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REFORMING OUR CIVIL JUSTICE SYSTEM:

A REPORT ON PROGRESS & PROMISE

A joint project of the
American College of Trial Lawyers Task Force on Discovery and Civil Justice
and IAALS—the Institute for the Advancement of the American Legal System

REFORMING OUR CIVIL JUSTICE SYSTEM:

A REPORT ON PROGRESS AND PROMISE

THE AMERICAN COLLEGE OF TRIAL LAWYERS
TASK FORCE ON DISCOVERY AND CIVIL JUSTICE

AND

IAALS—THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM

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American College of Trial Lawyers

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

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A REPORT FROM THE JOINT PROJECT OF
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REFORMING OUR CIVIL JUSTICE SYSTEM

In 2009, the American College of Trial Lawyers Task Force on Discovery and Civil Justice ("Task Force") and IAALS, the Institute for the Advancement of the American Legal System at the University of Denver, issued a Report containing our findings regarding the state of the civil justice system in the United States and 29 proposed Principles for reform of that system ("Final Report"). That Report came after two years of study and work and took into account the results of an extensive survey of the Fellows of the American College of Trial Lawyers ("College"). The Final Report was then accepted and adopted by the Board of Regents of the College.

One of our main hopes was that the publication of the Final Report would generate a "lively and informed debate" and a "nationwide discussion" about the state of our civil justice system and active consideration of proposed changes in that system to make it more accessible, affordable, efficient, and just.

As we had hoped, the publication of the Final Report generated intense discussion among practitioners, academics, and judges. It also led to requests from several courts for the creation of a set of rules that could be used to put the 29 Principles into practice in pilot projects in both federal and state courts. Those requests led in turn to our promulgation, in 2011, of a set of Pilot Project Rules, published as a part of the IAALS "Roadmap for Reform" series, that are meant to apply the Principles set forth in the Final Report. Pilot projects, several of which are based on the Principles and the Roadmap suggestions, are now well underway in federal and state courts, and are summarized in the attached Appendix A.

The federal Judicial Conference Committee on Rules of Practice and Procedure (the "Standing Committee") and the Advisory Committee on Civil Rules (the "Advisory Committee") have played key roles in the discussion and reform efforts as well, and in May of 2010, the Advisory Committee convened a Conference on Civil Litigation at Duke University Law School to study the current state of the civil justice system and to work toward solutions to the identified problems. Building on the 2010 Duke Conference work, and several years of study, the Advisory Committee developed proposed rule changes intended to remedy some of those problems. The proposed rules were published for comment, more than 2,300 written comments were received, and several public hearings were held, at which more than 120 witnesses testified. In May 2014, the Standing Committee unanimously approved a set of proposed amendments to the Federal

Rules of Civil Procedure that, if approved by the Supreme Court and not acted upon by Congress, will become effective on December 1, 2015. Those proposed amendments and the process through which they were adopted are briefly summarized in the attached Appendix B.

The Task Force endorses all of the proposed amendments to the Federal Rules of Civil Procedure. They are thoughtful and timely. In some respects, they are consistent with our Principles as, for example, they give prominence to the notion of proportionality. In other respects, our Principles go further than the proposed amendments, and we continue to urge both state and federal rules officials to consider our Principles in their continued efforts to reform the civil justice system.

At the state level, the Conference of Chief Justices ("CCJ") has established a Civil Justice Initiative that is focused on making recommendations with the goal of significant reform at the state level, also drawing from the pilot project experiences and evaluations around the country. As many of the pilot projects come to their natural conclusions, those states are also considering the statewide adoption of various aspects of the projects that were most effective. For example, New Hampshire has implemented its pilot project reforms statewide and Colorado is currently considering statewide rule amendments. Utah adopted statewide changes to its discovery rules in 2011 without going through a pilot project phase.

Looking at the activity at both the state and federal level, much has happened since our Final Report in 2009. We also recognize that there is still work to be done. As it has been said, "life is a marathon, not a sprint," and that notion has been applied in many other contexts, including leadership and success. It applies equally in the context of civil justice reform. The pilot projects test many of the Principles in practice. We must learn from those experiences and continue the forward momentum. Thus, we have taken this opportunity to revisit the Final Report and note how our thinking has evolved in light of the lessons learned from the pilot projects and proposals for reform around the country. In some cases, we have left the Principles intact; in other cases, we have eliminated them; and in still others, we have substantially revised them.

We have also made our revisions to the Principles and comments with an eye toward the current efforts around the country. Because the proposed federal amendments are broad and take into account many of the proposals made in our 2009 Final Report, as well as the comments that were made during the Duke Conference in 2010, we do not anticipate another round of sweeping amendments to the Federal Rules for some time. For that reason, this report focuses primarily on the various state systems of civil justice. We recognize the efforts of other entities, like the CCJ's Civil Justice Initiative, that may lead to significant reform of the various state systems of civil justice and we hope that this report will be useful to those entities as they do their work.

In our 2009 Final Report, we unanimously recommended that the proposed Principles be made the subject of public comment, discussion, debate, and refinement. We encouraged lively and informed debate among interested parties with the goal of achieving a fair and more efficient system of justice. We stand by our original call for a dialogue—and now add a call for action. To extend the marathon analogy, civil justice reform cannot falter mid-race. We must see the reforms to the finish line, so that we truly achieve our goals of a more fair, accessible, and efficient system for all who come before the courts with their disputes.

GENERAL OBSERVATIONS

1. As we have studied the Rules and reviewed the comments and the results of the pilot projects, one thing has become very clear to us: rules reform without a change in culture will not be effective. Much has been written about the benefits of cooperation and we endorse those sentiments, but they are not enough. The cultural change that we believe must occur is an understanding from all participants in the system, including the parties, that the object of litigation is a full, fair, and rational resolution of disputes. Whatever leads to that objective is good; whatever impedes that objective should be shunned.

2. 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, and reasonably affordable resolution. It is our hope that proportionality serves as a guiding principle not just for discovery, but for the process as a whole.

3. One of our Fundamental Principles is that the "one size fits all" approach to litigation does not work. By the numbers, simple cases in state courts comprise the largest percentage of cases in the nation. Yet our system has not been designed with these cases in mind. On the other hand, complex cases are indeed different and that is why so many of the existing rules and some of our Principles do not apply easily to them. For example, although we favor early and robust initial disclosures, we are fully cognizant of the fact that in some cases, such as complex cases with voluminous documents, the timing and staging of initial disclosures may require individualized treatment and more cooperation between the parties. We believe that, as the federal and many state rules have demonstrated, even in such cases there is merit in requiring some initial disclosure. Rules reform efforts must take into account the fact that, as our Principle holds, there should be "different sets of rules for different types of cases."

4. We have seen in the pilot projects that many courts have decided to test some, but not all, of our Principles. It bears repeating that because our Principles were the result of long discussion and efforts to balance different views, it is our intent that they should be taken as a whole. They were meant to work together; using only some of them may not give full effect to the many compromises reflected in the Principles.

5. It also bears repeating that the Principles are meant to suggest ways to reform the civil justice system so that it becomes more efficient, less costly, more accessible, and more just. Those four essentials should lie at the heart of any attempted reform.

6. In the few short years since the Final Report was published, we have seen an explosion in technology. E-filing, for example, is now the norm in many courts. E-mail is ubiquitous. "Predictive coding" and "statistical sampling" may revolutionize document discovery and especially electronic discovery. Unfortunately, for many courts, the technological explosion has had little or no effect. That needs to change. Technology can

reform civil justice precisely because it is, almost by definition, efficient, affordable and accessible. Its use should be universal.

PRINCIPLES FOR CIVIL JUSTICE REFORM

FUNDAMENTAL PRINCIPLES

PRINCIPLE 1:

- **Procedural rules should be construed and administered by the courts, the parties, and their lawyers to secure the just, speedy, and inexpensive determination of every action.**

This is taken directly from the proposed amendment to Rule 1 of the Federal Rules of Civil Procedure, to which we have added "lawyers." The amendment makes it clear that the obligation to follow Rule 1 applies to the parties and their lawyers as well as to the courts. This is consistent with the culture change that we believe is essential to an improved system of civil justice.

PRINCIPLE 2:

- **The "one size fits all" approach of the current federal and most state rules should be discouraged. Case management should allow for flexibility to create different sets of rules and protocols for certain types of cases so that all cases can be resolved 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 district 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.

We call this a "fundamental principle" because we believe that one of the most effective changes that could be made in our civil justice system is the creation of specialized rules and protocols for certain types of cases.

It is time that the rules generally reflect the reality of practice. This Principle recognizes 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 employment

discrimination, patent, and medical malpractice cases. Congress also perceived the need for different rules by enacting the Private Securities Litigation Reform Act for securities cases. Since our Final Report in 2009, a consistent theme across the pilot projects has been to define rules by case type or case complexity. Examples include the Initial Discovery Protocols for Employment Cases Alleging Adverse Action, the Colorado Civil Access Pilot Project ("CAPP") focused on business litigation and the Southern District of New York's Pilot Project Regarding Case Management Techniques for Complex Civil Cases. The new Utah rules divide cases into tiers based on amounts in controversy and also provide for particularized initial disclosure based on case type.

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. One lesson from CAPP is that case differentiation can present challenges in terms of defining and designating cases for application of different rules schemes. As different rules are developed and implemented, we caution rulemakers to think about how such rules will operate on the ground, so as not to add undue complexity and so any differentiation reflects true differences in case needs.[1]

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 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 encouraged.

PRINCIPLES RELATING TO CASE MANAGEMENT

The Purpose of Case Management: This is an idea whose time has come. Effective judicial case management, tailored to the needs of the case, will save the parties time and money and will, in most cases, lead to a more informed and, we think, reasonable resolution.

PRINCIPLE 3:

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

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

[1] *See* CORINA D. GERETY & LOGAN CORNETT, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., MOMENTUM FOR CHANGE: THE IMPACT OF THE COLORADO CIVIL ACCESS PILOT PROJECT 35-36 (2014) [hereinafter MOMENTUM FOR CHANGE], *available at* http://iaals.du.edu/images/wygwam/documents/publications/Momentum_for_Change_CAPP_Final_Report.pdf.

In many federal districts, the normal practice is to assign each new case to a single 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 manage the case toward trial and ultimately, if appropriate, try the case. Judges who are going to try cases are in the best position to make pre-trial rulings on evidentiary and discovery matters and dispositive motions.

This Principle is strongly supported by the experiences within the states. For example, a survey of Oregon lawyers and judges revealed frustration and inefficiency related to having different decision-makers for each appearance, and moving to one judge per case was frequently suggested as a way to improve the process.[2] In Colorado, the CAPP rules provided that the judge assigned to the case was to handle all pre-trial matters and try the case. The evaluation of the pilot project found that the CAPP cases saw a judge earlier and more often and were also resolved more quickly. Lawyers felt the judge was more accessible and fair.[3]

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, brings to the system of justice.

We are also aware that it is not always possible to assign a single judge to every case. Where that is not possible, we recommend that the multiple judges who are assigned utilize a team approach and we urge that lessons learned from the joint IAALS/ACTL Report, *Working Smarter, Not Harder: How Excellent Judges Manage Cases*, be followed.[4] Some of those lessons include:

1. Requiring lead lawyers to participate in Case Management Conferences, preferably in person, but at least by phone;

2. Using Case Management Conferences to narrow and prioritize discovery;

3. Requiring lead lawyers to personally discuss discovery disputes before filing motions and providing the opportunity for, or mandating, oral presentations of discovery disputes to the court before filing written motions;

4. Ruling on motions from the bench, if possible, and promptly, in any case, to avoid delays and to keep later judges from having to re-plow the same ground; and

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[2] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SURVEY OF THE OREGON BENCH & BAR ON THE OREGON RULES OF CIVIL PROCEDURE 62 (2010), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Survey_Oregon_Bench_Bar2010.pdf.

[3] MOMENTUM FOR CHANGE, *supra* note 1, at 18, 22-23, 25.

[4] INST. FOR ADVANCEMENT OF THE AM. LEGAL SYS. & AM. COLL. OF TRIAL LAWYERS, WORKING SMARTER, NOT HARDER: HOW EXCELLENT JUDGES MANAGE CASES 21-23 (2014) [hereinafter WORKING SMARTER], *available at* http://iaals.du.edu/images/wygwam/documents/publications/Working_Smarter_Not_Harder.pdf.

5. Keeping parties focused on the real and important issues in the case while doing everything possible to hold the trial date.

Where it is possible, assigning a single judge to all aspects of a case promotes consistency and clarity. In those situations in which the scarcity of judicial resources will not allow for the assignment of every case to a single judge, we recommend an increase in judicial resources including more judges and support staff so that this Principle can be consistently followed as often as possible.

PRINCIPLE 4:

- **Unless requested earlier by any party, a Case Management Conference should be held as soon as practicable after the appearance of all parties.**

This Principle calls for a robust Case Management Conference at the beginning of a case in all but those very few cases that do not require or are not amenable to such a conference.[5] In our Survey, 67 percent of respondents thought that such conferences inform the court about the issues in the case, and 53 percent thought that such conferences identified and, more important, narrowed the issues. In our Final Report, we called such conferences "Initial Pre-Trial Conferences" but we are now of the view that the term "Case Management Conference" is more accurate, because we envision that such a conference will be a robust discussion of the issues, required discovery, and the timetables for effective and efficient resolution of the case.

Case Management Conferences are a useful, if not essential, 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. Even when counsel reach agreement between themselves, the Court should be informed if the agreement they reach will impact the case schedule.

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. In some simpler cases, it may actually cost the parties more to require a Case Management Conference, so, here too, we endorse the creation of differentiated procedures. The goal is the just, cost-effective, and expeditious resolution of disputes.

Seventy-four percent of the Fellows in our 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

[5] In our earlier Report, we called for such conferences in every case, but we now recognize that, for a variety of reasons, such a conference may not be possible or necessary in every case.

said that early and frequent involvement of a judicial officer leads to results that are more satisfactory to the client.

One of the key features of CAPP was an early initial Case Management Conference, which provided the judge the opportunity to focus on the issues early and shape the pre-trial process proportionally to the needs of the case. Surveyed lawyers were enthusiastic about the conference, reporting that "it can set the standard of conduct, frame the issues and provide the parties with a valuable opportunity for judicial input on the case prior to commencing discovery."[6] Moreover, judges applied case management appropriately and selectively "in those cases demonstrating the greatest need."[7] Indeed, the focus on early, active, and ongoing judicial management received more positive feedback than any other aspect of the Colorado project. The Boston Litigation Session Pilot Project also highlighted the initial Case Management Conference and its importance in the proportionality assessment. The surveyed lawyers from that project were also very positive in terms of timeliness, cost-effectiveness of discovery, the timeliness of case events, and access to a judge to resolve discovery issues.[8]

We believe that, in most cases, a Case Management Conference 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.

We suggest the following topics for further consideration by the court during the Case Management Conference:[9]

1. Limitations on scope of initial disclosures and discovery;

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);

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[6] MOMENTUM FOR CHANGE, *supra* note 1, at 25.

[7] *Id.* at 24.

[8] SUFFOLK SUPERIOR COURT BUSINESS LITIGATION SESSION PILOT PROJECT, FINAL REPORT ON THE 2012 ATTORNEY SURVEY (2012), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Final_BLS_Survey_Report.pdf.

[9] *See generally* WORKING SMARTER, *supra* note 4, at Appendix D.

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);

9. Discovery budgets that are approved by the clients and the court;

10. Whether there will be dispositive motions and, if so, whether initial disclosures and discovery should be stayed;

11. Setting a trial date (see Principle 5 below);

12. Preservation of electronically stored information ("ESI");

13. Protocols for and limitations on the production of ESI;

14. Procedures for oral submission of discovery motions; and

15. The importance of cooperation and collegiality.

PRINCIPLE 5:

- **At the Case Management Conference, the court should, with input from counsel, set a realistic date for completion of discovery and a realistic trial date. The dates should be held firm, absent good cause shown.**

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."[10] A majority of Survey respondents (60 percent) thought that the trial date should be set early in the case.

We are aware that in some cases there are judges who believe that at the beginning of a case, they (and the parties) do not know enough about the case to set a trial date. That may be so, but nevertheless we believe that there can be significant benefits to setting a trial date early in the

[10] Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?* 7 TUL. J. INT'L & COMP. L. 153, 179 (1999).

case. For example, as the known trial date approaches, the claims tend to narrow, the evidence is streamlined, and the process becomes efficient. 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 the 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 is more focused.

An 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.[11]

We also believe that once set, the trial date should not be continued absent good cause shown. The IAALS study found that trial dates are routinely continued in federal court. Over 92 percent of motions to continue 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 continued, 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 in which trial dates are expected to be held firm, the parties seek trial continuances at a much lower rate and only under truly extraordinary circumstances.

In Colorado's CAPP, where continuances were "strongly disfavored" and were to be denied absent "extraordinary circumstances," the result was fewer extension motions filed and granted. The survey in Colorado highlighted some negative feedback from lawyers and judges on the strictness of that standard, with some calling for increased judicial discretion and flexibility.[12] In light of that experience, we have revised this Principle to recognize that dates should be firm, but to allow for some flexibility where good cause for moving the trial date can be shown. In addition, where the deadlines in question do not impact the ultimate discovery deadline and trial dates, more flexibility is warranted.

[11] *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL COURTS: A TWENTY-FIRST CENTURY ANALYSIS (2009), *available at* http://iaals.du.edu/images/wygwam/documents/publications/PACER_FINAL_1-21-09.pdf.

[12] MOMENTUM FOR CHANGE, *supra* note 1, at 27-29.

PRINCIPLE 6:

- **Cooperation and communication between counsel is critical to the speedy, effective, and inexpensive resolution of disputes in our civil justice system. Counsel should be required to confer and communicate early in order to resolve potential disputes, and the court should be available to resolve disputes in a timely manner, if necessary.**

Discovery and other periodic conferences between or among counsel work well and should be continued. Over half (59 percent) of our Survey 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.

Ninety-seven percent of our respondents said that when all counsel are collaborative and professional, the case costs the client less. Unfortunately, cooperation does not often occur. In fact, it is sometimes 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.[13]

However, United States District Judge Paul W. Grimm of the United States District Court for the District of Maryland, then writing as Chief Magistrate, referred specifically to Professor Landsman's comment and responded:

> 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.[14]

The Seventh Circuit Electronic Discovery Pilot Program's Principle 1.02 on cooperation provides that "[a]n attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions." In the Final Report on Phase Two of that Pilot Program, 84 percent of judges indicated that the application of the pilot principles, including the pilot principle on cooperation, "increased" or "greatly increased" the level of cooperation by counsel efficiently to resolve the case. While the lawyer percentage was not as high, only one percent responded that the Principle had a negative impact, indicating that cooperation can lead to greater efficiencies, with minimal negative consequences.[15]

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[13] STEPHEN LANDSMAN, ABA SECTION OF LITIGATION, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 2 (1988).

[14] *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 361 (2008).

[15] SEVENTH CIR. ELECTRONIC DISCOVERY PILOT PROGRAM COMM., SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM FINAL REPORT ON PHASE TWO May 2010-May 2012 34-35 (2012), *available at* http://www.discoverypilot.com/sites/default/files/Phase-Two-Final-Report-Appendix.pdf.

As The Sedona Conference® Cooperation Proclamation recognizes, "[t]he costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system."[16] Cooperation of counsel is a critical piece in reducing these burdens and refocusing litigation on the fair and efficient resolution of disputes. Counsel should not bring a dispute to the court for resolution without having directly spoken to each other in an attempt to resolve the dispute.

PRINCIPLE 7:

- **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; 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 Manual for Complex Litigation (Fourth), Section 11.3, "[t]he process of identifying, defining, and resolving issues begins at the initial pre-trial 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 description of the form that such statement of issues should take; but, however it is done, the court should be informed of the issues to be tried through one of the available mechanisms, perhaps before the Case Management Conference is held, or during the conference itself or later status conferences.

PRINCIPLE 8:

- **When appropriate, the court should raise the possibility of mediation or other form of alternative dispute resolution early in the case. The court should have the discretion to order mediation, other form of dispute resolution, or other form of streamlined procedures at the appropriate time, unless all parties agree otherwise.**[17]

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

Over half (55 percent) of the respondents in our Survey said that alternative dispute resolution was a positive development. A surprisingly high 82 percent said that court-ordered alternative

[16] The Sedona Conference®, *The Sedona Conference® Cooperation Proclamation*, 10 SEDONA CONF. J. 331, 332 (2009 Supp.).

[17] We have eliminated the Principle dealing with a proposed new summary procedure, similar to the "Application" procedure in Canada, that was designed to address certain factual and legal issues without triggering an automatic right to discovery or trial, because we not aware of any jurisdiction in the United States that has adopted such a procedure and we now believe that current rules provide procedures to achieve that end, such as a motion for partial summary judgment.

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 to which alternative dispute resolution has become efficient and effective. Second, it could be a reflection of how slow and inefficient the normal judicial process has become. Third, it could be a reflection of the fact that alternate dispute resolution 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 alternate dispute resolution. 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 alternate 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.

In addition, in many states, there are streamlined procedures for certain tracks of cases that impose limitations on discovery and fast tracks to trial. Such procedures offer a process that is tailored to the proportional needs of the cases, and we endorse such procedures.

PRINCIPLE 9:

- **Courts should promptly rule on all pending motions, giving greater priority to the resolution of motions that will advance the case more quickly.**

Judicial delay in deciding motions is a cause—perhaps a major cause—of delay and expense in our civil justice system. We recognize that our judges often are overworked and without adequate resources. Judicial delay in deciding motions has a materially adverse impact on the ultimate resolution of litigation. In our Final Report, this Principle was limited to encouraging prompt decision on motions that would materially advance the litigation. While that should remain a priority, we are persuaded that this Principle should be broadened to include all motions.

Since 2009, there has been a marked increase in the number of judges who are using streamlined motion practices, including the requirement that status conferences be held on discovery disputes prior to the making of any motions, or the submission of disputes by letter instead of formal briefing. The Southern District of New York's Pilot Project Regarding Case Management Techniques for Complex Civil Cases provides one example. While we do not yet have formal data from such experiments, anecdotal reports from judges and lawyers have been positive. Further, in the Report of our joint project, *Working Smarter, Not Harder*, the judges who were interviewed described many innovative practices for streamlining motion practice and almost all favored ruling as quickly as possible.[18] In terms of cost and delay, this is a low hanging fruit ripe for the picking and we hope to see widespread adoption of these practices.

PRINCIPLE 10:

- **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 urged by the College. Judicial resources are limited and need to be increased. This is even truer today than it was in 2009, when we originally proposed this Principle. Included in our concept of judicial resources are technological aids, paralegals, interns, legal secretaries, and other assistants who will aid the court in doing its work.

PRINCIPLE 11:

- **Trials represent a success, not a failure, of our civil justice system. Trial judges should be familiar with trial practice by experience, judicial education or training. Training programs on case management and the efficient trial of cases should be highly encouraged for trial judges.**

Knowledge of the trial process is critical for judges responsible for conducting the trial process. We urge that consideration of trial experience be an important part of the judicial selection process. Judges who have trial experience, or at least significant case management experience, are better able to manage their dockets and 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, somewhat surprisingly, 57 percent thought that judges did not like taking cases to trial. Accordingly, we believe that more training programs should be made available and that judges should be encouraged to attend them so that they will be able to manage and try cases in a more efficient and effective way.

[18] WORKING SMARTER, *supra* note 4, at 21-23.

PRINCIPLE RELATING TO 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 case to trial or other resolution.

PRINCIPLE 12:

- **Pleadings should concisely set out all material facts that are known to the pleading party to establish the pleading party's claims or defenses.**

One of the principal reforms made in the Federal Rules of Civil Procedure was to permit notice pleading. In *Conley v. Gibson*,[19] the Supreme Court held that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim that would entitle the plaintiff to relief. However, after our Final Report was first drafted, the Supreme Court changed the pleading requirements in federal cases to require the pleading party to set forth sufficient facts to demonstrate the plausibility of the conduct alleged.[20] Many commentators believed that our original pleading Principle was intended to adopt the *Twombly* requirement, but it was not. We did not address the issue of plausibility. Rather, we believed that if pleadings were more specific, discovery could be more targeted, leading to lower costs and more efficiency. In addition, fact-based pleading informs the court so that it can make proportionality determinations.[21]

We would require the parties to plead, at least in complaints, counterclaims and defenses, all material facts that are known to the pleading party to establish elements of a claim for relief or a defense. In the earlier version of this Principle, we limited this requirement to affirmative defenses, but we now believe that it should apply to all defenses that are pleaded. We would not require the pleading party to plead all "relevant" facts, and we would permit pleading on "information and belief" if the pleading party cannot reasonably obtain the material facts

[19] 355 U.S. 45 (1957).

[20] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *see also Ashcroft v. Iqbal,* 556 U.S. 662 (2009).

[21] *See generally* AM. COLL. OF TRIAL LAWYERS & INST. FOR ADVANCEMENT OF THE AM. LEGAL SYS., REPORT FROM THE TASK FORCE ON DISCOVERY AND CIVIL JUSTICE OF THE AMERICAN COLLEGE OF TRIAL LAWYERS AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM TO THE 2010 CIVIL LITIGATION CONFERENCE DUKE UNIVERSITY SCHOOL OF LAW (2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/ACTL%20Task%20Force,%20IAALS,%20Report%20to%20the%202010%20Civil%20Litigation%20Conference.pdf.

necessary to support one or more elements of a claim or a defense, so long as the basis for the information and belief, which the pleading party should know, is stated.

It is clear to us that a "hide the ball" culture is counter-productive. 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. A basic premise throughout these Principles is that early exchange of information between counsel and with the court identifies disputes fairly at issue in the litigation and leads to more focused, effective, efficient, and less-expensive discovery, especially in the digital age.

Material, 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 in controversy if the system of pleading fails to identify them.

Two of the recent pilot projects experimented with fact-based pleading: New Hampshire's Proportional Discovery/Automatic Disclosure ("PAD") Pilot Rules and Colorado's CAPP. New Hampshire's fact-based pleading and automatic disclosures were intended to bring the issues to light earlier in the litigation. While New Hampshire did not see a decrease in the overall time to disposition, anecdotal reports from lawyers suggested that those provisions were working well, and the rules have been implemented statewide. One unexpected result in New Hampshire has been a statistically significant decrease in default judgments. This may be attributable to fact-based pleading, which provides defendants with more information upon which they can base a defense.[22] In CAPP, which encouraged fact-based pleading and required automatic disclosures, there was a statistically significant reduction in the time to disposition that was consistent across all case types.[23] These experiences lend support to the early identification of claims and defenses.

[22] PAULA HANNAFORD-AGOR, ET AL., NAT'L CTR. FOR STATE COURTS, CIVIL JUSTICE INITIATIVE: NEW HAMPSHIRE: IMPACT OF THE PROPORTIONAL DISCOVERY/AUTOMATIC DISCLOSURE (PAD) PILOT RULES 17 (2013), *available at* http://ncsc.contentdm.oclc.org/cdm/ref/collection/civil/id/115.

[23] MOMENTUM FOR CHANGE, *supra* note 1, at 13.

PRINCIPLES RELATING TO DISCOVERY

The Purpose of Discovery: Discovery should enable a party to procure in admissible form through the most efficient, non-redundant, cost-effective method reasonably available, evidence that can be used to prove or disprove 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.

PRINCIPLE 13:

- **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 of the full range of discovery options offered by the rules. They believe that zealous advocacy (or the potential threat 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. As technology has evolved from the use of photocopiers and scanners to the current explosion of electronic information in its many forms, discovery has become increasingly burdensome on the parties and the civil justice system. The high cost of litigation often prevents the pursuit or defense of a claim in court or precludes the possibility of a trial. Even when cases are brought and defended, pre-trial expenses are compounded by the concern that a lawyer's failure to obtain all discovery permitted by Rule 26 will put the client at a disadvantage or expose the lawyer to risk. What will address that concern is a change in culture from an "all you can eat" model to "you get what you need."

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 quickly 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 ensure that discovery related to potentially dispositive issues is taken first so that those issues can be isolated and timely adjudicated.

One of the most consistent themes across the pilot projects and state rule reforms is the incorporation of the concept of proportionality. New Hampshire's PAD Pilot Rules, the Boston Litigation Session's Pilot Project, Colorado's CAPP, the Seventh Circuit's Electronic Discovery Pilot Program, and Utah's statewide rule changes all incorporate proportionality as a guiding

principle. The results have been positive, with reports that the time and costs are proportional to the issues at stake.[24] In addition, proportionality is a key theme in the proposed amendments to the Federal Rules of Civil Procedure. Proportionality has been moved up into the scope of what is discoverable under Rule 26(b)(1) to give it prominence and ensure that proportionality serves as a guiding principle throughout discovery.

PRINCIPLE 14:

- **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 Survey 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 be 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 client expectations 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.

The Utah statewide rule changes and Colorado's CAPP represent efforts to switch the paradigm, from a world where all facts are discoverable to a world where discovery is tailored to the needs of the case. While this is a culture change, the experimentation around the country confirms that it is possible, with positive results.

[24] *See, e.g., id.* at 12-17.

PRINCIPLE 15:

- **Shortly after the commencement of litigation, each party should produce all known and reasonably available non-privileged, non-work-product documents and things that support or contradict specifically pleaded factual allegations. The parties should retain the right in individual cases to make a showing to the court that this initial production may not be appropriate or may need to be modified.**

In 2008, the results of our Survey reflected that only 34 percent of the respondents thought that the current initial disclosure rules reduced discovery, and only 28 percent said they save the clients money. The national surveys that have followed further confirm that lawyers nationwide generally do not believe that Federal Rule of Civil Procedure 26(a)(1) initial disclosures reduce discovery, nor do they believe that such disclosures save their clients money.[25] The same surveys reflect that very high percentages report requiring additional discovery after initial disclosures. In contrast, in a study of Arizona's experience, where parties are required to make extensive initial disclosures, there is a consensus that such disclosures reveal pertinent facts early in the case, do not substantially increase satellite litigation, and do not raise litigation costs.[26] Our original Principle recognized that the initial disclosure rules need to be revised. This holds even truer today. It is time to make initial disclosures broader to ensure that they are truly effective.

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 broader in two ways. Whereas the current Rule permits description of documents by categories and location, we would require production. This Principle is also broader because it would require the production of all known and reasonably available documents and things that support or contradict specifically pleaded factual allegations.

The disclosures must be meaningful and robust. The rationale for this Principle is simple: each party should produce, without delay and without a formal request, documents that are known and reasonably available and that support or contradict specifically pleaded factual allegations. The goal of this Principle is to encourage the parties to bring the facts and issues to light at the earliest opportunity, thus allowing the litigation process to be shaped by the true nature of the dispute.

Our Principle does not require the parties to do an exhaustive search for or to produce all documents in the party's possession, custody or control that meet this definition at this early stage of the case. Initial production, as we envision it, is defined by what is then known and reasonably available. By including the requirement that the documents must be "known" and "reasonably available," we contemplate, as an example, the situation in which a party collects

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[25] *See* AM. BAR ASS'N, ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: FULL REPORT 56-59 (2009); REBECCA M. HAMBURG & MATTHEW C. KOSKI, NAT'L EMP'T LAWYERS ASS'N, SUMMARY OR RESULTS OF FEDERAL JUDICIAL CENTER SURVEY OF NELA MEMBERS, FALL 2009 29 (2010).

[26] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SURVEY OF THE ARIZONA BENCH & BAR ON THE ARIZONA RULES OF CIVIL PROCEDURE 19-26 (2010), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Survey_Arizona_Bench_Bar2010.pdf.

documents for the purpose of supporting a factual allegation in a complaint or in a defense and runs across a document that contradicts a specifically pleaded factual allegation. Many current rules would require the production of the "supporting" document in the initial disclosures. We would now require the production of the "contradictory" document as well. Where responsive documents might be voluminous and entail a substantial and expensive burden to produce within the timeframe for initial disclosures, such documents may not be considered to be "reasonably available." We also acknowledge that the parties should retain the right in individual cases to make a showing to the court that initial production (i.e., production of documents and things before there is a "reasonably particular" request) may not be appropriate or may need to be modified.

While there should be an ongoing duty to supplement initial and subsequent productions, as there is now, we do not intend this Principle to replace the decades-old and well-understood rule that in discovery (as opposed to initial production), document requests must describe the documents to be produced with "reasonable particularity." To the extent that discovery is required after initial production (or in cases where there is no initial production), that definition should still be the test for document requests.

We note that the proportionality Principle (Principle 13) applies to initial production, just as it underlies all of our Principles on discovery. Under Principle 19, in appropriate cases, the court should consider staying initial production pending the decision on a dispositive motion. We also expect counsel to confer as soon as possible in order to reach an agreement as to what initial production is appropriate in a particular case and to reach an agreement as to the timing of any such production. Federal Rule of Civil Procedure 26(f) requires such a conference before there can be any initial disclosures or discovery. The Seventh Circuit Electronic Discovery Pilot Program also recognizes the importance of this early conference to discuss discovery and identify disputes for early resolution.

To those charged with applying such a Principle, we suggest that the plaintiff could be required to make the required initial production 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.

Our changes to this Principle are informed by the experiences around the country, including those in Colorado and Arizona, both of which require early robust disclosure of relevant documents, whether supportive or harmful. In neither jurisdiction has there been a backlash against the more robust disclosures. In fact, in Arizona, lawyers who have experience with both state and federal systems prefer the Arizona scheme to the federal rules.[27] One takeaway from both jurisdictions is that enforcement is essential. Thus, it is critical that there be consequences related to the lack of initial disclosures or inadequate disclosures. A sanction for a bad faith failure to comply absent cause or excusable neglect could be included in the rules implementing this Principle. Examples include an order precluding use of such evidence at trial, or a denial of

[27] *See id.*

the right to object to the admissibility of the evidence at trial, although we urge caution about creating a scheme that would encourage "discovery about discovery" or unwarranted sanctions litigation.

We also urge the specialty bars to develop specific initial disclosure rules for certain types of cases that could supplement or even replace this Principle.[28]

By requiring early, meaningful initial production, the goal of this Principle is to limit gamesmanship throughout the pre-trial process, to decrease the current concentration of resources on the litigation of discovery disputes, and to increase the opportunity for meritorious trials. This change represents a dramatic shift in litigation practice, but business as usual is not working for clients and it is certainly not ideal for legal professionals. It is our hope that this Principle will lead to significant cultural change. The civil pre-trial process should not be a game of "hide the ball," with the outcome decided by attrition. Rather, the arguments should be about the merits, with the outcome decided by the evidence (whether at trial or through settlement).

PRINCIPLE 16:

- **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 Federal Rules permit discovery of all documents and information relevant to a claim or defense of any party, and the proposed amendments add the requirement of proportionality to that definition. 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, and we are hopeful that the addition of a proportionality requirement will eliminate such requests.

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 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

[28] *See, e.g.,* FED. JUDICIAL CTR., PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION (2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/DiscEmpl.pdf/$file/DiscEmpl.pdf.

intended to allow the system to operate extrajudicially, but the result was to afford virtually no protection at all to the parties from whom discovery was sought. 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 proven to be flawed. Discovery has become broad to the point of being virtually limitless. We have even seen lawyers take depositions solely to establish that the deponent does not have any relevant information. While there may be rare cases in which such depositions are necessary, the practice is unduly expensive and rarely productive. This Principle would require courts and parties to focus on what is important to the fair, expeditious, and inexpensive resolution of disputes.

As noted, the proposed amendments to the Federal Rules of Civil Procedure would modify the definition of what is discoverable by adding a proportionality requirement. Since our Principle 13 requires proportionality throughout the discovery process, including with respect to initial disclosures, we see no need to repeat that limitation here. The proposed federal amendments also make it clear that the familiar incantation—"information reasonably calculated to lead to the discovery of admissible evidence"—was never meant to be a definition of what is discoverable, although most lawyers and many courts thought it was.

PRINCIPLE 17:

- **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 identification of persons who have information that may be used at trial that the current federal rule requires as an initial disclosure (Rule 26(a)(1)(A)(i)) probably comes too early in many cases and often leads to responses that are useless.

PRINCIPLE 18:

- **After complete initial production is made, only limited additional discovery subject to proportionality should be had. Once that limited discovery is completed, no more should be allowed absent a court order, which should be granted only upon a showing of good cause and proportionality.**

This was a radical proposal when we first made it, and it was our most significant proposal. It challenged 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 changed the default. The default had been that each party may take virtually unlimited discovery unless a court said otherwise. We would reverse the default.

Our discovery system may not be completely broken, but most participants at the Duke Conference believed, as do we, that it was in need of serious repair. Fewer than half of the

respondents in our Survey thought that our discovery system worked well, and 71 percent thought that discovery was 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 a report in 1977 that recommends 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 more than a quarter 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; forty-four percent disagreed and an additional 12 percent strongly disagreed.

Efforts to limit discovery must begin with a 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. Our definition is set forth in Principle 16. 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. It should not be.

This Principle changes the default while still permitting a search, within reason, for the proverbial "smoking gun." Today, the default is that there will be discovery unless it is blocked. This Principle, together with our definition of what is discoverable in Principle 16, permits, under more active judicial supervision, 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 robust initial disclosures required by Principle 15. This Principle also applies to electronic discovery.

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 discovery defaults. For example, in employment cases, the standard practice is that personnel files are produced and the immediate decision maker 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. Some such work has already begun and we applaud those efforts.[29]

[29] *See, e.g., id.*

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 should 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 initial disclosures. We expect that the limited discovery contemplated by this Principle and the initial disclosure Principle would be swift, useful, and virtually automatic in most cases. There should of course be a continuing duty to supplement initial disclosures and discovery responses.

This concept of limited discovery has been implemented in Utah, with success. The preliminary results suggest that the rules have had a positive impact, in terms of discovery disputes and time. In addition, in Utah there has not been a lot of discovery after the initial disclosures, even in larger cases.

PRINCIPLE 19:

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

Discovery should be a mechanism by which a party discovers evidence to support or defeat a valid claim or defense. 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 required to embark on expensive disclosures and discovery that may never be used. [30]

We do not propose an absolute rule, but one that calls upon the court to decide whether initial production and discovery should be stayed in an appropriate case. There may be good reasons for staying discovery while a motion to dismiss is pending, so long as the motion is not frivolous. On the other hand, the Colorado experience highlights the competing tensions relating to motions and stays. In Colorado's CAPP, motions to dismiss did not stay the obligation to file an answer or any of the pleading or disclosure requirements.[31] However, in implementing the lessons learned of CAPP statewide, the Colorado Rules Committee has proposed amendments that would stay the case where such motions are based on lack of jurisdiction and insufficiency of process, but not for a motion to dismiss based on a failure to state a claim upon which relief may be granted or the failure to join a party. It is important for courts to consider the relevant competing considerations so that, on the one hand, costly discovery that may ultimately prove unnecessary because the case will be dismissed does not need to occur while, on the other hand, stays do not result in the very costs and delays they are meant to avoid.

[30] We have eliminated as unnecessary the former Principle relating to damages discovery.

[31] MOMENTUM FOR CHANGE, *supra* note 1, at 26-27, 30.

PRINCIPLE 20:

- **Shortly after the commencement of litigation, the parties should discuss the preservation of electronically stored information ("ESI") and attempt to reach agreement about preservation. The parties should discuss the manner in which ESI is stored and preserved. If the parties cannot agree, the court should issue an order governing ESI as soon as possible. That order should specify which ESI should be preserved and should address the scope and timing of allowable proportional ESI discovery and the allocation of its cost among the parties.**

Electronically stored information ("ESI") is fundamentally different from other types of discovery in the following respects: it is ubiquitous, often hard to access, and typically and routinely erased. Once litigation is reasonably anticipated, the parties have an obligation to preserve all material that may prove relevant during a civil action, including ESI. That is very difficult, if not impossible in some cases, 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 ESI) the initial pre-trial 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 ESI preservation and many local rules require such cooperation. Absent agreement of counsel, this Principle requires prompt judicial involvement in the identification and preservation of electronic evidence. We call on courts, shortly after a complaint is served, to inquire of the parties whether they have reached an agreement with respect to ESI preservation or, in the alternative, for the parties to make such a report to the court. The court should then make an order with respect to the preservation of ESI.[32] We are aware of cases in which, shortly after a complaint is filed, a motion is made for the preservation of ESI that otherwise would be destroyed in the ordinary course.[33] Our Principle would obviate such motions.

[32] The proposed amendments to the Federal Rules of Civil Procedure call for a Case Management Conference at the earlier of 90 days after any defendant has been served or 60 days after any defendant has appeared. However, if there is a dispute about the preservation of ESI, earlier court intervention will be required.

[33] *See, e.g., Keir v. Unumprovident Corp.*, No. 02 Civ. 8781, 2003 WL 21997747 (S.D.N.Y. Aug. 22, 2003) (counsel told court that 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).

Before such an order is entered, there should 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 ESI discovery; rather, the issue is what must be preserved before the scope of permissible ESI discovery can be determined. It is the preservation of ESI at the outset of litigation that engenders expensive retention efforts, made largely to avoid collateral litigation about evidence spoliation. Litigating ESI 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 and the proposed amendments to some of those rules do not adequately address this issue.

This Principle is supported by and consistent with the experiences of the Seventh Circuit Electronic Discovery Pilot Program. That pilot program recognizes the importance of appropriate preservation requests and orders and provides for an early conference of the parties, at which the preservation and production of ESI is discussed.

PRINCIPLE 21:

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

In order for this Principle to be effective, early and good faith communication between counsel is essential. The goals of this Principle are straight-forward, but the implementation is often difficult and requires good faith and cooperation between counsel.

PRINCIPLE 22:

- **ESI discovery should be limited by proportionality.**

While the discovery of ESI is included under the broader discovery umbrella, we felt it important to underscore the need for proportionality as related to ESI.

Although ESI is becoming extraordinarily important in civil litigation, it is proving to be enormously expensive and burdensome. The strong majority (75 percent) of our Survey respondents confirmed the fact that ESI discovery has resulted in a disproportionate increase in the expense of discovery and thus an increase in total litigation expense. ESI discovery, however, is a fact of life that is here to stay.

Because of its unique characteristics and the challenges associated with keeping ESI discovery proportional, our guiding Principle is all the more important in this context.

PRINCIPLE 23:

- **In order to contain the expense of ESI discovery and to carry out the Principle of proportionality, attorneys practicing civil litigation should become familiar with the technology employed by their clients for storage of ESI and the technology necessary to deal with ESI discovery requests, employing "technology liaison assistance" where appropriate. Judges should have access to and attend technical workshops where they obtain a full understanding of the complexity of ESI.**

The 2012 Rand Report "Where the Money Goes" found that review of ESI typically consumes 73 percent of all ESI production costs and argued that technology-assisted review would be far less expensive than manual techniques.[34] Yet, 76 percent of the respondents in our Survey said that courts do not understand the difficulties that parties face in providing ESI discovery.

Courts need to understand the complexity of the technical issues associated with ESI to avoid making orders that are unworkable or result in the imposition of unreasonable burdens on the parties. Courts are not assisted when lawyers appearing before them are not familiar with the technical issues or fail to cooperate by taking overly adversarial positions.

At a minimum, courts making decisions about ESI 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 ESI 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 ESI discovery. Decisions on relevance and privilege, which should be made by counsel, should not be delegated to third-party providers, which may needlessly add to the time and cost of ESI discovery.

We applaud efforts such as the Seventh Circuit's Electronic Discovery Pilot Program, and, in particular, its pilot principle 2.02, which calls for the appointment of an "e-discovery liaison" in the event of a dispute concerning the preservation of ESI. Other courts have appointed Special Masters to resolve complex, technical ESI disputes.

[34] NICHOLAS M. PACE & LAURA ZAKARAS, RAND INST. FOR CIVIL JUSTICE, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY xv-xvii (2012).

PRINCIPLE RELATING TO EXPERTS

PRINCIPLE 24:

- **Experts should usually be limited to one per issue per party. Experts should be required to furnish a written report setting forth all opinions, the bases therefore, a complete curriculum vitae, a list of cases in which they have testified, and all materials they have reviewed. The court must limit direct testimony to the content of the report. No depositions of experts may be taken unless approved by the court.**

Too often the "battle of experts" devolves into a numbers game. By limiting each party to one expert per issue, the case can proceed without repetitive opinions.

The need to depose an expert should be obviated by the written report. Expert depositions often do more to educate the witness for cross examination than to aid the party in preparation for trial. However, the reason for our Principle has to do with limiting expenses, not trial tactics.

Both Colorado's CAPP and Utah's statewide rule changes have implemented limits on expert discovery. CAPP provided for one expert witness per side per issue, with discovery and testimony limited to the report and no depositions. In Utah, an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. While the parties have the option of a deposition or a report, most opt for just the expert report.

While recognizing that some jurisdictions operate well with no expert depositions, there are conceivable instances in which a deposition may be warranted. Therefore, we have added the provision for an allowable deposition if the Court approves. It is our thinking that such allowable depositions should be limited to a showing of "good cause" or to a bona fide challenge to the adequacy of the written report.

The written report contemplated by this Principle should include all requirements of Federal Rule of Civil Procedure 26(a)(2)(b).

We also endorse Federal Rule 26(b)(4)(B) and (C), and recommend comparable state rules that would prohibit discovery of draft expert reports and most communications between experts and counsel.

THE ROAD TO REFORM

This is a report of progress and promise. Since we began our work in 2007, there has been much progress in civil justice reform. We intended to spark a serious discussion about reform. As we have seen, there has been more than a discussion; there has been a movement toward reform. There is much promise in that movement. Serious significant steps toward reform have been taken, but there is still much more work to be done. We hope that this report will continue to inspire substantive discussion and action among practicing lawyers, the judiciary, the academy, legislators and, most important, clients and the public. In the words of Task Force member The Honorable Mr. Justice Colin L. Campbell, formerly 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 and the ACTL Foundation, the members of the Task Force and the IAALS staff have applied their experience to a seven-year long process in which we collectively invested thousands of hours in analyzing the apparent problems in our civil justice system, studying the history of previous reform attempts and in debating and developing a set of Principles for reform. We believe that these Principles will 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.

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. Unfortunately, the majority of the American people still cannot afford lawyers or our system of attrition. Discovery delays and expense are the biggest part of the economic equation. Scorched-earth litigation comes with too high a price. Civil jury trials in state and federal courts are quickly disappearing. If we do not change, public trust and confidence will soon follow. As a profession, we must continue to apply our experience, our differing perspectives and our commitment to justice in order to devise meaningful reforms that will reinstate a trustworthy civil justice system in America.

APPENDIX A

IAALS' Review of Pilot Projects and Statewide Rule Changes across the United States

Just as in the Final Report, the updated Principles set forth in this report were not developed in a vacuum. IAALS and the Task Force intended that the Principles from the Final Report in 2009 be tested and evaluated in pilot projects in courts around the country. To support those efforts, IAALS and the Task Force jointly developed and published a model set of Pilot Project Rules for this purpose.[1] The Pilot Project rules, published in 2009, reduced the Principles to operational rules that could be utilized by jurisdictions around the country.

Jurisdictions took up this call. Today, there are numerous pilot projects in various stages of consideration, implementation, and evaluation around the country. 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. While some jurisdictions have recently implemented reforms (e.g., Minnesota[2] and Iowa[3]), others have run their course, evaluation is forthcoming or complete, and even broader implementation is underway (e.g., New Hampshire,[4] Massachusetts,[5] Colorado,[6] Utah,[7] New York,[8] and the Seventh Circuit[9]). There are common

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[1] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., A ROADMAP FOR REFORM, PILOT PROJECT RULES (2009), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Pilot_Project_Rules2009.pdf.

[2] CIVIL JUSTICE TASK FORCE, RECOMMENDATIONS OF THE MINNESOTA SUPREME COURT CIVIL JUSTICE REFORM TASK FORCE: FINAL REPORT (2011), *available at* http://archive.leg.state.mn.us/docs/2012/other/120214.pdf.

[3] IOWA CIVIL JUSTICE REFORM TASK FORCE, REFORMING THE IOWA CIVIL JUSTICE SYSTEM (2012), *available at* http://www.iowacourtsonline.org/wfdata/files/Committees/CivilJusticeReform/FINAL03_22_12.pdf.

[4] *See* Supreme Court of New Hampshire, Order (Apr. 2010), *available at* http://iaals.du.edu/images/wygwam/documents/publications/NH_PAD_Final_Report.pdf.

[5] *See* BUS. LITIG. SESSION, MASS. SUPERIOR COURT, BLS PILOT PROJECT, *available at* http://www.mass.gov/courts/docs/press/superior-bls-pilot-project.pdf (last visited Mar. 23, 2015).

[6] *See Colorado Civil Rules Pilot Project*, JUD. BRANCH ST. OF COLO., *available* http://www.courts.state.co.us/Courts/Civil_Rules.cfm (last visited Mar 23, 2015).

[7] *See Utah Rules of Civil Procedure*, UTAH ST. CTS. http://www.utcourts.gov/resources/rules/urcp/ (last visited Mar. 23, 2015) (showing numerous amendments to rules governing discovery). Utah is included here because of the broad, sweeping changes that have been implemented. These changes are not technically a "pilot program" because they have been implemented permanently rather than on an experimental basis.

[8] *See* JUDICIAL IMPROVEMENTS COMM. OF THE S. DIST. OF N.Y., PILOT PROJECT REGARDING CASE MANAGEMENT TECHNIQUES FOR COMPLEX CIVIL CASES (2011), *available at* http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot.pdf.

themes among these efforts, but each project is unique in its proposed solutions and design. For example, Utah has implemented broad-sweeping, permanent statewide rule changes that mandate proportionality through tiers of discovery based on the amount in controversy.[10] The Colorado Supreme Court, through its Civil Access Pilot Project ("CAPP"), implemented rule changes in business cases in select judicial districts for a period of two and a half years, and the court is now considering statewide rule changes applicable to all civil cases.[11] The efforts in both states are based on the ACTL's proposed Principles, with the goal of narrowing and framing the issues to achieve proportional and targeted discovery.

Various entities—including the National Center for State Courts, the Federal Judicial Center, and IAALS—have taken on the responsibility of evaluating the projects, and there are multiple evaluations that have informed this report. We summarize the pilot projects and evaluations below, as they have been foundational to this report. Moreover, they stand on their own as evidence of the march toward comprehensive reform across the United States.

A SUMMARY OF STATE PROJECTS

Colorado Civil Access Pilot Project

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 the Principles from the Final Report.[12] On June 22, 2011, the Colorado Supreme Court voted to implement a pilot project that would apply generally to "business actions" as specifically defined based on the claims set forth in the initial complaint. The pilot project went into effect on January 1, 2012, in four judicial districts, for a two-year period.[13] At the request of the Court, IAALS evaluated the effects of the pilot project. 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

[9] *See Statement of Purpose and Preparation of Principles*, DISCOVERY PILOT: SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM, www.discoverypilot.com (last visited Mar. 23, 2015).

[10] *See* UTAH R. CIV. P. 26.

[11] *See* Chief Justice Directive 11-02: Adopting Pilot Rules for Certain District Court Civil Cases (Colo. amended July 2014) [hereinafter Chief Justice Directive 11-02], *available at* http://www.courts.state.co.us/Courts/Supreme_Court/Directives/11-02amended%207-11-14.pdf.

[12] A History and Overview of The Colorado Civil Access Pilot Project Applicable to Business Actions in District Court, *available at* https://www.courts.state.co.us/userfiles/file/Court_Probation/Educational_Resources/CAPP%20Overview%20R8%2014%20%28FINAL%29.pdf (last visited Mar. 23, 2015).

[13] *See* Chief Justice Directive 11-02, *supra* note 11.

Directive was extended a second time by Chief Justice Nancy E. Rice for an additional six months to give the Court further time to consider the evaluation and proposed rule changes.[14]

The CAPP rules provide for proportionality as the guiding principle.[15] The rules provided that parties should plead all material facts that are known in the complaint and responsive pleadings so as to help define and narrow the disputed issues. Initial disclosures were more robust, staggered, filed with the court, and included all documents related to the claims and defenses, whether they are supportive or harmful. The rules also provided that motions to dismiss do not stay the obligation to file an answer, with continuances and extensions strongly disfavored. In CAPP, the rules provided that a single judge be assigned to the case for the duration, and that the judge would hold an initial case management conference with lead counsel to shape the pre-trial process, including determining the amount of discovery, guided by proportionality. One expert per side per issue was permitted, with expert discovery limited to the report.

In October 2014, IAALS released its final evaluation of the project, *Momentum for Change: The Impact of the Colorado Civil Access Pilot Project*.[16] The analysis reveals that the CAPP process as a whole has succeeded in achieving many of its intended effects, including a reduced time to resolution, increased court interaction, proportional discovery and costs, and reduced motions practice. Much of the positive feedback relates to CAPP's early, active, and ongoing judicial management of cases. CAPP cases were more likely to see a single judge, and to see that judge earlier and twice as often. Judges point to the initial case management conference as the most useful tool in shaping the pre-trial process to ensure that it was proportional. The evaluation also highlighted various issues. The rolling and staggered deadlines at the beginning of the case raised various logistical issues and increased costs in some cases (e.g., where plaintiffs were required to file initial disclosures prior to the defendants' appearance in cases that ended in default). One lesson learned is that enforcement of expanded pleading and initial disclosure requirements is critical to ensure these have their intended effect. Finally, while CAPP cases saw a positive reduction in the time to resolution, there was feedback that the "extraordinary circumstances" standard for continuances was challenging in application.[17]

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 Iowa 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

[14] *Id.*

[15] *Id.*

[16] *See* CORINA D. GERETY & LOGAN CORNETT, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., MOMENTUM FOR CHANGE: THE IMPACT OF THE COLORADO CIVIL ACCESS PILOT PROJECT (2014), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Momentum_ for_Change_CAPP_Final_Report.pdf.

[17] *Id.* at 1-2.

malpractice matters. To inform its work, the Task Force administered a survey of the Iowa bench and bar, focusing on specific problems and potential solutions. Informed by the results of that survey, the Task Force issued a final report, *Reforming the Iowa Civil Justice System*, in March 2012.[18] 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 has been in the process of implementing those 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, beginning May 1, 2013.[19] 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. Additional rule amendments became effective January 1, 2015.[20] As part of those amendments, the Iowa Supreme Court 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. The 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.

Massachusetts Business Litigation Session Pilot Project

The Massachusetts 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 pre-trial discovery, particularly electronic discovery.[21] The pilot project was implemented on a voluntary basis, effective January 4, 2010, for all new cases in Suffolk Superior Court's BLS, and all cases that have not previously had an initial Rule 16 case management conference. The 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.

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[18] IOWA CIVIL JUSTICE REFORM TASK FORCE, REFORMING THE IOWA CIVIL JUSTICE SYSTEM (2012), *available at* http://www.iowacourtsonline.org/wfdata/files/Committees/CivilJusticeReform/FINAL03_22_12.pdf.

[19] Memorandum of Operation In the Matter of Establishment of the Iowa Business Specialty Court Pilot Project (Dec. 2012), *available at* http://www.iowacourts.gov/wfdata/files/Committees/BusinessCourts/MemorandumOfOperation.pdf.

[20] Order regarding Revisions to Expedited Civil Action Rule and Recent Amendments to Iowa Discovery Rules (Oct. 2014), *available at* http://www.iowacourts.gov/wfdata/files/ECA/103014%20Ord%20Re%20Civl%20Act%20Rule%20and%20Disc%20Rules.pdf.

[21] *See* BUS. LITIG. SESSION, MASS. SUPERIOR COURT, BLS PILOT PROJECT, http://www.mass.gov/courts/docs/press/superior-bls-pilot-project.pdf (last visited Mar. 23, 2015).

The project was heavily influenced by the *Final Report*, citing directly to the Principles. Under the pilot project, the "concept of limited discovery proportionally tied to the magnitude of the claims actually at issue" was the "guiding principle."[22] Following initial disclosures, the pilot project rules provided that the judge manage the amount of discovery, including electronic discovery, to settle on the right amount of discovery proportionate to the type of case at hand. Staging of discovery was encouraged, and the parties were expected to confer early and often regarding discovery.

The Court has published a *Final Report on the 2012 Attorney Survey*, based on a 10-question "Pilot Project Evaluation" survey administered in the fall of 2012.[23] Despite the program's voluntary nature, the survey found that 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. In comparison with other BLS cases, most respondents concluded the pilot was "much better" or "somewhat better" with respect to the timeliness and cost-effectiveness of discovery, the timeliness of case events, access to a judge to resolve discovery issues, and the cost-effectiveness of case resolution. In comparison with non-BLS session cases, 80% of respondents had a "much better" or "somewhat better" overall experience in the pilot project.

Minnesota Civil Justice Reform Task Force

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 Minnesota Task Force submitted its final report to the Minnesota Supreme Court in December 2011, with a number of rule and case management recommendations.[24] The Minnesota 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 non-dispositive motions, and an expedited litigation track pilot program and a complex case program. The Minnesota 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 Minnesota Task Force to prepare particular proposed rule changes, case management orders, and forms. In May 2012, the Minnesota Task Force submitted a Supplemental Report including the requested items.[25]

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[22] *Id.*

[23] SUFFOLK SUPERIOR COURT BUSINESS LITIGATION SESSION PILOT PROJECT, FINAL REPORT ON THE 2012 ATTORNEY SURVEY (Dec. 2012), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Final_BLS_Survey_Report.pdf.

[24] CIVIL JUSTICE TASK FORCE, RECOMMENDATIONS OF THE MINNESOTA SUPREME COURT CIVIL JUSTICE REFORM TASK FORCE: FINAL REPORT (2011), *available at* http://archive.leg.state.mn.us/docs/2012/other/120214.pdf.

[25] CIVIL JUSTICE TASK FORCE, RECOMMENDATIONS OF THE MINNESOTA SUPREME COURT CIVIL JUSTICE REFORM TASK FORCE: SUPPLEMENTAL REPORT (2012), *available at*

The Minnesota Supreme Court received public comments in the fall of 2012, and issued final amendments to the Rules of Civil Procedure and the General Rules of Practice for the District Courts on February 12, 2013.[26] The amendments, which went into effect on July 1, 2013, adopt many of the recommendations of the Minnesota Task Force, including incorporating proportionality into the scope of discovery, automatic disclosures, a discovery plan, an expedited process for non-dispositive motions, and a new Complex Case Program. The Supreme Court also created an Expedited Civil Litigation Track Pilot, which provides for early involvement by the judge, limited discovery, curtailed continuances, and the setting of a trial date within four to six months.[27] 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 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.[28] 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. In 2012, the pilot rules were extended to 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.

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http://www.mncourts.gov/Documents/0/Public/Court_Information_Office/Civil_Justice_Ref_Task_Force_Supp_Rpt_May_2012.pdf.

[26] Minnesota Supreme Court, Order Promulgating Corrective Amendments to the Rules of Civil Procedure and General Rules of Practice Relating to The Civil Justice Reform Task Force (Feb. 2013), *available at* http://www.mncourts.gov/Documents/0/Public/Clerks_Office/Rule%20Amendments/2013-02-12%20Order%20Corrective%20Amendments%20Civ%20Proc.pdf.

[27] Minnesota Supreme Court, Order Relating to the Civil Justice Reform Task Force, Authorizing Expedited Civil Litigation Track Pilot Project, and Adopting Amendments to the Rules of Civil Procedure and the General Rules of Practice (May 2013), *available at* http://iaals.du.edu/images/wygwam/documents/publications/2013-05-07_Order_Authorizing_Expedited_Civil_Litigation_Track.pdf.

[28] *See* Supreme Court of New Hampshire, Order (Apr. 2010) *available at* http://iaals.du.edu/images/wygwam/documents/publications/NH_PAD_Final_Report.pdf.

The pilot project rules implemented temporary changes to the Superior Court pleading and discovery rules. The pleading standard was changed to fact pleading from a notice pleading system where the plaintiffs filed a writ with notice of suit, the defendants entered an appearance acknowledging suit, but neither party was required to include the factual basis for the suit until discovery. The pilot rules required the parties to meet and confer early in the case to establish deadlines, and where there was agreement, a case structuring conference was not required. The rules also provided for telephonic case structuring conferences rather than in-court conferences. In terms of discovery, the pilot project rules required early initial disclosures, after which only limited additional discovery was permitted.

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*.[29] The evaluation compared case processing outcomes for cases filed in the pilot courts under the PAD Pilot Rules with those outcomes for non-pilot project cases, and also included interviews with key stakeholders and attorneys. The results from the pilot project are mixed. There was not a statistically significant decrease in the time from filing to disposition—a significant goal of the pilot project. Anecdotal reports from attorneys with pilot project cases, however, suggest the provisions worked well and that fact pleading gets the cases moving along faster. Although the rules appeared to have reduced the frequency of structuring conferences, with a majority of those held conducted telephonically, anecdotal reports suggested issues with the early timelines and logistics of scheduling the teleconferences. NCSC reported that judges were moving back to in-court hearings. One interesting outcome is that the change to fact pleading appears to have decreased the number of default judgments.

New York Task Force on Commercial Litigation in the 21st Century

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 New York Task Force submitted its final report in June 2011.[30] The New York Task Force's key recommendations included: 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.

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[29] PAULA HANNAFORD-AGOR, ET AL., NAT'L CTR. FOR STATE COURTS, CIVIL JUSTICE INITIATIVE: NEW HAMPSHIRE: IMPACT OF THE PROPORTIONAL DISCOVERY/AUTOMATIC DISCLOSURE (PAD) PILOT RULES (2013), *available at* http://ncsc.contentdm.oclc.org/cdm/ref/collection/civil/id/115.

[30] THE CHIEF JUDGE'S TASK FORCE ON COMMERCIAL LITIGATION IN THE 21ST CENTURY, REPORT AND RECOMMENDATIONS TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (June 2012), *available at* http://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf.

In 2013, Chief Judge Lippman established a permanent Commercial Division Advisory Council, as recommended by the New York Task Force.[31] The Council has been working on implementing the recommendations, and multiple rule amendments have been implemented. Some of the changes in 2014 included: 1) amendments that provide for more robust expert disclosure, 2) an accelerated adjudication procedure, 3) a pilot mandatory mediation program, 4) a limit to the scope and number of interrogatories, 5) a preference for the use of "categorical designations" in privilege logs, 6) guidelines for discovery of electronically stored information from nonparties, 7) replacing the calendar call system with specific time slots, and 8) 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 Supreme Court Task Force on Commercial Dockets

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 Ohio Task Force began working in June 2007 and submitted an interim report in 2008 summarizing the Ohio 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 Ohio Task Force submitted a second interim report in March 2011, noting the great success of the pilot project at that time, but also highlighting its challenges. In December 2011, the Ohio 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.[32] The Ohio 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.

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.[33] Among the bill's provisions, Article 2

[31] New York State Unified Court System, Press Release, Chief Judge Names Members of Commercial Division Advisory Council (Mar. 2013), *available at* http://www.courts.state.ny.us/press/PDFs/PR13_05.pdf.

[32] THE SUPREME COURT OF OHIO, REPORT AND RECOMMENDATIONS OF THE SUPREME COURT OF OHIO TASK FORCE ON COMMERCIAL DOCKETS (Dec. 2011), *available at* http://www.supremecourt.ohio.gov/Boards/commDockets/Report.pdf.

[33] Texas H.B. No. 274 (May 24, 2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/billtext/html/HB00274F.htm.

directed the Texas Supreme Court to adopt rules to promote "the prompt, efficient, and cost-effective resolution of civil actions." The rules were to apply to civil actions in which the amount in controversy does not exceed $100,000, and H.B. 274 required 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.[34]

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 pre-trial 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."[35] The National Center for State Courts is evaluating this program.

Utah Statewide Amendments to the Rules of Civil Procedure

The Utah Supreme Court's Advisory Committee on the Rules of Civil Procedure developed, proposed, and ushered through significant statewide rule changes to address the expansion and increased cost of discovery, and its impact on the state civil justice system.[36] Prior to presenting their 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.[37] 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

[34] THE TASK FORCE FOR RULES IN EXPEDITED ACTIONS, FINAL REPORT TO THE SUPREME COURT OF TEXAS (Jan. 25, 2012), *available at* http://iaals.du.edu/images/wygwam/documents/publications/SCAC_Expedited_Actions_Final_Task_Force_Report.pdf.

[35] *See generally* Tex. R. Civ. P. 47, 169, & 190, *available at* http://www.txcourts.gov/media/514725/TRCP_2014_01_01.pdf.

[36] *See Utah Rules of Civil Procedure*, UTAH ST. CTS. http://www.utcourts.gov/resources/rules/urcp/ (last visited Mar. 23, 2015) (showing numerous amendments to rules governing discovery).

[37] Utah State Court Rules – Published for Comment, http://www.utcourts.gov/resources/rules/comments/20110621/ (June 21, 2011).

prohibited unless the rules or a judge say otherwise. The changes include comprehensive initial disclosures, a requirement that discovery be proportional, and tiered discovery based on amount in controversy. Discovery is tiered as follows: 1) actions claiming $50,000 or less are limited to three deposition hours, zero interrogatories, five requests for production, five requests for admission, and 120 days to complete discovery; 2) actions claiming more than $50,000 and less than $300,000 or non-monetary relief are limited to fifteen deposition hours, ten interrogatories, ten requests for production, ten requests for admission, and 180 days to complete discovery; and 3) actions claiming more than $300,000 are limited to thirty deposition hours, twenty interrogatories, twenty requests for production, twenty requests for admission, and 210 days to complete discovery.[38] These limits apply unless the parties agree or a court orders otherwise. Expert discovery is limited to either a four-hour deposition or a report that limits the expert's testimony at trial. The Utah Rules have also adopted an expedited process for resolving discovery disputes.

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 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.

A SUMMARY OF FEDERAL PROJECTS

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.[39] Chaired by Judge John Koeltl and facilitated by IAALS, the committee presented its final product to the Civil Rules Advisory Committee in November 2011. 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."[40] 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

[38] *See generally* UTAH R. CIV. P. 26.

[39] FED. JUDICIAL CTR., PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION (2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/DiscEmpl.pdf/$file/DiscEmpl.pdf.

[40] *Id.* at 1.

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 in the process of evaluating the effects.

District of Kansas

In early March 2012, the U.S. District Court for the District of Kansas undertook an effort focused on ensuring that civil litigation in the District is handled in a "just, speedy, and inexpensive" manner, in accordance with Rule 1 of the Federal Rules of Civil Procedure.[41] 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 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 Rule 1 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 Pre-trial 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.

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 pre-trial case management of complex cases.[42] 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, expiring October 31, 2014. On November 14, 2014, the

[41] U.S. DISTRICT COURT FOR THE DISTRICT OF KANSAS, RULE 1 TASK FORCE DOCUMENTS (2013), *available at* http://www.ksd.uscourts.gov/rule-1-task-force-documents/.

[42] U.S. District Court for the S.D.N.Y., Standing Order M10-468, In re: Pilot Project Regarding Case Management Techniques for Complex Civil Cases in the Southern District of New York (Nov. 1, 2011), *available at* http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot_2011-10-31.pdf.

Court entered an order recognizing the completion of the project.[43] 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.

The pilot project provided for an early and comprehensive initial pre-trial conference, at which parties state their positions on a number of issues and recommend limitations on fact and expert discovery. For discovery disputes not involving issues of privilege or work product, the pilot project provided that the discovery dispute be submitted to the Court by letter rather than motions. Pre-motion conferences are provided for all other motions except motions for reconsideration, motions for a new trial, and motions *in limine*. The rules also included provisions intended to streamline privilege logs.

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.[44] Under the leadership of Chief Judge James Holderman and Magistrate Judge Nan Nolan, a diverse E-Discovery Committee developed Principles Relating to the Discovery of Electronically Stored Information, intended to incentivize early information exchange and meaningful cooperation on commonly encountered issues relating to evidence preservation and discovery.[45]

The Seventh Circuit Principles are implemented through standing orders issued by individual judges voluntarily participating in the program. The Seventh Circuit Principles highlight the importance of cooperation and proportionality. One of the most popular aspects of the pilot project has been the e-discovery liaisons. In the event of a dispute concerning preservation or production of ESI, each of the parties designates an e-discovery liaison for purposes of meeting, conferring, and attending court hearings on the issues. The Seventh Circuit Principles also address meet and confer discussions; preservation scope, requests, and orders; and the identification and production format of electronically stored information.[46]

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[43] U.S. District Court for the S.D.N.Y., Standing Order M10-468, In re: Pilot Project Regarding Case Management Techniques for Complex Civil Cases in the Southern District of New York (Nov. 14, 2014), *available at* http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot.pdf.

[44] *See generally* www.discoverypilot.com.

[45] *See* 7TH CIRCUIT ELECTRONIC DISCOVERY COMMITTEE, PRINCIPLES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION (rev. 08/01/2010), *available at* http://www.discoverypilot.com/sites/default/files/Principles8_10.pdf.

[46] *Id.*

The Pilot Program has proceeded in phases. 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. 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 Seventh Circuit Principles were revised in response to the Phase One survey results, and revised Seventh Circuit 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.

THEMES ACROSS THE PROJECTS AND EVALUATIONS

The pilot projects have been shaped by the particular circumstances and needs of the jurisdictions in which they have been implemented. Nevertheless, there are several themes that can be drawn across the projects and evaluations, including a shift away from transsubstantive rules towards differentiated rules for different types of cases, a focus on proportionality, and a commitment to efficient judicial case management.

The Task Force urged in its Final Report that "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."[47] Subsequent surveys, conducted by IAALS and others, confirmed that there is a strong sense that our civil justice system works well for certain types of cases but not others.[48] Consistent with this theme, much of the experimentation has been around defined rules based on case type or complexity. In some jurisdictions, pilot projects have focused on the most complex of cases, irrespective of subject matter, to address the issues of cost and delay in those cases that are often the worst offenders. On the other end of the spectrum, there has also been a

[47] *See* AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., 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 4 (rev. ed. 2009), *available at* http://iaals.du.edu/images/wygwam/documents/publications/ACTL-IAALS_Final_Report_rev_8-4-10.pdf.

[48] Corina Gerety, *Trial Bench Views: IAALS Report on Findings From a National Survey on Civil Procedure*, 32 PACE L. REV. 301, 303 (2012) (noting that state and federal judges agreed in their 2010 survey, with 70% of trial judge respondents agreeing that the "civil justice system works well for certain types of cases but not others").

groundswell of support and implementation of programs addressing the simplest of cases. These programs offer short, summary, and expedited processes for simple cases so that parties can gain access to the system, and a jury or bench trial, in a way that is affordable and proportional.[49] These programs, which are often marked both by an expedited pre-trial process and an expedited trial process, have grown in popularity around the country since 2009. The hope is that such programs address the needs of, and thereby ensure access for, the smaller cases by offering a proportionally simpler and more expedited process.

Proportionality is a second key theme across reform efforts. One of the most important Principles espoused by the Final Report is the notion that "[p]roportionality should be the most important principle applied to all discovery."[50] Jurisdictions around the country have embraced this concept, and many have incorporated proportionality as a central aspect of their pilot projects and rule reforms. Several reform efforts seek to ensure proportionality by flipping the discovery paradigm from an "all facts are discoverable unless the court decides otherwise" framework to one that expressly limits the scope of discovery unless the court decides otherwise.

Finally, pilot projects have recognized that efficient case management is an essential component to any of these reforms. Like proportionality, jurisdictions around the country have recognized the need for judges to play a role in reducing the cost and delay in the cases before them. Several reforms recognize the case management conference as an opportunity for the court to engage with the parties, focus on the issues, and tailor the subsequent pre-trial process. There is also a trend toward streamlining motions practice, either by requiring a status conference prior to filing discovery motions, or providing for brief letters and a hearing rather than full motions.

While many of the lessons learned from the evaluations are specific to the respective jurisdictions, there are themes that can be drawn from the evaluations as well, and they mirror the above themes across projects. It is clear one size does not fit all, and projects have been successful when they provide opportunities for the court and parties to tailor the process to the needs of the case. Those projects that have made proportionality an overarching principle have received positive feedback that the process and costs have been proportional. Finally, to the extent the projects have featured case management, this has been called out as a highlight of the reforms by both the bench and bar.

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[49] *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. ET AL., A RETURN TO TRIALS: IMPLEMENTING EFFECTIVE SHORT, SUMMARY, AND EXPEDITED CIVIL ACTION PROGRAMS 3–4 (2012), *available at* http://iaals.du.edu/images/wygwam/documents/publications/A_Return_to_Trials_-_Implementing_Effective_Short_Summary_and_Expedited_Civil_Action_Programs.pdf (discussing common characteristics of programs in various jurisdictions designed to provide litigants with speedy and less expensive access to civil trials); PAULA L. HANNAFORD-AGOR ET AL., NAT'L CTR. FOR STATE COURTS, SHORT, SUMMARY & EXPEDITED: THE EVOLUTION OF CIVIL JURY TRIALS 6–7 (2012), *available at* http://www.ncsc.org/~/media/Fiks/PDF/Information%20and%20Resources/Civil%20cover%20sheets/ShortSummaryExpedited-online%20rev.ashx (describing expedited procedures in six jurisdictions).

[50] FINAL REPORT, *supra* note 47, at 7.

APPENDIX B

A Review of the Rule Reform Efforts at the Federal Level

The Duke Conference

Following the adoption of our Final Report in 2009, the Standing Committee convened a conference at Duke Law School in 2010 to study the state of civil litigation in federal courts. We have been told that our Final Report was the principal impetus for that conference. At that conference, more than 40 papers, 80 presentations, and 25 compilations of empirical data were submitted. More than 70 judges, lawyers, and academics made presentations to an audience of more than 200.[1]

Following that conference, the Rules Committee created the so-called "Duke Subcommittee" to consider many of the recommendations made during the Conference. In addition, a Discovery Subcommittee was created to consider changes to Rule 37(e) (relating to electronically stored information). A third committee, called the Rule 84 Subcommittee, was created to consider abrogation of the Appendix of Forms in the Federal Rules.

The Proposed Amendments

There are four proposed amendments to Rule 26:

1. All discovery must be "proportional" to the needs of the case;

2. Language relating to the discovery of sources has been removed as unnecessary;

3. The distinction between discovery of information relevant to the claims and defenses and information relevant to the subject matter of the case on a showing of good cause has been eliminated because the latter provision was rarely used and because the "proper focus of discovery is on the claims and defenses in the litigation;"[2] and

4. The sentence allowing discovery of information "reasonably calculated to lead to the discovery of admissible evidence" has been rewritten to make it clear

[1] *See* Memorandum from Judge David G. Campbell to Judge Jeffrey Sutton, Proposed Amendments to the Federal Rules of Civil Procedure (June 14, 2014), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014-add.pdf.

[2] *Id*. at 9.

that that language was never intended to define the scope of discovery and to make it clear that "information within the scope of discovery need not be admissible in evidence to be discoverable."

There are three proposed amendments to Rule 34:

1. Objections to requests to produce must be stated "with specificity";

2. A responding party may offer to produce copies instead of permitting inspection; and

3. All objections must state whether any responsive material is being withheld on the basis of the objection.[3]

There are four proposed amendments to Rule 16:

1. Case Management Conferences with the Court may be held by any means of simultaneous communication (e.g., by video conference, but not by e-mail);

2. The time for holding such a conference is now set at the earlier of 90 days after any defendant has been served and 60 days after any defendant has appeared;

3. Now included in the list of subjects that may be addressed in a Case Management Conference are the preservation of electronically stored information and agreements under FRE 502 (non-waiver of privilege);

4. Also included in the list of subjects that may be considered at the Case Management Conference is whether the parties should request a conference with the Court before making a discovery motion.

Rule 1 has been amended to make it clear that the obligation to construe and administer the Rules to secure the just, speedy, and inexpensive determination of every action and proceeding also applies to the parties as well as the Court.

Rule 37(e) has been amended in order to resolve a circuit split as to whether or not an adverse inference instruction may be given for the loss of electronically stored information in cases due to negligence or required a showing of bad faith. The new rule provides that an adverse inference instruction may be given only upon a showing that the party acted "with the intent to deprive another party of the information's use in the

[3] The little-known and even lesser-used moratorium on the filing of a Rule 34 Request to Produce until after the Rule 26(f) discovery conference is held between the parties has been amended to allow the filing of such requests before that conference is held so that it could be discussed at the conference, but the time to respond to such a request does not begin until the date of the Rule 26(f) conference.

litigation." The new rule does not address when a duty to preserve electronically stored information was triggered or on what constituted "reasonable steps" to preserve it, although the Advisory Committee Notes do provide that determining reasonableness includes consideration of a party's resources and the proportionality of efforts to preserve. Rule 37(e) also provides that upon a finding of prejudice to a party caused by the loss of electronically stored information, the Court may order measures "no greater than necessary to cure the prejudice." Notably, the proposed amendments to Rule 37 apply only to electronically stored information, not to any other forms of information.

Rule 84 and the forms in the Appendix have been abrogated as out of date.