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Civil Justice Reform - An Idaho Imperative

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Idaho Supreme Court

ESSAYS

CIVIL JUSTICE REFORM—AN IDAHO IMPERATIVE

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Kenneth Eyer, a Bonner County octogenarian, has a jaded view of the Idaho legal system. In 2009, Mr. Eyer decided to log part of his Sagle property to raise money for his wife's chemotherapy bills.[1] He engaged a logging company to perform the work, receiving about $6,500 for the timber.[2] As it turns out, the logging company inadvertently removed $1,600 worth of timber from a neighbor's property, which exposed the Eyers to treble damages under Idaho Code section 6-202.[3]

This is normally the type of claim that could have been resolved in magistrate court within a few months' time.[4] The Eyers' neighbor initially demanded payment of $7,000, claiming property damages in addition to the value of the timber actually taken.[5] It would have been a bargain for the Eyers at the time, even though it exceeded the total amount he had received from the logging job. But Mr. Eyer turned down the neighbor's demand, calling it "legalized extortion."

A year later, he received a letter from the neighbor's attorney, demanding $82,640. That caused the Eyers to lawyer up. In 2012, the

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[1] Stevens v. Eyer, 387 P.3d 75, 77 (Idaho 2016).

[2] *Id.*

[3] Idaho Code § 6-202 provides, in part, that "[a]ny person who, without permission of the owner, or the owner's agent . . . willfully and intentionally cuts down and carries off any wood or underwood, tree or timber . . . on the land of another person . . . without lawful authority, is liable to the owner of such land . . . for treble the amount of damages which may be assessed therefor or fifty dollars ($50.00), plus a reasonable attorney's fee . . . ." IDAHO CODE ANN. § 6-202 (West 2016); *see also Stevens*, 387 P.3d at 77.

[4] Under Idaho Court Administrative Rule 57, the targeted processing time for Other Civil Claims (Magistrate Division) is 180 days. 2015 ANNUAL REPORT OF THE IDAHO JUDICIARY 16–17 (2015), https://isc.idaho.gov/annuals/2015/2015-Annual-Report.pdf. This target was met 77% of the time in 2015. *Id.*

[5] Betsy Russell, *Logging Error Saddles Elderly Idaho Man with Legal Bills; 'It Is a Tragedy,' Justice Says*, SPOKESMAN-REVIEW (Sept. 12, 2016), http://www.spokesman.com /stories/2016 /sep/12/logging-error-saddles-elderly-idaho-man-with-legal/.

neighbor filed suit for a whopping $268,770 in damages—a severe case of damage inflation.[6] Eventually, that case was settled upon the Eyers' agreement to pay the neighbor $50,000, plus interest, out of the estate of the last of them to die.[7] Of the settlement, $15,000 was for timber trespass damages, while $35,000 was for the neighbor's attorney's fees.[8] Meanwhile, the Eyers had incurred their own attorney's fees and costs in the sum of $37,934.[9]

The Eyers pursued a third-party claim against the timber company, seeking indemnification or contribution.[10] That matter went to jury trial, resulting in a verdict against the Eyers.[11] An award of attorney's fees and costs was made against the Eyers in the amount of $97,821.30.[12] During oral argument of the appeal to the Idaho Supreme Court, Mr. Eyer's counsel could not recall how much he had charged Mr. Eyer for pursuit of the third-party claim.[13] Even if it were half the amount of fees awarded to the timber company, when combined with the fees that Mr. Eyer will have to pay the attorneys on both sides of his losing appeal, the amount will likely end up close to the fee award to the timber company.[14]

The Eyer case started in 2009 and concluded in 2016 and witnessed a claim for about $5,000 turn into a quarter-of-a-million-dollar disaster for the Eyer family.[15] It would be bad enough if this were the only case where such an unfortunate result occurred. However, the Idaho Supreme Court encounters many cases where the attorney's fees incurred by both sides greatly exceed the amount in controversy. In *City of Meridian v. Petra, Inc.*,[16] each party incurred well over a million dollars in attorney's fees, to contest a dispute over about a third of a million dollars.[17] In *Campbell v. Parkway Surgery Center*,[18] the defendant-appellant racked up nearly $100,000 in fees

[6] *Stevens*, 387 P.3d at 81 (J. Jones, J., concurring).
[7] *Id.* Sadly, Mrs. Eyer died in January 2016.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] 299 P.3d 232 (Idaho 2013).
[17] *Id.* at 239–41 (regarding the attorney's fees awarded and the cost involved in the case).
[18] 354 P.3d 1172 (Idaho 2015).

and costs in order to avoid liability for an indebtedness in the amount of $6,800.[19] These cases make absolutely no sense from an economic standpoint.

Mr. Eyer could be excused for feeling that he was manhandled by the legal system. Unfortunately, he is certainly not alone. While Idaho's lawyers and judges work hard and the system generally produces just results, the system demands a thorough review and thoughtful overhaul in order to produce more speedy and inexpensive justice. After all, Rule 1 of the Idaho Rules of Civil Procedure boldly states: "These rules should be construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding."[20]

The question that prompted this Essay is whether the current legal system is delivering on the promise of Rule 1. The answer is a qualified yes. The Supreme Court's Advancing Justice Committee has been working the last several years to develop case flow management plans to streamline the processing of discrete case types throughout the state, including family law, child protection, parental termination, juvenile, felony, and misdemeanor cases.[21] This initiative has resulted, thus far, in the implementation in 2013 of the Idaho Rules of Family Law Procedure[22] and in 2016 of the Idaho Rules for Small Claim Actions.[23] In fiscal year 2015, family law cases accounted for 14% of Idaho's civil actions, while small claims cases accounted for 11%.[24] The Advancing Justice Committee is working to address other significant case types with the purpose of expediting proceedings and reducing costs.[25]

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[19] *Id.* at 1185 (J. Jones, J., specially concurring).

[20] IDAHO R. CIV. P. 1(b).

[21] Order Appointing the Advancing Justice Committee (Idaho Oct. 26, 2016), https://isc.idaho.gov/adm_orders/Second_Amended_Advancing_Justice_Committee_10.16.pdf.

[22] IDAHO R. FAM. L.P.

[23] IDAHO R. SMALL CLAIMS ACTIONS.

[24] Other types of cases filed in FY15 were: 2% guardianship/conservatorship; 5% probate; 1% personal injury; 62% general magistrate court filings, such as debt collection, landlord/tenant disputes, and small-dollar tort and contract cases; and 6% general district court case filings. STEVE KENYON, CIVIL CASE FILING TRENDS: CALENDAR YEAR 2006–2015 (2016) (on file with Concordia Law Review).

[25] *See* STATEWIDE CASEFLOW MANAGEMENT PLAN FOR THE IDAHO DISTRICT COURTS (Sept. 9, 2014), http://iaals.du.edu/sites/default/files/documents/publications/idaho_statewide_caseflow_management_plan.pdf.

However, it is obvious that work needs to be done to provide more timely and cost-effective justice in the approximate 70% of other types of cases filed in the courts involving collections, contracts, real estate disputes, employment, personal injury, medical malpractice, and the like. We must do a better job.

One troubling indicator of the need to do better is the reduction in civil case filings in recent years.[26] This is a phenomenon both for filings at the trial level and filings on appeal.[27] Since 2007, district court civil filings have fallen by 26%.[28] New case filings and re-openings totaled 7,857 in 2007, increased to a high of 10,087 in 2009, and then steadily declined to a total of 5,820 in 2015.[29] Magistrate division civil filings, including re-openings, dropped from 95,891 in 2007 to 85,449 in 2015, a decline of 11%.[30] Civil appeals totaled 249 in 2007, reached a high of 259 in 2010, and then steadily declined to 189 in 2015, a reduction of 24%.[31] Many observers attribute the decline to the increasing costs and lengthy delays encountered in our civil courts.[32]

The reduction in case filings does not imply that judges are sitting around with idle time on their hands, having little to do. Unlike civil cases, criminal case filings have remained relatively steady since 2007.[33] Although mediation is making its way into the criminal arena, it is not particularly widespread and it will be difficult for a fee-based mediation system to make

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[26] 2015 ANNUAL REPORT OF THE IDAHO JUDICIARY, *supra* note 4, at 14–15.

[27] *Id.*

[28] KENYON, *supra* note 24.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] For example, a report from the National Center for State Courts explains:

> Much of the debate concerning the American justice system focuses on procedural issues that add complexity to civil litigation, resulting in additional cost and delay and undermining access to justice. Many commentators are alarmed by the increasing privatization of the civil justice system and particularly by the dramatic decline in the rates of civil bench and jury trials. In addition, substantially reduced budgetary resources since the economic recession of 2008–2009 have exacerbated problems in civil case processing in many state courts.

CIVIL JUSTICE INITIATIVE: THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS, NAT'L CTR. FOR ST. COURTS iii, https://www.ncsc.org/~/media/Files/PDF/Research/CivilJustice Report-2015.asuhx.

[33] At the appellate level, there were 673 criminal appeals in 2007, 841 in 2013, and 726 in 2015. KENYON, *supra* note 24. The yearly average from 2007 to 2015 was 744. *Id.*

its way into the publicly financed criminal system.[34] Judges in Idaho work hard and are kept busy by their criminal caseloads. Additionally, both civil and criminal cases tend to be litigated in a more time-consuming manner than in the past, taking significantly more judicial time.[35] Also, with the greater attention paid to the judicial attempt to rehabilitate defendants through problem-solving courts, which has been an effective alternative to incarceration, judges have devoted additional hours of their time, including after-hours work, to resolve and prevent recurrence of criminal activity.[36] In the civil arena, the examples set out above (the *Eyer*,[37] *Petra*,[38] and *Parkway Surgery*[39] cases) show that much court time is devoted to excessive litigation of cases—litigation substantially out of proportion to the actual amount in controversy.

Having joined the Supreme Court in 2005, I have observed the decline in the number of civil appeals. For the first several years, the Supreme Court's caseload consisted almost exclusively of civil appeals, with just a smattering of important criminal cases—capital cases, issues of first impression, and the like. However, during the past few years, the Court has had fewer civil cases,[40] particularly from venues outside of the Treasure Valley. When I first joined the Court, it often had a full caseload of fifteen civil appeals when the Court traveled to Coeur d'Alene and Lewiston and as many as four or five days' worth of cases in Pocatello and Idaho Falls.[41] In the last few years,

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[34] *See, e.g.*, Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1285 (1994).

[35] *See, e.g.*, Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 510–31 (2004).

[36] *See, e.g.*, Leslie Eaton & Leslie Kaufman, *In Problem-Solving Court, Judges Turn Therapist*, N.Y. TIMES (Apr. 26, 2005), http://www.nytimes.com/2005/04/26/nyregion/in-problemsolving-court-judges-turn-therapist.html ("To take on so many roles requires many hours. The judge arrives at his chambers at 7:30 a.m., although the courtroom doors do not open until 9:30. He works after the doors have closed, too, looking over cases at night.").

[37] Stevens v. Eyer, 387 P.3d 75 (Idaho 2016).

[38] City of Meridian v. Petra Inc., 299 P.3d 232 (Idaho 2013).

[39] Campbell v. Parkway Surgery Ctr., LLC, 354 P.3d 1172 (Idaho 2015).

[40] For example, in 2005, the Idaho Supreme Court handled 100 civil appeals compared with 69 in 2015. 2015 ANNUAL REPORT OF THE IDAHO JUDICIARY, *supra* note 4, at app.; 2005 ANNUAL REPORT OF THE IDAHO JUDICIARY app. (2005), https://isc.idaho.gov/annuals/2005/2005_Appellate CaseloadStatSummary.pdf.

[41] The Supreme Court considers at least 135 cases per year, holding hearings in 15 cases per month with no cases being heard during the months of March, July, and October. *See, e.g.*, 2015 ANNUAL REPORT OF THE IDAHO JUDICIARY, *supra* note 4, at app.; 2005 ANNUAL REPORT OF THE IDAHO JUDICIARY, *supra* note 40, at app. Therefore, a week's worth of cases would be 15 and two days' worth of cases would be six.

caseloads on our northern trips were often just enough for two days and the same for trips to eastern Idaho. Because of the declining number of civil appeals, the number of criminal appeals considered by the Supreme Court has increased, [42] with the Supreme Court hearing many cases that would previously have been assigned to the Idaho Court of Appeals. Years ago, the Court of Appeals was assigned a significant number of civil appeals, but in recent years there have been virtually no meaningful civil cases to assign to the Court of Appeals.[43]

And, it is not just a quantity problem; there are also case quality concerns, particularly at the appellate level. The quality of the declining number of civil appeals in recent years is notable. There are a larger percentage of cases where frivolous issues are involved, where the amount in controversy is small and substantially eclipsed by attorney's fees incurred by both sides, or where the appeal fails because the issues were not raised in the trial court. The Court still hears cases with novel issues or important first-impression questions, but the general run of cases is simply not as interesting or important as when I first came on the Court twelve years ago. The decline in the quantity and quality of civil appeals is troubling.

It appears to me that people and entities with disputes to be resolved are voting with their feet. That is, they are choosing to use alternate dispute resolution mechanisms—mediation and arbitration—to resolve disputes, rather than entrusting these matters to the court system. Mediation is generally quicker and more cost effective.[44] If one examines any recent issue of *The Advocate*, the Idaho Bar's official periodical, it is apparent that many column inches of the publication are dedicated to advertisements for mediators and arbitrators.[45] There is nothing wrong with this because the courts have been encouraging dispute resolution through mediation for many

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[42] 2015 ANNUAL REPORT OF THE IDAHO JUDICIARY, *supra* note 4, at app.; 2005 ANNUAL REPORT OF THE IDAHO JUDICIARY, *supra* note 40, at app.

[43] The Idaho Court of Appeals was assigned a mere 46 civil appeals in 2015, mostly post-conviction relief cases. 2015 ANNUAL REPORT OF THE IDAHO JUDICIARY, *supra* note 4, at app.

[44] *See generally* Louise Phipps Senft & Cynthia A. Savage, *ADR in the Courts: Progress, Problems, and Possibilities*, 108 PENN ST. L. REV. 327 (2003) (discussing the efficiency of mediation).

[45] The February 2017 issue of *The Advocate* devoted approximately 19 column inches to advertisements for mediation and arbitration services.

years.[46] The problem is that the courts should be able to offer at least comparable timely and cost-effective problem solving for the people of this State.

What can the court system do to become more competitive with mediators? If Idaho's experience were unique, it might be more difficult to determine what needs to be done. However, states across the country have had similar experiences—declining civil caseloads brought about by lengthy and costly litigation.[47] The national phenomenon has been studied in many quarters and solutions have been suggested.[48] One organization that has been on the leading edge of this effort is the Institute for the Advancement of the American Legal System (IAALS), operated out of the University of Denver.[49] The founder and executive director of that organization, Rebecca Love Kourlis, who served on the Colorado Supreme Court for ten years, traveled to Idaho twice in 2016 to talk about IAALS' proposals to reform the civil justice system. Former Justice Kourlis first presented at the Supreme Court's Darrington Lecture in February and again at the annual Idaho Judicial Conference in September.[50] Her presentation in February planted the seed that is blooming into a substantial undertaking to reform Idaho's civil justice system. On both visits, Justice Kourlis spoke of implementing changes in procedural rules to require lawyers and judges to devote closer attention to civil cases earlier in the process, to set different timelines for simple and

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[46] *See generally* Michael McManus & Brianna Silverstein, *Brief History of Alternative Dispute Resolution in the United States*, 1 CADMUS J. 100 (2011), http://www.cadmusjournal.org/files/pdfreprints/vol1issue3/Reprint_McManus_Silverstein_Brief_History_ADR.pdf (discussing the courts' encouragement of mediation).

[47] *Civil Caseloads - Trial Courts*, NAT'L CTR. FOR ST. COURTS, http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Civil (last visited Mar. 4, 2017). The caseloads of any state can be viewed by selecting a year in the year box and selecting statewide civil caseloads and rates. For example, California had 1,163,784 civil cases in 2012 and 848,949 in 2015; New York had 1,561,240 in 2012 and 1,419,459 in 2015; Idaho 79,791 in 2012 and 66,473 in 2015; Washington had 290,690 in 2012 and 266,991; and Colorado had 424,831 and 304,570 respectively. *Id.*

[48] For a great discussion of various civil justice reform proposals, see Rebecca L. Kourlis, *Keynote Address: Civil Justice at a Crossroads*, 11 PEPP. DISP. RESOL. L.J. 3 (2010); *see also, e.g.*, CIVIL JUSTICE INITIATIVE: THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS, *supra* note 32.

[49] *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., http://iaals.du.edu/ (last visited Mar. 4, 2017).

[50] Zachary Willis & Hunter Metcalf, *Kourlis Keynotes Idaho Darrington Lecture: Why We Cannot Afford to Fail*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (Apr. 19, 2016), http://iaals.du.edu/blog/kourlis-keynotes-idaho-darrington-lecture-why-we-cannot-afford-fail.

complex cases, and to change the culture in both the bench and the bar to achieve justice more efficiently and less expensively.[51]

After those visits, it became apparent that action was necessary in order to make our court system more relevant to the needs of those involved in legal disputes. In April, a third-year law student, Chad Johnson, agreed to research the issues and propose solutions. He devoted a good deal of unpaid time to this task, while at the same time finishing his J.D. studies and studying for and passing the Idaho Bar. In September 2016, he produced a good piece of work, titled *Restoring Proportionality*.[52] During his research, he considered the IAALS proposals,[53] reform plans implemented in Texas[54] and Utah,[55] and a proposal advanced by the Conference of Chief Justices (CCJ), titled *Achieving Civil Justice for All*.[56]

The various reform proposals have a good deal in common, although they differ in the details. For example, they all call for earlier judicial intervention in cases so that the court system as a whole, not just the individual trial judge, takes responsibility for moving a case forward, rather than leaving it primarily to the attorneys.[57] The proposals generally call for mandatory initial disclosures, which necessitate a more critical evaluation by attorneys as to how they intend to pursue or defend a case, including the elements necessary to pursue or defend their claims and the evidence that is then available to prove or disprove various claims.[58] With the initial disclosures, the plans generally call for substantial limitation of discovery for cases that are not complex in nature, which is designed to make discovery proportional to the value of the case.[59] Some of the plans call for assigning

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[51] *Id.*

[52] Chad Johnson, Restoring Proportionality: Proposed Changes to the Idaho Rules of Civil Procedure (Sept. 19, 2016) (unpublished manuscript) (on file with Concordia Law Review).

[53] *Projects*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., http://iaals.du.edu /rule-one/projects (last visited Mar. 4, 2017).

[54] TEX. R. CIV. P. 190.

[55] UTAH R. CIV. P. 26.

[56] CCJ CIVIL JUSTICE IMPROVEMENTS COMMITTEE, CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL (2016), http://iaals.du.edu/sites/default/files/documents/publications /cji-report.pdf.

[57] *E.g.*, *id.* at 16.

[58] *E.g.*, *id.*; TEX. R. CIV. P. 190; UTAH R. CIV. P. 26.

[59] CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL, *supra* note 56; TEX. R. CIV. P. 190; UTAH R. CIV. P. 26.

different pathways to cases, based upon their complexity.[60] Some plans call for a fast track for cases based on a dollar limit or other factors with the intent of moving those cases to resolution expeditiously without running up costs.[61] The plans generally call for more rigorous judicial enforcement of disclosure and discovery obligations.[62] The plans also generally anticipate reliance upon cutting edge electronic management capabilities and use of court personnel to ensure the smooth processing of cases, particularly in high volume areas.[63]

Chad Johnson's *Restoring Proportionality* proposal is largely based on the Texas model. His proposal calls for mandatory initial disclosures in all cases, which would include disclosure of documents that will be relied upon by the party and a computation of all damages claimed.[64] Failure to observe disclosure requirements without just cause would result in the exclusion of the subject matter from evidence and the possible imposition of other sanctions.[65] Where cases involve $50,000 or less in damages, claimants can pursue an expedited procedure with more limited discovery, earlier trial dates, and shorter trials.[66] Any recovery under this streamlined procedure would be limited to $50,000.[67] Discovery would be substantially limited during a 90 day discovery period and the trial would be conducted within 90 days of the close of discovery.[68] In cases where the expedited procedure is not selected, the parties would be required to attempt in good faith to agree upon a proposed discovery plan that is proportional to the needs of the case.[69] A discovery plan would be adopted at a scheduling conference and all deadlines would be enforced.[70]

The CCJ released its proposal this summer at a meeting in Jackson, Wyoming.[71] The CCJ recommendations call for mandatory disclosures in all

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[60] *E.g.*, CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL, *supra* note 56; TEX. R. CIV. P. 190.2.

[61] UTAH R. CIV. P. 26; TEX. R. CIV. P. 190.

[62] CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL, *supra* note 56, at 16–22.

[63] *Id.* at 18.

[64] Johnson, *supra* note 52, at 8–11.

[65] *Id.* at 11–12.

[66] *Id.* at 13–17.

[67] *Id.* at 14.

[68] *Id.* at 15–16.

[69] *Id.* at 7.

[70] *Id.* at 12.

[71] Carolyn A. Tyler & Zachary Willis, *Conference of Chief Justices Endorses Report on Civil Justice Improvements*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (Aug. 3,

cases other than the limited number of complex cases that involve difficult issues or numerous parties.[72] It is suggested that cases be triaged into three separate pathways—a streamlined pathway that would encompass the great majority of cases, a complex pathway that would deal with the relatively small number of cases involving multiple legal and factual issues or many parties, and a general pathway that would encompass those cases between the other two pathways.[73] The streamlined pathway would have limited and proportional discovery, a firm scheduling order with a firm trial date, and disposition in six to eight months.[74] The complex pathway—designed for multi-party commercial and medical malpractice cases, construction defects, product liability, and other complex cases—would entail an early case management plan, intensive judicial oversight of the plan, and proportional discovery.[75] The general pathway would be a hybrid of the other two with more flexibility in permitted discovery and a recommended time to disposition of 12 to 18 months.[76] The recommendations call for greater involvement of court personnel and technology in following the progress of cases under established case plans, notification of judges of violations, and strict enforcement of deadlines.[77] Justice Kourlis was an active participant in the consideration and development of the CCJ recommendations,[78] which were the focus of her September presentation at the Judicial Conference.

During the summer meeting of the CCJ, the administrative director of the Utah court system gave a presentation regarding the civil justice reform program that was implemented in Utah in 2012. The Utah rules require initial disclosures, a narrower scope of permissible discovery, amount and timing of discovery based upon the tiered value of the case, waiver of damages not sought in pleadings, and prohibition of use at trial of undisclosed evidence, except for good cause.[79] Although the Utah plan implements various rules of the Utah Rules of Civil Procedure, Rule 26 contains the guts of the Utah

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2016), http://iaals.du.edu/blog/conference-chief-justices-endorses-report-civil-justice-improvements.

[72] CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL, *supra* note 56, at 22.

[73] *Id.* at 21–27.

[74] *Id.* at 21–22.

[75] *Id.* at 23–25.

[76] *Id.* at 26–27.

[77] *Id.* at 12.

[78] *Id.* at 1.

[79] UTAH R. CIV. P. 26.

plan.[80] The Utah court director indicated that the reform plan was implemented statewide following a year's worth of presentations and discussions with the bench and bar and, after some initial skepticism, has been widely accepted by both during the ensuing years.

The CCJ has embarked upon a program to encourage near-term implementation of its reform recommendations, or other reform measures that may be better suited based upon the particular situation of the individual states.[81] The State of Idaho is a member of that working group[82] and will be represented by Chief Justice Roger Burdick.

Additionally, the Idaho Supreme Court has appointed its own working group to consider the various proposals and to recommend a reform plan suitable for the State of Idaho.[83] That working group will intensively review the CCJ recommendations, the *Restoring Proportionality* proposal, and the Texas and Utah plans, as well as other available plans or proposals, during the course of its proceedings. It is an important undertaking and, indeed, an imperative if Idaho's courts are to provide efficient and cost-effective dispute resolution services for the people of this State.

My own belief, based on my judicial and legal experience, is that mandatory initial disclosures, proportionate discovery, and active judicial involvement in cases starting at an early stage, are essential to any reform program. I was in private practice in Boise when the U.S. District Court of Idaho implemented its initial disclosure requirement.[84] At the time, it appeared to me to be an unnecessary pain in the neck. However, there was no choice if a person was litigating in federal court. Over time, I became accustomed to the requirement and came to regard initial disclosures as a valuable tool, whether representing plaintiffs or defendants. When prosecuting or defending a case, the rule requires counsel to take a more detailed and critical view of the case—to take a closer look at the facts at hand, the elements of any potential claims or defenses, and the evidence that

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[80] *Id.*

[81] Lorri Montgomery & Carolyn A. Tyler, *Conference of Chief Justices Endorses Report on Civil Justice Improvements*, NAT'L CTR. FOR ST. COURTS, http://www.ncsc.org /Newsroom/News-Releases /2016/CCJ-endorses-civil-justice-report.aspx (last visited Mar. 4, 2017).

[82] *Committees*, CONFERENCE OF CHIEF JUSTICES, http://ccj.ncsc.org/Committees.aspx (last visited Mar. 4, 2017).

[83] *Idaho Supreme Court - Judicial Committees*, ST. IDAHO JUD. BRANCH, https://isc .idaho.gov/main/ judicial-committees (last visited Mar. 4, 2017).

[84] FED. R. CIV. P. 26.

will be essential to pursue or defend such claims. It is an excellent disciplinary tool, requiring counsel to make sure that the case is worthy of pursuing or defending, rather than trying to settle the dispute at the outset or just simply sending the client elsewhere for a second opinion.

During my twelve years on the bench, I have seen too many cases where counsel show up in front of the Supreme Court after having received an adverse summary judgment below with no valid ground for relief on appeal because of difficulties that arose early on in their case. It is not unusual to be presented with a case where counsel has overlooked an essential element of a cause of action, has pursued a case without adequate evidence to sustain a claim, or has filed an inappropriate cause of action, while overlooking one that may possibly have prevailed below. It is not infrequent that an appellant raises an issue for the first time on appeal, after determining in retrospect that he or she might have fared better below had that issue actually been raised in trial court. This is preventable conduct and initial disclosures would go a long way toward prevention.

It should be noted that the new Idaho Rules of Family Law Procedure mandate early disclosure of information relative to child support, spousal maintenance, attorney's fees and costs, property, and indebtedness. [85] Recognizing that disclosure requirements are only effective if they are enforced, the rules contain a number of provisions allowing for sanctions for failure to comply with disclosure and discovery requirements.[86]

Most observers blame overblown discovery for the dramatic increase in the cost of litigation and prescribe proportionate discovery as a solution.[87] I largely near the dawn of the discovery movement in Idaho. In the early 1970s, Idaho was transitioning from a system of "trial by ambush," in which lawyers went into court not particularly knowing what testimony or documentation the other side would offer into evidence, to a system where interrogatories, depositions, and requests for production and admission

[85] IDAHO R. FAM. L.P. 401.

[86] IDAHO R. FAM. L.P. 444–447.

[87] *See, e.g.*, Leah M. Wolfe, Comment, *"The Perfect is the Enemy of the Good": The Case for Proportionality Rules Instead of Guidelines in Civil E-Discovery*, 43 CAP. U. L. REV. 153 (2015) (discussing proportionality in e-discovery); Michael Thomas Murphy, *Occam's Phaser: Making Proportional Discovery (Finally) Work in Litigation by Requiring Phased Discovery*, 4 STAN. J. COMPLEX LITIG. 89 (2016) (discussing a phased solution in implementing proportional discovery); Gordon W. Netzorg & Tobin D. Kern, *Proportional Discovery: Making it the Norm, Rather Than the Exception*, 87 DENV. U. L. REV. 513 (2010) (advocating for proportional discovery).

allowed attorneys to learn beforehand the evidence that would be offered by the other side. It was an interesting time because some of the older practitioners did not avail themselves of discovery, so we newer practitioners could compare the two systems side by side. Openness in litigation appeared to be by far the better alternative. If each side laid its cards on the table, justice was more likely to be served.

Indeed, most practitioners took the rules seriously, using discovery where needed to obtain pertinent information in order to prosecute or defend their case. It was not regarded as a weapon designed to harass, overpower, or beat the opposition into submission.

Unfortunately, toward the late 1970s, some practitioners started to realize the offensive power of discovery, using excessive interrogatories, unnecessarily burdensome requests for production of documents, and onslaughts of depositions to overpower the other side. The Supreme Court responded by limiting the number of interrogatories that could be propounded and, when practitioners started breaking interrogatories down into numerous subparts, the Court responded further by disallowing that practice. That battle has continued.

As a result of overuse of discovery, a number of practitioners became overly stingy in their responses. Rather than answering an interrogatory with an appropriate response, many practitioners started lodging numerous objections to each and every interrogatory, sometimes adding a weak response following anywhere up to eight separate objections. Discovery became less of a system to make the facts known than one to assist in obscuring them. Of course, all practitioners have not engaged in such practices, but these practices have certainly become widespread. Toward the end of my practice years at the turn of the century, I had concluded that discovery was often not particularly helpful and that lengthy depositions could take the joy out of life without shedding much light on the merits of a dispute.

Excessive discovery is often regarded as one of the principal causes of the dramatic increase in the cost of litigation and one of the reasons why parties with disputes have shied away from the courts and embraced alternative dispute resolution mechanisms.[88] That is the reason why many

[88] *See, e.g.*, Wolfe, *supra* note 87; Murphy, *supra* note 87; Netzorg & Kern, *supra* note 87.

people who study court dysfunction have begun advocating for proportionate discovery. There is absolutely no reason to conduct $20,000 worth of discovery for a case where less than $10,000 is at issue. Such cases are not uncommon in the Idaho Supreme Court's caseload. The difficulty is that unless early attention is paid to a case and efforts are made to get it resolved, once the attorney's fees near or exceed the amount in controversy, the case becomes practically incapable of being settled. The Court has too often been presented with cases where the attorney's fees racked up at the trial level exceed the amount in controversy by a factor of two, three, or more.[89]

The various proposals to be considered by the Court's civil justice working group approach proportional discovery in different ways. There is a general approach, such as the new language of Rule 26(b)(1) of the Federal Rules of Civil Procedure, which went into effect on December 1, 2015:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.[90]

Commentators have disagreed as to whether this constitutes a significant change in the scope of permissible discovery—whether it acts as a proportional limitation on discovery or merely restates the previous rule in new-found language.[91] It has been suggested that more concrete limitations

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[89] *See, e.g.*, Stevens v. Eyer, 387 P.3d 75, 81 (Idaho 2016) (J. Jones, J., concurring); City of Meridian v. Petra, Inc., 299 P.3d 232 (Idaho 2013); Campbell v. Parkway Surgery Ctr., LLC, 354 P.3d 1172 (Idaho 2015) (exemplifying cases in which the amount of attorney's fees was greater than the amount in controversy).

[90] FED. R. CIV. P. 26(b)(1).

[91] *See, e.g.*, Immanuel R. Foster, *Proportionality Emphasized in Amendments to the Federal Rules of Civil Procedure*, 60 BOS. B.J. 17, 18 (2016) (discussing the intent of the amendment to limit the scope of discovery); Philip J. Favro, *Getting the Big Picture on the New Ediscovery Amendments to the Federal Rules of Civil Procedure*, 29 UTAH B.J. 30, 31 (2016) (discussing the increased limitation of the amended Rule 26(b)(1)); John J. Jablonski & Alexander R. Dahl, *The 2015 Amendments to the Federal Rules of Civil Procedure: Guide to Proportionality in Discovery and Implementing a Safe Harbor for Preservation*, 82 DEF. COUNS. J. 411, 419–20 (2015) (advocating the position that the rule change will not limit the

are necessary in order to effectively rein in excessive discovery.[92]

The CCJ recommendation takes a step in this direction, calling for "presumptive discovery limits" in the streamlined pathway cases, which start with "robust, meaningful initial disclosures."[93] The CCJ recommendation points to presumptive discovery maximums, indicating that they have worked well in various states, including Utah and Texas.[94]

The Utah discovery limits, which follow mandatory initial disclosures, are the most definite, being based on the amount of damages sought.[95] In actions where damages of $50,000 or less are claimed, each party is limited to three hours of fact depositions, no interrogatories, five requests for production, five requests for admission, and 120 days to complete standard fact discovery.[96] Where more than $50,000 but less than $300,000 in damages or non-monetary relief is sought, fact depositions are limited to 15 hours, interrogatories and requests for production and admission are all limited to ten, and fact discovery must be completed in 180 days.[97] Where more than $300,000 is sought, each party may have up to 30 hours of deposition time, up to 20 interrogatories and requests for production and admission, and 210 days in which to complete fact discovery.[98]

Chad Johnson's *Restoring Proportionality* proposal, which is a hybrid of the Utah and Texas plans, proposes that discovery in the elective expedited-action cases involving damages of less than $50,000 be limited to a period of 90 days, with a maximum of six hours of deposition time for either party, and no more than five interrogatories, requests for production, and requests for admission.[99]

The options for obtaining proportional limitations on discovery are fairly broad. However, limitations are only effective if they are enforced by the court. In its recommendations, the CCJ cites to an IAALS survey of the

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scope of discovery); David F. Herr & Steven Baicker-McKee, *Scope of Discovery—Proportionality*, 31 FED. LITIGATOR NL 11, 11 (2016) (explaining parties' burdens remain unchanged).

[92] *See* Murphy, *supra* note 87 (arguing that more can be done to further proportional discovery than the changes in Rule 26(b)(1)).

[93] CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL, *supra* note 56.

[94] *Id.*

[95] UTAH R. CIV. P. 26(c)(5).

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] Johnson, *supra* note 52.

Arizona bench and bar, which is probably not far off on the issue of court enforcement in Idaho.[100] According to the survey, court enforcement occurs almost always for 4% of cases, often for 18%, half the time for 20%, occasionally for 36%, and almost never for 22%.[101] Enforcement activities are time consuming and practitioners sometimes feel it is not worth the effort. Judges are often reluctant to get into discovery disputes that sometimes take on the look of pig wrestling, while attorneys have become accustomed to the view that discovery obligations are rarely honored by opposing counsel and it is not worth the effort to try to obtain compliance.[102] In response, the CCJ calls for development of case management teams and the use of electronic case management capabilities to aid the judge in monitoring timelines and enforcing compliance. In other words, court personnel and technology would be employed to assist in obtaining compliance with scheduling orders and compliance with disclosure and discovery deadlines. The CCJ points out that Utah's implementation of team case management resulted in a 54% reduction in the average age of pending civil cases from 335 days to 192 days, which amounted to a 54% reduction for all case types over that period.[103] This approach, plus the availability of beefed-up sanctions for failure to comply with disclosure and discovery obligations, is likely to speed up the processing of cases and cut down the cost of litigation.

With the excessive cost of litigation, the attendant delays in obtaining resolution, and the declining civil caseload of Idaho's court system, inaction is not an option. Idaho citizens are entitled to a judicial system that meets the promise of Rule 1—"the just, speedy, and inexpensive determination of every action and proceeding."[104] Our present civil justice system often does not deliver on that promise. A properly functioning system would offer those with legitimate disputes an alternative that would provide advantages not available through mediation or arbitration, such as access to enforcement proceedings under execution statutes and attorney's fees.

It is likely that many disputes where parties have solid claims or defenses are compromised just to save the time and expense of litigation. Why not give in to a less than meritorious claim or fail to vigorously defend

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[100] CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL, *supra* note 56, at 17.
[101] *Id.*
[102] *Id.* at 15–17.
[103] *Id.* at 27.
[104] *See* IDAHO R. CIV. P. 1(b).

against a spurious claim, where it is simply too costly to do so? I certainly recall instances during my private practice in Boise where I advised a client to just pay some money so that a claim would go away, even if the claim did not have significant merit. On the other hand, it was not infrequent that a client needed to be told that even though he or she had a meritorious claim, it was not significant enough from a dollar standpoint to justify resolution through the litigation process.

If people are discouraged from litigating meritorious claims, it will have another deleterious effect on the legal system. When I started practice in the early 1970s, there were many procedural and substantive areas where Idaho did not have a definitive legal precedent, necessitating the use of out-of-state precedent. At that time, California was the gold standard that lawyers relied upon to make their case. When no Idaho precedent was available, most of us used California case law. Over the ensuing years, Idaho has developed its own case law to the point that the Idaho Supreme Court generally need not look elsewhere, except in unusual cases. Litigants with novel claims based upon cutting edge issues should have the availability of speedy and cost-effective resolution of such claims through the Idaho court system. That certainly serves the interests of potential litigants, but also allows Idaho to build its body of case law in procedural and substantive areas that will serve the state well into the future. Therefore, reform of Idaho's civil justice system to make it more efficient and cost effective, is an imperative, not an elective.