Kansas Journal of Law and Public Policy Symposium
Access to Justice: Commemorating the 50th Anniversary
of the Criminal Justice Act
Adams Alumni Center, University of Kansas
February 20, 2015

12:30 – 1:30pm   Civil Panel - 1.0 CLE credit

“Seeking Just, Speedy and Inexpensive Civil Litigation in the
United States”
Justice Rebecca Love Kourlis, Executive Director, IAALS—the
Institute for the Advancement of the American Legal System,
University of Denver

“Access to Civil Justice – Keeping America’s Promise”
Ronald Flagg, Legal Services Corporation
Seeking Just, Speedy and Inexpensive Civil Litigation in the United States

The civil justice system costs too much and takes too long, and there are now sweeping national efforts to find solutions, in order to continue to provide and protect access to the courts and in hopes of ensuring the viability of jury trials. Although these themes have resonated throughout the history of the civil litigation system, recent efforts have demonstrated a renewed and serious commitment by judges and attorneys around the country to develop updated procedures and achieve a change in culture. From initial efforts to identify and define the problems that plague the system, to efforts to develop and implement solutions, over the past seven years, judges and attorneys have been trying to reinvent the system. We now stand at the cusp of sweeping changes to our civil justice system, both at the state and federal level.

In 2007, IAALS, the Institute for the Advancement of the American Legal System at the University of Denver, and the American College of Trial Lawyers Task Force on Discovery and Civil Justice (ACTL Task Force, composed of plaintiff and defense attorneys and judges) formed a partnership to study costs and delay in America’s civil justice system and, if applicable, to propose solutions. The goal of the project was first to determine if a problem really existed in the system and, if so, to define and examine it. As a starting point, IAALS surveyed the Fellows of the American College of Trial Lawyers (ACTL). One of the major themes to emerge from that survey was that, “[a]lthough 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.” 81% of Fellows agreed that the civil justice system is too expensive. 69% of Fellows said that the civil justice system takes too long. And 68% of Fellows agreed that the potential of litigation costs inhibits the filing of civil cases. The same or a similar survey was administered to five additional attorney and judge groups, with very similar results. What was absolutely clear is that civil litigation—along with our world—has changed profoundly since the prevailing civil procedures were adopted in 1938, and corresponding change in the civil justice system is needed to maintain the objectives of a “just, speedy, and inexpensive determination of every action”—the goals as set forth in Rule 1 of the Federal Rules of Civil Procedure.
From there, IAALS and the Task Force published a Final Report that proposed 29 Principles for improving the civil justice system, with the goal of achieving fundamental change. The Principles recommend particular changes around three themes: increased judicial involvement in cases; a process that is proportional to the matters at issue; and a change in attorney culture, including cooperation between attorneys in the pretrial phase. There is a need for judges to take a more active role at the beginning of a case, and for a change in the way attorneys approach civil litigation, and particularly discovery.

IAALS’ early efforts to define the problem and, with the ACTL, recommend solutions, touched off a groundswell of activity at both the federal and state level. At the federal level, in May of 2010, the federal Advisory Committee on the Federal Rules of Civil Procedure convened a Conference on Civil Litigation at Duke University. The conference brought together rule makers, legal scholars, practitioners, judicial officers, professional associations, and researchers. The general consensus was consistent with the results of the IAALS/ACTL Task Force survey—the current system, for certain kinds of cases, is “often too costly” and cases take too long to complete. The result is that people across the country are not able to access the civil justice system for resolution of their disputes. While discovery was identified as a leading culprit, the materials also supported earlier and more extensive judicial case management and the need for a change in culture. Following the Duke Conference, the Rules Committee set to work to draft and propose revisions to the Federal Rules of Civil Procedure. This work culminated in a package of proposed amendments that focuses on these themes—achieving proportionality in discovery, cooperation, and increased judicial case management. The proposed amendments are currently before the Supreme Court. The Supreme Court has until May 1, 2015 to consider the amendments. Once they are adopted by the Supreme Court, they will go into effect December 1, 2015, unless Congress enacts legislation to reject, modify, or defer the proposed amendments.

This commitment to civil justice reform is paralleled at the state level as well. Following the IAALS/ACTL Task Force Final Report, IAALS also published a set of proposed “pilot project rules,” which takes the Principles from the Final Report and turn them into a set of practical rules. The intent was to achieve real impact by encouraging jurisdictions around the country to test the proposals in their courts. Courts around the country have taken up the challenge. Numerous pilot projects are in various stages of consideration and implementation around the country. In some jurisdictions, the pilot projects have run their course and evaluation—and even broader implementation—is underway (e.g. New Hampshire, Massachusetts, and Colorado). In Utah, state-wide rule changes were implemented with the goal of achieving more immediate impact. The pilot projects are not limited to the states, with various pilot projects at the federal level as well (e.g. Seventh Circuit Electronic Discovery Pilot Program). The Conference of Chief Justices (CCJ) has supported these efforts, and in 2013 the CCJ created a committee dedicated to reviewing the experiences from the pilot projects and rule reform efforts around the country and developing guidelines and best practices for civil litigation.
and case flow management. The Civil Justice Improvements Committee, jointly staffed by the National Center for State Courts and IAALS, is currently working on these recommendations and a final report is expected in early 2016.

IAALS continues to remain on the forefront of this work. IAALS is working with the ACTL Task Force to prepare an Update to the Final Report, expected in the spring of 2015, which will update the Principles based on the experiences around the country. Thus, over the next year we will see significant changes in civil litigation at the federal level, followed by significant recommendations for change in civil litigation in state courts. There is a common theme across these efforts. It has become clear that costs and delays associated with civil litigation prevent many from accessing the courts. And, for those who are able to engage in litigation, the result is significant cost and delay that undermine access to trials. The current efforts seek to open the door to civil justice for all, so that we can truly achieve the goals of a just, speedy, and inexpensive determination for all who seek access to our courts.
IAALS is a national, independent research center dedicated to continuous improvement of the process and culture of the American legal system.
The Rule One Initiative serves to advance empirically informed models for court processes and procedures that provide greater accessibility, efficiency, and accountability in the civil justice system.
Rules Changes

RULE ONE INITIATIVE

Judicial Case Management

Legal Culture

IAALS

INSTITUTE for the ADVANCEMENT of the AMERICAN LEGAL SYSTEM

UNIVERSITY of DENVER
Early Efforts in the Area of Civil Justice Reform
Although the system is not broken, it is in serious need of repair

82% of recent survey respondents believe litigation is too expensive

83% of recent survey respondents believe discovery is too expensive
29 Proposed Principles for improvement of the civil justice system:

- One size doesn’t fit all
- Proportionality should be the most important principle applied in discovery
12 Pilot Project rules to be tested in pilot projects around the country:

- A single judge should be assigned for the duration of the case
- Initial pretrial conference with lead trial counsel in attendance
Action on the Ground
State Efforts at Reform: From Implementation to Evaluation
Civil Justice Initiative

New Hampshire: Impact of the Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules
August 16, 2013

NCSC
National Center for State Courts
Williamsburg, Virginia
New Hampshire Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules

Timeline

- Launched in two counties October 1, 2010
- Expanded to third county October 1, 2012
- Expanded statewide effective March 1, 2013
- New Hampshire revised its Rules of Civil Procedure for all civil cases to fully incorporate the pilot project rules, effective October 1, 2013
New Hampshire Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules
Key Elements

- Implemented changes to pleading, case structuring orders, and discovery procedures
  - Replaced notice pleading with fact-based pleading
  - Changed case structuring order rules to include a “meet and confer” requirement and telephonic conferences; eliminated conferences where full agreement and stipulation by the parties
  - Required early initial disclosures, after which only limited additional discovery is permitted
New Hampshire Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules Evaluation

The results of the pilot project are mixed. There is no statistically significant decrease in the time from filing to disposition, a significant goal of the project. Anecdotal reports from attorneys suggest the provisions are working and that fact pleading gets the cases moving along faster. Judges are moving back toward in-court conferences instead of telephonic. Decrease in the number of default judgments.
SUFFOLK SUPERIOR COURT BUSINESS LITIGATION SESSION PILOT PROJECT

FINAL REPORT ON THE 2012 ATTORNEY SURVEY

December 2012

Submitted by Jordan Singer
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Massachusetts Business Litigation Session (BLS) Pilot Project

Timeline

- Implemented on a voluntary basis January 4, 2010 for all new cases in Suffolk Superior Court’s Business Litigation Session
- Initially set to run through December 31, 2010
- Extended through December 2011
Massachusetts Business Litigation Session (BLS) Pilot Project

Key Elements

- Limited discovery (including electronic discovery) proportional to the magnitude of the claims actually at issue
  - Parties required to produce “all reasonably available non-privileged, non-work product documents and things that may be used to support the party’s claims, counterclaims or defenses”
  - Discovery is limited to documents and information that would enable a party to prove or disprove a claim, or for impeachment
  - Staged discovery where possible so that potentially dispositive issues may be adjudicated first
  - Parties required to confer early and often about discovery and, especially in complex cases, to make periodic reports of these conferences to the court
Massachusetts Business Litigation Session (BLS) Pilot Project Evaluation

- A 10-question “Pilot Project Evaluation” was conducted mid-2011 with a low response rate
- A second survey was conducted mid-2012, leading to a Final Report on the 2012 Attorney Survey (Dec. 2012)
Massachusetts Business Litigation Session (BLS) Pilot Project Evaluation Results

- Most respondents concluded that the pilot was “much better” or “somewhat better” than other BLS cases re: timeliness and cost-effectiveness of discovery, timeliness of case events, access to a judge to resolve issues, and cost-effectiveness of case resolution
- 71% said their experience was “much better” or “somewhat better” than a regular BLS case
- 80% said BLS pilot provided a “much better” or “somewhat better” overall experience versus a non-BLS case
Preliminary Findings on the Colorado Civil Access Pilot Project

Corina D. Gerety
Director of Research

&

Logan Cornett
Research Analyst

April 7, 2014

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Colorado Civil Access Pilot Project

Timeline

- Applies to state court “business” cases, as specifically defined by claim type
- Two-year program initially scheduled to run from January 1, 2012 to December 31, 2013; extended for an additional year until December 31, 2014
Colorado Civil Access Pilot Project

Key Elements

- Rules incorporate many of the IAALS/ACTL Task Force Final Report recommendations, but some differences
  - One judge per case
  - Robust, staggered initial disclosures
  - Motions to dismiss do not stay other deadlines
  - Level of discovery and case timeline proportionally tailored to the case following an early case management conference
  - No depositions of expert witnesses
Colorado Civil Access Pilot Project Evaluation Results

- The CAPP rules increase the probability of an earlier resolution by 103% over the standard procedure, and the effect is even greater for cases that end in settlement.
- Most attorneys consider the process to be proportionate to the needs of their case, in terms of:
  - Time to resolution
  - Costs incurred
  - Amount of permitted discovery
- CAPP reduces the number of motions by 1/3 and cuts the number of requests for extensions in half.
- No impact on win-lose rates.
Examples of Additional Reform Efforts

- Seventh Circuit Electronic Discovery Pilot Program
- Utah
  - State-wide rule changes
- Iowa Civil Justice Reform Task
  - Business Court Pilot Project
  - Rule changes
- Minnesota Civil Justice Reform Task Force
  - Rule changes
  - Expedited Civil Litigation Track Pilot Project
  - Complex Case program
- Short Summary and Expedited Programs
Lessons Learned from Process of Reform and Implementation
A Roadmap for Action

Lessons from the Implementation of Recent Civil Rules Projects
Lessons for Rules Project Implementation

- The Right People
- The Right Process
- Clear Project Scope
- Buy-In from Legal Community
- Addressing the Nuts and Bolts
- Conducting an Evaluation
Conference of Chief Justices
Civil Justice Improvements Committee
NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices establishes a Committee charged with (1) developing guidelines and best practices for civil litigation based upon evidence derived from state pilot projects and from other applicable research, and informed by implemented rule changes and stakeholder input; and (2) making recommendations as necessary in the area of case flow management for the purpose of improving the civil justice system in the state courts.
Conference of Chief Justices
Civil Justice Improvements Committee
Federal Efforts at Reform: Proposed Federal Rule Amendments
2010 Civil Litigation Conference

- Duke Law School, May 10-11, 2010
- Sponsored by the Advisory Committee on Civil Rules
- Explored the current costs of civil litigation, particularly discovery, and discussed possible solutions
Federal Rule Amendment Process

- Standing Committee on Rules of Practice and Procedure, January 2013
- Civil Rules Advisory Committee, April 2013
- Back to Standing Committee, June 2013
- 6 month public comment period (August 2013 – February 2014)
- Back to Advisory Committee, April 2014
- Back to Standing Committee, May 2014
- Judicial Conference of the United States, September 2014
- United States Supreme Court, before May 1, 2015
- United States Congress statutory time period to reject or modify
- Earliest effective date: December 1, 2015
Lawyers Spar Over Discovery Rules

Litigation costs at center of debate.

Tony Mauro, The National Law Journal
February 24, 2014 | 0 Comments

Litigation: Proposed amendments to the FRCP prioritize early and active judicial management

Delay itself undermines the goals of Rule 1. Accordingly, certain proposed changes merely shorten time frames already existing in the Rules.

Cynthia Courtney, Peter Coons
January 30, 2014

Litigation: Cooperation in the proposed Federal Rules amendments

At the Duke Conference, “cooperation” had center stage. The Duke Conference attendees lamented that excessively adversarial behavior drives up the costs of litigation.

Cynthia Courtney, Peter Coons
February 27, 2014

In part 2 of this series, we described the proposed amendments to the Federal Rules of Civil Procedure that are intended to promote active and early judicial case management. In part 3, we described the proposed amendments that are intended to promote increased proportionality in discovery. In this part, we will describe the proposed amendment that is aimed at increased cooperation among litigants and their counsel.
Rule One Initiative

A FORUM FOR UNDERSTANDING AND COMMENT ON THE PROPOSED FEDERAL RULES AMENDMENTS

December 5-6, 2013. Denver, Colorado

IAALS’ Report on
A FORUM FOR UNDERSTANDING AND COMMENT ON THE FEDERAL RULES AMENDMENTS

On December 5, 2013, IAALS—the Institute for the Advancement of the American Legal System at the University of Denver—hosted a Forum for Understanding and Comment on the Federal Rules Amendments in Denver, Colorado. The Forum brought together a group of approximately forty lawyers, academics, and judges from around the country, with diverse practices and viewpoints, from both sides of the “v.” The Forum provided an opportunity for comment on the proposed federal rules amendments for those with expertise and experience in the federal civil litigation process, but who may not have regularly participated in the federal rule-making and comment process. The following report provides additional background and summarizes the discussion.

BACKGROUND

IAALS is a national, independent research center at the University of Denver dedicated to continuous improvement of the process and culture of the civil justice system. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications, and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models, and tools to advance a more accessible, efficient, and accountable civil justice system.

IAALS has taken a leadership role in finding solutions to problems within the civil justice system, by doing important research on the operation of the civil justice process and by generating practical, implementable recommendations. Since we began our work in 2006 we have come a long way, with meaningful research and recommendations that have informed...
January 28, 2014

Submitted electronically via Regulations.gov

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle NE
Washington, D.C. 20544

Dear Committee:

We write to you today jointly as the Chair of the American College of Trial Lawyers Task Force on Discovery and Civil Justice and the Executive Director of IAALS, the Institute for the Advancement of the American Legal System at the University of Denver, to comment on the proposed amendments to the Federal Rules of Civil Procedure.

BACKGROUND

In 2007, IAALS and the American College of Trial Lawyers Task Force on Discovery and Civil Justice (ACTL Task Force or Task Force) formed a partnership to study costs and delays in America’s civil justice system and, if applicable, to propose solutions. Although the project was originally focused on discovery, the project was expanded to a broader examination of the civil justice system.

The goal of the project was first to determine if a problem really existed in the system and, if so, to define and examine it. As a starting point, IAALS and the Task Force worked with an outside consultant to design and conduct a survey of the Fellows of the ACTL. Several 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.

Summary of Proposed Rules

- Cooperation (Rule 1)
- Case Management (Rules 4, 16, 26, 34)
- Proportionality/Discovery (Rule 26)
- Production Requests/Objections (Rule 34(b)(2))
- Failure to Preserve/Limitations (Rule 37(e))
Case Management
WORKING SMARTER NOT HARDER
HOW EXCELLENT JUDGES MANAGE CASES

streamline

collaborate

convene
Continuous Improvement Model

Measurement → Research

Implementation ← Recommended Models

RULE ONE INITIATIVE

INSTITUTE for the ADVANCEMENT of the AMERICAN LEGAL SYSTEM

UNIVERSITY of DENVER
There is national momentum around reducing the costs and delays associated with civil litigation, in order to continue to provide and protect access to the courts and in hopes of ensuring the viability of trials. Although these themes have resonated throughout the history of the civil litigation system, recent efforts have demonstrated a renewed and serious commitment by judges and attorneys around the country to developing updated procedures designed to serve these two interrelated goals. From initial efforts to identify and define the problems that plague the system, to efforts to develop and implement solutions, the past six years have seen a surge in attention to these issues. With pilot projects underway across the country implementing and testing solutions, we have moved from recommendations to action on the ground.

Pilot projects have been implemented in Colorado, Massachusetts, and New Hampshire state courts, Pennsylvania and New York federal courts, and the federal district courts in the Seventh Circuit. Statewide rules changes have been implemented in Minnesota, Utah, and Wyoming. The Federal Circuit Advisory Council has adopted a model order governing electronic discovery in patent cases and a nationwide committee of plaintiff and defense attorneys has developed Initial Discovery Protocols for Employment Cases Alleging Adverse Action. Expedited trial projects have been established or are under development in a growing number of courts at the state and federal level. Iowa is in the process of implementing recommendations to make civil cases more efficient and cost-effective, with discovery amendments and a new expedited civil action rule set to take January 1, 2015. This overview memorandum, separated by state and federal projects, discusses the background of these projects, specific goals, and their current status. Links to additional information on the projects are provided.

The overarching purpose of these experiments is to develop rules that work to achieve the goals of a just, speedy, and inexpensive process for civil litigation. The National Center for State Courts (NCSC) intends to monitor and evaluate a number of the state projects, IAALS—the Institute for the Advancement of the American Legal System—has evaluated the Colorado project, and the Federal Judicial Center (FJC) has undertaken measurement of a number of the
federal projects. It is IAALS’ hope that the balance of the projects will also be evaluated, so that data can be broadly shared and digested.

I. Current State Projects

California

California Expedited Jury Trials Act\(^1\)

In September 2010, the California legislature passed the Expedited Jury Trials Act, authorizing the California Judicial Council to establish a program under which parties could stipulate to a jury trial of eight or fewer jurors, a limit of three peremptory challenges per side, and a limit of three hours for each side to present its case, with the goal of completing the trial in one day. The decision of the jury is binding on the parties, and appeals and post-trial motions are strictly limited. A hallmark of the program is its flexibility; parties can enter into agreements governing the rules of procedure, including the presentation of evidence and high/low agreements on damages. The program is to remain in effect until January 1, 2016.

Colorado

Colorado Civil Access Pilot Project\(^2\)

In August 2009, a group of local practitioners and members of the Colorado judiciary began meeting in order to explore whether Colorado courts might be a viable jurisdiction for a pilot project based on some of the Principles in the American College of Trial Lawyers (ACTL) Task Force on Discovery and IAALS Final Report. The committee focused on two case types for a potential pilot project—medical negligence and business litigation. The committee presented the proposed Civil Access Pilot Project (CAPP) rules to the Chief Judge and judges in the districts that expressed initial interest, and submitted the project to the Colorado Supreme Court for consideration. The Court requested comments and held a public hearing, and then formed a working group for the purpose of reviewing the comments and formulating recommendations for the Court.

On June 22, 2011, the Colorado Supreme Court voted to implement a pilot project that applies generally to business actions, with a few exceptions—for example, employment cases, construction defect actions, cases where the Colorado Governmental Immunity Act may provide a defense, and cases involving wages and forcible entry. The pilot project went into effect on January 1, 2012, in four judicial districts, for a two-year period. In June, 2013, then Chief Justice Michael L. Bender amended Chief Justice Directive 11-02 and extended the pilot project for one year, to run through December 31, 2014, so as to provide “more data and a detailed evaluation” and “give the court time to determine whether the rules as piloted achieved the stated goals.” The Directive was been extended a second time by Chief Justice Nancy E. Rice for an

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additional six months to give the Court further time to consider the evaluation and proposed rule changes. At the request of the Court, IAALS studied the effect of the pilot project.

In April 2014, IAALS released its Preliminary Findings on the Colorado Civil Access Pilot Project. IAALS has followed this up with a final evaluation of the project, *Momentum for Change: The Impact of the Colorado Civil Access Pilot Project*, released in October 2014. The analysis reveals that the CAPP process as a whole has succeeded in achieving many of its intended effects, including a reduced time to disposition, increased court interaction, proportional discovery and costs, and a lower level of motions practice. Much of the positive feedback relates to CAPP’s early, active, and ongoing judicial management of cases, with many calling for this to become a permanent feature of the rules.

**Delaware**

*Delaware Court of Chancery Rule Changes and Discovery Guidelines*  

The Delaware Court of Chancery amended its Rules regarding discovery on January 1, 2013 to “account for modern discovery demands” and to bring the Court’s rules in line with “current practice.” The amendments to Rules 26, 30, 34, and 45 incorporate “electronically stored information” into the rules, consistent with similar changes that have been made to the Federal Rules of Civil Procedure. The Court has also expanded its Guidelines to Help Practitioners in the Court of Chancery to include guidelines regarding discovery. The Guidelines now provide thorough guidance to practitioners on preservation, collection, review, production, privilege review, privilege logs, written discovery, discovery from third parties, and discovery disputes.

**Iowa**

*Iowa Civil Justice Reform Task Force*

In December 2009, the Iowa Supreme Court established the Iowa Civil Justice Reform Task Force to develop a blueprint for the reform of the state’s civil justice system. The Task Force was to develop proposals to make the system faster, less complex, more affordable, and better equipped to handle complex cases, such as complex business cases and medical malpractice matters. The Task Force convened a larger committee of 70 and formed five subcommittees dedicated to exploring the following issues: 1) discovery; 2) court-annexed alternative dispute resolution; 3) litigation management; 4) specialty courts and rules; and 5) pretrial procedures. To inform its work, the Task Force administered a survey of the Iowa bench and bar, focusing on specific problems and potential solutions. IAALS worked with the Task Force to design the survey and provided materials on unique state rules and civil justice reform efforts in other jurisdictions.

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The Task Force issued its final report, *Reforming the Iowa Civil Justice System*, in March of 2012. Among the recommendations was the establishment of a business court pilot project, one judge/one case and date certain for trial, adoption of the Federal Rules’ initial disclosure regime, and a two-tiered differentiated case management pilot project.

Iowa is in the process of implementing the committee’s recommendations. As a first step, in December, 2012, the Iowa Supreme Court established a three-year pilot project for an Iowa Business Specialty Court for complex cases. Cases are eligible to be heard in the Business Court Pilot Project if compensatory damages totaling $200,000 or more are alleged, or the claims seek primarily injunctive or declaratory relief. In addition, eligible cases must satisfy one or more of the criteria listed in the Memorandum of Operation issued by the Supreme Court. The pilot project began accepting cases for management and case processing May 1, 2013. More recently, the Iowa Supreme Court has adopted an expedited civil action rule for actions involving $75,000 or less in money damages. The new expedited civil action rule includes limits on discovery and summary judgment motions, an expedited trial, and limitations on the length of trial. Finally, the Iowa Supreme Court also adopted a package of discovery amendments that include initial disclosures, limitations on the frequency and extent of discovery, a discovery plan, and an expert report requirement. Both the expedited civil action rule and the discovery amendments took effect January 1, 2015.

**Massachusetts**

*Business Litigation Session Pilot Project*[^5]

The Business Litigation Session (BLS) Pilot Project was developed as a joint effort of the BLS judges and the BLS Advisory Committee, to address the increasing burden and cost of civil pretrial discovery, particularly electronic discovery. The project was influenced by the ACTL Task Force and IAALS’ *Final Report*.[^6] The pilot project was implemented on a voluntary basis, effective January 4, 2010, for all new cases in Suffolk Superior Court’s BLS, and all cases that have not previously had an initial Rule 16 case management conference. Under the pilot project, the judge managed the case’s use of discovery, including electronic data and depositions, to settle on the right amount of discovery proportionate to the type of case at hand. The pilot project ran for an initial one-year period and was extended by Superior Court Chief Justice Barbara Rouse for a second calendar year, ending in December 2011. While the BLS pilot project has not been officially made permanent, it continues to be implemented on a voluntary basis.

The Suffolk Superior Court Business Litigation Session conducted a 10-question “Pilot Project Evaluation” survey in mid-2011. Because of a low rate of response, the court conducted a revised 10-question survey, administered electronically via Survey Monkey, in the fall of 2011.


2012. The Court has published a Final Report on the 2012 Attorney Survey. The survey results are positive. Despite the program’s voluntary nature, few respondents opted out when they had eligible cases. In addition, the pilot program fared well across nearly all key indicators in comparison to both BLS and non-BLS cases.

**Minnesota**

*Minnesota Civil Justice Reform Task Force*[^7]

In November, 2010, Minnesota Supreme Court Chief Justice Lorie S. Gildea signed an order establishing the Civil Justice Reform Task Force, for the purpose of reviewing civil justice reform initiatives undertaken in other jurisdictions and recommending changes to facilitate efficient and cost-effective processing of civil cases. The Task Force was also to consider in more detail the work previously undertaken by the Civil Justice Forum in 2009, and the initiatives proposed by the Forum. Three subcommittees formed to examine various issues. The Rules Subcommittee explored how pleading and discovery rules in other jurisdictions reduce delay and costs, the Differentiated Case Management Subcommittee studied how other jurisdictions differentiate cases, and the Specialty Courts Subcommittee reviewed options for creating greater court specialization. IAALS provided the Task Force with a national perspective on civil justice issues and reforms and the ACTL/IAALS Pilot Project Rules served as a discussion point for potential rules changes.

The Task Force submitted its final report to the Minnesota Supreme Court in December of 2011, with a number of rule and case management recommendations. The Task Force recommendations included the incorporation of a proportionality consideration for discovery, the adoption of the federal regime of automatic disclosures, the adoption of an expedited procedure for nondispositive motions, and an expedited litigation track pilot program and a complex case program. The Task Force also recommended a trial date certain and assignment of civil cases to a single judge. Following the report, the Minnesota Supreme Court directed the Task Force to prepare particular proposed rule changes, case management orders, and forms. In May of 2012, the Task Force submitted a Supplemental Report including the requested items.

The Minnesota Supreme Court received public comments in the fall of 2012, and issued amendments to the Rules of Civil Procedure and the General Rules of Practice for the District Courts on February 4, 2013. A few minor language errors were fixed in corrective amendments issued on February 12, 2013. The amendments, which went into effect on July 1, 2013, adopt many of the recommendations of the Task Force, including incorporating proportionality into the scope of discovery, automatic disclosures, a discovery plan, an expedited process for nondispositive motions, and a new Complex Case Program.

On May 7, 2013, the Court issued an additional Order authorizing the creation of an Expedited Civil Litigation Track Pilot Project and promulgating further rule amendments consistent with the Task Force’s recommendations. The Expedited Civil Litigation Pilot Project provides for early involvement by the judge, limited discovery, curtailed continuances, and the setting of a

trial date within four to six months. The goal of the project, which applies to cases involving contract disputes, consumer credit, personal injury, and some other types of civil cases, is to see whether this expedited process can reduce the duration and cost of civil suits.

**New Hampshire**

*New Hampshire Proportional Discovery/Automatic Disclosure (PAD) Pilot Project*

In August 2009, at the request of Chief Justice John T. Broderick Jr., a committee was established to determine whether and to what degree the problems with the civil justice system identified at the national level apply to the New Hampshire state system. The committee designed the Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules Project to refocus the civil justice system in New Hampshire on the principle that the purpose of a trial is to do justice for the parties involved—which means a system that is efficient, affordable, and accessible to all citizens who turn to the court system to resolve disputes.

The PAD Pilot Rules Project was launched in Strafford and Carroll County Superior Courts on October 1, 2010. The pilot project rules—temporarily approved by the New Hampshire Supreme Court for the pilot program—implemented changes to the Superior Court pleading and discovery rules, including replacing notice pleading with fact-based pleading and requiring early initial disclosures after which only limited additional discovery should be permitted. By order dated July 17, 2012, the PAD Pilot Rules became applicable to all civil and equity actions filed on or after October 1, 2012, in the Superior Courts for Hillsborough County-Northern District and Hillsborough County-Southern Judicial District. Because of the positive feedback regarding the PAD Project, by order dated January 9, 2013, New Hampshire made the pilot project rules applicable statewide. New Hampshire has since revised its Rules of Civil Procedure for all civil cases to fully incorporate the pilot project rules, and the new rules went into effect on October 1, 2013.

The National Center for State Courts has published a report summarizing its evaluation of the pilot project, titled New Hampshire: Impact of the Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules. The evaluation compares case processing outcomes for cases filed in the pilot courts under the PAD Pilot Rules with those for cases filed under the previous rules of civil procedure. To provide a broader context for the evaluation, the NCSC also conducted interviews of key stakeholders involved in the development and implementation of the pilot project, as well as attorneys who had litigated cases under the PAD pilot project rules. The report notes that the results of the Pilot project are mixed. There has not been a statistically significant decrease in the time from filing to disposition—a significant goal of the pilot project. Nevertheless, the anecdotal reports from attorneys with pilot project cases suggest the provisions are working and that fact pleading gets the cases moving along faster.

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**New York**

*Task Force on Commercial Litigation in the 21st Century*\(^9\)

New York Chief Judge Jonathan Lippman formed the Task Force on Commercial Litigation in the 21st Century to explore and recommend reforms to enhance the already world-class status of the Commercial Division of the New York Supreme Court. Recognizing the increased pressures and demands on the Division, the Chief Judge wanted to ensure the quality of the Division going forward. The Task Force submitted its final report in June of 2011. The Task Force’s key recommendations include 1) endorsing the Chief Judge’s legislative proposal to establish a new class of Court of Claims judges, appointed by the Governor and assigned to the Commercial Division; 2) implementing several measures to provide additional support to the Division, including additional law clerks and the creation of a panel of “Special Masters”; 3) implementing procedural reforms to facilitate prompt and cost-effective resolution of cases; 4) implementing initiatives to facilitate early case resolution and arbitration; and 5) appointing a statewide Advisory Council to review the recommendations and guide implementation.

In 2013, Chief Judge Lippman established a permanent Commercial Division Advisory Council, as recommended by the New York Task Force. The Council has been working on implementing the recommendations, and multiple rule amendments have been implemented. Some of the changes in 2014 included (i) amendments that provide for more robust expert disclosure; (ii) an accelerated adjudication procedure; (iii) a pilot mandatory mediation program, (iv) a limit to the scope and number of interrogatories, (v) a preference for the use of “categorical designations” in privilege logs; (vi) guidelines for discovery of electronically stored information from nonparties; (vii) replacing the calendar call system with specific time slots; and (viii) a special masters pilot program for referral of complex discovery issues. The Advisory Council is continuing to work on implementation of the recommendations set forth in the New York Task Force report, and additional proposals are expected.

**Ohio**

*Ohio Supreme Court Task Force on Commercial Dockets*\(^10\)

In April 2007, the late Chief Justice Thomas J. Moyer announced the formation of the Supreme Court Task Force on Commercial Dockets to “develop, oversee, and evaluate a pilot project implementing commercial civil litigation dockets in select courts of common pleas.” The Task Force began working in June 2007 and submitted an interim report in 2008 summarizing the Task Force’s work, along with a proposed set of rules for the establishment of a commercial docket pilot project. Commercial dockets were established in four counties in 2009. The Task Force submitted a second interim report in March of 2011, noting the great success of the pilot project at that time, but also highlighting its challenges. In December 2011, the Task Force submitted its final Report and Recommendations, wherein it recommended creating a permanent


program for courts operating specialized dockets to resolve business-to-business disputes. The Task Force also recommended operating the docket with at least two judges, and creating a Commission on Commercial Dockets to oversee the program. The report found that the benefits of the program include accelerating decisions, creating expertise among judges, and achieving consistency in court decisions around the state.

In February, 2013, the Supreme Court of Ohio adopted permanent rules that govern the establishment and operation of commercial dockets in Ohio. The rules went into effect July 1, 2013.

**Oregon**

*Oregon Expedited Civil Jury Trial Program*¹¹

On May 6, 2010, Oregon Supreme Court Chief Justice Paul J. De Muniz signed an order implementing an expedited civil jury trial program in selected Oregon Circuit Courts. The goal of this program is to provide speedy and economical disposition of civil cases and to increase the use of jury trials to decide civil cases.

Multnomah County is now offering this expedited track for civil jury trials. Parties may opt in to this track. The process includes an initial case management conference with trial counsel no later than 10 days after the case is designated as appropriate for this track. At the initial conference, the court will set a firm trial date which will be no later than four months from the date of the designation order.

**South Carolina**

*South Carolina Fast Track Jury Trial Process*¹²

On March 7, 2013, Chief Justice Jean Hoefer Toal of South Carolina entered an Administrative Order implementing a voluntary Fast Track Jury Trial process statewide. An attorney-controlled program has been in place for several years in several counties in South Carolina, including Charleston County where the program has been highly successful. Along with the statewide expansion, the Court has also promulgated Rules and Procedures for the Fast Track Jury Trial process, which apply in the absence of agreement of counsel otherwise, as well as a form Consent Order for the Fast Track Jury Trial and Appointment of Special Hearing Officer. The rules provide for removal of the case from the docket and the setting of a mutually convenient trial date, as well as the timing for the exchange of documentary evidence to be used at trial and a pretrial conference. Fast Track juries will consist of no more than six jurors, trial is expected to last no longer than one day, and the result is a binding jury verdict, subject to any written high/low stipulations agreed upon by the parties.


Texas Expedited Civil Actions

In May 2011, the Texas legislature passed H.B. 274 relating to the reform of certain remedies and procedures in civil actions and family law matters. Among the bill’s provisions, article 2 authorized the Texas Supreme Court to adopt rules to promote “the prompt, efficient, and cost-effective resolution of civil actions.” The rules will apply to civil actions in which the amount in controversy does not exceed $100,000 and H.B. 274 requires the rules to “address the need for lowering discovery costs in these actions.” The Texas Supreme Court appointed a Task Force to advise the Court in developing the program and the Task Force issued its final report on January 25, 2012, and presented rules to the Supreme Court Advisory Committee (SCAC) on January 27, 2012.

The Task Force was unable to come to an agreement about whether the process should be mandatory or merely voluntary. As a result, the Task Force submitted two separate sets of rules. In November 2012, the Texas Supreme Court issues the long-awaited rules for expedited handling of cases. The rules are mandatory and put limits on pretrial discovery and trial in cases where the party seeks “monetary relief of $100,000 or less, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees.” The final rules went into effect on March 1, 2013, with some minor revisions, including additional commentary to the Rule that provides guidance on when “there is good cause to remove the case from the process or extend the time limit for trial.”

Utah

Amendments to Utah Rules of Civil Procedure

The Utah Supreme Court’s Advisory Committee on the Rules of Civil Procedure developed and proposed significant changes to the Rules to address the expansion and increased cost of discovery, and the impact on the state civil justice system. The Committee considered significant statewide changes to the rules governing disclosure and discovery in order to reverse the default from unlimited discovery to proportional and cost-effective discovery. Prior to presenting the proposed rules changes for official notice and comment, the Committee spoke to bar groups, judges, and other interested organizations to inform them about, and receive comments on, the proposed changes. After working through comments and specific sections of the proposed changes, the Committee officially published the proposed rules for a notice and comment period.

On August 29, 2011, the Utah Supreme Court approved the proposed rule changes, with the exception of the proposed heightened pleading standard which the Court chose not to adopt. The rules went into effect statewide on November 1, 2011. The new rules focus on proportional discovery, flipping the presumption from one where discovery is allowable unless the rules or a

judge say otherwise to a scheme where discovery is *prohibited* unless the rules or a judge says otherwise. The changes include comprehensive initial disclosures, a requirement that discovery be proportional, and tiered discovery based on amount in controversy.

The National Center for State Courts is studying the statewide rule changes, with a report expected in 2015. To address the additional case management needs of Tier 3 cases, Utah is implementing a Tier 3 Case Management Pilot Program, which goes into effect beginning April 1, 2015. The Pilot Program includes various recommended management techniques, including holding periodic status conferences, encouraging professionalism, exploring settlement early and periodically through the process, providing for no-motion status conferences to resolve discovery disputes, and setting a firm trial date.

*Utah Expedited Jury Trials*¹⁵

The Expedited Jury Trials Act passed in March of 2011 and authorized the Judicial Council to create procedures for a pilot project for expedited jury trials in civil actions. The Expedited Jury Trial Act has been codified at *Utah Code* 78B-3-901 to -909. The Administrative Office of the Courts shall present a report on the pilot to the Judiciary Interim Committee no later than September 2016.

**Wyoming**

*Wyoming Circuit Court and Rule 1 Study Committee*¹⁶

Concerned about issues of cost, delay, and access to the civil justice system in Wyoming, the Wyoming Supreme Court is moving forward on a number of fronts to address these issues.

The Wyoming legislature has increased the circuit court’s jurisdiction to $50,000, in hope that the circuit courts will be able to handle most modest litigation, leaving more time to the district courts to handle more complex cases. In conjunction with this increase, the Wyoming Supreme Court and the Board of Judicial Policy and Administration approved simplified rules for the circuit court, which incorporate the concept of proportionality, contain a requirement that parties bearing the burden of proof plead all materials facts known, introduce mandatory initial disclosures, limit discovery (including expert discovery), and provide for an expedited trial setting of seven months from the date the action is commenced. The new Wyoming Rules of Civil Procedure for Circuit Courts went into effect on July 1, 2011.

In addition to the rule changes at the circuit court level, Wyoming formed a Rule 1 Study Committee in 2013 to develop rules and case management recommendations for civil cases in district court and to consider changes to the Wyoming domestic relations procedures. In April, 2014, the Wyoming Supreme Court adopted amendments to a few of the Wyoming Rules of Civil Procedure, including the rules regarding disclosure of expert testimony. The Court also adopted temporary rules for expedited marriage dissolution cases.

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II. Current Federal Projects

Northern District of California’s Expedited Trial Procedure

The Northern District of California adopted an expedited trial procedure in June 2011. The procedure is “meant to offer an abbreviated, efficient and cost-effective litigation and trial alternative.” Participation in the procedure is consensual and the outcome is binding. The goal of the expedited trial procedure is to hold the trial—before a judge or jury—no later than six months after the agreement to participate is approved by the court. The procedure requires initial disclosures and discovery, including expert discovery, is presumptively limited. Parties may not file pretrial motions without leave of court and rights to appeal are limited.

Federal Circuit Advisory Committee’s Model Order Regarding E-Discovery in Patent Cases

The Federal Circuit Advisory Council has adopted and released a Model Order Regarding E-Discovery in Patent Cases (Model Order). The Model Order is “intended to be a helpful starting point for district courts to use in requiring the responsible, targeted use of e-discovery in patent cases,” and it requires that before parties can make email production requests, they must exchange core documentation concerning the patent, accused product, prior art, and finances. The number of custodians and search terms for email production requests are presumptively limited and a discovering party wishing to exceed these limits shall bear all reasonable costs. Chief Judge Randall Rader of the U.S. Court of Appeals for the Federal Circuit—which has not approved the specific language of the Model Order—unveiled the order at an Eastern District of Texas Bench Bar Conference, where he explained that “[i]n the electronic age, discovery procedures designed for the 19th and 20th centuries just do not work for complex patent litigation.”

The Order served as the baseline for the Eastern District of Texas’s Model Order Regarding E-Discovery in Patent Cases. The Eastern District of Texas’s Model Order departs from the Federal Circuit’s Model Order in the following ways: parties are required to cooperate in identifying email custodians, search terms, and time frames; limits on email custodians and number of search terms increased from five to eight and five to ten, respectively; and there is a “hard limit” on the number of email discovery requests.

Initial Discovery Protocols for Employment Cases Alleging Adverse Action

In the fall of 2010, Judge Lee Rosenthal convened a nationwide committee of plaintiff and defense attorneys to explore the idea of case-type-specific “pattern discovery” for federal employment law cases. Chaired by Judge John Koeltl and facilitated by IAALS, in November

2011, the committee presented its final product to the Civil Rules Advisory Committee. The Initial Discovery Protocols for Employment Cases Alleging Adverse Action (Protocols) is a set of procedures intended to “encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery.” The Protocols create a new category of information exchange, replacing initial disclosures with initial discovery specific to employment cases alleging adverse action. While the parties’ subsequent right to discovery under the Federal Rules is not affected, the amount and type of information initially exchanged ought to focus the disputed issues, streamline the discovery process, and minimize opportunities for gamesmanship.

The Protocols are accompanied by a standing order for their implementation by individual judges in the pilot project, as well as a model protective order that the attorneys and the judge can use as a basis for discussion. Individual judges throughout the U.S. District Courts are utilizing the Protocols, and the FJC is evaluating the effects.

District of Kansas

Beginning in March 2012, the U.S. District Court for the District of Kansas has been involved in an effort to ensure that civil litigation is handled in a “just, speedy, and inexpensive” manner, in accordance with Rule 1 of the Federal Rules of Civil Procedure. Spearheaded by the court’s Bench-Bar Committee, the Rule 1 Task Force broke down into six working groups with corresponding recommendations: 1) overall civil case management; 2) discovery involving electronically stored information (ESI); 3) traditional non-ESI discovery; 4) dispositive-motion practice; 5) trial scheduling and procedures; and 6) professionalism and sanctions.

Nearly all of the Rule 1 Task Force’s recommendations were approved by the Bench-Bar Committee, and then by the court. As a result of the Task Force’s recommendations, the court revised its four principal civil case management forms: 1) the Initial Order Regarding Planning and Scheduling; 2) the Rule 26(f) Report of Parties’ Planning Conference; 3) the Scheduling Order; and 4) the Pretrial Order. The court also revised its Guidelines for Cases Involving Electronically Stored Information and its Guidelines for Agreed Protective Orders, along with a corresponding pre-approved form order, and developed new guidelines for summary judgment. The court has also adopted corresponding amendments to its local rules.

District of Nevada Short Trial Program

In March 2013, the District of Nevada adopted General Order 2013-01, which implemented a Short Trial Program. The program is similar to Nevada’s successful Short Trial Program in state court, which has been in existence since 2000. The Short Trial Rules include the express purpose of expediting “civil trials (both bench trials and jury trials) through procedures designed to control the length of the trial, including, without limitation, restrictions on discovery, the use of smaller juries, and time limits for presentation of evidence.” Unless otherwise stipulated, trial is to be calendared within 150 days from the date the presiding judge is assigned. The rules

provide for the exchange of initial disclosures upon designation and then the “extent to which discovery is allowed is in the discretion of the presiding judge.”

Southern District of New York Pilot Project Regarding Case Management Techniques for Complex Civil Cases

In early 2011, the Judicial Improvements Committee (JIC) of the U.S. District Court for the Southern District of New York formed an attorneys’ Advisory Group, drawn from many sectors of the bar, to work with the JIC in developing a pilot project focused on the judicial pretrial case management of complex cases. The approved Pilot Project Regarding Case Management Techniques for Complex Civil Cases took effect on November 1, 2011, and was initially scheduled for an 18-month trial period. The pilot project was extended on November 28, 2012, to run for an additional eighteen months, to expire October 31, 2014. On November 14, 2014, the Court entered an order recognizing the completion of the project. The order recognized that judges may continue to treat any case as complex if they so choose and to abide by any, or all, of the provisions of the pilot project. In addition, practitioners can agree to voluntarily implement any, or all, of the provisions of the project they select. The Bench and Bar is urged to consider the provisions as best practices. The Federal Judicial Center is expected to publish an evaluation of the pilot project.

Western District of Pennsylvania E-Discovery Special Masters Pilot Program

Recognizing that complex electronic discovery issues are surfacing in an increasing number of cases, in November 2010 the Board of Judges of the Western District of Pennsylvania—through its Alternative Dispute Resolution Implementation Committee—approved the establishment of an E-Discovery Special Masters Pilot Program. In February and March of 2011, the Committee accepted special master applications, followed by a mandatory orientation for selected individuals. The court has published a list of approved special masters, who can be appointed at the discretion of the presiding judge. They are authorized to monitor electronic discovery compliance, narrow and facilitate the resolution of electronic discovery disputes, and provide reports and recommendations to the judge, as necessary.

Western District of Pennsylvania Pilot Program for Expedited Civil Litigation

In August 2012, the United States District Court for the Western District of Pennsylvania adopted an expedited program for civil cases. As the Pilot Program description notes, “[t]he perception that federal civil lawsuits always involve complex legal and factual issues is not accurate. There are many cases filed in federal court that are relatively simple and do not require lengthy and expensive pretrial and trial proceedings.” For those cases, the Western District of


Pennsylvania offers a voluntary Expedited Docket that includes initial disclosures within seven days of approval of the Stipulation designated the case as expedited, an Expedited Trial Conference after which the court will set a firm trial date, limited discovery to be completed within 90 days of the Expedited Trial Conference, and a trial no later than six months after the Expedited Trial Conference.

**Seventh Circuit Electronic Discovery Pilot Program**

The Seventh Circuit Electronic Discovery Pilot Program originated in the U.S. District Court for the Northern District of Illinois as a response to widespread discussion about the rising burden and cost of electronic discovery. Under the leadership of Chief Judge James Holderman and Magistrate Judge Nan Nolan, a diverse E-Discovery Committee (Committee) developed Principles Relating to the Discovery of Electronically Stored Information (Principles), intended to incentivize early information exchange and meaningful cooperation on commonly encountered issues relating to evidence preservation and discovery. The Principles are implemented through standing orders issued by individual judges voluntarily participating in the program.

Phase One included an initial testing period from October 2009 through March 2010. During that phase, five district court judges and eight magistrate judges in Illinois implemented the Principles in 93 civil cases pending on their individual dockets. IAALS then provided assistance to the Committee in creating and administering evaluation surveys for the judges and attorneys in those cases. Although the time frame was too short to draw any definitive conclusions from the Phase One Survey, the response was generally positive.

Phase Two included a longer testing period running from May 2010 to May 2012. During Phase Two, the Committee’s membership tripled, including e-discovery experts from around the country. Several additional Subcommittees were also created during Phase Two, including the Criminal Discovery, National Outreach, Technology, and Web Site Subcommittees, reflecting the broad scope of the Committee’s work. The Committee’s work continues to expand beyond the Seventh Circuit in membership as well as outreach and education. The Phase One Principles were revised in response to the Phase One survey results, and revised Phase Two Principles were promulgated August 1, 2010. During the Phase Two period, the number of participating judges grew to 40 and the number of cases to 296 in which the Pilot Program Principles were tested. In addition to a greater number of participating judges, Phase Two also saw expansion geographically beyond Illinois to include judges in Indiana and Wisconsin. The Pilot Program is now in Phase Three.

**Western District of Washington**

The Western District of Washington amended its Local Civil Rules on December 1, 2012. The amendments are notable for their inclusion of new Local Rule 39.2, which provides for an

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Individualized Trial Program. The program is “meant to offer an abbreviated, efficient and cost-effective litigation and trial alternative.” Subject to court approval, the Individualized Trial Program provides for a consensual, binding trial before a jury or judge with an expedited trial conference, limited discovery, an expedited trial, and limited rights of appeal.
Introduction to the Legal Services Corporation

Established by Congress in 1974, the Legal Services Corporation (LSC) promotes equal access to justice by funding high-quality civil legal assistance for low-income Americans. LSC is the single largest funder of civil legal aid for the poor in the country. LSC awards grants through a competitive process and currently funds 134 independent legal aid organizations with approximately 800 offices throughout the United States and its territories.
LSC’s grantees serve thousands of low-income individuals, children, families, seniors, and veterans in every congressional district. LSC grantees handle the basic civil legal needs of the poor, addressing matters involving safety, subsistence, and family stability. LSC grantees set case priorities based on community need. Legal assistance can protect children, keep families in their homes and help protect people from predatory lenders.
I. The Promise of Equal Justice

LSC is entrusted with promoting and protecting a core American value — equal justice for all. Equal justice under law has been a fundamental value of our country even before we were a country. In 1620, as they made their way to the New World, the Pilgrims drew up and signed an agreement called the Mayflower Compact. Chief among its principles was a call for “just and equal laws.” A call for justice is enshrined in the preamble of the Constitution: “We the People of the United States, in order to form a more perfect Union, establish Justice, . . .” It is also engraved over the entrance of the Supreme Court -- “Equal justice under law” -- and recited everyday by school children who proclaim we are a nation "indivisible, with liberty and justice for all."

The promise is widely recognized throughout our history and across America’s political spectrum. For example, Justice Scalia at LSC’s 40th Anniversary Conference recently remarked: “The American ideal is not for some justice. It is, as the Pledge of Allegiance says, ‘Liberty and justice for all’. Can there be a just society when some do not have justice? Equality, equal treatment, is perhaps the most fundamental element of justice.”

Supreme Court Justice Antonin Scalia:

“Equality, equal treatment is perhaps the most fundamental element of justice.”

At that same Conference, Hillary Clinton former Chair of LSC’s Board remarked: “Guaranteeing legal services for all Americans makes us a better country and a fairer country. It helps by empowering people to solve those problems and it helps to level the playing field. It is not just a fair shot at the justice system, but it is a fair shot at the American dream.”
II. Is the Promise Being Met?: Unmet Civil Legal Needs in America Abound and are Growing

Nearly one in three Americans—96 million people—qualified for LSC-funded services at some time during 2013, the most recent year for which U.S. Census Bureau data are available. 63.6 million people—one in five Americans—had annual incomes below the income threshold for LSC-funded legal assistance. These people had annual incomes below 125% of the federal poverty line: $14,363 for an individual; $29,438 for a family of four. Another 32.4 million people had incomes below the 125% level for at least two consecutive months during the year.

Millions of those eligible for LSC-funded services are seniors or persons with disabilities. Of the 63.6 million people living in households with annual incomes below 125% of poverty in 2013:

- 6.3 million (9.9%) were seniors 65 years or older.
- 7.5 million (12.0%) were 18-64 years old with at least one disability.

An estimated 1.8 million veterans are eligible for LSC-funded services. One-half (50.2%) of the working age adults (16-64 years old) eligible for LSC-funded services are employed. Nearly one in seven—5.5 million—worked full-time, year-round in 2013, but earned so little their families had annual incomes less than 125% of the federal poverty line.
Over the past 15 years, the number of people eligible for LSC services has grown dramatically. The number of people eligible for civil legal aid from LSC funded programs is up 25 percent since the start of the recession.

### III. Is the Promise Being Met?: Resources Available to Meet Civil Legal Needs for the Poor are Insufficient to Meet the Growing Needs

While the number of Americans eligible for civil legal assistance has steadily increased, funding for civil legal services has generally been declining. LSC basic field funding is down 20 percent since 2010. Temporary state funding from foreclosure settlements and other sources have filled almost half of this gap, but these funds are distributed evenly across the country and often come with significant restrictions on how they can be spent.
If LSC's funding had merely kept pace with inflation since 1995, the 2014 appropriation would be more than $620 million. The $365 million appropriated for 2014 is 40 percent less than inflation adjusted funding for 1995, and federal funding per eligible client has dropped to an all-time low.
Decreased funding is having an impact. Grantees have been forced to cut staff including more than 10 percent of attorneys and nearly 20 percent of paralegals and other support staff.

Not surprisingly, LSC grantees are having to turn away scores of low-income Americans seeking civil legal assistance.

According to LSC’s 2009 report Documenting the Justice Gap in America, 50% of all those who sought legal assistance from LSC grantees were turned away because of the lack of adequate resources. State studies consistently show that only 20% of the civil legal needs of the eligible population are being met.

A recent study by the Boston Bar Association found that in Massachusetts civil legal aid programs turn away 64% of eligible cases. See Investing in Justice, A Roadmap to Cost-Effective Funding of Civil Legal Aid in Massachusetts. A Report of the Boston Bar Association Statewide Task Force to Expand Civil Legal Aid in Massachusetts, October 2014. Nearly 33,000 low-income residents in Massachusetts were denied the aid of a lawyer in life-essential matters involving eviction; foreclosure; and family law such as cases involving child abuse and domestic violence. People seeking assistance with family law cases were turned away 80% of the time.

New York’s recent findings confirm national data that fewer than 20% of all civil legal needs of low-income families and individuals are met. In 2013, more than 1.8 million litigants were not represented by counsel in civil proceedings in New York’s state courts. See The Task Force to Expand Access to Civil Legal Services in New York, Report to the Chief Judge of the State of New York, State of New York Unified Court System, November 2014.
In New York City:

- 91% of petitioners and 92% of respondents do not have lawyers in child support matters in family court.
- 99% of tenants are unrepresented in eviction proceedings.

In New York State:

- 87% of petitioners and 86% of respondents do not have lawyers in child support matters in family court.
- 91% of tenants are unrepresented in eviction proceedings.

Nationally, LSC grantees served over 1.8 million low-income persons in 2013. Millions more requested assistance but did not receive it because of the lack of adequate resources.

### IV. Meeting America’s Promise

To move toward meeting America’s promise of justice for all, we must overcome three challenges.

#### A. Raising Public Awareness
The first challenge is “the invisibility of the access to justice issue – the widespread ignorance of the magnitude of the justice gap in the United States today.” See James J. Sandman, 63 Virginia Lawyer 28 (October 2014). “Those who care about this issue must carry the message beyond the access-to-justice community to new audiences, particularly opinion makers and opinion leaders, and also find people outside the legal aid world to make the case—including corporate general counsel, chief executive officers, and those foundation leaders who understand the issue and fund legal aid.” Id. And the case for legal aid needs to be made in terms that those outside that community can understand, stressing the importance of fairness in our justice system, a value that recent research shows resonates deeply with the public. Id. The arguments should be illustrated with compelling stories and make the business case for legal aid as well. Id. As I stated before, equal justice should not be a partisan issue. As Texas Supreme Court Chief Justice Nathan Hecht said at LSC’s 40th Anniversary Conference in September:

“We hope that justice has few enemies. Most of what we struggle with, I don’t think is opposition to justice, but ignorance of what is going on … I think when you understand exactly what we do, and where the money goes, and what it’s used for, and how that makes a difference, then it’s much easier to find support for legal services.”

B. Increasing and Better Leveraging Resources

The second challenge is to attract more resources and better leverage those resources. The most fundamental need is clear and was summed up by Justice Elena Kagan at that same Conference: “More money . . . more money.” We must provide the funding necessary to adequately support LSC’s mission. We cannot continue to accept funding that is so low that it does not even approach the $400 million LSC received in 1995.
In a world of constrained resources and growing unmet legal needs, no matter what level of financial support legal aid organizations receive, we must better leverage those resources. LSC is focusing on two leveraging strategies: the use of technology and the use of pro bono resources.

LSC employs a range of strategies to expand access to justice through the use of technology. Since 2000, LSC has awarded Technology Initiative Grants (TIG) to support projects to develop, test, and replicate technologies that improve client access to high quality legal information and pro se assistance. Since 2000, TIG has funded more than 570 projects totaling more than $46 million. Currently the program is funded at $4 million, annually. With these grants, LSC grantees have been able to build a foundation for better service delivery that includes statewide websites; enhanced capacity for intake and case management systems; automated forms to support clients, staff, and pro bono efforts; user-friendly online tools for women veterans; mobile delivery of legal services for clients using text messaging; and video-conferencing technology that reaches low-income clients in rural areas. With that foundation in place, LSC is poised to expand access to justice through additional technology innovations.
LSC has also collaborated with others to find ways to use technology to provide effective legal assistance. After convening a technology summit that included 75 representatives of legal aid programs, courts, bar associations, government, and business as well as technology experts, academics, and private practitioners, LSC issued a report in 2013 with recommendations to broaden and improve civil legal assistance through an integrated service-delivery system. Annually, LSC hosts a technology conference that brings together LSC grantees and members of the technology community to explore effective uses of technology in legal aid and to encourage project ideas. The LSC technology conference is the only national event focused exclusively on the use of technology in the legal aid community.

A second way to narrow the justice gap is to expand the role of the private bar in civil legal aid. Several years ago LSC convened a national Pro Bono Task Force, which issued a wide-ranging report and recommendations on ways to expand the number of lawyers who are willing to do pro bono work, and better match that larger available talent pool with the growing unmet need.
With much help from others in the profession — access to justice commissions, the ABA, and local bars — LSC has implemented many of those recommendations, including the creation of a Pro Bono Innovation Fund. Congress allocated $2.5 million for the fund in FY-2014, and after reviewing nearly 80 applications, LSC awarded the first 11 grants this past September.

C. Changes in the Delivery System

The third challenge we face is to change our delivery system. Given enormous and growing demands and resource constraints, “it is not realistic to try to provide full representation in every case, and pursuing that goal at the expense of other alternatives is letting the perfect be the enemy of the good.” See James J. Sandman, 63 Virginia Lawyer 28 (October 2014). The fact is that some assistance— including referrals to court-based resource centers or online self-help resources— is better than no assistance. Id. Late last year, LSC released a report addressing this issue following a technology summit that it convened “to explore the potential of technology to move the United States toward providing some form of effective assistance to 100 percent of persons otherwise unable to afford an attorney for dealing with essential civil legal needs.”

The vision set forth in the report focuses on five main areas:

- Creating in each state a unified “legal portal” which, by an automated triage process, directs persons needing legal assistance to the most appropriate form of assistance and guides self-represented litigants through the entire legal process.
- Creating automated forms and other documents to support self-help and limited scope legal representation.
- Taking advantage of mobile technologies to reach more persons more effectively.
- Applying business process/analysis to all access-to-justice activities to make them as efficient as practicable.
- Developing “expert systems” to assist lawyers and other services providers.
The report focused on the use of technology, and I must be underscore, in many cases, full representation by a lawyer is clearly required if justice is to be realized. Nonetheless, the goal and vision set forth in the report “represents a much-needed rethinking of the traditional service-delivery model and points to a future where no one will get nothing, which is what happens all too often today.” See James J. Sandman, 63 Virginia Lawyer 28 (October 2014). This is a realistic but still inspiring goal for access to justice in the world we live in today. Id.