PERSPECTIVES FROM THE STATES:
DIFFERENT SOLUTIONS FOR COMMON PROBLEMS AND THEIR RELATIVE EFFECTIVENESS

EXECUTIVE SUMMARY

PANEL MODERATOR:

Justice Andrew Hurwitz
Arizona Supreme Court

PANELISTS:

William Maledon
Partner, Osborn Maledon

Judge Henry Kantor
Multnomah County Circuit Court

Seymour Moskowitz
Professor, Valparaiso University

Paula Hannaford-Agor
Principle Court Research Consultant, National Center for State Courts (NCSC)

Rebecca Love Kourlis
Executive Director, Institute for the Advancement of the American Legal System (IAALS)

The Perspectives from the States panelists would like to thank conference organizers for considering the state court experience. There are several reasons why the states can provide valuable information to federal rule-makers in search of methods to make civil procedure more conducive to meeting the goals of Rule 1. First, the bulk of civil litigation, including complex civil litigation, takes place in state courts. Second, state courts face the same concerns about ensuring a just, speedy, and inexpensive process. Finally, state courts are nimble in implementing change and can readily experiment.

Panel Consensus

The panelists reached a pre-conference consensus that the federal rules committees should devote attention to three approaches:

1) Abandoning complete trans-substantivity in favor of some case type-specific rules, protocols, and procedures;
2) Narrowing issues early in the case through fact-based pleading and extensive mandatory disclosures;
3) Managing the pretrial process through rules that create presumptive limits on the use of discovery tools.

These approaches, which were topics of discussion throughout the conference, are already embodied in state rules and systems, where they have shown some measure of success.

Panel Recommendations

Following the panel discussion (summarized below), the panelists present a number of recommendations for change, to be considered by the federal rules committees.

First, the panel recommends departure from the presumption of trans-substantivity, through one or more of the following mechanisms:

1) Creating standardized mandatory disclosures tailored to particular recurring case types (e.g., employment discrimination cases);
2) Creating presumptive discovery parameters tailored to particular case types, including different discovery limits and/or pattern discovery (e.g., form interrogatories);
3) Requiring some form of court-sponsored alternative dispute resolution (such as mandatory mediation) or an expedited trial process (with limited motion and discovery practice) for cases where the cost of litigation will often make traditional litigation prohibitively expensive.

Second, the panel recommends implementation of procedures that will narrow the issues and disputed facts earlier in the case, such as:

1) Requiring parties to set forth in the pleadings certain material facts, using a standard akin to Oregon's and distinct from *Twombly*/*Iqbal*'s "plausibility" approach;
2) Broadening the scope and substance of mandatory disclosures under FRCP 26(a), using requirements similar to Arizona's.

Third, the panel recommends changes to the default limits on discovery, to guide the parties in maintaining a proportionate process focused on the real issues in dispute. Departure from these limits would be allowed by court order. These changes would be most effective in conjunction with the panel's second proposal on narrowing the issues, and could include, for example:

1) Reducing the standard deposition time (e.g., four hours);
2) Limiting third-party depositions;
3) Limiting the number of document requests;
4) Limiting the number of requests for admission;
5) Limiting written interrogatories to facts rather than contentions;
6) Limiting the number of expert witnesses per issue; and
7) Limiting expert testimony to the contents of the expert's report.

Panel Discussion

The panel closely examined the rules regimes in the state courts of Arizona and Oregon, and briefly discussed innovations in other jurisdictions around the country. The panel also

discussed important lessons learned in the states, which ought to be considered by federal rule-makers.

Arizona

Mr. Maledon presented on the Arizona system, emphasizing that as Arizona has become the state with the fastest growing population, it has also instituted itself as an "incubator of innovation." Beginning in 1992, Arizona diverged from the federal model by implementing far-reaching disclosure requirements, more restrictive presumptive discovery limits, and different treatment for certain types of cases.

Mr. Maledon first provided a side-by-side comparison of the Arizona and federal disclosure rules. In contrast to the federal rule, the Arizona rule requires early disclosure of essentially all relevant information, including, *inter alia*, a detailed recitation of the factual and legal basis of the party's claim or defense, a summary of the substance of all testimony the party expects to present (even impeachment testimony), identification of the sources of electronic information and recorded statements, and copies of all documents and ESI in the party's control that may be relevant to the action. Each party must also provide a list of the materials withheld from production and the reasons therefor. The rule mandates satisfaction of these disclosure obligations early in the case – within 40 days after the case is at issue – and requires prompt, ongoing supplementation. There is an enforcement mechanism, as parties are precluded from making use of information not timely disclosed.

In Arizona, extensive disclosures allow for and shape the limited nature of the discovery to follow. The Arizona rules contain the following presumptive discovery limits: only parties, experts, and document custodians may be deposed; depositions are limited to four hours; interrogatories are limited to 40 (including sub-parts); requests for production are limited to 10; and requests for admission are limited to 25. In addition, only one expert witness is permitted per issue per side, and there is generally no discovery of ESI that is not readily accessible or involves undue burden or expense.

Arizona also employs a "case differentiation approach." First, all cases claiming monetary relief under a certain threshold ($50,000 in the most populous counties) are diverted to non-binding mandatory arbitration, in an effort to resolve these cases more quickly. Second, there is a complex civil division, with distinct rules and limitations. Finally, there are separate rules for medical malpractice cases, which were designed in consultation with experienced practitioners and contain a variety of innovations.

Justice Kourlis presented some of the more significant findings from the IAALS Survey of the Arizona Bench and Bar. The survey was sent to the entire membership of the State Bar of Arizona, and was ultimately completed by a balanced group of Arizona practitioners. The survey results suggest that, in many respects, the Arizona approach is working. Arizona practitioners prefer the current state system – particularly the disclosure and discovery rules – over the federal system and over the system in place before 1992. Plaintiffs' and defense attorneys agreed that extensive disclosures "reveal the pertinent facts early in the case," "help narrow the issues early in the case," and "facilitate agreement

on the scope and timing of discovery." Moreover, respondents *disagreed* that such disclosures front-load or increase costs, and indicated that parties rarely litigate the scope and adequacy of disclosures.

With respect to the presumptive discovery limits, survey respondents were asked to consider how the discovery defaults should be modified, if at all, in the best interest of litigants. For all of the limits (except requests for production), a majority of respondents expressed a desire to either maintain the current default or further limit presumptive discovery. Considering the presumptive limits as a whole, plaintiffs' and defense attorneys agreed that they focus discovery to the disputed issues and reduce the total volume of discovery. Moreover, respondents *disagreed* that the presumptive limits result in insufficient information at trial or generally favor defendants over plaintiffs.

Accordingly, there is evidence that the innovative Arizona rules are beneficial, which supports the exploration of similar provisions for the federal system.

Oregon

Judge Kantor presented on the Oregon system, emphasizing that the state's unique rules work within a culture of cooperation. According to Judge Kantor, the state rules themselves were a product of negotiation and cooperation by both sides of the bar and judges, fueled by a fear that the state courts would otherwise be subject to the federal rules. Oregon rule-makers sought to create a system that would work for all involved and keep costs down for all clients. The result has many unique aspects. Pleadings are required to contain the ultimate facts constituting each element of the claim for relief, which – taken as true – would establish the right to recovery. Absent good cause, trial must occur within one year of filing for normal cases or two years of filing for cases designated as "complex." In addition, Oregon has focused discovery, with a presumptive limit of 30 requests for admission, and no provisions allowing for written interrogatories or disclosure and discovery concerning expert witnesses. Finally, summary judgment motions may be defeated by an affidavit attesting to the existence of expert witness support for the claim.

Judge Kantor explained that the rules create an atmosphere in which the system is focused on trial. Lawyers and judges are trained to prepare for and conduct trial without extensive pretrial knowledge of what every witness will say, and the result is quite satisfying. However, Oregon has not been immune to the decline in jury trials, which does present cause for concern. In response to a question, Judge Kantor noted that the lack of information on experts prior to trial has no observable effect on settlement, as Oregon state cases tend to settle at rates similar to other jurisdictions. Judge Kantor highlighted a legal culture in Oregon that routinely supports and endorses the ideals of cooperation.

Justice Kourlis presented some significant findings from the IAALS Survey of the Oregon Bench and Bar, as well as the IAALS Oregon Civil Case Processing Study. The survey was sent to the entire membership of the Oregon State Bar, and was ultimately completed by a balanced group of Oregon practitioners. The case processing study examined court docket data in Multnomah County. Both studies suggest that Oregon pretrial procedure is

streamlined and efficient. State court cases are resolved more quickly than similar cases in federal court, and survey respondents tend to prefer Oregon state court over the federal court and neighboring state courts. Despite fact pleading and discovery limitations, more practitioners believe that Oregon courts are friendly to plaintiffs than believe they are friendly to defendants.

Plaintiffs' and defense attorneys agreed that Oregon's fact pleading standard "reveals the pertinent facts early in the case" and "helps narrow the issues early in the case." In addition, respondents indicated that fact pleading increases counsel's ability to prepare for trial and the efficiency of the litigation. Respondents did not find that the standard decreases fairness, and *disagreed* that it generally favors defendants over plaintiffs. Regarding the effect of fact-based pleading on dismissal rates, the case processing study found that pleadings motions are both filed and granted at lower rates in Oregon state court than in the District of Oregon (pre-*Twombly*).

A majority of respondents indicated that the window within which trial must take place provides adequate time for trial preparation in the majority of cases. In addition, respondents found that the time requirement decreases time to resolution and increases litigation efficiency, and did not find that it decreases fairness.

Accordingly, there is evidence that there are beneficial aspects of the Oregon rules, which supports the exploration of similar provisions for the federal system. Judge Kantor stated that – done correctly – following in Oregon's footsteps on pleading standards will not result in an unfair process or restrict access to the courts. However, promoting a culture of cooperation is important. Judges and senior attorneys must be available and accessible to promote professionalism, and the system must publicly extol and reward lawyers who get it right. In fact, Oregon is prepared to go even further, experimenting with a multi-track system with an expedited trial in four months, with no or very limited discovery and pretrial motions practice (by agreement).

The National Perspective

Professor Moskowitz discussed the issues of differentiated case management, narrowing issues at the outset, and managing discovery presumptively by rule from a more national perspective. He emphasized that state courts handle millions of cases every year, and these cases are not insignificant, either for the parties involved or for the public interest. A courageous state can serve as a laboratory for innovative procedures, and states continue to diverge from the federal rules.

Many states have different rules for different kinds of cases. The ability to "triage" discovery for different cases may be based on the case type (e.g., personal injury cases in New York), the complexity or simplicity of the case, or – very often – the amount in controversy (e.g., no physical or mental examinations for cases under $100,000 in South Carolina). New Jersey, in particular, sub-divides cases to a great extent.

Some states, such as California, Colorado, Florida, Maryland, New Jersey, and South Carolina, have implemented pattern discovery forms for particular kinds of cases (model interrogatories, standardized requests for production, etc.). These protocols are often cooperatively drafted with the help of the specialty bars.

According to Professor Moskowitz, states have shown little enthusiasm for *Twombly* and *Iqbal.*, Less than one-quarter of states that have considered the issue have adopted the U.S. Supreme Court's pleading standard. Approximately 11 states already have some form of fact-based pleading. Moreover, states such as Texas, Alabama, New York, and Pennsylvania have pre-complaint discovery procedures, reported to be advantageous to the prompt and judicious resolution of cases.

Justice Kourlis provided information on pilot projects either in place or in development around the country – many developed from the ACTL/IAALS pilot project rules. In Boston, a voluntary Business Litigation Session Pilot Project is currently in place, with the guiding principle of limited discovery proportionally tied to the magnitude of the claims at issue. A New Hampshire pilot project will test fact-based pleading, early initial disclosures, limited additional discovery, and the assignment of a single judge to each case. These rules will apply to all cases in two counties beginning in October of this year. Committees in Colorado are currently drafting case type-specific rules for medical malpractice and business cases. Utah is also contemplating either a pilot project or an entirely new set of rules. In addition, Justice Kourlis mentioned the Seventh Circuit's e-discovery pilot project, to be discussed in more detail by Judge James Holderman.

Ms. Hannaford-Agor gave her perspective on what can and should be generalized from the state experience. She stated that differentiated case management comes naturally to state courts, as a more diversified caseload composition logically leads to limited jurisdiction and specialized courts. State courts also tend to be user-centered.

Ms. Hannaford-Agor explained that many state programs were developed in response to very specific complaints, such as limited judicial resources, limited judicial civil trial experience, inconsistencies arising out of master calendar systems, and the need to coordinate related cases (e.g., mass tort cases) across jurisdictions. Each concern is not necessarily present everywhere; therefore, jurisdictions must consider their objectives carefully in developing specialized procedures. Rule-makers should ask: What is the problem to be addressed? How will success be defined? Implementing change that will have a real impact requires consensus building and judicial buy-in, as well as mandatory rules. Pet projects of individual judges will not establish roots and will "die on the vine". Moreover, when given the choice to opt-in or opt-out, lawyers tend to maintain the status quo.

All three panelists speaking on the national perspective emphasized the need to collect data in connection with any change, in order to assess its effectiveness. One problem with state experiments is that they are rarely subject to empirical evaluation. Rule-makers should to make a commitment to measure success with specific criteria and establish evaluation mechanisms prior to implementation of the change. IAALS and NCSC are

currently working on a joint plan to measure pilot projects, which will provide consistent criteria and aid in the collection of comparable data across jurisdictions. Items to be measured include the number of discovery motions, the number of experts, the number of witnesses, the number of trials, the duration of trials, lawyer satisfaction, and costs. Both objective case data and the subjective perceptions of those in the system should be considered in any evaluation.

Justice Kourlis made a plea to institutionalize the sharing of innovative ideas between jurisdictions – between state courts and between state and federal court. She proposed that IAALS could serve as a clearinghouse of information and monitor developments. Justice Kourlis also urged conference participants to make an individualized commitment to work cooperatively to improve the system, both in individualized cases and systemically.

Conclusion

The civil justice system should listen and be responsive to its users, and the state experience can provide useful information in the effort to re-invigorate the federal rules. Justice Hurwitz confessed his own initial surprise upon learning of the preference to litigate in Arizona state court as opposed to federal court. He believes that it must be – at least in part – attributable to the procedural system in place.

During the question-and-answer portion of the presentation, one conference attendee remarked that parties can effectively operate within limited discovery boundaries. In response, Justice Hurwitz noted that, while everyone agrees on the benefits of hands-on judicial management, presumptive discovery limits can be a valuable aid in management.

During informal conversations after the panel presentation, conference participants expressed a strong interest in learning more about state procedural regimes and any accompanying lessons for the federal system.