Creating the Just, Speedy, and Inexpensive COURTS OF TOMORROW

Ideas for Impact from IAALS' Fourth Civil Justice Reform Summit

RULE ONE INITIATIVE

10 YEARS OF IAALS
INSTITUTE for the ADVANCEMENT of the AMERICAN LEGAL SYSTEM

"Improving our civil justice system requires culture change. Culture change requires serious leadership from the top. Judges and lawyers don't like to be led. We have to convince them it's in their best interest. And we need to appeal to their professionalism and the reason they became lawyers and judges in the first place."

Hon. Thomas A. Balmer
Chief Justice, Oregon Supreme Court

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Brittany K.T. Kauffman
Director, *Rule One Initiative*

August 2016

IAALS—Institute for the Advancement of the American Legal System

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IAALS, the Institute for the Advancement of the American Legal System, is a national, independent research center at the University of Denver dedicated to facilitating continuous improvement and advancing excellence in the American legal system. We are a "think tank" that goes one step further—we are practical and solution-oriented. Our mission is to forge innovative solutions to problems in our system in collaboration with the best minds in the country. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications, and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models, and will to advance a more accessible, efficient, and accountable American legal system.

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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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Acknowledgements

IAALS' Fourth Civil Justice Reform Summit would not have been possible without the invaluable input of the Summit Planning Committee* and panelists:

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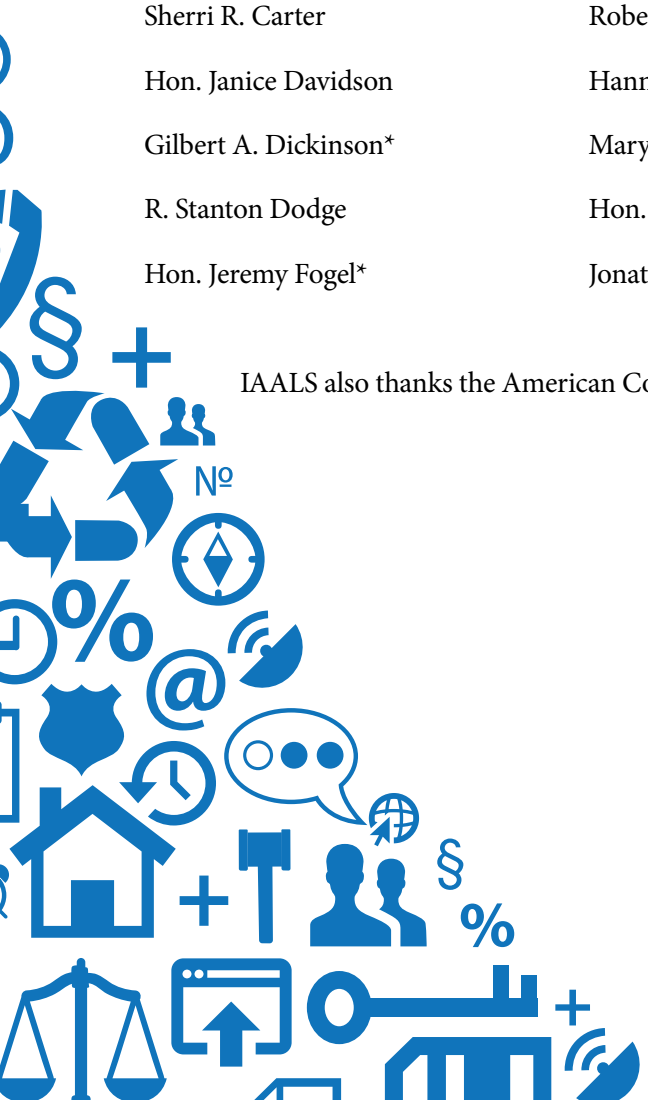
IAALS also thanks the American College of Trial Lawyers Foundation for its generous support of the Summit.



Executive Summary

In February 2016, the *Rule One Initiative* at IAALS—the Institute for the Advancement of the American Legal System at the University of Denver—hosted its Fourth Civil Justice Reform Summit: Creating the Just, Speedy, and Inexpensive Courts of Tomorrow. The goal of the Summit was to bring together federal and state court judges, court administrators, attorneys on both sides of the "v," academics, and users of the system to chart the next steps for creating the just, speedy, and inexpensive courts of tomorrow.

It was a packed two-day Summit that covered the waterfront—current civil justice reform efforts around the country at the state and federal levels, simple cases to complex cases, the importance of case management by judges *and* the court, and the varying perspectives of the users of the system. The Summit provided a unique opportunity for discussion about the state of innovation across our federal and state courts—and a corresponding unique opportunity to share lessons that can be learned from those very different experiences and dockets.

The discussion highlighted the realities of our civil justice system, including similarities and differences in state and federal courts. It also highlighted the need for civil justice reform, efforts that are currently underway, and ideas for future impact. From the discussion, a vision for the courts of tomorrow took shape—a court system where we have:

- Litigation that is cost effective;
- Courts that are accessible and affordable;
- Technology that serves litigants;
- Judges who are engaged and attentive; and
- Lawyers who are cooperative and innovative.

The Summit ignited a renewed energy and commitment to achieving this goal. That energy was palpable in the room, which was filled with attendees spanning not only the nation but also the world—united in their dedication to making our civil justice system better.

Our goal is to spread that energy beyond the Summit. Thus, this report summarizes the discussion at the Summit and captures current efforts toward reform, challenges of implementation, and specific proposals that were shared. It is our hope that these ideas for impact inspire attorneys, judges, our courts, and other members of the system to embrace their role in creating the just, speedy, and inexpensive courts of tomorrow.

Introduction

On February 25 and 26, 2016, IAALS[1] hosted its Fourth Civil Justice Reform Summit. All four Summits have focused on the extent to which America's civil justice system has fallen short of its promise of a just, speedy, and inexpensive process and have proposed solutions designed to achieve this goal.

The first Summit was held in 2007, when IAALS convened a number of prominent leaders, both from the United States and internationally, to discuss reform in the civil justice system and draw lessons from the experiences of others. The goal of the second Summit, in 2009, was to initiate a proposed action plan for implementation of pilot projects and collection of data. At our third Summit, in 2012, IAALS continued the dialogue, this time with more than 70 influential Rules reformers, federal and state judges, representatives of the National Center for State Courts, representatives of the Federal Judicial Center, and attorneys. The third Summit recognized the new landscape of innovation that had taken hold, including multiple pilot projects and rule changes underway at the state and federal level. This history highlights just how far we have come in civil justice reform in the United States. In ten years, we have moved beyond making the case for civil justice reform and are now engaged in a widespread movement to make it happen.

With this fourth Summit, IAALS has endeavored to engage an even wider audience in this movement, to recognize that we are not there yet, and to create a collective vision for the courts of tomorrow. The Summit began with panels that highlighted the civil justice reform efforts at the state and federal level, as well as lessons learned from evaluations of those efforts over the last three years. An international panel of speakers from Singapore, Australia, England, and Canada provided insight into the challenges facing civil justice reform around the globe, and solutions. The international panel also served as a catalyst for thinking outside the box in terms of next steps and our overall vision for civil justice in the United States. This background, at home and abroad, laid the groundwork for more in depth discussion for the remainder of the Summit. Panels focused on implementation of proportionality concepts at the state and federal level, cooperation, the role of attorneys, the role of judges, the role of the courts, and perspectives from the users of the system. The Summit included a session devoted to brainstorming a vision for the just, speedy, and inexpensive courts of tomorrow, and concluded with a judges' panel that pulled together themes and highlights.

This report summarizes the discussion that occurred and highlights themes that emerged over the two days. The viewpoints, recommendations, and perspectives expressed in this report do not represent the positions of any represented organizations that attended the Summit, or any individual Summit attendees. Rather, this report seeks to recount the robust conversation and ideas that were shared to broaden the reach and impact of this important dialogue.

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1 IAALS, the Institute for the Advancement of the American Legal System, is a national, independent research center at the University of Denver dedicated to facilitating continuous improvement and advancing excellence in the American legal system. IAALS has four initiative areas, one of which is the *Rule One Initiative*. The *Rule One Initiative* is focused on improving the civil justice process, with the goal of ensuring access to justice, an efficient court process, and an accountable system that is fair and reasoned—all with the goal of service to litigants. Learn more about IAALS and *Rule One* at http://iaals.du.edu.

The Landscape of Litigation in America's Courts

To understand the challenges, and to have a basis for developing solutions, the Summit began by looking at the current landscape of litigation in our civil justice system. While individual jurisdictions have their own challenges, and there are certainly differences between the state and federal systems, there are also many commonalities.

The National Center for State Courts recently studied the landscape of litigation in state courts, yielding significant takeaways.[2] That 2015 study highlights that the dockets in state courts are changing. Nearly two-thirds of cases are contract cases, and a majority of those are debt collection and landlord/tenant cases. The most recent large-scale comparable study was conducted by NCSC in 1992, and at that time there was a one to one ratio of contract to tort cases.[3] Today, the ratio is seven to one. Tort cases have largely evaporated.[4] In addition to this change in type of case, civil case loads in general around the country are dropping at a rate of between 2% and 6% annually.[5]

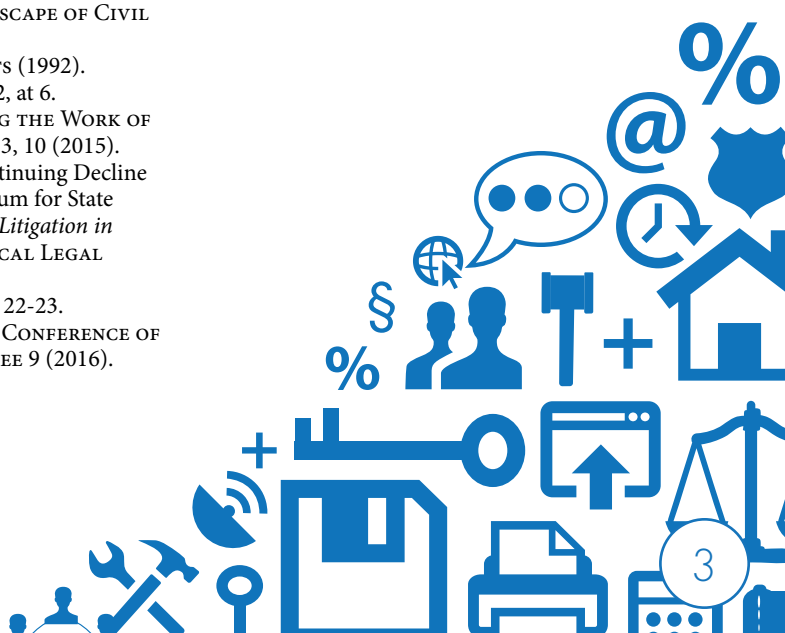
For decades we have watched the decline in civil jury trials, with the current rate of jury trials at less than 1%.[6] However, NCSC's recent study highlights that our system is suffering from more than just a drop in the number of jury trials. Across the board, there is very little formal adjudication happening in the civil cases in state court. The biggest mode of case disposition in state courts is dismissal.[7] In addition, we need to readjust our vision of the size of the average case in our state courts. In the study, 90% of judgments entered were less than $25,000.[8]

In terms of representation, most plaintiffs are represented in state courts, but most defendants are not. Looking at both plaintiffs and defendants, in 76% of cases in the study, one of the parties was not represented.[9] This is

"The Landscape of Litigation study reflects that the dockets in our state courts have changed dramatically in the last twenty years."

Paula Hannaford-Agor
Director, Center for Jury Studies, National Center for State Courts

2 Paula Hannaford-Agor et al., Nat'l Ctr. for State Cts., The Landscape of Civil Litigation in State Courts 35-38 (2015) [hereinafter Landscape of Civil Litigation in State Courts].
3 Nat'l Ctr. for State Cts., Civil Justice Survey of State Courts (1992).
4 *See* Landscape of Civil Litigation in State Courts, *supra* note 2, at 6.
5 Court Statistics Project, Nat'l Ctr. for State Cts., Examining the Work of State Courts: An Overview of 2013 State Court Caseloads 2-3, 10 (2015).
6 Mark Galanter & Angela Frozena, Pound Civil Justice Inst., The Continuing Decline of Civil Trials in American Courts (2011) (presented at the 2011 Forum for State Appellate Court Judges); Thomas H. Cohen, *General Civil Jury Trial Litigation in State and Federal Courts: A Statistical Portrait*, 5 Journal of Empirical Legal Studies 593, 611-612 (2008).
7 Landscape of Civil Litigation in State Courts, *supra* note 2, at 22-23.
8 Call to Action: Achieving Justice for All—A Report to the Conference of Chief Justices from the Civil Justice Improvements Committee 9 (2016).
9 *Id.* at 9.



inconsistent with the common view of our system as an adversarial one in which both parties have representation. The numbers of self-represented litigants in federal courts are growing as well.[10] At the same time, we know that nationwide, attorneys are turning down the smaller cases, commonly citing $100,000 or more as the threshold amount to be able to afford to take a case.[11]

In addition to lack of representation, there are significant issues plaguing the simpler cases. High-volume dockets in particular present their own unique challenges.[12] Factual issues tend to be repetitive in these cases, where the plaintiffs tend to be entities and defendants tend to be self-represented litigants. While these cases often involve small amounts, they nevertheless are critical cases. The amounts are not "small" to the defendants. Yet self-represented litigants lack a knowledge of our legal system and procedure. There are issues with service of process, overcrowding in courtrooms, and insufficient scrutiny by the court to determine if the plaintiff is able to satisfy the legal requirements prior to judgment. In addition, these cases have an important impact on our civil justice system because of their vast numbers and the collective effort necessary by courts to manage them efficiently and effectively.

Concerns regarding time to disposition have been around for a century. In 2011, the Conference of Chief Justices and other agencies adopted new model time standards for our state courts.[13] We are not meeting these standards. The same is true in federal courts.[14] The consensus from surveys of judges and attorneys around the country is that our civil justice system takes too long and costs too much.[15]

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10 *See* Emery G. Lee III, *Law Without Lawyers: Access to Civil Justice and the Cost of Legal Services*, 69 U. Miami L. Rev. 499, 505 (2015) (noting that while the percentage has remained relatively steady, the absolute number of non-prisoner pro se filings increased by 65% between 1999 and 2013).

11 *See, e.g.,* Rebecca M. Hamburg & Matthew C. Koski, *Summary of Results of Federal Judicial Center Survey of NELA Members*, Nat'l Emp't Lawyers Ass'n Fall 2009 45 (2010); Am. Bar Ass'n Section of Litigation, Am. Bar Ass'n, *ABA Section of Litigation Member Survey on Civil Practice: Full Report* 172-73 (2009); Kirsten Barrett et al., Mathematica Policy Research, ACTL Civil Litigation Survey: Final Report 83 (2008).

12 Hannah E.M. Lieberman & Paula Hannaford-Agor, *Meeting the Challenges of High-Volume Civil Dockets*, Trends in State Courts (2016).

13 Nat'l Ctr. for State Cts., Model Time Standards for State Trial Courts (2011).

14 Donna Stienstra, Fed. Judicial Ctr., A Study of Civil Case Disposition Time in U.S. District Courts (2016).

15 Corina Gerety, Inst. for the Advancement of the Am. Legal Sys., Excess and Access: Consensus on the American Civil Justice Landscape (2011).

Discovery in particular continues to present significant challenges in our system, particularly in the mid-size to larger cases. Next to trials, which now happen in less than 1% of cases in the United States,[16] the next most expensive aspect of the civil process in terms of time and cost is discovery.[17] Discovery is cited as the primary reason for the current cost and delay in our system.[18] Attorneys have not focused discovery on the issues in the case, particularly with the advent of electronically stored information, but rather, have taken a much broader approach, discovering everything that may be even tangentially relevant before focusing on what is really needed. Discovery is more time consuming and costly than ever before. As the international panelists at the Summit highlighted, the United States is unique in this "discovery to the ends of the earth" mentality.

"I have yet to run into a foreign judge who has said, "What you're doing in discovery in the United States is really great."

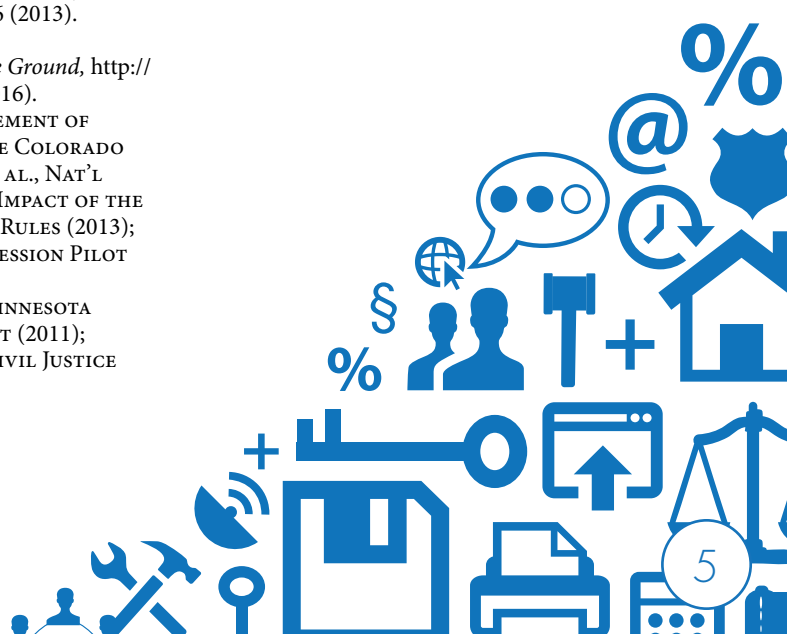
Hon. Jeffrey S. Sutton
Judge, U.S. Court of Appeals, Sixth Circuit

Momentum for Reform

These challenges have not gone unnoticed. To the contrary, there is clear momentum toward reform. We are at a stage where there are many pioneering jurisdictions that have embraced pilot projects, rule changes, and other innovations, and we now have some data from those experiences to inform future efforts.[19] The Summit began with several panels that discussed those experiences, highlighting the significant efforts toward reform underway and the lessons learned.

Over the last seven years, pilot projects have been implemented and evaluated in New Hampshire, Massachusetts, and Colorado.[20] Utah has implemented sweeping statewide rule changes focused on achieving proportionality in discovery. Other states have formed civil justice reform task forces and implemented significant statewide rule changes and other innovations, such as Minnesota and Iowa.[21] To further and share these significant efforts, in 2013 the Conference of Chief Justices created the Civil Justice Improvements Committee ("CJI Committee") with the purpose of:

16 Galanter & Frozena, *supra* note 6, at 26-27.
17 Paula L. Hannaford-Agor et al., Nat'l Ctr. for State Cts., *Estimating the Cost of Civil Litigation*, 20 Court Statistics Project: Caseload Highlights 6 (2013).
18 Gerety, *supra* note 15, at 11.
19 Inst. for the Advancement of the Am. Legal Sys., *Action on the Ground*, http://iaals.du.edu/rule-one/projects/action-ground (last visited July 18, 2016).
20 *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); Paula Hannaford-Agor et al., Nat'l Ctr. for State Cts., Civil Justice Initiative, New Hampshire: Impact of the Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules (2013); Jordan Singer, Suffolk Superior Court Business Litigation Session Pilot Project: Final Report on the 2012 Attorney Survey (2012).
21 *See, e.g.*, Civil Justice Task Force, Recommendations of the Minnesota Supreme Court Civil Justice Reform Task Force: Final Report (2011); Iowa Civil Justice Reform Task Force, Reforming the Iowa Civil Justice System (2012).



(1) developing guidelines and best practices for civil litigation based upon evidence derived from state pilot projects and other applicable research, and informed by implemented rule changes and stakeholder input; and (2) making recommendations as necessary in the area of caseflow management for the purpose of improving the civil justice system in the state courts.[22]

"There are consistent themes across state and federal civil justice reform efforts: increased cooperation, a proportional process to fit the needs of cases, and increased management to ensure against cost and delay, all with the goal of ensuring a civil justice process in the United States that fairly and promptly resolves disputes for our citizens."

Brittany K.T. Kauffman
Director, Rule One Initiative, IAALS

"There is a lot we can learn from the 50 laboratories around the country that are our state courts."

Hon. David G. Campbell
District Judge, U.S. District Court, District of Arizona

The report and recommendations of the CJI Committee, *Call to Action: Achieving Justice for All*, were presented to and adopted by the Conference of Chief Justices in July 2016.[23] There are states like Arizona that are already leading the effort to analyze their own landscape of civil litigation and act on recommendations designed to improve their system.[24] Other states will hopefully follow suit, on the heels of the Conference of Chief Justices' recommendations.

States have already served as laboratories for reform, but this spirit of innovation has not been limited to our state courts. There has been a focused effort to address the problems associated with civil litigation in our federal courts over the last seven years as well, dating back to the 2010 Conference on Civil Litigation at Duke Law School and culminating in significant amendments to the Federal Rules of Civil Procedure that went into effect on December 1, 2015.[25] The Amendments intend to change litigation in the federal system for the better, by focusing on attorney cooperation, proportionality, and active judicial case management. In addition to, and in some cases, underlying the federal rule amendments, there have also been significant pilot projects at the federal level. These efforts include the Initial Discovery Protocols for Employment Cases Alleging Adverse Action, the Southern District of New York's Pilot Project Regarding Case Management Techniques for Complex Civil Cases, and the Seventh Circuit Electronic Discovery Pilot Program.[26]

Thus, while the current landscape of litigation in the United States presents significant challenges, our civil justice system is also in the midst of historic reform at the state and federal level. There is national momentum around

22 Conference of Chief Justices, Resolution 5 To Establish a Committee Charged with Developing Guidelines and Best Practices for Civil Litigation (Jan. 2013).

23 Call to Action: Achieving Justice for All—A Report to the Conference of Chief Justices from the Civil Justice Improvements Committee (2016).

24 *See, e.g., In re* Establishment of the Committee on Civil Justice Reform and Appointment of Members, No. 2015-126 (Ariz. Dec. 23, 2015).

25 *See generally* Memorandum from Judge David Campbell to Judge Jeffrey Sutton re Proposed Amendments to the Federal Rules of Civil Procedure (June 14, 2014), *available at* www.uscourts.gov/file/18218/download.

26 *See* Fed. Judicial Ctr., Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action (2011); Judicial Improvements Comm. of the S.D.N.Y., Pilot Project Regarding Case Management Techniques for Complex Civil Cases (2011); *Statement of Purpose and Preparation of Principles*, Discovery Pilot: Seventh Circuit Electronic Discovery Pilot Program, www.discoverypilot.com (last visited July 18, 2016).

reducing the costs and delays associated with civil litigation, in order to continue to provide and protect access to the courts and ensure a just, speedy, and inexpensive system for all. There are common themes across these reforms, including a focus on cooperation, proportionality, and early active management of cases to ensure an efficient and effective process. There is also a recognition that the courts have a responsibility along with the lawyers to move cases through the process in a just and efficient way. Although these themes have resonated throughout the history of our system, dating back to Roscoe Pound's speech in 1906 calling for reform,[27] recent efforts have demonstrated a renewed and serious commitment by judges and attorneys around the country to reform our system to achieve these goals.

The Importance of Implementation

Discovery is a pressure point in our system where there is great opportunity for change and impact. The research and experiences across the country illustrate that if we want reasonable discovery, we must incorporate limits guided by proportionality, along with active case management. This is true for the rest of the pretrial process as well. An important message from the Summit was that while we have seen significant progress toward reform, we are not at the finish line yet. We need to remain committed to ensuring that these changes have a positive impact on the ground. Fair and efficient implementation of the federal rule changes and the recommendations from the CJI Committee at the state level are paramount.

Incorporation of proportionality into the scope of discovery was the most controversial of the federal rule amendments. Some believe the changes will have a significantly negative impact on access to justice; other commentators view it as much sound and no light; and still others embrace the goals but worry about their achievability. This difference of opinion reinforces the need for continued focus and effort surrounding the implementation of the amendments. The Civil Rules Advisory Committee recognized in submitting the proposed amendments that "a rule amendment alone will not produce reasonable and cooperative behavior among litigants, but . . . [c]ombined with the continuing work of the FJC on judicial education and the continuing exploration of discovery protocols and other pilot projects, the Committee believes that these changes will promote worthwhile objectives identified at the Duke Conference and improve the federal civil litigation process."[28] The Summit highlighted that a great deal of the concern

"A lesson we learned at Duke and the ABA Roadshow is the power of terminology. Core, phased, staggered, etc. We learned how much baggage these terms carry."

Steven S. Gensler
University of Oklahoma College of Law

"The Civil Rules Advisory Committee didn't go through all of this effort just so a couple of rules could be changed. The larger intention was to change the way we do business—to change the way civil litigation is run in the United States. We have to envision—what could civil litigation look like?"

Hon. Jeremy Fogel
Director, Federal Judicial Center

27 Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 395 (1906), *reprinted in* 70 F.R.D. 79, 85 (1976).
28 *See* Campbell Memorandum, *supra* note 25, at B-13 to B-14.

"To make these rule amendments effective, we need actively involved judges in the process."

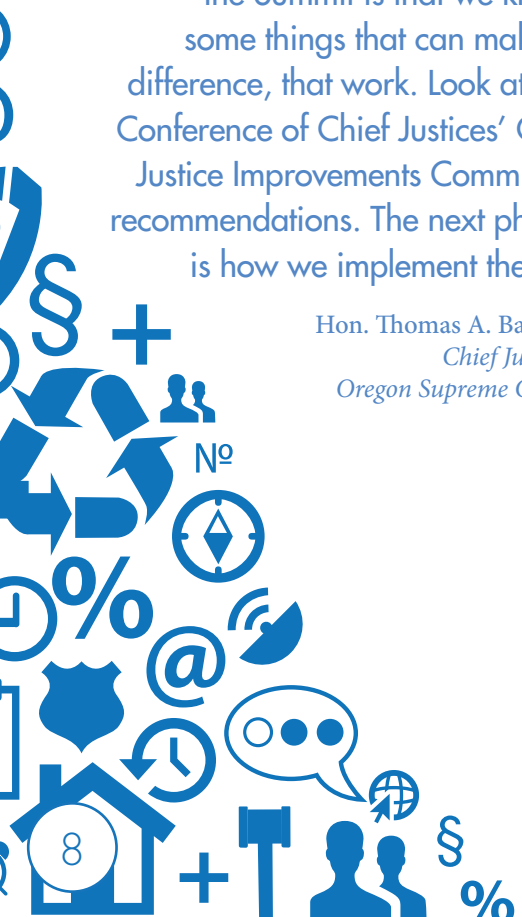
Jennie Lee Anderson
Andrus Anderson LLP

"In terms of the impact of the federal rule amendments, much will depend upon the case law that develops. I am hopeful that it will develop along positive lines."

R. Stanton Dodge
Executive Vice-President, General Counsel and Secretary, DISH Network LLC

"One of the takeaways from the Summit is that we know some things that can make a difference, that work. Look at the Conference of Chief Justices' Civil Justice Improvements Committee recommendations. The next phase is how we implement them."

Hon. Thomas A. Balmer
Chief Justice,
Oregon Supreme Court



around proportionality stems from distrust by lawyers. Given this distrust, judges play an essential role in facilitating application of proportionality. It is also clear that developing case law will be closely watched, and will provide continued guidance and—hopefully—clarity from the courts to ensure that the rule amendments are implemented as intended.

After six months of implementation, one of the most helpful changes appears to be additional opportunities and encouragement for the parties to engage in a dialogue regarding the important issues in the case, their discovery needs, and production challenges. Attorneys need to exercise their judgment, and their judgment improves when these conversations happen. Much of the implementation will come down to the intent behind these rule changes, and the extent to which the attorneys and judges embrace that intent. There is clear energy surrounding the new amendments, with the goal of making a positive difference—now it just needs to "hit the ground." Organizations around the country—including the Federal Judicial Center, the Duke Center for Judicial Studies, and the American Bar Association—are dedicated to educating the bench and bar to ensure a clear understanding of the rules and fair and effective implementation.

While proportionality has been emphasized as a guiding principle at the federal level, the CJI Committee recommendations echo the same theme, but frame it in terms of a "pathway approach" to right size the process to the case needs, based on case characteristics. In both instances, there is a common theme: case management is central to achieving proportionality both in discovery and in the overall process. That means we need court staff, administrators, and judges engaged in the process of assuring that the case is on the right path.

The state court pilot projects support the importance of case management in achieving proportionality. Utah, Colorado, and Minnesota have incorporated proportionality prominently into their rules without the adverse consequences of sideline litigation and limited access that some feared. Clearly, reform in each jurisdiction must be driven by that jurisdiction's needs and must be the outgrowth of multiple stakeholder input. Reform also requires leadership, courage, and the capacity to imagine what can be, and then to work toward it.

Ideas for Impact

- We need strong leadership, among the bench and bar, to ensure successful implementation.
- Judges must play an essential role in facilitating the application of proportionality.
- Increased dialogue between the parties will go far to focus the issues of the case, address discovery challenges before they become disputes, and build trust between the parties.
- Pilot projects provide an important opportunity for innovation and culture change.

"Lawyers and judges are idealistic, and they're good at perfection. But in our system, resolution can be more important than perfection, which is hard to accept."

Kevin Traskos
Civil Division Chief, U.S. Attorney's Office

"The notion that cooperation is not part of what we do—let's shelve that concept. Cooperation to me means communication, courtesy, being civil. Civil litigation is not an oxymoron. Half of my job is getting lawyers to communicate with each other. As Shakespeare once said, 'Strive mightily, but eat and drink as friends.'"

Hon. Jack Zouhary
District Judge, U.S. District Court, Northern District of Ohio

"Zealous advocacy is not a professional conduct standard—it's a matter of old language that's been hanging around. We have to take a look at what we mean by advocacy. We do not mean obstructionist tactics. Let's just talk about effective advocacy."

Kenneth J. Withers
Deputy Executive Director, The Sedona Conference®

"The whole emphasis from Duke is the importance of lawyers working together to devise a program of proportional discovery and a reasonable judge moving things along."

Hon. John G. Koeltl
District Judge, U.S. District Court, Southern District of New York

"My students asked me about my best advice and my answer was 'Do unto others as you would have them do unto you.' They laughed, but it's true. If you do that all the time, in the end you'll win more than you lose. We'll improve the practice of law if we do that."

William A. Rossbach
Rossbach Hart, P.C.

The Role of Attorneys

With individual panels on cooperation and the role of attorneys, another clear theme that arose from the Summit was that attorneys play an essential role in reform. Particularly with regard to discovery, much of what happens occurs between the parties outside of the courtroom. Rules provide essential guidance and limits, but the choices attorneys make within the confines of the rules are equally important. Beyond rule changes, we need culture change from the bar.

Lawyers are taught to look under every stone. They are risk averse and tend toward perfection. This tendency toward perfection often gets in the way of service to the clients, however, who need a just and fair resolution and not perfection in discovery. There is a connection between time and money, and to the extent lawyers are making decisions about time, they are also driving the cost.

Attorneys need to be thoughtful about the impact of their discovery efforts. Requesting parties need to think about the cost of what they are requesting, and producing parties need to recognize the cost of obstruction. What is needed is a clear focus on the issues in the case, and then efficient and effective discovery guided by those issues towards ultimate resolution. We also need to be open to a new and better system for discovery of pertinent information, including through technology.

The recent federal rule amendments highlight the important role of cooperation in achieving a just, speedy, and inexpensive process. Negotiation—and working across the aisle to achieve the best outcome for the client—has always been an essential tool in the attorney's toolbox. Attorneys who do not know how to pick their battles are not doing justice for their clients. Attorneys need to be thoughtful and use this judgment. Thus, rather than being incompatible, cooperation and advocacy actually go hand in hand. Cooperation and working issues out between counsel are a necessary part of the process—and a necessary part of service to the client. We cannot afford to lose this important aspect of our system with the advent of technology and the decrease in direct communication. Constructive communication builds connections and creates trust, which fosters an atmosphere where the parties can fully engage in a discussion about what discovery is necessary and proportional, as well as about other aspects of the case.

The Rule 26(f) conference in federal court provides an opportunity for increasing communication and reining in excessive discovery. Senior attorneys perform a critical function in these early communications, as well as in later discovery disputes, because they have the judgment that comes from experience. Relegating discovery disputes to junior lawyers may not serve the client well even though those lawyers are—in the first instance—more economical. Honing in and shaping appropriate discovery requires judgment, analysis, decision-making skills, and the authority to compromise. Thus, an important question is: how do we train and empower younger lawyers?

There are examples around the country of this type of early, serious engagement in the issues by attorneys and the courts. Judges and lawyers at the state and federal level universally praise informal motion practice that achieves immediate resolution of discovery disputes. There is also broad-based support for the new federal amendment that allows for early Rule 34 requests. These requests are one way to get the parties thinking about the case earlier, and engaging in a dialogue, supported on both sides. Some argue that we should push this even further to requests for production. We should use these tools as a means for discussion of discovery early in this case. Use of these tools, such as early Rule 34 requests, will result in a more robust conference between the parties, and a more robust case management conference with the court.

Attorneys have the opportunity to have great impact, for good or bad, on the system. We need to harness this opportunity to ensure that the bar is fully invested and engaged in reform.

Ideas for Impact

- Attorneys need to focus on the issues in the case, and then conduct discovery in an efficient and effective way—guided by those issues—towards ultimate resolution.
- Early robust meet and confer conferences between the parties provide an important opportunity for increased communication regarding the issues in the case and heading off potential discovery challenges.
- Initial disclosures and early discovery requests, such as early Rule 34 requests, help highlight the issues and significantly move the case forward, to the benefit of all parties.
- Expedited court processes for resolving discovery disputes can have a significant impact on reducing the cost and delay of discovery.

The Role of Judges

Another important takeaway from the Summit is the important role that judges must play in implementation of existing reforms and as leaders in future reforms. Time and again over the course of the two-day discussion, the conversation circled back to the importance of judges in achieving change—for the individual cases before them and as leaders in the system more broadly. For these reasons, education and engagement of our judges at the federal and state levels is vital.

"When the lawyer has a choice, he or she will go to the court where there is access to, and management by, the judge."

Hon. Jack Zouhary
District Judge, U.S. District Court, Northern District of Ohio

An important theme from recent civil justice efforts is that courts and judges must take responsibility for management of the cases in our system. As Judge Jerome Abrams noted, "It comes down to every case in the system needing a plan, and the courts and the judges managing that plan." Judges need to change how they think about managing cases and about the importance of that management. Litigants look to the judges to make the system work; attorneys look to the judges to ensure fairness and to move the case through the system. The judges themselves need to embrace that responsibility. This is no longer optional, but a full imperative.

The input from attorneys at the Summit made it clear that different attorneys want and need different levels of involvement from the court. And different cases have different needs. Judges need to recognize that every single case that comes into the system does not need active hands-on management by the judge him- or herself. This isn't necessary, and for judges in the state courts, it isn't even possible. Rather, some cases only need to be monitored. Others need the attention of court staff other than the judge. But overall, cases move better when a judge is involved. We need judges who are paying attention and can be flexible in their approach. Courts must be involved earlier in the process, including as part of the discussion on the scope of discovery.

Just as there is an obligation on the part of attorneys to cooperate, so too is there a real obligation on the part of judges to set the tone. Judges can make clear that cooperation will get more positive attention from the court than uncooperative behavior. Along with setting the tone for the case, judges also can make an important impact by issuing timely decisions. Waiting months for a summary judgment ruling, or for a ruling on any contested motion, stymies the progress of the case and infuriates the litigants. Money is continuing to be spent while the case is on hold—and it is often for naught. Ultimately, although the time to disposition of the case matters in terms of measuring court efficiencies, what really matters to the litigants is whether the process is efficient and responsive. Relatedly, judges need to recognize that the time taken to craft highly detailed decisions comes at a cost to litigants. Judges should understand the case sufficiently to assess the impact of a process or a ruling—both in terms of time and money. One practice around the country that touches on all the above is the use of expedited motions practice in lieu of full briefing on discovery disputes. By meeting with the parties promptly to address any discovery disputes, the judge sets the tone for increased communication, cooperation, and prompt resolution of disputes. An early robust case management conference that includes direct communication between the court and parties and a thorough discussion of case needs and proportionality similarly sets the stage for the rest of the litigation.

Given the important role of judges, there is a related takeaway: we need to motivate judges. We need to convince judges that active case management is in their interest. This management will actually free their time up to do more of what they like. Additionally, case management is not a rote, mechanistic process. It is complex and sophisticated, calling upon experience, understanding of the issues and of the interrelationship of the parties in order to craft the best possible path to resolution for that case. We need to make it as easy as possible for the judges and to make them feel the urgency of the needs of our consumers. This is, indeed, a component of access to justice.

"As a judge, what are you modeling? Lawyers will pick up on the culture that you set in a case. Don't just tell them to be cooperative—model it for them."

Hon. David Prince
District Judge,
Fourth Judicial District of Colorado

"We have to get judges aware and motivated to overcome forces of inertia and risk aversion."

Hon. Lee H. Rosenthal
District Judge, U.S. District Court,
Southern District of Texas,
Houston Division

"We need education for judges focused on modern litigation and its needs. It is like cooking school. We need cooking classes for judges, where they learn to cook, not just how to read a recipe."

Jonathan M. Redgrave
Redgrave LLP

Education is a critical component of this change. We need to educate judges and include lessons from business, management, and leadership. The skills we need from our judges are not necessarily what led to their success as an attorney. Rather, judges need to be able to facilitate a cooperative atmosphere and engage the parties, encourage them to identify goals and legal issues early, and enforce the rules when necessary. We need more training for judges—such that they can facilitate a cooperative atmosphere and engage the attorneys and self-represented litigants around the goals and issues in their case. Judges need training in soft skills, too.

Finally, judges need support from the appellate level. From the focus groups in Utah regarding the rule changes, we learned that one of the messages was that trial judges were anxious about whether they could enforce the rules. They did not want to be overturned on appeal. Judges need their appellate courts to affirm their rulings when they enforce the rules and take an active and engaged approach at the trial level. For judges to manage cases, we need appellate courts that will support and reinforce their efforts.

When Thomas Church studied efficiency of courts around the country, what he found was that local legal culture drives efficiency. It was the judges that created this culture. Individual courts have unique cultures, but another takeaway from the Summit is that judges have a lot to gain from interaction with each other and across jurisdictions. Judges can be siloed, which undermines widespread innovation. Judges should be encouraged to interact, learn from each other, and serve as leaders in this movement.

Ideas for Impact

- Judges play a critical role in achieving change—for the individual cases before them and as leaders in the system more broadly.
- Judges need to take ownership and manage the cases before them to ensure an efficient and just outcome.
- We need to motivate judges to be leaders and active case managers. We need to get the buy-in of our state and federal judges in order to effect lasting change and demonstrate the ways in which that involvement benefits them and the users of the system.
- We need to invest in education for our judges, including lessons from business, management, and leadership.
- For judges to be willing to manage cases, we need appellate courts that will support and reinforce their efforts.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The Role of Courts

"We have moved beyond 'should' in case management. Courts and judges 'must' take ownership and manage the cases before them. Case management is a responsibility, not an option."

Hon. David G. Campbell
District Judge, U.S. District Court, District of Arizona

"Technology is going to allow us to develop better access, better tools, and a system that is more responsive to the needs of our litigants."

Rebecca Love Kourlis
Executive Director, IAALS

Courts are the next player in achieving this change. A clear theme of the Summit and recent reform efforts is that we need the judges *and courts* to take responsibility for management of cases through the process. The number one recommendation from the CJI Committee is that courts must take responsibility for managing civil cases from time of filing to disposition. This responsibility exists in tandem with and separately from the responsibility of lawyers to move cases toward fair resolution. Once a case is filed in court, it is not simply the responsibility of the parties or the lawyers. The courts must be involved. That does not mean just the judges. Teams of court staff, under the leadership of a judge, or working directly with a judge, can achieve great change. Given the number of cases and the docket pressures, it is not possible for the judges to take sole responsibility for moving cases forward. It must also be the duty of case managers and other non-judicial staff, who can help move these cases along and take responsibility for them. Our court system will serve the public better if it can move cases toward resolution quickly.

As we learned from our keynote speaker, Judge Carolyn Kuhl, Presiding Judge of the Superior Court of California for the County of Los Angeles, all court officers and court staff must think outside the box to meet the ultimate goal of our system—*service to litigants*. When we recognize the court's role and this service orientation, then we can start resolving issues. One of the biggest challenges for courts is service to litigants with high demands while the courts themselves are limited in their resources, particularly regarding technology. How do we make the court more accessible? There are numerous opportunities through forms, consistency across courts and websites, use of technology, and availability to appear/achieve resolution by video/phone.

In order to modernize our courts, we must develop the court infrastructure, invest in technology, and implement training. Most importantly, we need to figure out a way to share ideas. One of the biggest challenges is that while some courts have embraced innovation, those innovations are not being shared more broadly.

Ideas for Impact

- Courts must take responsibility for managing civil cases from time of filing to disposition.
- Teams of court staff, under the leadership of a judge, or working directly with a judge, can achieve great change.
- In order to modernize our courts, we must develop the court infrastructure, invest in technology, and implement training.
- We need to continue to share the innovative work of individual courts so that our system as a whole can improve.

The Role of Technology

Technology is a short-term challenge but also a long-term answer to creating the courts of tomorrow. And it is an essential component in ensuring that courts will be able to meet the expectations and needs of our system's users.

Technology is challenging because it requires an investment of resources, it requires understanding to be effective, and it is ever changing. Our initial successes in this arena have also bred all kinds of problems, such as security concerns and issues with scraping data from court websites. There is a clear tension between data and privacy. Yet technology has allowed us to innovate in whole new ways. Technology holds the key to so many options, such as analyzing high volume dockets and triaging cases.

In particular, there are great opportunities via technology to increase access to justice. There are huge opportunities to provide litigants, especially self-represented litigants, with greater access to services and information through technology. We may not see increased resources or judges coming to our system, but we may be able to use technology to solve some of these issues.

"Law is inherently backward looking. As a result, we are inclined to force new problems to fit into old models. The good news here is that technology may force us to develop new solutions."

Hon. Jeffrey S. Sutton
Judge, U.S. Court of Appeals, Sixth Circuit

Ideas for Impact

- There are opportunities to provide litigants, especially self-represented litigants, with greater access to services and information through technology.
- The value of technology is not limited to increased access and information. It can also be harnessed to fully realize the power of case management within our courts.

In Service to Litigants

An important takeaway from the Summit is a reminder that the system, and all of us in it, are here to serve litigants. We are responsible for providing a just, speedy, and inexpensive resolution in every case *for the litigants*.

We need to think about our system without blinders. We need to think of big dollar cases on the one hand and high volume dockets where most defendants are self-represented litigants on the other. In many cases, there are issues with lack of notice and proper service, rampant inadequacies in documentation, and confused and intimidated litigants

who do not know how to communicate their narrative to the court within the structure and process of our system. Being involved in such a case can be a dramatic and traumatic experience in their lives. This is how many Americans experience our court system. Those cases are a prime example of a context in which we must work hard to preserve the integrity of our legal system, and to ensure public trust and confidence.

For litigants, there is a common theme of the importance of information. The more information that can be provided about the process, the expectations, and options, the better. This includes disclosure of information to litigants within the litigation as well. As an example, New Hampshire's Proportional Discovery/Automatic Disclosure (PAD) Pilot Project replaced notice pleading with fact-based pleading and required early initial disclosures after which only limited additional discovery was permitted.[29] One consequence of the increased information provided through fact pleading was a decrease in the number of default judgments.[30] Parties are better able to engage in the process when they have more information and understand the claims that are being asserted against them.

We also need to teach judges how to deal with self-represented litigants. Self-represented litigants comprise a large percentage of the parties in court, and judges need to be knowledgeable about how best to deal with them in a positive and fair way. Just like attorneys, judges come to the bench with an underlying expectation that both parties will be represented in our adversary system. That is no longer the reality, and self-represented litigants will continue to make up a significant percentage of cases at the state and federal levels. We need training and guidance for judges regarding self-represented litigants, and we need better sources of information and assistance for those individuals as they move through the system.

We have to keep in mind the users of the system on the other end of the spectrum as well. Predictability and efficiency in the courts is essential for business litigants. Inconsistency results in greater costs. For example, this has been true with regard to the preservation of electronically stored information related to litigation. As we engage in civil justice reform, we must continue to value the voice of businesses that litigate in a variety of forums and depend upon effective courts for their own sustainability.

"High-volume dockets dominate the business of our state courts, and they pose a serious challenge to the integrity of our system. At the same time, we are at a point where there are enormous opportunities for our court system to work better."

Hannah Lieberman
Executive Director,
Neighborhood Legal Services Program

"We need to ask ourselves: What is the cost of not having a functional system?"

Daniel C. Girard
Girard Gibbs LLP

"The public's trust and confidence is essential. If we don't have a system that's accessible—physically, economically—we lose the public's trust, and the development of the common law. That seems high level, but what does that really mean? Fairness, predictability, transparency, confidence."

Mary McQueen
President, National Center for State Courts

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).

30 *Id.* at 17-18.

A Vision for the Courts of Tomorrow

Ultimately, we need to be guided by a vision for the courts of tomorrow. What does that vision look like? The following list highlights ideas brainstormed at the Summit:

- One-hundred percent of people have access to justice. Courts should be accessible and understandable for all, with levels of assistance that can meet various needs.
- We embrace that lawyers, judges, and courts exist to serve.
- We no longer view non-traditional means of providing legal information and services as a threat to the legal profession but rather as an important way to empower citizens.
- Providers are available to offer services to help those who have neither the need nor the pocketbook for full-scale legal assistance.
- We mentor junior attorneys.
- Each case receives the "due process" it requires to achieve just, speedy and inexpensive resolution.
- We reimagine discovery through discovery planning and discovery budgets, with each type of case getting what it needs—no more and no less.
- We harness the power of the pretrial process to identify and flesh out the real issues in the case as early as possible—through robust initial disclosures, more active use of e-discovery, efficient use of ADR, limited deposition of experts, efficient trials, a streamlined process for the majority of cases, and prompt rulings from the bench.
- Courts utilize and harness the power of online dispute resolution.
- Courts differentiate their approach to case management so we can do more things effectively.
- Courts harness technology to support court operations, including outreach to juries, case tracking, and advanced user interfaces.
- Courts harness the power of people, using ombudsmen and other non-judicial personnel to help litigants in a more efficient way.
- Attorneys and courts learn from business/organizational change science.
- We have increased access to information across the system for all.
- We invest real money in our courts, recognizing their importance in society.
- We increase trust and confidence in the system.
- We have real-time exchange of ideas across jurisdictions, including state and federal, to share best practice ideas.
- Rule 1 is a guiding directive, and not just a slogan.

Conclusion

IAALS' Executive Director Rebecca Love Kourlis began the Summit by imagining a court system in five years, where we have litigation that is cost effective, courts that are accessible and affordable, technology that serves litigants, judges who are engaged and attentive, and lawyers who are cooperative and innovative.

An important takeaway from the Summit is that we are in this together, and together we can achieve real change. It is too easy to point fingers. We can't view problems from any one perspective or blame any one aspect of the system. The public sees us all as responsible for the system. In addition, we need to draw from one another in terms of ideas and solutions. State and federal judges can learn from each other, as can court administrators. Academics and researchers need to be solution oriented and helpful. No one group can do this alone. We are facing complex problems, and the solutions are also multi-faceted. To get others invested in positive change, we need to tap into and synergize around what people value: regaining market share and investment in the courts, legitimacy, trustworthiness, making their jobs easier, happier clients, more satisfaction with the profession.

One of the takeaways from our international guests is that we need to remember the goals of the process. The Woolf reforms resulted in quicker time to disposition but huge increases in costs, resulting in reduced access to justice. The Jackson reforms came about because of those cost increases. We all need to think about the ramifications of our behavior, from attorneys to judges. Not enough judges are asking, "If I do X, how much will that cost the parties?" Attorneys need to think about this same question from the perspective of their clients.

An underlying current throughout the Summit was the importance of culture change. We have come so far, but to achieve widespread and lasting change, civil justice reform must include culture change. As Chief Justice Roberts recognized in his year-end report:

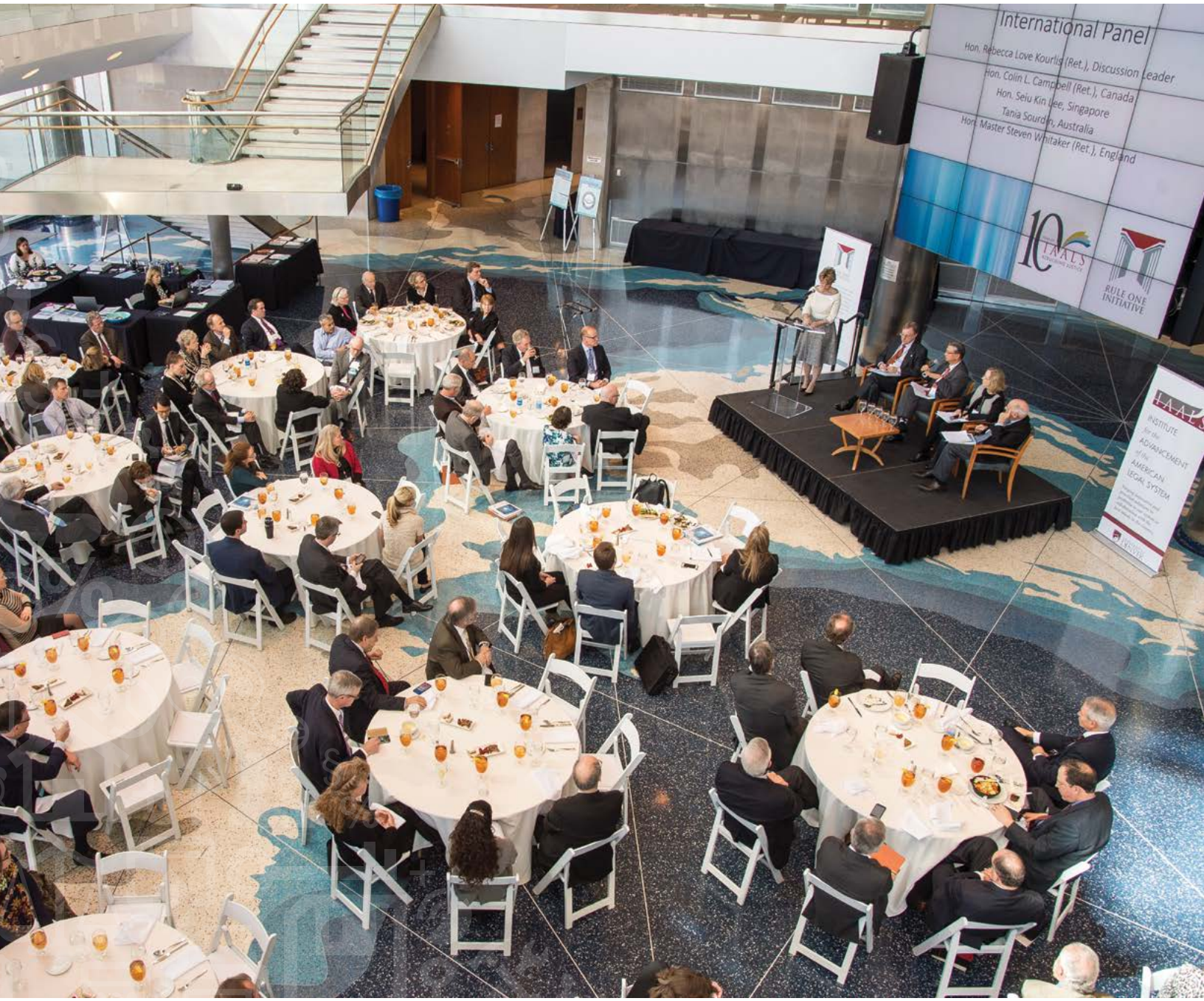
> The 2015 civil rules amendments are a major stride toward a better federal court system. But they will achieve the goal of Rule 1—the "just, speedy, and inexpensive determination of every action and proceeding"—only if the entire legal community, including the bench, bar, and legal academy, step up to the challenge of making real change.[31]

"The people here have passion, they believe in something better. And the variety of different experiences in the room is informative. We need to extend this experience and energy to the entire bar. There is not one solution, but we can influence those around us to believe in a better way and find multiple solutions."

Jonathan M. Redgrave
Redgrave LLP

31 U.S. Courts, *Chief Justice Roberts Issues 2015 Year-End Report* (Dec. 31, 2015), *available at* http://www.uscourts.gov/news/2015/12/31/chief-justice-roberts-issues-2015-year-end-report.

Rule changes are an essential component of reform, but they alone will not change the culture. There are lessons to be learned from the failed attempt to include more robust initial disclosures in the 1990s. The rules ended up being diluted because we were not ready culturally for this change. To achieve change, it has to be about more than just "the rules," because that approach alone will not change the outcomes.



We are at a critical moment in this movement. We have had great success in individual jurisdictions. Now we are moving from individual adoption to implementation system-wide. This type of system-wide implementation and change takes time. Judge John Koeltl noted that the requirement to hold a Rule 26(f) conference has been in the rules since 1993. When he came on the bench in 1994, he would inquire if the parties had held such a conference, and they typically had not. Today, Judge Koeltl sees that more parties are holding conferences than ever before, and the research reflects that parties now meet and confer to plan for discovery in a majority of cases.[32] Change takes time.

How do we speed up this change? Ideas for impact from the Summit include pilot projects, judicial involvement, and a clear expectation that the parties will be prepared, engaged, and cooperative. Education and outreach also makes a difference, for judges and attorneys, as does leadership from the bench and the bar, focused on a culture of excellence and integrity. The Federal Rules Advisory Committee has spent many years engaging with the bench and bar to revise the federal rules. The states should look to that effort and the resulting amendments as they move forward with their own reform. At the same time, we should look to the states for lessons that can inform change at the federal level. State courts are able to be more innovative on a quicker time frame. Accountability and transparency can also drive behavior, for both attorneys and judges. The technology is now available to assist in these efforts and we need to capitalize on it.

And most importantly, we need to continue to come together to share ideas, inspiration, and our commitment to civil justice reform. How wonderful it would be if commentators looking back in ten or twenty years traced profound change to these moments, and these efforts—change that ensures the accessibility and trustworthiness of the American civil justice system.

"Utah was the first state to build upon the work of the ACTL Task Force and change its discovery rules for all cases. Change takes time, but we have already seen positive impact. That gives me hope that we can achieve changes to the discovery culture throughout the country."

Francis M. Wikstrom
Parsons Behle & Latimer

32 *See, e.g.,* Emery G. Lee III, Fed. Judicial Ctr., Early Stages of Litigation Attorney Survey: Report to the Judicial Conference Advisory Committee on Civil Rules 9 (2012) (78% of survey respondents who provided a "yes" or "no" answer to the question reported a discovery planning conference); Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., Federal Judicial Center National, Case-Based Civil Rules Survey 7 (2009) (for cases in which some discovery took place, 82% of plaintiff attorneys and 83% of defense attorneys reported a conference to plan discovery).

"This is possible. Together we really can make this a system that is trusted, trustworthy, and a system that serves."

Rebecca Love Kourlis
Executive Director, IAALS

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