to the same extent that it would be as a trial. There are provisions that upon appeal, i.e. a trial de novo, the appellant will forfeit certain fees that they have deposited with the court and may have to pay the fees and expenses incurred by the opposing party during arbitration, if the de novo trial does not better the position of the appellant.

Medical negligence cases are, also, subject to mandatory mediation.

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G. Rock Island County Arbitration Caseloads

A. Rock Island County Arbitration Caseloads

Arbitration Caseload FY 06

Cases Pending/Referred to Arbitration	1078
Cases Settled/Dismissed	815
Arbitration Hearings	107
Awards Accepted	15
Awards Rejected	53
Cases filed in Arbitration that proceeded to trial	14

Arbitration Caseload FY 07

Cases Pending/Referred to Arbitration	617
Cases Settled/Dismissed	394
Arbitration Hearings	74
Awards Accepted	9
Awards Rejected	38
Cases filed in Arbitration that proceeded to trial	17

Arbitration Caseload FY 08

Cases Pending/Referred to Arbitration	558
Cases Settled/Dismissed	333
Arbitration Hearings	51
Awards Accepted	10
Awards Rejected	23
Cases filed in Arbitration that proceeded to trial	9

Arbitration Caseload FY 09

Cases Pending/Referred to Arbitration	592
Cases Settled/Dismissed	396
Arbitration Hearings	43
Awards Accepted	5
Awards Rejected	17
Cases filed in Arbitration that proceeded to trial	6

Arbitration Caseload FY 10

Cases Pending/Referred to Arbitration	583
Cases Settled/Dismissed	394
Arbitration Hearings	34
Awards Accepted	7
Awards Rejected	13
Cases filed in Arbitration that proceeded to trial	4

H. Court-Connected General Civil Mediation Programs

Court-Connected General Civil Mediation Programs

Issues and Options with Respect to Mediators

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Report to Court-Annexed ADR Subcommittee,
Civil Justice Reform Task Force
Iowa Supreme Court

June, 2011

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Gittler, Court-Connected General Civil Mediation Programs: Issues and Options with Respect to Mediators

Gittler, Court-Connected General Civil Mediation Programs: Issues and Options with Respect to Mediators

INTRODUCTION

This report dealing with the mediation of court-referred civil cases was prepared for the Court-Annexed ADR Subcommittee of the Iowa Supreme Court's Civil Justice Reform Task Force[1]. For the purpose of this report, court-connected civil mediation programs refers to programs providing mediation services in cases on a court's general civil trial docket, other than domestic relations, probate and small claims cases. (Center for Dispute Resolution & Institute of Judicial Administration, 1992).

Appendix A of this report contains the results of a literature review and references. Appendix B contains the results of a survey of state statutes and court rules with respect to mediation of court-referred civil cases in twelve states (hereinafter state survey). Seven of these states—Illinois, Kansas, Minnesota, Missouri, Nebraska, South Dakota, and Wisconsin—were included in the state survey because of their proximity to Iowa; and five of these states—California, Florida, Maryland, Ohio, and Virginia—were included in the state survey because they have well-established and well-respected programs.

CAVEAT: It must be emphasized that state statutes and state court rules do not necessarily furnish a complete picture of the court–connected general civil mediation programs in the states included in the survey. For example, in Illinois, Missouri, and Ohio, it largely has been left to local courts to determine the requirements for any court-connected programs.

BACKGROUND

Mediation Defined, Models of Mediation and Popularity of Mediation

There is no generally accepted definition of mediation. The Model Standards of Conduct for Mediators, issued by the American Arbitration Association, the American Bar Association (ABA), and the Association for Conflict Resolution, broadly defines mediation as "a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute." (American Arbitration Association, ABA & Association for Conflict Resolution, 2005, p. 1).

A core principle of mediation is party determination. Thus, the Model Standards of Conduct for Mediators states: "A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome." (American Arbitration Association, ABA & Association for Conflict Resolution, 2005, p. 2). It is this core principle of party determination that distinguishes mediation from adjudicative dispute resolution processes, such as litigation and arbitration, in which a neutral third party controls and decides the outcome of the dispute.

As mediation has evolved, three different models of mediation have gained recognition. A leading mediation text describes these models as follows:

[1] I appreciate the assistance provided by Mario Kladis in conducting research for this report and the administrative assistance provided by Kelley Winebold in compiling it.

> In **facilitative mediation**, the mediator conducts the process along strict lines in order to define the problem comprehensively, focusing on the parties' needs and concerns and helping them to develop creative solutions that can be applied to the problem. The facilitative mediator views her role as facilitating communication and helping the parties avoid common pitfalls in problem solving. They are "process" experts, not "content" experts. They do not provide opinions about the quality of settlement options, although they may through questioning, and other techniques, assist the parties in evaluating the settlement options for themselves.
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> ***
>
> In **evaluative mediation**, the mediator guides and advises the parties on the basis of his or her expertise with a view to their reaching a settlement that accords with their legal rights and obligations, industry norms, or other objective social standards. In doing so, the mediator will often provide opinions concerning an acceptable settlement range and likely outcome in court if the dispute is not settled. The primary focus of the evaluative mediator is to highlight the strengths and weakness of the parties' positions and arguments, as he sees them, in order to bring about a compromise.
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> ***
>
> In **transformative mediation**, the mediator assists parties in conflict to improve or transform their relationship as a basis for resolving the dispute …. A transformative mediator's primary focus is assisting the parties to have constructive interaction to improve the relationship, not settling the dispute at hand. By improving the quality of the relationship, the parties are better equipped to resolve not only the problem at hand, but future conflicts as well (emphasis added). (Boulle, Coaltrella Jr. & Picchioni, 2008, p.12-13).

Different mediators adopt the facilitative, evaluative, or transformative model depending on their individual orientation and style, the wishes of the parties, the nature of the case being mediated, and the context in which the mediation occurs.

In the past few decades, the use of mediation has risen dramatically and is said to be a more popular form of dispute resolution than litigation. (Boulle, Coaltrella Jr. & Picchioni, 2008; Reuben, 1996). The benefits of mediation to which its popularity is attributable have been summarized as : “(1) greater participant control over the proceedings and outcome; (2) greater likelihood of preserving and enhancing the relationship of the participants; (3) greater access to creative and adaptable solutions; (4) quicker resolutions for participants; (5) less expensive proceedings for participants; and (6) conservation of court resources.” (Boulle, Coaltrella Jr. & Picchioni, 2008, p. 30).

Emergence of Court-Connected Civil Mediation

Almost all states have some type of statewide or local court-connected mediation programs. The 1980’s saw the emergence of court-connected general civil mediation with the 1988 enactment of a Florida statute under which judges, at their discretion, could refer any case on the civil trial docket to mediation. (Baruch Bush, 2008). Today, mediation of court-referred civil cases is common throughout

the country. (Baruch Bush, 2008, McAdoo & Welsh, 2004; Wissler, 2004; Young 2006). All but one of the states included in the state survey (CA, FL, IL, KS, MD, MN, MO, NE, OH, VA, WI) had state statutes and/or court rules mandating or permitting court-referred general civil mediation programs (hereafter court-connected programs). (Appendix B, Table One).

Court-connected programs may be wholly mandatory, wholly voluntary or somewhere in between from the standpoint of the participation of the parties. At one end of the continuum are programs where the court automatically refers all cases, or some subset of cases, to mediation. At the other end of the continuum are programs where the court refers cases to mediation with the consent of all the parties. (Baruch Bush, 2008; Cole, 2005; Rogers & McEwen, 2010a; McAdoo & Welsh, 2004; Wissler, 2004).

Although court-connected mediation is now widely accepted, the institutionalization of mediation in court-connected programs is sometimes viewed as problematical. Two long-term and well-known observers of court-connected programs have explained their reservations about these programs as follows:

> "The classic definition of mediation ….assumes a generally facilitative mediator whose focus is on fostering the parties' ability to discuss their dispute and work together toward a settlement. In the court-connected environment, however, mediation often looks more evaluative, with mediators pursuing settlement quite aggressively and in a manner that may become inconsistent with party self-determination. Some critics now worry that court-connected mediation is virtually indistinguishable from an early neutral or even a judicial settlement conference, albeit with a mediator taking the place of a judge. " (McAdoo & Welsh, 2004, p. 6).

Other commentators have expressed the same or similar reservations. (Baruch Bush, 2004; Golann & Folberg, 2011).

PLANNING OF COURT-CONNECTED PROGRAMS AND ISSUES WITH RESPECT TO MEDIATORS

An excellent source of information and advice about planning court-connected programs can be found in McAdoo and Welsh, "Court-Connected General Civil ADR Programs: Aiming for Institutionalization, Efficient Resolution, and the Experience of Justice," a chapter in the *ADR Handbook for Judges*, published by the ABA Section of Dispute Resolution in 2004. (McAdoo & Welsh, 2004). (A copy of this chapter was included in the materials submitted by the Court-Annexed ADR Subcommittee to the Civil Justice Reform Task Force). McAdoo and Welsh examine the many issues, about which decisions must be made in planning court-connected programs, and they term the decisions concerning mediators and their relationship to the court as among "[the] most important" that must be made. (McAdoo & Welsh, 2004, p.19).

At the outset it must be decided who will provide mediation services. Court-connected programs may use mediators in private practice, employ full-time or half-time in-house staff mediators, or use a combination of private providers and court staff. Most programs, however, rely on independent private providers for mediation services. (McAdoo & Welsh, 2004; Wissler, 2002).

Once the decision as to who will provide services is made, a series of other decisions regarding the initial screening and selection of mediators and the ongoing monitoring, evaluation and support of mediators must be made. The issues and options concerning these decisions are discussed below.

CREDENTIALING OF MEDIATORS AND COURT-CONNECTED PROGRAMS

There is a long standing debate over whether mediation is a profession that should be subject to state regulation and what, if any, approaches to credentialing are most appropriate for mediators to ensure their competence to provide quality mediation services. (See. e.g. Cole, 2005; McEwen, 2005; Pou, 2004; Welsh & McAdoo, 2005). According to one nationally recognized authority, "competence is the term often used to describe the ability to use dispute resolution skills and knowledge effectively to assist disputants in prevention, management, or resolution of their disputes in a particular setting or context." (Pou, 2002, p. 4).

Credentialing can take various forms including licensure and certification. Licensure refers to a mandatory form of credentialing by governmental or governmentally authorized entities involving the grant of a license to engage in a particular occupation or profession to individuals who have demonstrated that they have met established competency standards. (ABA Section of Dispute Resolution, 2002; ACR, 2010; Pou, 2002). Certification refers to a voluntary rather than a mandatory form of credentialing by private as well as public entities involving certification that individuals have designated qualifications for an occupational field or professional practice. (ABA Section of Dispute Resolution, 2002; ACR, 2010; Pou, 2002). While a state license is a prerequisite for the practice of law and a number of other professions, it is not currently a prerequisite for the practice of mediation in any state. (ACR, 2010). However, credentialing in the form of certification is increasingly being used for mediators, including mediators in court-connected programs. (ACR, 2010). (See Appendix B, Table One, Table Two A and TableTwo B).

Credentialing of mediators can also entail rosters and registries that list mediators who have purportedly satisfied the criteria for listing. The criteria may range from the minimal to the very restrictive. (ABA Section of Dispute Resolution, 2002; Association for Conflict Resolution, 2010). (See Appendix B, Table One). A variety of organizations and groups have created rosters and registries that specify a variety of criteria for listings. (Association for Conflict Resolution, 2010; Della Noce, 2008). Many court-connected programs have made extensive use of rosters from which parties select mediators for court-referred cases. (Association for Conflict Resolution, 2010; Della Noce, 2008; McAdoo & Welsh, 2004). (See Appendix B, Table One).

Although no general consensus exists regarding whether mediators should be credentialed and how they should be credentialed, there is a consensus that courts have a special responsibility to ensure the competency of mediators to whom they refer cases, especially when participation in mediation is mandated for parties. This consensus is reflected in the National Standards for Court-Connected Mediation Programs, which the Center for Dispute Resolution and the Institute for Judicial Administration developed with support from the State Justice Institute, and it is reflected in the recommendations of other nationally recognized experts. (Center for Dispute Resolution & the Institute

for Judicial Administration, 2004). It is likewise reflected in the numerous state statutes and court rules requiring mediators in court-connected programs to satisfy specified criteria. All of the states surveyed with court-connected programs have some such requirements for mediators, albeit they vary widely from state to state and often within states. (See Appendix B, Table Two A, Table Two B and Table Three).

The basic rationale for such requirements is quality control and assurance. More specifically, such requirements are directed at protecting consumers from "poor" mediators and thereby protecting the credibility and integrity of court-connected programs and mediation as a dispute resolution process; assisting consumers in selecting qualified mediators, allowing mediators to market themselves to consumers as qualified mediators, and promoting the overall improvement of mediator competence and thereby the overall quality of mediation services. (Cole, 2005; Della Noce, 2008).

Court-connected programs can take a "free market" approach to mediator credentialing and place the responsibility for choosing "good" mediators entirely upon the parties and their lawyers. (Pou, 2004). Underlying this approach is the assumption that parties and their attorneys know what type of mediation services they need, are familiar with the mediation marketplace, and can determine which mediators are competent and will provide them with the type of services they need. This assumption rests in turn upon the assumption that parties and their attorneys always will be sophisticated repeat users of mediation. However, the validity of these assumptions cannot be presumed.

It should be noted that court-connected programs may allow parties to select by mutual agreement mediators who have not been certified, or otherwise approved, to provide services in court-referred cases. (McAdoo & Welsh, 2004). Three of the states surveyed with court-connected programs (FL, MD, MN) have state statutes and/or court rules specifically giving parties this alternative. (See Appendix B, Table One).

The development of appropriate and effective standards and methods for ensuring and promoting the competency of mediators and the quality of mediation services in court-connected programs presents substantial challenges. These challenges stem in part from the lack of agreement as to the constellation of knowledge, skills, abilities and other attributes (KSAOs) that determine and are associated with mediator competence. (Pou, 2002). These challenges also are attributable to the diversity of mediator orientations and styles, the diversity of cases mediated, the diversity of contexts in which mediation takes places, and the diversity of goals and objectives of court-connected programs.

Requirements for mediators to assure competency and accountability can be divided into two main categories. One category consists of the initial requirements that individuals must satisfy in order to become mediators, and the other category consists of requirements that mediators must satisfy in order to continue as mediators. Pou has created a Mediator Quality Assurance Grid "displaying the height of 'hurdles' that mediators must meet at the outset to engage in practice and the amount of 'maintenance' or development aid provided them later on …." (Pou, 2004, p. 324). This Grid identifies five approaches to mediator requirements: (1) no hurdle/no maintenance, (2) high hurdle/low maintenance, (3) high hurdle/high maintenance, (4) low hurdle/low maintenance, (5) low hurdle/high maintenance.

Gittler, Court-Connected General Civil Mediation Programs: Issues and Options with Respect to Mediators

INITIAL SCREENING AND SELECTION OF MEDIATORS FOR COURT-CONNECTED PROGRAMS

The Qualifications Approach to Mediator Quality Assurance

The predominant credentialing model used in process for the initial screening and selection of mediators for court-connected programs is a qualifications model. There is considerable variation in the qualifications required for mediators who serve in these programs. The qualifications may include age, educational degrees, legal experience, mediation training, and prior mediation experience.

Age and Educational Degree Requirements

Among the mediator qualifications that state court-connected programs may initially require for program participation is a minimum age requirement. For example, state court rules in two of the states surveyed (FL, MD) require mediators to be at least 21 years of age. (See Appendix B, Table Two A).

Court-connected programs also may require mediators to have obtained a specified level of education. For example, one of the states surveyed (MD) has a court-connected program that requires mediators to have a bachelor's degree; one state (FL) has two different court-connected programs, one requiring a high school diploma/GED and the other requiring a bachelor's degree; and one state (CA) has "model" state standards recommending that local court rules require a high school diploma/GED. (See Appendix B, Table Two A).

Experts have criticized age and educational degree requirements on the ground that they are not an accurate measure or predictor of mediator competency; and they have been criticized on the ground that they can result in the exclusion of competent mediators from program participation. (Association for Conflict Resolution, 2010; Center for Dispute Settlement & Institute of Judicial Administration, 1992; National Association for Community Mediation, n.d.).

Legal Experience Requirements

Not surprisingly, many attorneys have a preference for mediators who are attorneys with litigation experience and substantive legal knowledge, and attorney mediators frequently serve as mediators in court-referred civil cases. (McAdoo & Welsh, 2004; Wissler, 2002). However, none of the states surveyed had state statutes or court rules making a law degree, a valid license to practice law, or legal practice experience, a requirement for conducting mediations in court-connected programs. One surveyed state (FL) does have a minimum point system for mediator certification under which additional points are awarded for a law license, as well as for other professional degrees. (See Appendix B, Table Two A).

In the *ADR Handbook for Judges,* McAdoo and Welsh concluded: "[Legal] qualifications and training will not be ideal in every situation. Some cases will be aided more by the presence of mediators with other types of expertise, such as human resources, cross-cultural communication, business valuation, or engineering skills. As a result, your court-connected program should include both attorneys and non-attorneys as mediators." (McAdoo & Walsh, 2004, p 23). Similarly, the drafters of National Standards for Court-Connected Mediation Programs commented that mediator competence is not a function of a

particular professional background or standing, such as law, but they recognized that the selection of a mediator with legal knowledge or experience related to the subject of a case may be appropriate. (Center for Dispute Settlement & Institute of Judicial Administration, 1992). (See also Association for Conflict Resolution, 2010).

Empirical research lends some support for the position that both attorneys and non-attorneys should be allowed to serve as mediators for general civil cases in court-connected programs. An empirical study of Ohio's court-connected programs for general civil actions found that "neither whether the mediators were familiar with the substantive issues in the case from their legal practice nor the number of years of practice was related to the likelihood of settlement." (Wissler, 2002, p. 679).

Mediation Training Requirements

Mediation training is widely regarded as an essential qualification for mediators. (ACR Mediator Certification Task Force, 2004; Broderick & Carroll, 2002; Center for Dispute Resolution & Institute for Judicial Administration, 1992; National Association for Community Mediation, n.d.; Pou, 2002, 2004; Raines, Needen & Barton, 2010). Completion of a specified amount of mediation training is a common initial requirement for mediators in court-connected programs. The amount of training required varies from program to program, but the norm appears to be 40 hours. For example, six of the surveyed states (FL, KS, MD, MN, MO, VA) have state statutes and/or court rules requiring mediators to complete mediation training ranging from 16 hours to 40 hours; and one state (CA) has "model" state standards for local court rules recommending 40 hour of training. (See Appendix, Table Two A).

In addition to requiring a minimum number of hours of training, there appears to be a trend toward requiring approval of mediation training programs and trainers, and a trend toward specifying the subject matter covered by training and/or the training methodologies used. For example, in five of the states surveyed (FL, KS, MD, MN, VA), state statutes and/or court rules contain such requirements. (See Appendix B, Table Two A). These requirements are directed at assuring that the programs providing training are of an acceptable quality and that the topics covered and the methodologies used are relevant to and appropriate for mediators in particular court-connected programs.

Mediation training requirements reflect the belief that training is necessary, or at least desirable, to prepare mediators to provide quality services. (Pou, 2002). However, mediation training—even the best training—does not necessarily translate into the competent and ethical practice of mediation. The relationship between training and mediator competence is not clear. (Cole, 2005). Two empirical studies, which are relevant in this regard, found that "[t]he amount of mediation training was not related to settlement … or to litigant' or attorneys' assessments of the fairness of mediation." (Wissler, 2004, p.69).

Prior Mediation Experience Requirements

Some court-connected programs require mediators to possess prior mediation experience in order to serve as mediators for court-referred cases. For example, two of the surveyed states (MD, VA) have court-connected programs requiring the completion of a minimum number of mediation cases, hours, or

both for mediator certification; one state (FL) has a point system for mediator certification under which points are awarded on the basis of the number of cases mediated; and one state (CA) has "model" state standards recommending that local court rules include an experience requirement for mediators . (See Appendix B, Table Two B).

Some authorities take the position that prior experience should be required for mediators in court-connected programs because they regard experience as a better indicator of competence than other commonly relied upon qualifications. (Association for Conflict Resolution, 2010; ACR Mediator Certification Task Force, 2004). A few empirical studies have, in fact, found that mediators with more mediation experience have higher settlement rates than those with less experience. (Wissler, 2004). But other authorities have expressed the concern that experience requirements make it difficult for newer and less experienced mediators to enhance their skills. There is also the concern that such requirements may exclude potentially capable mediators from program participation. (Pou, 2004).

The Performance-Based Assessment, Mentorship, and Peer Support Approach to Mediator Quality Assurance

Dissatisfaction with the limitations of a qualifications model of mediator credentialing has led to the development of methods for performance-based assessment of mediators. (Honeyman, 2009; National Institute of Dispute Resolution, 1995). Many experts regard performance-based assessment, properly designed and implemented, as the best measurement and predictor of mediator competence. (McAdoo & Walsh, 2004; National Institute of Dispute Resolution, 1995; Pou, 2004, 2002; Society of Professionals in Dispute Resolution, 1989).

Some court-connected programs have incorporated elements of performance-based assessment into their processes for the initial screening and selection of mediators. For example, three of the states surveyed (FL, MD, VA) have court-connected programs that have made efforts to use performance-based assessment. (See Appendix B, Table Two B). The Virginia program has been at the forefront of these efforts. In Virginia, applicants for certification as mediators in court-referred civil cases must co-mediate with and must be evaluated by already certified mediators.

Information and tools are available to assist court-connected programs in instituting performance-based mediator assessment. (McAdoo & Welsh, 2004). Despite the availability of such assistance, it may not be feasible for court-connected programs to incorporate a performance-based assessment component into their processes for the initial screening and selection of mediators, because of the significant financial, administrative and mediator resources such an assessment component necessitates. (ACR Mediator Certification Task Force, 2004; McAdoo & Walsh, 2004).

A model that is sometimes used in combination with performance-based assessment is mentorship and peer support. The aim of mentorship and other forms of peer support is to assist mediators in enhancing their skills and in improving their performance through interaction with and feedback from other mediators. Three of the states surveyed (FL, MD, VA) have court-connected programs that have elements of mentorship and peer support. (Appendix B, Table Two B). Of these states, Florida has done the most to incorporate mentorship and peer support into the initial screening and selection of

mediators. Under Florida's point system for certification of mediators, applicants for certification must have a specified number of mentorship points that are awarded for working with two different mediators; an applicant must observe a specified number of mediations conducted by their mentors; and their mentors must supervise a specified number of mediations conducted by the applicant.

ONGOING MONITORING, EVALUATION, AND SUPPORT OF MEDIATORS IN COURT-CONNECTED PROGRAMS

Just as requirements for the initial screening and selection of mediators are needed to ensure the quality of court-connected programs, requirements are needed for the ongoing monitoring, evaluation and support of mediators after their selection to ensure the quality of these programs. Such monitoring should be part of larger and more comprehensive processes to ensure the quality of the court-connected programs as a whole. (Ostermeyer & Keilitz, 1997; Brown, 2005).

Based on the state survey conducted for this report, it appears that by and large the state statutes and court rules pertaining to the programs surveyed set forth "front-end" requirements, which mediators initially must satisfy in order to be selected to mediate court-referred cases, but do not set forth "back-end" requirements, which mediators, once selected, must satisfy in order to continue to mediate court-referred cases. However, it may well be that local court rules have enunciated such requirements and that the offices which administer these programs have put in place such requirements.

Continuing Education Requirements

Mediators who are selected for court-connected programs frequently must comply with continuing mediation education requirements. For example, five surveyed states (FL, KS, MD, MN, VA) have state statutes and/or court rules requiring mediators in court-connected programs to participate in continuing mediation education; and one state (CA) has "model" state standards recommending that local court rules require continuing education. The number of hours of education required ranges from 6 to 16 hours and the frequency of education required ranges from annually to every three years. (See Appendix B, Table Three).

Participant Satisfaction Surveys

Information about satisfaction of mediation participants with their mediator can be used by court-connected programs to evaluate the performance of mediators and to assist them in improving their performance and their development as mediators. Programs typically determine participant satisfaction after a mediation by asking participants to fill out a form or brief questionnaire. None of the surveyed states with court-connected programs has a state court rule specifically requiring participant evaluation of mediators, but participant satisfaction surveys may, in fact, be used by administrators or evaluators of court-connected programs in the surveyed states.

Performance-Based Assessment, Mentorship, And Peer Support

As it has been pointed out, performance-based assessment can be a reliable indicator of mediator performance, and mentorship and peer support can assist mediators in improving their performance

and their development as mediators. Two states surveyed with court-connected programs (KS, MD) have state court rules specifically providing for performance-based assessment, mentorship, or peer support. (See Appendix B, Table Three).

Ethics Requirements for Mediators

National dispute resolution organizations and other authorities have recommended that court-connected programs should monitor, evaluate, and support mediators in court-referred cases, not only to ensure their competence, but also to ensure their ethical conduct. (Center for Dispute Settlement & Institute of Judicial Administration, 1992; McAdoo & Welsh, 2004; Young, 2006). In a growing number of states, state statutes and/or court rules enunciate ethics requirements applicable to mediators in court-connected programs. For example, in six of the surveyed states (CA, FL, KS, MD, MN, VA) state statutes and/or court rules require mediators for court-referred cases to adhere to an ethics code, standards or guidelines. (See Appendix B, Table Three).

Complaint and Grievance Mechanisms

National dispute resolution organizations and other authorities have recognized that mechanisms for the reporting and resolution of problems with mediators or the mediation process can play a significant role in efforts to monitor, evaluate, and support mediators in court-connected programs. (ABA Section on Dispute Resolution, 2002; Center for Dispute Settlement & Institute of Judicial Administration, 1992; McAdoo & Welsh, 2004; Young, 2006). For example, four of the states surveyed (CA, FL, KS,VA), have state court rules containing detailed procedures for reporting and handling of complaints involving mediators and processes for enforcement of mediator standards of ethics and conduct. (See Appendix B, Table Three).

COMPENSATION OF MEDIATORS AND FUNDING OF COURT-CONNECTED PROGRAMS

As it was previously mentioned, most court-connected programs use mediators in private practice to mediate court cases. These mediators may be paid by the parties or the court or may provide services on a pro bono basis. Some programs use in-house staff, employed on a full-time or part-time basis by the court, to mediate court-referred cases. These mediators, like other court staff, receive a salary. Still other programs contract with organizational entities, such as a community mediation center or bar association, for the provision of mediation services. Such entities may use salaried staff, unpaid volunteers, or private practitioners paid on a case by case basis, for the provision of mediation services. (McAdoo & Welsh, 2004; Wissler. 2002).

The cost of compensating mediators is not the only cost associated with a court-connected program. Another major cost is that of program administration. Many programs have a statewide or local offices, typically located within the court administrative infrastructure, to manage the program and coordinate its activities. There also may be additional costs associated with training of program mediators and program monitoring and evaluation. (McAdoo & Welsh, 2004).

Securing the funding needed to establish and maintain a quality court-connected program can be difficult. As one knowledgeable observer has pointed out:

Gittler, Court-Connected General Civil Mediation Programs: Issues and Options with Respect to Mediators

> "Most courts struggle to maintain and increase their budgets to provide ADR services…. Court ADR programs have to compete for their funding with other traditional court services, a competition that ADR programs often lose, particularly in recent years when state … budgets for nonessential programs have been slashed. Courts have experimented with a number of funding options, including filing fees, user fees, and certification fees …, but the funding for many programs remains uncertain." (Brown, 2005).

CONCLUSION

Since the Iowa court system is one of the few state court systems that currently does not have a court-connected program for the mediation of cases on the general civil trial docket, the Civil Justice Reform Task Force may wish to consider whether the Iowa court system should follow the lead of other state court systems and develop a court-connected program or programs. One option, of course, is not to recommend such a program; another option is to recommend a full-scale statewide program; and still another option is to recommend a pilot project or projects.

The establishment and maintenance of a quality court-connected program would necessitate adequate funding, an appropriate administrative infrastructure, and a sufficient pool of qualified mediators. In planning and implementing court-connected mediation programs, numerous issues must be addressed, including, most importantly, issues concerning mediators. Many of these issues relate to the initial screening and selection of mediators for court-connected programs and the ongoing monitoring, evaluation and support of mediators in court-connected programs. In addressing these issues, the individuals and groups charged with the responsibility of planning court-connected programs can draw upon the recommendations of national dispute resolution organizations, the experience of other states with court-connected programs, and a growing body of knowledge as to what constitutes best practices in the development of court-connected programs.

Appendix A

Literature Review and References

Methodology

Appendix A was prepared for this report for the Court Annexed Subcommittee of the Iowa Supreme Court's Civil Justice Reform Task Force. It presents the results of a literature review conducted to identify literature related to court connected mediation programs, particularly general civil mediation programs, and the credentialing of mediators in court connected programs, particularly general civil mediation programs.

Westlaw, LexisNexis, and Google Scholar searches were conducted using the following key words and phrases *court connected mediation, court annexed mediation, court-connected general civil mediation, mediator credentialing, mediator certification, mediator accreditation, mediation training accreditation, mediator qualifications, mediator requirements,* and various combinations thereof. The websites of the ABA Dispute Resolution Section and the Association for Conflict Resolution also were consulted.

Appendix A contains references to materials identified as a result of the literature review that are most relevant to the subject matter of this report. It also contains additional references to materials referred to in this report.

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Appendix B

Survey of State General Civil Jurisdiction Court-Connected Mediation Programs

Methodology

This Appendix was prepared for a report on state-connected general civil mediation programs for the Court annexed ADR Subcommittee of the Iowa Supreme Court's Civil Justice Reform Task Force. It presents the results of a survey of state statutes and court rules pertaining to court-connected general civil mediation programs. The purpose of the survey was to ascertain which of the states surveyed had such programs and to identify how such programs were organized and structured with a focus on the requirements for individuals who provide mediation services in in these programs.

Twelve states were surveyed (CA, FL, IL, KS, MD, MN, MO, NE, OH, SD, VA, & WI). They were selected because either they were states bordering on Iowa, or they were states known to have well-established and well- respected court-connected mediation programs.

The first step in the survey was to consult the website Courtadr.org to identify pertinent state statutes and court rules. Westlaw searches were ten conducted to identify pertinent statutes and rules. Key words and phrases included *alternative dispute resolution*, *conflict resolution*, *dispute resolution*, *mediate*, *mediation*, *mediator(s)*, *neutral(s)*, *qualification(s)*, *qualified*, *education*, *educational*, *hour(s)*, *requirement(s)*, *settlement*, *standard(s)*, *training*, and various combinations of these words. Finally, each state's official government web site was consulted for materials not listed/linked by courtadr.org or not available through WestLaw.

Several caveats about the state survey are in order. As it has been pointed out, the survey was directed at identifying state statutes and court rules pertaining to court-connected general civil mediation programs. Only the provisions of such state statutes and court rules are reflected in the tables of this Appendix. However, the state statutes and court rules at issue are not necessarily clear and can be difficult to interpret. Moreover, in some states, such as Illinois and Ohio, local court rules, rather than state statutes and court rules, determine the nature and extent of the initial screening and selection of mediators and the ongoing monitoring, evaluation, and support of mediators. However, the Appendix tables do not reflect such local rules. Finally, it was not possible to contact the court systems in the states surveyed in order to verify the results of the survey reported in the Appendix tables because of time constraints.

Table One
State Statutes and Court Rules
STATE COURT-CONNECTED CIVIL MEDIATION PROGRAMS,
SOURCE OF MEDIATORS AND MEDIATOR REQUIREMENTS

STATE	COURT/ TYPE OF CASE	SOURCE OF MEDIATORS					SOURCE OF MEDIATOR REQUIREMENTS			
		Court Staff	Private Mediators				State Statutes	Court Rules		No Requirements If Mediator Selection by Party Agreement
			Referral to Mediation Provider Organization	Court Mediator Roster	Court Appointment of Individual Mediators	Parties Can Select Outside Mediators		State	Local	
CA	Superior Court	☑	☑	☑	☑	☑	☑	☑ **Note:** Each superior court must have local rules establishing minimum qualifications for mediators. Superior courts are "encouraged" to consider the CA Rules of Court, Model Qualification Standards.	☑	☑

Table One, cont'd
State Statutes and Court Rules
STATE COURT-CONNECTED CIVIL MEDIATION PROGRAMS,
SOURCE OF MEDIATORS AND MEDIATOR REQUIREMENTS

STATE	COURT/ TYPE OF CASE	SOURCE OF MEDIATORS						SOURCE OF MEDIATOR REQUIREMENTS			
		Court Staff	Private Mediators				State Statutes	Court Rules		No Requirements If Mediator Selection by Party Agreement
			Referral to Mediation Provider Organization	Court Mediator Roster	Court Appointment of Individual Mediators	Parties Can Select Outside Mediators		State	Local	
FL	County Court			☑		☑	☑	☑	☑	☑
	Circuit Court			☑		☑	☑	☑	☑	☑
	Mortgage Foreclosure Mediation			☑					☑	
IL	Circuit Court			☑		☑	☑	☑ Note: Supreme Court authorizes Circuit Courts to set own local mediation rules. Supreme Court reviews and approves rules.	☑	☑
KS	General Civil Cases			☑		☑	☑	☑	☑	☑

Table One, cont'd
State Statutes and Court Rules
STATE COURT-CONNECTED CIVIL MEDIATION PROGRAMS,
SOURCE OF MEDIATORS AND MEDIATOR REQUIREMENTS

STATE	COURT/ TYPE OF CASE	SOURCE OF MEDIATORS					SOURCE OF MEDIATOR REQUIREMENTS			
		Court Staff	Private Mediators				State Statutes	Court Rules		No Requirements If Mediator Selection by Party Agreement
			Referral to Mediation Provider Organization	Court Mediator Roster	Court Appointment of Individual Mediators	Parties Can Select Outside Mediators		State	Local	
MD	Circuit Court, Civil Actions			☑		☑	☑	☑		☑
	Business & Tech. Case Mgmt. Program			☑		☑	☑	☑		☑
	Foreclosure of Lien Instrument Proceedings			☑		☑	☑	☑		☑
	Health Care Malpractice Claims			☑		☑	☑	☑		☑
MN	General Civil Cases			☑		☑	☑	☑	☑	☑ If parties select neutral for his/her expertise, neutral does not have to satisfy requirement re qualifications.

Table One, cont'd
State Statutes and Court Rules
STATE COURT-CONNECTED CIVIL MEDIATION PROGRAMS,
SOURCE OF MEDIATORS AND MEDIATOR REQUIREMENTS

STATE	COURT/ TYPE OF CASE	SOURCE OF MEDIATORS					SOURCE OF MEDIATOR REQUIREMENTS			
			Private Mediators					Court Rules		No Requirements If Mediator Selection by Party Agreement
		Court Staff	Referral to Mediation Provider Organization	Court Mediator Roster	Court Appointment of Individual Mediators	Parties Can Select Outside Mediators	State Statutes	State	Local	
MN	Debtor and Creditor Mediation			☑			☑	☑		
	Conciliation Court				☑ Mediators are "assigned by court"					
MO	General Civil Cases			☑	☑	☑	☑	☑	☑	
	Residential Construction Defect Claims					☑				

Table One, cont'd
State Statutes and Court Rules
STATE COURT-CONNECTED CIVIL MEDIATION PROGRAMS,
SOURCE OF MEDIATORS AND MEDIATOR REQUIREMENTS

STATE	COURT/ TYPE OF CASE	SOURCE OF MEDIATORS						SOURCE OF MEDIATOR REQUIREMENTS			
		Court Staff	Private Mediators				State Statutes	Court Rules			No Requirements If Mediator Selection by Party Agreement
			Referral to Mediation Provider Organization	Court Mediator Roster	Court Appointment of Individual Mediators	Parties Can Select Outside Mediators		State	Local		
NE	Civil Claims		☑ Courts **may** refer cases to approved mediation center. However, courts usually refer to mediators chosen by agreement of parties, rather than to a center.				☑				☑
	Farm Mediation		Qualified mediators selected by farm mediation program. Courts can refer parties to program.				☑	☑			

Table One, cont'd
State Statutes and Court Rules
STATE COURT-CONNECTED CIVIL MEDIATION PROGRAMS,
SOURCE OF MEDIATORS AND MEDIATOR REQUIREMENTS

STATE	COURT/ TYPE OF CASE	SOURCE OF MEDIATORS						SOURCE OF MEDIATOR REQUIREMENTS			
		Court Staff	Private Mediators					State Statutes	Court Rules		No Requirements If Mediator Selection by Party Agreement
			Referral to Mediation Provider Organization	Court Mediator Roster	Court Appointment of Individual Mediators	Parties Can Select Outside Mediators			State	Local	
OH	Court of Common Pleas							☑	☑ Note: Supreme Court authorizes courts of common pleas to set own local mediation rules. Courts have wide latitude in setting own rules.	☑	
SD	No court-connected mediation program	Not applicable.									
VA	District Court Civil Claims			☑				☑	☑		
	Circuit Court Civil Claims			☑				☑	☑		

Table One, cont'd
State Statutes and Court Rules
STATE COURT-CONNECTED CIVIL MEDIATION PROGRAMS,
SOURCE OF MEDIATORS AND MEDIATOR REQUIREMENTS

STATE	COURT/ TYPE OF CASE	SOURCE OF MEDIATORS					SOURCE OF MEDIATOR REQUIREMENTS			
		Court Staff	Private Mediators				State Statutes	Court Rules		No Requirements If Mediator Selection by Party Agreement
			Referral to Mediation Provider Organization	Court Mediator Roster	Court Appointment of Individual Mediators	Parties Can Select Outside Mediators		State	Local	
WI	General Civil Cases				☑	☑	☑	☑		
	Health Care Liability and Injured Patients and Families Compensation Mediator Panels			☑			☑	☑		

Table Two A
State Statutes and Court Rules
INITIAL SCREENING AND SELECTION OF MEDIATORS FOR COURT-CONNECTED PROGRAMS
(Age/Educational Degree/Legal Experience/Mediation Training)

STATE	COURT/ TYPE OF CASE	AGE	EDUCATIONAL DEGREE(S)	LAW LICENSE	MEDIATOR TRAINING	TRAINING PROGRAMS	
						Accreditation/ Approval of Programs/ Trainers	Required Curriculum
CA	Superior Court		☑ *CA Rules of Court, Model Qualification Standards:* HS diploma/GED or 4 yrs work or volunteer experience.	*CA Rules of Court, Model Qualification Standards:* Law license not required but education or experience re legal system and civil litigation required.	☑ *CA Rules of Court, Model Qualification Standards:* 40 hours that includes specified curriculum completed within past 2 years or 40 hours that includes specified curriculum completed at any time and 7hrs of continuing/advanced training covering specified topics completed within past 2 years.		☑
					Note: Each superior court must have local rules establishing minimum qualifications for mediators. Superior courts are "encouraged" to consider the *CA Rules of Court, Model Qualification Standards.* This table refers to the Model Qualification Standards, rather than local court rules, which vary.		

Table Two A, cont'd
State Statutes and Court Rules
INITIAL SCREENING AND SELECTION OF MEDIATORS FOR COURT-CONNECTED PROGRAMS
(Age/Educational Degree/Legal Experience/Mediation Training)

STATE	COURT/ TYPE OF CASE	AGE	EDUCATIONAL DEGREE(S)	LAW LICENSE	MEDIATOR TRAINING	TRAINING PROGRAMS	
						Accreditation/ Approval of Programs/ Trainers	Required Curriculum
FL	County Court	☑ 21	☑ A minimum number of points are required for County Court mediator certification. HS diploma/GED required. Additional points awarded for education/ mediation experience beyond this requirement.	Law license not required, but under point system used for mediator certification, additional points awarded for law license and for other professional licenses.	☑ Completion of county court mediation training required. Under point system used for certification, additional points awarded for mediation training approved by jurisdiction other than Florida.	☑	☑
	Circuit Court	☑ 21	☑ A minimum number of points are required for Circuit Court mediator certification. Bachelor's degree required. Additional points awarded for education/ mediation experience beyond this requirement.	Law license not required, but under point system used for mediator certification, additional points awarded for law license and for other professional licenses.	☑ Completion of circuit court mediation training required. Under point system used for certification, additional points awarded for mediation training approved by jurisdiction other than Florida.	☑	☑
	Mortgage Foreclosure Mediation **Note:** Circuit courts set own rules. Table does not contain information re variable local rules.				☑ Training in foreclosure mediation and legal concepts related to foreclosure.		

Table Two A, cont'd
State Statutes and Court Rules
INITIAL SCREENING AND SELECTION OF MEDIATORS FOR COURT-CONNECTED PROGRAMS
(Age/Educational Degree/Legal Experience/Mediation Training)

STATE	COURT/ TYPE OF CASE	AGE	EDUCATIONAL DEGREE(S)	LAW LICENSE	MEDIATOR TRAINING	TRAINING PROGRAMS	
						Accreditation/ Approval of Programs/ Trainers	Required Curriculum
IL	Circuit Court	**Note:** Supreme Court authorizes, reviews and approves local circuit court rules. Rule must address "qualifications" of mediator, but nature and extent of requisite qualifications is matter of local rules. Table does not contain information about variable local rules.					
KS	General Civil Cases				☑ 16 hours of core mediator training, 14 hours of mediation-skills training, and 10 hours of training related to the specific subject being mediated or civil litigation system.	☑	☑
MD	Circuit Court, Civil Actions	☑ 21	☑ Bachelor's		☑ 40 hours	☑	☑
	Business & Tech. Case Mgmt. Program	☑ 21	☑ Bachelor's		☑ 40 hours	☑	☑
	Foreclosure of Lien Instrument Proceedings	☑ 21	☑ Bachelor's, plus specialized knowledge		☑ 40 hours	☑	☑
	Health Care Malpractice Claims	☑ 21	☑ Bachelor's, plus specialized knowledge		☑ 40 hours	☑	☑

Table Two A, cont'd
State Statutes and Court Rules
INITIAL SCREENING AND SELECTION OF MEDIATORS FOR COURT-CONNECTED PROGRAMS
(Age/Educational Degree/Legal Experience/Mediation Training)

STATE	COURT/ TYPE OF CASE	AGE	EDUCATIONAL DEGREE(S)	LAW LICENSE	MEDIATOR TRAINING	TRAINING PROGRAMS	
						Accreditation/ Approval of Programs/ Trainers	Required Curriculum
MN	General Civil Cases				☑ Requirements may be waived for individuals who "clearly demonstrate exceptional competence to serve as a neutral."		☑
	Debtor and Creditor Mediation **Note:** No rules available.						
	Conciliation Court						
MO	Judicial Circuit				☑ 16 hours		
NE	Civil Claims						
OH	Court of Common Pleas	**Note:** The Supreme Court's Dispute Resolution Section assists Courts of Common Pleas in developing mediation services. Each court can set its own rules for mediation problems. Table does not contain information about variable local rules.					
SD	No court-connected mediation program	Not applicable.					

Table Two A, cont'd
State Statutes and Court Rules
INITIAL SCREENING AND SELECTION OF MEDIATORS FOR COURT-CONNECTED PROGRAMS
(Age/Educational Degree/Legal Experience/Mediation Training)

STATE	COURT/ TYPE OF CASE	AGE	EDUCATIONAL DEGREE(S)	LAW LICENSE	MEDIATOR TRAINING	TRAINING PROGRAMS	
						Accreditation/ Approval of Programs/ Trainers	Required Curriculum
VA	District Court Civil Claims		☑ Bachelor's or evidence of relevant experience and qualifications sufficient to support certification.		☑ 20 hours of basic mediation training by a certified trainer. If not a member of the Virginia State Bar, and at least 4 hours of certified training re Virginia's judicial system. Applicants must observe at least 2 complete cases conducted by a certified mentor or complete an additional 8 hours of training during which the applicant can observe at least 2 mediations, one of which must be a live demonstration conducted by a certified mentor.	☑	☑

Table Two A, cont'd
State Statutes and Court Rules
INITIAL SCREENING AND SELECTION OF MEDIATORS FOR COURT-CONNECTED PROGRAMS
(Age/Educational Degree/Legal Experience/Mediation Training)

STATE	COURT/ TYPE OF CASE	AGE	EDUCATIONAL DEGREE(S)	LAW LICENSE	MEDIATOR TRAINING	TRAINING PROGRAMS	
						Accreditation/ Approval of Programs/ Trainers	Required Curriculum
VA	Circuit Court Civil Claims		☑ Bachelor's or evidence of relevant experience and qualifications sufficient to support certification.		☑ 40 hours of training by a certified trainer, including 20 hours of basic mediation training and 20 hours of advanced-skills training for procedurally complex cases. If not a member of the Virginia State Bar, at least 4 hours of certified training in Virginia's judicial system. Applicants must observe at least 2 complete circuit-court civil cases conducted by a certified circuit-court civil mentor or complete an additional 8 hours of training during which the applicant observes 2 circuit-court civil cases, one of which must be a live demonstration conducted by a certified circuit-court civil mediator.	☑	☑
WI	General Civil Cases	If parties cannot agree on mediator, judge may appoint any person with the necessary "ability and skills".					
	Health Care Liability and Injured Patients and Families Compensation Mediator Panels	**Note:** Director of State Court appoints panel consisting of 1 public member, who is not attorney or health care provider, 1 attorney, and 1 health care provider.					

Table Two B
State Statutes and Court Rules
INITIAL SCREENING AND SELECTION OF MEDIATORS FOR COURT-CONNECTED PROGRAMS
(Experience/Performance-Based Assessment/Mentorship)

STATE	COURT/ TYPE OF CASE	PRIOR MEDIATION EXPERIENCE	PERFORMANCE-BASED ASSESSMENT/ MENTORSHIP
CA	Superior Court	☑ *CA Rules of Court, Model Qualification Standards:* At least 2 mediations of at least 2 hrs., co-mediated or observed by mentor mediator and evaluated by monitor mediator; In addition, at least 4 mediations of at least 2 hrs., mediated or co-mediated within past 2 yrs.	☑ See Mediator Experience
		Note: Each superior court must have local rules for establishing minimum qualifications for mediators. Superior courts are "encouraged" to consider the CA Rules of Court, Model Qualification Standards. This table refers to the Model Qualification Standards, rather than local court rules, which vary.	

Table Two B, cont'd
State Statutes and Court Rules
INITIAL SCREENING AND SELECTION OF MEDIATORS FOR COURT-CONNECTED PROGRAMS
(Experience/Performance-Based Assessment/Mentorship)

STATE	COURT/ TYPE OF CASE	PRIOR MEDIATION EXPERIENCE	PERFORMANCE-BASED ASSESSMENT/ MENTORSHIP
FL	County Court		☑ All court certified mediators must complete mentorship with two different court certified mediators involving observation of mediations that certified mediators conduct and supervision of mediations that certified mediators supervise. Under point system, points are awarded on basis of number of observed and supervised mediations.
	Circuit Court	1 point per year awarded to court certified mediator for each year that 15 cases of any type are mediated. Maximum of 5 points awarded to any mediator regardless of court certification who has conducted minimum of 100 mediations in 5 year period.	
	Mortgage Foreclosure Mediation		
IL	Circuit Court	**Note:** Supreme Court authorizes, reviews and approves local circuit court rules. Rule must address "qualifications" of mediator, but nature and extent of requisite qualifications is matter of local rules. Table does not contain information about variable local rules.	
KS	General Civil Cases		

Table Two B, cont'd
State Statutes and Court Rules
INITIAL SCREENING AND SELECTION OF MEDIATORS FOR COURT-CONNECTED PROGRAMS
(Experience/Performance-Based Assessment/Mentorship)

STATE	COURT/ TYPE OF CASE	PRIOR MEDIATION EXPERIENCE	PERFORMANCE-BASED ASSESSMENT/ MENTORSHIP
MD	Circuit Court, Civil Actions		☑ Submit to periodic monitoring of court ordered mediations by qualified mediators.
	Business & Tech. Case Mgmt. Program	☑ At least 5 non-domestic circuit ct. mediations or 5 non-domestic non-circuit ct. mediations, at least 2 of which business & tech cases, or co-mediated additional 2 cases from Business & Tech Case Mgmt. Program with approved mediator of comparable complexity.	☑ Submit to periodic monitoring of court ordered mediations by qualified mediators.
	Foreclosure of Lien Instrument Proceedings	☑ At least 5 non-domestic circuit ct. mediations or 5 non-domestic non-circuit ct. mediations of comparable complexity.	☑ Submit to periodic monitoring of court ordered mediations by qualified mediators.
	Health Care Malpractice Claims	☑ At least 5 non-domestic circuit ct. mediations or 5 non-domestic non-circuit ct. mediations of comparable complexity.	☑ Submit to periodic monitoring of court ordered mediations by qualified mediators.

Table Two B, cont'd
State Statutes and Court Rules
INITIAL SCREENING AND SELECTION OF MEDIATORS FOR COURT-CONNECTED PROGRAMS
(Experience/Performance-Based Assessment/Mentorship)

STATE	COURT/ TYPE OF CASE	PRIOR MEDIATION EXPERIENCE	PERFORMANCE-BASED ASSESSMENT/ MENTORSHIP
MN	General Civil Cases		
	Debtor and Creditor Mediation		
	Conciliation Court		
MO	Judicial Circuit		
NE	Civil Claims		
OH	Court of Common Pleas	**Note:** The Supreme Court's Dispute Resolution Section assists Courts of Common Pleas in developing mediation services. Each court can set its own rules for mediation programs. Table does not contain information about variable local rules.	
SD	No court-connected mediation program	Not applicable.	

Table Two B, cont'd
State Statutes and Court Rules
INITIAL SCREENING AND SELECTION OF MEDIATORS FOR COURT-CONNECTED PROGRAMS
(Experience/Performance-Based Assessment/Mentorship)

STATE	COURT/ TYPE OF CASE	PRIOR MEDIATION EXPERIENCE	PERFORMANCE-BASED ASSESSMENT/ MENTORSHIP
VA	District Court Civil Claims	☑ 5 hours of supervised co-mediation, including a minimum of 3 complete cases, evaluated by a certified mentor.	☑ See Mediator Experience Evaluation by a certified mediator who must recommend that applicant be certified.
	Circuit Court Civil Claims	☑ 10 hours of supervised co-mediation, including a minimum of 5 complete circuit-court civil (non-family) cases, evaluated by a certified mentor.	☑ See Mediator Experience Evaluation by a certified mediator who must recommend that applicant be certified.
WI	General Civil Cases		
	Health Care Liability and Injured Patients and Families Compensation Mediator Panels	**Note:** Director of State Court appoints panel consisting of 1 public member, who is not an attorney or health care provider, 1 attorney, and 1 health care provider.	

Table Three
State Statutes and Court Rules
ONGOING MONITORING, EVALUATION AND SUPPORT OF MEDIATORS IN COURT-CONNECTED PROGRAMS

STATE	COURT/ TYPE OF CASE	CONTINUING EDUCATION	PERFORMANCE-BASED ASSESSMENT, MENTORSHIP, AND PEER SUPPORT	ETHICS CODES	COMPLAINT/ GRIEVANCE MECHANISMS
CA	Superior Court	☑ *CA Rules of Court, Model Qualification Standards:* 10 hours per year for paid mediators, 5 hours related to mediation and 5 hours related to substantive areas of the law; at least 15 hours every three years for both paid mediators and pro bono mediators.		☑	☑
		Note: Each superior court must have local rules establishing minimum qualifications for mediators. Superior courts are "encouraged" to consider the *CA Rules of Court, Model Qualification Standards*. This table refers to the Model Qualification Standards, rather than local court rules, which vary.			

Table Three, cont'd
State Statutes and Court Rules
ONGOING MONITORING, EVALUATION AND SUPPORT OF MEDIATORS IN COURT-CONNECTED PROGRAMS

STATE	COURT/ TYPE OF CASE	CONTINUING EDUCATION	PERFORMANCE-BASED ASSESSMENT, MENTORSHIP, AND PEER SUPPORT	ETHICS CODES	COMPLAINT/ GRIEVANCE MECHANISMS
FL	County Court	☑ 16 hours every 2 years.		☑	☑
	Circuit Court	☑ 16 hours every 2 years.		☑	☑
	Mortgage Foreclosure Mediation				
IL	Circuit Court	**Note:** Supreme Court authorizes, reviews and approves local circuit court rules. Rule must address "qualifications" of mediator, but nature and extent of requisite qualifications is matter of local rules. Table does not contain information about variable local rules.			
KS	General Civil Cases	☑ 6 hours of approved mediation training annually.	☑ New mediators must co-mediate with **or** be supervised by an approved mentor-mediator on three cases during new mediator's first year of practice. Court-approved mentor-mediator must certify that new mediator has demonstrated basic skills and knowledge.	☑	☑

Table Three, cont'd
State Statutes and Court Rules
ONGOING MONITORING, EVALUATION AND SUPPORT OF MEDIATORS IN COURT-CONNECTED PROGRAMS

STATE	COURT/ TYPE OF CASE	CONTINUING EDUCATION	PERFORMANCE-BASED ASSESSMENT, MENTORSHIP, AND PEER SUPPORT	ETHICS CODES	COMPLAINT/ GRIEVANCE MECHANISMS
MD	Circuit Court, Civil Actions	☑ 8 hours of continuing mediation training every 2 years on specified topics.	☑ Periodic monitoring by qualified mediator.	☑	
	Business & Tech. Case Mgmt. Program	☑ 8 hours of continuing mediation training every 2 years	☑ Periodic monitoring by qualified mediator.	☑	
	Foreclosure of Lien Instrument Proceedings	☑ 8 hours of continuing mediation training every 2 years	☑ Periodic monitoring by qualified mediator.	☑	
	Health Care Malpractice Claims	☑ 8 hours of continuing mediation training every 2 years	☑ Periodic monitoring by qualified mediator.	☑	

Table Three, cont'd
State Statutes and Court Rules
ONGOING MONITORING, EVALUATION AND SUPPORT OF MEDIATORS IN COURT-CONNECTED PROGRAMS

STATE	COURT/ TYPE OF CASE	CONTINUING EDUCATION	PERFORMANCE-BASED ASSESSMENT, MENTORSHIP, AND PEER SUPPORT	ETHICS CODES	COMPLAINT/ GRIEVANCE MECHANISMS
MN	General Civil Cases	☑ 18 hours of continuing education on ADR subjects every three years.		☑	
	Debtor and Creditor Mediation				
	Conciliation Court				
MO	Judicial Circuit				
NE	Civil Claims				
OH	Court of Common Pleas	**Note:** The Supreme Court's Dispute Resolution Section assists Courts of Common Pleas in developing mediation services. Each court can set its own rules for mediation programs. Table does not contain information about variable local rules.			

Table Three, cont'd
State Statutes and Court Rules
ONGOING MONITORING, EVALUATION AND SUPPORT OF MEDIATORS IN COURT-CONNECTED PROGRAMS

STATE	COURT/ TYPE OF CASE	CONTINUING EDUCATION	PERFORMANCE-BASED ASSESSMENT, MENTORSHIP, AND PEER SUPPORT	ETHICS CODES	COMPLAINT/ GRIEVANCE MECHANISMS
SD	No court-connected mediation program	Not applicable			
VA	District Court Civil Claims	☑ 8 hours of approved general mediation training, including at least 2 hours in mediation ethics, every 2 years. Mediator must also present evidence of having completed at least 5 complete cases or 15 hours of mediation during the 2-year certification period. The cases may be court-referred or privately referred.		☑	☑

Table Three, cont'd
State Statutes and Court Rules
ONGOING MONITORING, EVALUATION AND SUPPORT OF MEDIATORS IN COURT-CONNECTED PROGRAMS

STATE	COURT/ TYPE OF CASE	CONTINUING EDUCATION	PERFORMANCE-BASED ASSESSMENT, MENTORSHIP, AND PEER SUPPORT	ETHICS CODES	COMPLAINT/ GRIEVANCE MECHANISMS
VA	Circuit Court Civil Claims	☑ 8 hours of approved general mediation training, including at least 2 hours in mediation ethics, every 2 years. Mediator must also present evidence of having completed at least 5 complete cases or 15 hours of mediation during the 2-year certification period. The cases may be court-referred or privately referred.		☑	☑

Table Three, cont'd
State Statutes and Court Rules
ONGOING MONITORING, EVALUATION AND SUPPORT OF MEDIATORS IN COURT-CONNECTED PROGRAMS

STATE	COURT/ TYPE OF CASE	CONTINUING EDUCATION	PERFORMANCE-BASED ASSESSMENT, MENTORSHIP, AND PEER SUPPORT	ETHICS CODES	COMPLAINT/ GRIEVANCE MECHANISMS
WI	General Civil Cases				
	Health Care Liability and Injured Patients and Families Compensation Mediator Panels				

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I. Business Courts in Various States

Alabama (2009) The Alabama Supreme Court established a commercial litigation docket by administrative judicial order in the Tenth Judicial Circuit of Alabama-Birmingham. There is currently one judge assigned to the docket with a back up judge to serve if necessary.

Claims heard arise from allegations of breach of contract or breach of fiduciary duty, business torts (such as unfair competition), and other statutory violations arising out of business dealings (sales of assets or securities, corporate structuring, partnership, shareholder, joint venture and other business agreements, trade secrets and restrictive covenants). Other actions involve securities, intellectual property disputes, trademarks, development of commercial real property, commercial class actions, consumer class actions not based on personal injury or product liability claims, malpractice involving a business entity, environmental claims, ICC, and any other case where the presiding judge determines the case may result in significant interpretation of a statute within the scope of the docket or there is some other reason for inclusion.

The docket does not include: (1) disputes regarding sales or construction of residences; (2) professional malpractice arising outside the context of a commercial dispute; (3) cases seeking declaratory judgment as to insurance coverage or property damage; (4) individual consumer claims including product liability, personal injury, or wrongful death; and (5) individual employment-related claims.

When a new case is filed, the plaintiff may file a "Request for Assignment to the Commercial Litigation Docket" along with other required forms available from the Circuit Clerk. The request shall be served with the Summons and Complaint. A defendant may file a request with responsive pleadings.
*No funding was necessary to create the program. Instead, cases were reassigned under the Rules of Judicial Administration.

Arizona (2003) The Arizona Supreme Court established the complex litigation case management model as a pilot program in Phoenix (Maricopa County) with three judges. The pilot program is slated to become a permanent part of the court system by the end of 2011. The court handles seventy-five cases per year. The three judges assigned to the complex litigation docket also are assigned cases from the general docket.

Construction litigation comprises 25% of the court's docket. The remaining cases include fires, mass torts, breach of fiduciary duty, and security cases.

A plaintiff may designate an action as a complex case at the time of filing the initial complaint by filing a motion and separate certification of complex civil case. The motion is then ruled upon by the Civil Presiding Judge within thirty days after the filing of the response to the designating party's motion. The court may also decide on its own motion that a civil action is a complex case. Parties shall not have the right to appeal the court's decision regarding such a designation.

In deciding whether a civil action is a complex case, the court is to consider the following: pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve; management of a large number of witnesses or a substantial amount of documentary evidence; management of a large number of separately represented parties; coordination with related actions pending in one or more courts in other counties, states or countries, or in a federal court; substantial post judgment judicial supervision; whether the case would benefit from permanent assignment to a judge with a substantial body of knowledge in a specific area of the law; inherently complex legal issues; factors justifying the expeditious resolution of an otherwise complex dispute; and any other factor which in the interests of justice warrants a complex designation or is otherwise required to serve the interests of justice.

California (2000) The California Supreme Court established a complex civil litigation docket. Six courts handle complex cases, such as anti-trust, security claims, construction defects, toxic torts, mass torts, class action. The chief judge assigns judges to the docket. California did not create a "business court" or "business docket" because it wanted to avoid the perception that business courts only serve businesses. The courts are available to anyone with complex litigation, which requires exceptional judicial management to avoid placing burdens on the court or litigants, to expedite the case and to keep costs reasonable. Judges are extensively trained and technology has been improved. The courts received nearly $4 million in grants each year for training, technology, more clerks, etc.

According to attorneys whose cases were assigned to the pilot program, there was improved judicial comprehension of legal and evidentiary issues, fewer instances of excessive or inappropriate referee appointments, and closer judicial supervision of and insistence on case management requirements including referee decisions. These impressions were confirmed by the empirical examination of the pilot program cases that demonstrated measurably higher numbers of interim dispositions, suggesting more effective and faster case resolution, compared to non-pilot cases.

In Orange County, the court operates a 36,000 square foot, five-courtroom facility specially designed to handle complex civil litigation. There are five judges, who are assigned substantive areas of law. For example, one judge, Judge Andler, handles fertility issues, Dominos Pizza overtime cases, and BCBG wage and hour cases. Another judge, Judge Dunning, handles cases involving the Episcopal Church, Montrenes; Nordstrom Commercial Debit; Nissan 350Z; Weekend Warrior Trailer; Hard Rock Cafe wage and hour claims; and Yamaha Rhino litigation, etc.

Rule 3.400 of the California Rules of Court defines a complex case as an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision-making by the court, the parties and counsel.

Characteristics of a complex cases include: (1) antitrust; (2) construction defect claims involving many parties or structures; (3) securities claims or investment losses involving many parties; (4) environmental or toxic tort claims involving many parties; (5) mass torts claims; (6) class actions; (7) insurance coverage claims involving trade regulations or class actions; and (8) other cases involving numerous pretrial motions raising difficult or novel legal issues, management of a large number of witnesses or documentary evidence, management of a large number of separately represented parties, or coordination with related actions pending in one or more courts in other counties, states, or countries, or in federal court.

There is a "Desk Book on the Management of Complex Civil Litigation" manual for litigants and judges to identify complex cases more efficiently, as well as printed guidelines that outline service procedures, initial case management issues, motion practice, mandatory settlement conferences, etc.

Colorado (2007) Projected case numbers did not justify a specialty court. The Colorado Supreme Court, however, created a business docket to relieve congestion of business cases that have a broad impact or significant impact on the community. Judges are assigned by the chief judge. The docket exists as a subset to an existing docket and requires that parties are either seeking injunctive relief or equitable relief affecting members of community who are not named as parties, such as a corporate control dispute, which is incapacitating employees, customers, and creditors. The case also must involve unusually complex litigation. A clerk in the court administrator's office works solely with the subdivision. Judges have the right to order ADR. Written decisions are contained in the clerk's office and are available to public at no charge except fees for copying.

Connecticut The Connecticut Supreme Court established a complex litigation docket at three locations. One judge handles each case from suit to trial. The court handles cases involving multiple litigants, legally intricate issues, lengthy trials, or claims for large monetary damages (potentially in the millions of dollars). The primary benefit is increased efficiency. If one party asks to be included on the docket, the judge must automatically consider it. There is a $325.00 fee for filing such a request. The chief judge has the discretion to hold a hearing on whether the case should be transferred to the docket.

Delaware The Delaware Court of Chancery is widely recognized as the nation's preeminent forum for the determination of disputes involving the internal affairs of the thousands upon thousands of Delaware corporations and other business entities through which a vast amount of the world's commercial affairs is conducted.

However, because of increasing numbers new business courts across the nation, a new Superior Court Complex Commercial Litigation Division (CCLD) was created on May 1, 2010. President Judge James T. Vaughn, Jr. stated: "The new division will provide for streamlined and more uniform administration of complex commercial cases."

Firm pretrial and prompt trial dates will streamline cases. In addition, cases will be assigned to one of the three judges on a panel of superior court judges created to hear these cases and will be given scheduling priority over other cases the assigned judge hears. Uniformity in administration will be promoted through the establishment of consistent procedures by the panel of judges, as well as a case management order that will provide guidance on handling discovery disputes and dispositive motions, require mandatory disclosures such as those contemplated by Federal Rule of Civil Procedure 26(a), and establish procedures for other matters relevant to the case, including electronic discovery.

To be eligible for the CCLD, a case must involve an amount in controversy of $1 million dollars or more, be designated by the President Judge of the Superior Court, or involve an exclusive choice of court agreement or a judgment resulting from an exclusive choice of court agreement. To ensure that the CCLD focuses on true large-scale commercial disputes, the following types of cases are excluded: any case containing a claim for personal, physical or mental injury; mortgage foreclosure actions; mechanics' lien actions; condemnation proceedings; and any case involving an exclusive choice of court agreement where a party to the agreement is an individual acting primarily for personal, family, or household purposes, or where the agreement relates to an individual or collective contract of employment. Judges serve three-year terms on the CCLD panel.

Florida (2004) The Florida Supreme Court created a complex litigation court that operates in six separate courts. Depending on the court, amounts in controversy range from more than $75,000 to $150,000. Cases include breach of contract, business torts, business dealings, UCC, sale or purchase of stock, and insurance coverage disputes. Other cases have other jurisdictional amount limits. Parties are required to file a brief of up to twenty pages so the judge can accept or reject a case.

Georgia (2005) The Supreme Court of Georgia established a business court. The court started with twelve cases in 2006. The amount doubled the following year, doubled to fifty by 2008, and handled sixty-four cases in 2010. The business court became a permanent division in 2010.

Consent is not required if one party agrees. Cases include those involving the UCC, the Georgia Security Act and other state business codes, and any case involving a material issue related to a law governing corporations or partnerships. The chief judge appoints the judge. The court uses a high-tech courtroom with document cameras, projectors, and evidence display system. Teleconference hearings also can be arranged.

Illinois (1993) The Illinois Supreme Court established the Cook County commercial calendars, which are managed by the court of chancery. Cases involve any commercial relationship between parties. In some cases, parties must mediate their claims before a trial date is set. Cases heard are all equitable. Cases include shareholder disputes, appointment of receivers, etc.

Maine (2007) The Maine Supreme Court established a business and consumer docket based in Portland. The judge has discretion to accept a case. Discovery is limited to thirty interrogatories, twenty requests for admissions and five depositions. The principal claim must involve significant matters of transaction, operations or governance of a business, or consumer rights arising out of transactions or other dealings with business. Two judges, appointed by the chief judge, serve on the docket.

The principal claim or claims involve matters of significance to the transactions, operation or governance of a business entity or the rights of a consumer arising out of the consumer's dealings with a business. The cases also require specialized and differentiated judicial management. The court can handle both jury and nonjury matters.

The decision to assign cases to the business court includes a review of the complexity of the case, any novel issues, the number of witnesses, number of parties, size of the anticipated document

discovery, and the need for ongoing judicial supervision. The larger and more complex the case, the more likely it is to be assigned to the business court.

Assignment or not of a case to the business court cannot be appealed. The court has several unique features. A modified discovery procedure and intensive individual case management keep the case focused on those issues requiring judicial resolution. Case management sets time periods for and encourages negotiations. Scheduling is done with the particular needs of the case and the parties in mind.

The decisions of the business court are published, as are all court decisions in Maine. The court has the ability to conduct motions and other hearings via videoconference. Press coverage of the business court is very favorable.

Maryland (2003) The Maryland Supreme Court established a business and technology program as part of the civil division. The judges are specially trained with three judges serving state wide. Cases assigned to this program present commercial or technological issues of such a complex or novel nature that specialized treatment is likely to improve the administration of justice.

Both parties can opt out of the program and there is a $50,000 jurisdictional minimum. One judge is assigned to one case, there are expedited appeals, e-filings, a whiteboard, multi-media briefs, and other technological capabilities. The court has handled 113 cases since its inception. Maryland is the first state to propose creation of a court to handle both business and technology cases.

Special circumstances: Maryland is home to many Internet businesses, as well as a large concentration of bioscience and aerospace companies. Maryland may be home to the largest technological expert population in the nation.

Massachusetts (2003) The Massachusetts Supreme Court established a pilot program in 2003 and made it permanent in 2009. Parties can opt out of participating in the Business Litigation Section. Cases include employment contracts, shareholder disputes, securities, mergers, consolidations, UCC, complex issues, anti-trust, commercial claims, insurance, and construction.

A new pilot project in Suffolk Superior Court's Business Litigation Section (BLS) began in January 2010 and is aimed at saving corporate counsel thousands of dollars by shrinking discovery. At the start of each case, a BLS judge will essentially manage the use of discovery, including electronic data and depositions, and settle on the

right amount of discovery proportionate to the type of case at hand. Judges manage discovery by giving time limitations for depositions, including limiting the people from whom discovery will be sought.

Nevada (2006) The legislature established a business court docket. The court hears corporate governance issues and cases involving trademark, trade secret, security laws, deceptive business practices, and disputes between businesses. Judges must publish all opinions. The legislature drafted legislation later encouraging the Nevada Supreme Court to adopt rules that: direct business courts to issue written opinions; direct those courts to publish their opinions; direct those courts to provide citations for those opinions; and direct those courts to specify precedential value or authoritative weight that must be given to the business opinions. The legislature also supported additional funding for the courts to cover these costs.

New Hampshire (2008) The New Hampshire Legislature established a business court model as part of the civil division. One party must be a business and no party may be a consumer. Both parties must consent to have the court handle their case. There is a minimum amount at issue of $50,000. The court hears cases involving breach of contract, UCC, property sales, surety bonds, franchisee, professional malpractice (non-medical), and shareholder derivative actions. The governor appointed the judge. Docket orders are posted on the Internet.

New York (1993) Originally, the Commercial Division was established on an experimental basis. It has been part of the court system since 1995. The commercial division has grown from two counties to ten counties. Judges apply for a position on the Commercial Division, which have jurisdictional minimums that vary depending on location from $25,000 to $100,000.

Commercial Division cases include: breach of contract, fraud, misrepresentation, business tort, UCC cases, derivative actions, class actions, commercial insurance coverage, corporate dissolution, malpractice of accountants or actuaries, and legal malpractice arising out of representation in commercial matters. Parties submit statements requesting assignment to the Commercial Division.

North Carolina (1996) The North Carolina Supreme Court established a business court to hear complex commercial, technology, and business disputes. Three judges hear cases statewide. One judge is assigned to each case, and cases are tried in the county where filed. The governor appoints the judges.

Since 1996, the court has handled 738 cases; 233 of which are still pending. There is mandatory participation for cases involving a material issue related to the law of corporations, securities, antitrust

law, state trademark, unfair competition, intellectual property, and certain cases involving technology. Other cases can be moved to the business court through a Notice of Designation, including certain tax cases. There are no dollar limitations and no waiver of jury trial is required. Consumer litigation is not allowed. The court publishes its opinions.

The fee to move a case to the business docket is $1,000 (raised from $200 in 2009). Once the increased fee was instituted, there was a 28.6% drop in cases assigned to the business court.

Ohio (2009) A pilot program was recommended by a task force and later approved by the Supreme Court, which adopted a business court model. The Court will review the pilot project again in January 2012. Judges volunteer for the jobs and hear cases involving corporate governance issues, shareholder disputes, the formation, dissolution or liquidation of business, trade secrets and business disputes. The court has handled 600 cases since its inception. Motions are ruled on within sixty days and cases must be disposed of within eighteen months. The court publishes opinions and employs special masters.

After examining the 2007 filings, of the 50,000 cases filed in state courts, approximately 600 would have qualified to be heard in business court.

Oregon (Dec. 2010) The court, known as the "Oregon Complex Litigation Court (OCLC)," was established following a successful, single-county pilot program. That pilot program began in 2006.

Because the court is new, the number of cases it will handle is unknown at this time. However, the court is intended to handle only "the most complex" cases, not simply cases in which a business interest is involved.

Judges are drawn from sitting circuit court judges. "Sitting circuit court judges who wish to serve on the OCLC must submit a resume and a detailed description of their civil trial experience on the bench and in the bar." Chief Justice Order No. 10-066. One motivation for the specialty court seems to be to have specialty judges who are experienced in complex litigation and thus "know how to move a case more efficiently" and "whether to position it for settlement or fast track it for trial." *See* Oregon Task Force Laywer.

Parties must consent to become part of the docket. Judges look at the number of parties, complexity of legal issues, complexity of factual issues, complexity of discovery and anticipated length of trial to determine whether a case should be assigned to the docket. Cases are assigned to a single judge, who handles discovery plans and

can order mediation, settlement or trial. The presiding judge is the gatekeeper on accepting cases but has written guidance to follow. The court's web site publishes decisions.

Pennsylvania (1999) The Supreme Court established a Commerce Court in Philadelphia and Pittsburgh. Initially, there were two judges to handle the cases and currently there are three. By 2005, the court concluded the commerce program led to efficient, fair, and cost-effective resolution of business litigation. The cases involved business-to-business cases, with at least $50,000 at issue. Opinions are published on the court's web site. More than 800 opinions were issued in its first nine years and the commerce court hears more than 100 cases per year.

The types of cases that may be assigned to the court fall into two major categories: Commerce or Complex Litigation. The Commerce category is subject matter based. The Complex Litigation category is based on the complexities of the litigation. Many cases coming within the Commerce category will also come within the Complex Litigation category. The Commerce category is broken into two subcategories, those that because of the subject matter are presumptively accepted, and commercial cases.

Cases are assigned to different management tracks. Expedited commerce cases have target trial dates within thirteen months of filing. Standard commerce cases have target trial dates within eighteen months. Exceptionally complicated cases have target trial dates of two years.

The trial judge actively manages the case to provide an efficient, cost effective, timely and fair resolution of the case. All matters, including the trial and motions, are handled by the same judge except for jury selection.

South Carolina (2007) The Supreme Court established a business court pilot program by administrative order. It has been deemed a success and therefore has been extended until October 2011.

In the first two years of the pilot program, forty-two cases were assigned to the business court. Since then, the numbers have remained consistent.

For the pilot program, the chief justice selected one judge from each of the three districts in which the business court exists. These judges received specialized training in business court disputes (e.g., shareholder derivative suits, various corporate structures and obligations) through training programs.

Without respect to the amount in controversy, civil matters in which the principal claim or claims are made under the following Titles of the South Carolina Code of Laws are appropriate matters to be assigned to the business court: securities, trusts, monopolies, restraints of trade, etc. Assignment of cases to the business court may be made by the Chief Justice sua sponte or at the request of counsel.

Business court "cases are not subject to time and scheduling rules and constraints imposed on other cases on the regular docket and they are quite often given precedence in scheduling matters." In addition, "to the extent available in a business court forum, the use of technology by parties in matters assigned to the business court is encouraged. The business court judge presiding over a matter shall make the final determination on whether the use of technology in any proceeding or conference is warranted."

Also, business court judges must publish all written orders related to motions to dismiss and motions for summary judgment on the court's webpage. Business court judges are "encouraged" to "issue written orders on other non-jury, pretrial matters." *See* S.C. Sup. Ct. Admin. Order No. 2007-09-07-01 (2007), amended by S.C. Sup. Ct. Admin. Order No. 2007-11-30-01 (2007).

Business court cases are not subject to the same time rules of other cases and some priority is given in scheduling matters to business court cases. Because of the latter, business court cases can move through the system more quickly.

States Considering Business Courts/Dockets:

Indiana (May 2009) No formal system but the Supreme Court appointed one judge, who is devoted full time to manage the complex litigation docket, paving the way for a business court.

Michigan (2011) A Statewide task force recommended a three-year pilot program for a specialized business docket in the two largest counties and other areas as the Supreme Court deems fit. An oversight body of the bench and bar is to draft protocols for evaluating its success. The executive director of the Michigan State Bar met with the House Judiciary Committee in late February and was expected to meet with the committee again to discuss the pilot program.

West Virginia (May 2010) A law recommending the creation of a business court was signed into law by the governor in 2010. The law encourages the supreme court to establish a business court. The Supreme Court of Appeals of West Virginia held a public forum in

November to discuss the possibility of establishing a business court in the state. A committee is still studying the feasibility of such a project.

The state is interested in a court to resolve business disputes because it believes it might be good vehicle to bring business to the state.

States that rejected or stalled business courts:

Mississippi (2008) A study group was appointed to research whether business courts were a feasible option in Mississippi. It appears that the study group ceased meeting toward the end of 2008.

One of the attorneys involved with the study group provided us with the minutes of several meetings and a survey the group performed of several states. The survey they used is similar to the one we used in Iowa.

According to the Secretary of State's office, a bill was ultimately introduced regarding establishment of a business court system, but it died in a judiciary subcommittee. More than likely, this was probably the last "event" that occurred regarding the business court system. (There were other bills with higher priority that the Secretary of State's office and others wanted passed and the business courts bill would have required more effort to gain passage.)

Although business courts are still an objective, the committee is no longer active. However, the committee submitted a packet of information to the Supreme Court, which can establish a court without legislative approval.

New Jersey The legislature refused to make a ten-year pilot program permanent saying the current system was fine the way it was. The pilot program is still in effect but rarely used. Cases can be designated as "complex commercial," which is a box one can check when filing a case. At this point, the New Jersey system is "largely inactive."

Oklahoma (2003) The Supreme Court did not act on legislation proposing a business court.

Rhode Island (2001) A business calendar was set by judicial administrative order. Cases include breach of contract, UCC, commercial business transactions, shareholder derivative and matters affecting business transactions. The calendar was suspended in 2009 because of a case backlog in other areas.

Virginia A bill proposing a business court was not passed by the Legislature.

Wisconsin The Supreme Court established a stream-lined business set of civil procedure rules for business actions but they have not been used by the bar. The court initially had proposed a business court in Milwaukee but determined it did not have sufficient cases to justify one.

J. Iowa District Court Civil Filings & Dispositions '09

Sept. 6, 2010

Iowa District Courts

Regular Civil Filings, 2009 (Including Contempts)

Torts (P.I. = Pers. Injury)	State	1A	1B	2A	2B	3A	3B	D4	5A	5B	5C	D6	D7	8A	8B
P.I. - Med/dental malp*	172	5	11	4	19	8	10	10	8	2	47	18	12	10	8
P.I. - Motor vehicle	1,892	71	115	76	157	73	109	149	86	19	540	224	150	73	50
P.I. - Premises liability	400	13	22	8	30	15	19	17	24	2	134	55	43	14	4
P.I. - Prod liab & toxic*	37	1	1	0	2	2	1	3	6	1	6	8	4	1	1
P.I. - Other negl/intent.	542	22	42	25	48	21	26	34	20	15	111	80	48	32	18
Profess. malp (no PI)*	40	1	3	2	1	0	1	4	0	1	14	7	4	1	1
Other torts (no PI)	445	20	32	21	45	20	23	27	29	8	96	39	37	29	19
Contract/Commercial															
Debt Collection	15,112	648	1,129	615	1,191	676	858	1,078	929	334	2,852	2,117	1,528	671	486
Fraud/Misrep.	142	5	11	5	9	3	5	11	8	3	33	24	13	10	2
Employment claim	286	10	12	9	18	9	8	10	12	4	117	36	25	12	4
Cont/commrc: other**	1,229	59	69	45	73	59	60	60	96	20	356	135	109	65	23
Real Property/Other Equity															
Mortgage Foreclosure	11,611	374	689	462	937	314	505	876	1,175	232	2,603	1,388	1,270	470	316
Other Real Property	461	29	50	27	31	24	27	52	24	16	77	36	31	27	10
Other Equity	2,973	160	197	98	300	112	167	115	184	61	571	447	235	142	184
Other Civil															
Admin Appeals to DCt	2,203	118	149	86	142	98	77	159	138	52	398	330	277	75	104
Distress warrants***	103	7	5	0	7	0	2	5	4	0	38	13	14	2	6
Foreign judgments	825	31	12	17	25	17	174	317	23	6	84	37	53	21	8
Liens***	5,650	191	293	234	411	221	300	351	532	120	1,171	950	498	237	141
Post conviction relief	438	15	33	4	53	9	22	23	7	1	70	64	43	22	72
Other actions***	2,299	99	439	210	156	89	169	146	96	61	373	157	168	96	40
Total Reg. Civil	46,860	1,879	3,314	1,948	3,655	1,770	2,563	3,447	3,401	958	9,691	6,165	4,562	2,010	1,497

* In weighted caseload formula for judges, these case types are considered "complex" civil cases (see next note).

**In the weighted caseload formula for judges, 10% of "other contract/commercial" cases are considered "complex" civil cases.

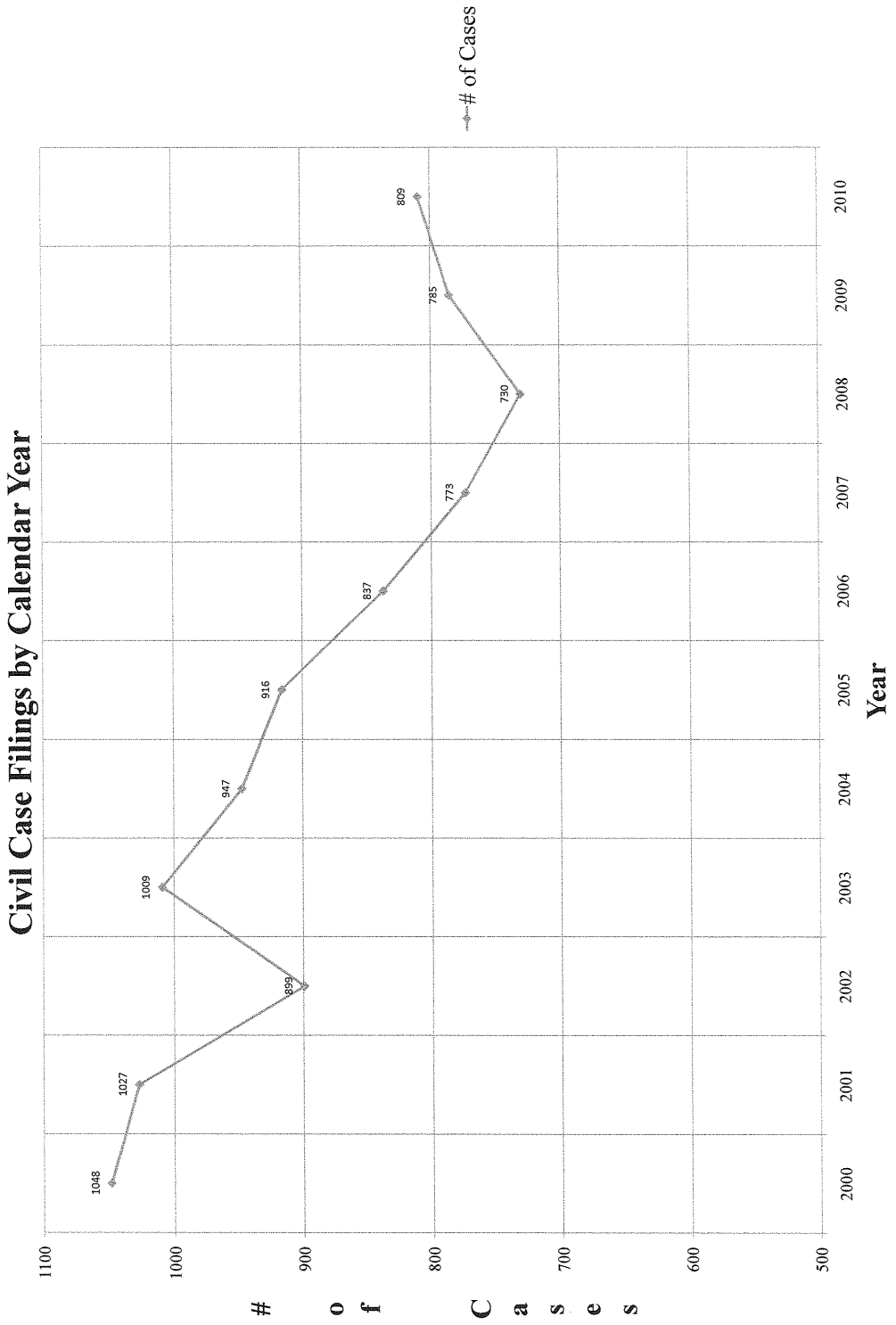
***These civil actions are not included in the judgeship formulas.

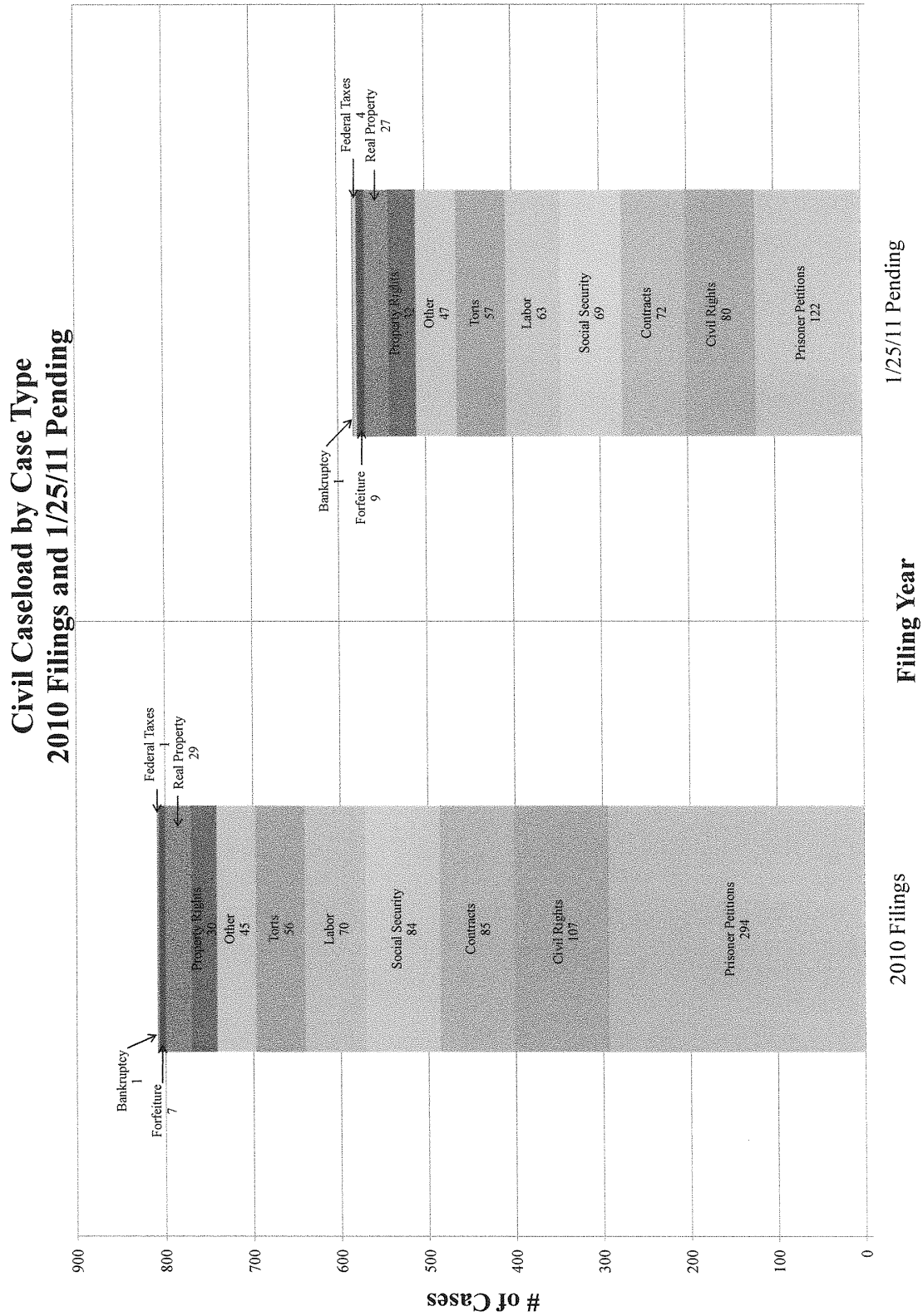
Regular Civil Case Dispositions by Disposition Type -- State -- 2009

		Trial		WITHOUT TRIAL				
Law: Torts (P.I. = Personal Injury)	**Total disposed**	**Jury**	**Nonjury***	Default jgmt	Other jgmt	Vol. Dism	Other dism	Transfer
P.I. - Med/dental malp	**192**	26	3	3	4	100	50	6
P.I. - Motor vehicle	**1,794**	102	22	54	49	1016	535	16
P.I. - Premises liability	**413**	42	4	1	3	226	131	6
P.I. - Prod liab & toxic	**44**	2	1	0	0	18	21	2
P.I. - Other neg/intent.	**520**	27	18	6	25	247	184	13
Profess. malp (no PI)	**60**	8	2	0	1	30	18	1
Other tort (no PI)	**383**	15	27	39	33	121	142	6
Law: Contract/Comrc.								
Contract - Debt Collec	**13,391**	4	529	4,420	3897	2393	2018	130
Fraud/Misrep.	**109**	9	11	9	7	28	41	4
Employment claim	**224**	4	15	11	5	92	70	27
Cont/commrc: other	**1,136**	18	82	196	155	380	288	17
Equity								
Mortgage Foreclosure	**9,406**	0	797	2,429	2927	1971	1280	2
Other Real Property	**423**	0	73	34	99	97	118	2
Other Equity	**2,391**	1	580	276	968	187	362	17
Other Civil								
Admin Appeals to DCt	**1,737**	5	204	500	458	166	386	18
Distress warrants	**20**	0	5	4	10	0	1	0
Foreign judgments	**602**	0	5	187	408	1	1	0
Liens	**1,170**	0	19	253	887	0	10	1
Post conviction relief	**434**	0	93	8	34	27	232	40
Other actions	**714**	0	78	129	412	7	80	8
TOTAL REG. CIVIL	**35,163**	**263**	**2,565**	**8,559**	**10,385**	**7,107**	**5,968**	**316**
% of Total	*100.0%*	*0.7%*	*7.3%*	*24.3%*	*29.5%*	*20.2%*	*17.0%*	*0.9%*

Final: 4-19-2010

K. Federal Civil Case Filings




Civil Caseload by Case Type
2010 Filings and 1/25/11 Pending
# of Cases
900
800
700
600
500
400
300
200
100
0
Bankruptcy 1
Forfeiture 7
Property Rights 30
Other 45
Torts 56
Labor 70
Social Security 84
Contracts 85
Civil Rights 107
Prisoner Petitions 294
Federal Taxes 1
Real Property 29
2010 Filings
Bankruptcy 1
Forfeiture 9
Property Rights 32
Other 47
Torts 57
Labor 63
Social Security 69
Contracts 72
Civil Rights 80
Prisoner Petitions 122
Federal Taxes 4
Real Property 27
1/25/11 Pending
Filing Year

	Contract					Other Tort	IP			Other			
IA-N Total	53					4	11			43			
	Insurance	Stockholder's Suits	Other Contract	Contract Product Liability	Franchise	Property	Copyright	Patent	Trademark	Antitrust	Banks and Banking	Commerce	Securities/Commodities/Exchange
	11	0	35	0	0	4	1	5	5	11	0	1	0
	Contract					Other Tort	IP			Other			
IA-S Total	69					11	25			34			
	Insurance	Stockholder's Suits	Other Contract	Contract Product Liability	Franchise	Property	Copyright	Patent	Trademark	Antitrust	Banks and Banking	Commerce	Securities/Commodities/Exchange
	24	1	40	0	0	11	2	12	7	0	1	0	4

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www.iowacourts.gov.