

CIVIL RE-ENGINEERING

CONCEPT PAPER

EXECUTIVE SUMMARY

The Chief Justice has established re-engineering as a defined component of the second phase of the Judicial Branch's strategic plan, directing that the entire process of dispute resolution be reviewed and evaluated with the goal of better meeting the needs of the people that the Branch serves. The first step in the re-engineering process is the review and analysis of the processes and procedures of the civil justice system. In the near future, this process will be undertaken in family, criminal and juvenile justice systems as well.

The re-engineering process began with a series of focus groups composed of a broad spectrum of our stakeholders with diverse civil litigation experience. The conversations with the focus groups about the civil litigation process were candid and informative, and the attendees proposed many different suggestions for consideration.

This concept paper outlines the information and suggestions gathered from the five focus groups on how to improve the civil litigation process from their perspective. This information was analyzed and organized into four general areas of focus, which will help to form the framework for the Branch's civil re-engineering efforts over the next several years. Each of the four general areas is discussed in greater detail including the problems and issues identified and the ideas and proposals suggested by the focus groups for re-engineering the civil litigation system. Briefly the four areas of focus are:

- Improving litigation management: The focus in this area will be on achieving greater effectiveness in litigation management through increasing the uniformity, consistency, predictability, and administrative oversight of the litigation process. Some of the suggestions for addressing the issues in this area include undertaking a review of scheduling practices on the short calendar; expanding individual calendaring statewide; examining the voir dire process statewide; exploring ways to obtain feedback on judge trial referees, attorney trial referees, special masters, arbitrators and mediator in order to ensure their effective preparation, utilization,

support and oversight; and examining and expanding the education provided to judges on case management, settlement techniques, evidence, and substantive law.

- Confronting current discovery issues: The focus in this area will be on addressing the frustration of litigants with current discovery rules and practice and the attendant costs of discovery. Many proposed solutions were mentioned by focus group attendees, including expanding the use of standardized discovery to additional case types; exploring the possibility of a streamlined litigation docket with limited discovery and simplified rules; investigating the possibility of adding a proportionality requirement to the discovery rules or otherwise limiting the amount of discovery permitted based upon the type or the value of a case; and looking at other states' experiences with discovery reform to determine what has worked well.
- Enhancing alternative dispute resolution options: The focus in this area will be on ensuring that appropriately-trained mediators, arbitrators, and other non-judicial officers are available to provide litigants with efficient and effective options for alternative dispute resolution, including exploring ways to identify effective mediators; developing and providing training on the goals of mediation, the role of the mediator, and effective methods and techniques for facilitating mediation; exploring the concept of a mediation docket as an adjunct to the existing Judicial ADR program; developing uniform criteria and processes for arbitrators; and collecting and disseminating information on the qualifications and experience of all Judicial Branch alternative dispute resolution providers.
- Addressing the needs and impact of self-represented parties: The focus in this area will be on exploring additional ways that the Branch can assist self-represented parties in navigating the civil litigation process, including continuing the Branch's ongoing commitment to providing assistance to self-represented parties through the court service centers and ongoing revision of materials, forms and rules to utilize plain language; expanding existing volunteer attorney programs in foreclosure and family matters; enhancing the training provided to judges and court staff with regard

to issues that commonly arise where parties are representing themselves; participating in efforts to establish some type of modest/moderate means program in Connecticut; and considering the implementation of a new volunteer attorney program in the area of consumer collections.

Many of these ideas are already underway; however, most of the ideas discussed in this concept paper are simply possibilities that merit further evaluation and exploration over the coming months with the cooperation and input of judges, Judicial Branch staff and stakeholders. More information will be gathered about what is happening in other states that are facing the same issues, and additional evaluations will be undertaken to ensure that the suggestions and ideas address the underlying problems identified by the focus groups.

Re-engineering is not a quick process. It is a long-term commitment to seeking and implementing changes that address the problems identified by our stakeholders to improve the civil litigation system and to ensure access to justice to all of our stakeholders in a civil litigation system that provides relevant, affordable, predictable and appropriate dispute resolution.

INTRODUCTION

The initial strategic planning process with the breadth of its scope and its focus on the needs and perspectives of the people who interact with the Branch broke new ground for the Judicial Branch. Over the past five years, judges, administrators, supervisors and staff implemented hundreds of changes, some big and some small, that support the long-term outcome goals of the Strategic Plan: increasing access to justice, responding to changing demographics, improving the delivery of services, collaborating with others, and being accountable to all. These goals are articulated in the Branch's vision statement: *An independent, accountable and responsive Judicial Branch will administer justice, ensure access to the courts and deliver effective, uniform and consistent services to a diverse public. In doing so, the Judicial Branch will collaborate with the Executive and Legislative branches of government and others with an interest in administration of justice.*

With the first phase of the strategic plan, the Judicial Branch embarked on an on-going process of re-engineering – from the planning to the implementation of the first phase, the Branch has set about enhancing and improving itself. Some improvements involved greater utilization of technology; some involved streamlining of processes to make them more efficient. In this second phase of the strategic plan, recognizing the importance of looking at the entire process of dispute resolution, the Chief Justice has determined that re-engineering become a defined component of the plan. She has directed that the examination and analysis of existing processes in the civil, family, criminal and juvenile justice systems be undertaken, with the goal of better meeting the needs of the people that the Branch serves. A review and analysis of the civil litigation system is the first step in this re-engineering process.

The past ten years have seen remarkable changes for the Judicial Branch, particularly in the area of civil litigation. The development and implementation of electronic filing has completely changed the way civil files are initiated, processed and accessed by judges, staff, attorneys, self-represented parties and the public. These technological changes have

resulted in greater access to files and more rapid processing of pleadings and motions. But technological changes alone cannot resolve all issues that affect the ability of the Judicial Branch to provide relevant, affordable and accessible dispute resolution. These issues include the ever-increasing costs of discovery, the greater complexity of substantive issues in cases that come before the courts, the growth in the numbers of self-represented parties, and the challenges of providing the appropriate type of dispute resolution – be it court trial, non-binding arbitration, mediation, status and settlement conferences or jury trial. Individuals, small businesses and larger corporations all need a strong, flexible and responsive Judicial Branch to which they can turn for impartial, affordable and timely dispute resolution.

Beginning with a kick-off meeting with members of the Bar in May of 2013, the Chief Justice, the chief court administrator, the deputy chief court administrator and judicial branch staff have conducted five focus groups, comprising over 75 attorneys with diverse civil litigation experience, seeking their input on the civil justice system: what is working; what is not working; and how we can work together to better serve the people of the state. The comments, criticisms and suggestions from each of the five focus groups were presented to a workgroup composed of appellate and trial court judges and civil litigators for discussion and validation. The work group had a lengthy and spirited discussion about the problems and solutions identified by the focus groups. As a result of the discussions, four general areas will become the focus of the branch's civil re-engineering efforts over the next several years: improving litigation management; confronting current discovery issues; enhancing alternative dispute resolution options; and addressing the needs and impact of self-represented parties. What follows is a detailed discussion of each of the four general areas.

Improving Litigation Management

Effective management of litigation throughout the process is a key factor in the accessible, affordable and impartial resolution of disputes. Litigation management cannot be only about providing mechanisms to shepherd individual cases through a process quickly. The comments from the focus groups make it clear that it is not just the product – a “timely resolution” - that is important. Instead, it is essential to look at the entire *process* of getting to that timely resolution. The process itself gives rise to frustration, uncertainty, increased costs and a lack of confidence in the efficacy and fairness of dispute resolution. Participants in the focus groups identified needs in several areas that fall under the general area of litigation management: greater uniformity of policies and procedures, greater consistency and predictability in the litigation process, enhanced oversight by judicial administration, and ongoing education for all participants in the civil litigation process.

Greater uniformity of policies and procedures

From the perspective of the Bar and self-represented parties, a lack of uniformity in how cases are managed, scheduled, processed and tried, both within a judicial district and among all the districts, can lead to frustration, inconsistency, and an unfair advantage to local counsel. This lack of uniformity includes the inconsistent requirements for preparation of a trial management report, the scheduling of special proceedings, the date of jury selection, the way individual voir dire is conducted, and the utilization of telephone or video conferencing. Variations in processes and procedures can result in counsel who are unprepared and unable to proceed, or who arrive with clients and witnesses when it is unnecessary because they are unaware of the local customs or procedures. When scheduled matters cannot proceed or counsel spends time preparing a report that nobody looks at, the result for judges, staff, litigants and other counsel is wasted time and effort, and for the litigants, increased costs.

The existing lack of uniformity may, in part, be the result of the difficulty in striking a balance between judicial independence and procedural predictability. It is also, in part, attributable to physical limitations of various judicial branch facilities. These reasons do not present an insurmountable barrier. As part of its obligations under Sec. 51-5a, judicial administration, mainly the office of the chief court administrator, is “responsible for the efficient operation of the department, the prompt disposition of cases and the prompt and proper administration of judicial business.” In fulfilling those responsibilities, the chief court administrator “may issue such orders, require such reports and appoint other judges to such positions to perform such duties, as the chief court administrator deems necessary to carry out his or her responsibilities.” Judicial administration, therefore, has the primary responsibility for achieving uniformity within and among districts as one of the steps towards effective litigation management.

Achieving and maintaining uniformity is a continuous effort, and it should begin with a process of review. The office of the chief court administrator should undertake a review of the case management and calendaring practices for short calendar matters, special proceedings, foreclosure calendars, conferences and trials in each judicial district as a means of identifying best practices that can then be implemented statewide. It may also include the elimination of inefficient or unnecessary steps in the process. This review should include the collection and analysis of information, which can then be shared at a meeting with presiding judges, caseflow coordinators and clerks. Throughout this process, the Branch should continue to solicit input from the Bar.

An analysis on how best to manage the short calendar efficiently should also be undertaken to minimize the amount of time attorneys and litigants spend waiting for their cases to be heard. For example, on a foreclosure calendar, several firms with multiple matters on a single calendar could be scheduled at one time, and those attorneys or self-represented parties with a single matter would be scheduled at a separate time. This small scheduling change would reduce the costs of attorney’s fees for people who are already struggling financially.

Also, specific attention should be given to the overall process of scheduling matters on a daily basis. Based upon feedback from the focus groups, some judicial districts are scheduling multiple cases for pretrials and other events at the same time. A cursory review of the case management system indicates that this practice is occurring, but judicial administration should survey all districts to ascertain how widespread the practice is and whether there are reasons it is occurring. Depending upon the results of this survey, the Branch may want to consider developing standards and guidelines for civil presiding judges on the use of staggered scheduling of pretrials and any other events. Appropriate scheduling should be based upon a realistic assessment of past history of last-minute continuances or other factors that impact the number of events that actually go forward and the time needed for a meaningful event. In addition to increasing uniformity, more efficient scheduling can have a significant impact on the amount of time an attorney, self-represented party or litigant spends in court, helping to reduce the overall cost of litigation.

It is important to note that the members of the bar also have an important role in ensuring that the scheduling process works as it should. The focus groups pointed out repeatedly that counsel fail to show up or show up late, unprepared, or without necessary parties for a scheduled event. This type of behavior wastes the court's time and resources as well as the time and resources of attorneys, self-represented parties and litigants. The Judicial Branch should enter into an ongoing dialogue with the bench and the bar to identify ways to best resolve these issues.

One additional area where a lack of uniformity was noted is in the area of the voir dire process. The variations on this process included voir dire conducted with only counsel and the juror present; voir dire conducted with a clerk present; or voir dire conducted with the judge on the bench. Among other possible options, there seemed to be an agreement that the prescreening of jurors would significantly impact the amount of time spent in jury selection. Judicial administration in collaboration with representatives from both the plaintiff and defense bars should review lawful prescreening options, including electronic prescreening of jurors, prescreening of all jurors called on a particular date, or prescreening

of a group of jurors selected for a particular panel. Consideration should be given to the recommendations made by the Public Service and Trust Commission Jury Committee regarding prescreening of jurors and the presence of a judge during the voir dire process while being mindful of the impact this may cause in handling the court's business. Both the presence of the judge and the prescreening of jurors could result in a shorter and more efficient voir dire process, benefitting not only counsel and litigants, but also the potential jurors.

Greater Consistency and Predictability in the Litigation Process

A second aspect of litigation management is the need for greater consistency and predictability in the litigation process. One of the comments heard frequently in the focus groups was that litigation has become an extremely expensive option, as the cost of pursuing a claim from initiation to conclusion increases. What also became evident from the discussions is that the cost of litigation, in and of itself, is not the real issue. Rather, costs are a by-product of other issues, and it is only by addressing these other issues that the branch and the bar will be able to reduce the overall cost of litigation. An issue raised over and over again in the focus groups is the lack of consistency and predictability in the litigation process. Whether it is the inconsistency resulting from the assigning of the same case to multiple judges for rulings on motions or discovery disputes, different perspectives on the granting of continuances on discovery or continuances of trial dates, or the availability of telephone or video conferences, the result is a lack of predictability for counsel in advising their clients, and for litigants in making important decisions about their cases.

As one of the first steps in addressing many of these issues, the Judicial Branch began the implementation of individual calendaring, first in Waterbury, then in New Britain, and in July of this year, in Stamford. Implementation of individual calendaring will enhance the consistency and predictability of rulings on motions and discovery disputes and increase the possibility for settlement, thereby reducing the cost of litigation. Instead of filing and

arguing motions, the parties will be able to resolve disputes on pleading and discovery through status conferences by telephone, video or in person with a judge who is very familiar with the law and procedural history of the case and the parties. The parties will be much less inclined to waste time and effort in filing repeated motions looking for a different outcome when it will be the same judge hearing the argument each time. A judge who is already familiar with the case will need less time to prepare for arguments or discussions or to enter orders. An important element of the individual calendaring program is a firm trial date. Counsel and parties who know that a trial will proceed on the scheduled date, absent highly unusual circumstances, will conduct their preparations in a timely manner.

Individual calendaring will also enhance the possibility of settlement at an earlier stage of the proceedings, before positions harden as a result of time, money and effort expended in the pretrial phase of the case. A judge who is familiar with all aspects of a case will be in a position to suggest alternatives that are suited to the case and the parties involved in that case, whether it is mediation or some form of early neutral evaluation. Some disputes cannot be resolved short of trial but, in the cases where it is reasonable and possible, an earlier resolution benefits counsel, parties and the court system, economically and personally.

The first individual calendaring pilot was implemented in Waterbury in January 2013. Information gained from judges' experiences, feedback from the Waterbury Bar and the various focus groups conducted as part of this re-engineering process, and from an analysis of the Waterbury individual calendaring docket over the course of the first year of the program has resulted in adjustments to several elements of the program. The second pilot program was implemented in New Britain in January of 2014, and the third will be implemented in Stamford in July of 2014. The following is the basis for the individual calendaring program, in Waterbury, New Britain, and Stamford, and in all future locations.

1. The individual calendaring program will be implemented in each court location for cases filed after a certain date, not for existing cases. With the introduction of individual calendaring in a location, there will be three tracks for civil cases.

- Track 1 encompasses any existing civil cases and cases excluded from the individual calendaring program. Excluded cases are administrative appeals, contract collections, eminent domain, property and most miscellaneous case types. Contract cases except for contract collections, tort cases, vehicular tort cases and some miscellaneous case types are included in individual calendaring. As part of the overall re-engineering process, consideration should be given to developing case management guidelines, including time standards for the processing of the excluded cases.
- Track 2 encompasses cases that are in specialized civil dockets. Currently, the Judicial Branch has several of these dockets: the Complex Litigation Docket, established for the adjudication of civil cases that have multiple litigants and/or legally challenging issues or multi-million dollar claims for damages; the Land Use Litigation Docket, established for the adjudication of specifically identified land use cases such as Planning and Zoning, Inland Wetlands and Environmental Enforcement and Affordable Housing appeals; and the Administrative Appeals and Tax Session of the Superior Court, charged with the authority to hear administrative appeals of state agency decisions filed pursuant to General Statutes §§ 4-166 et seq. and 4-183 of the Uniform Administrative Procedure Act and appeals concerning a variety of tax related issues. Another possibility for a specialized civil docket was suggested by one of the focus groups: dedicate a specific judge to handle probate matters, analogous to the existing Land Use Litigation Docket, in order to ensure consistency and predictability in the management and resolution of probate appeals. As the individual calendaring program expands statewide, its effect on the Complex Litigation Docket and the other specialized civil dockets should be examined.
- Track 3 encompasses the cases in the individual calendaring program. Within this track, there will be two levels. The first level will include all case types

that are included in the individual calendaring program except for vehicular tort cases involving driver and/or passenger(s) vs. driver(s) (V 01). These vehicular tort cases will be part of the second level.

2. When a case is filed, unless it is an excluded case type, it will be assigned by the presiding judge to an individual calendaring judge, who will then manage the case from its initiation to its disposition.
3. Caseflow staff will schedule a status conference with the attorneys of record and any self-represented parties with the individual calendaring judge between 60 – 90 days after the return date, or earlier if appropriate. The purpose of the initial status conference is to assign a firm trial date, have a preliminary discussion about ADR options, and establish a scheduling order. In establishing the dates in this scheduling order, it is important to consider the complexity of the case and the existing commitments of the attorneys and litigants to ensure that the dates are reasonable and feasible.
4. In lieu of a status conference, in vehicular tort (V 01) cases, a standard scheduling order will issue within 30 days of the return date.
5. A second status conference will take place approximately two weeks after the scheduled completion date for the written discovery/fact witness depositions. At this conference, the judge and parties can discuss a case's readiness for pretrial and settlement short of trial.
6. A conference can be requested by the parties at any time, but one will be scheduled within a month of the trial date. Conferences will be conducted by the individual calendaring judge in jury cases.
7. A trial management conference will be scheduled within a month of the trial, and it will be conducted by the individual calendaring judge or the judge that will be presiding over the trial.

Concern was expressed about the length of an individual calendaring judge's assignment. It is anticipated that a judge assigned to an individual calendaring docket will

remain in that assignment for at least three years. A longer assignment should allow many cases to be handled from commencement to resolution by a single judge, but at least some cases will have to be transitioned to a second individual calendaring judge as judges are rotated off of the individual calendaring docket. It will be critical for individual calendaring judges to utilize available technology to track and manage their cases from the beginning of their assignment in order to assist in any transition. The Judicial Branch should also institutionalize a process whereby the incoming judge and the judge who is leaving meet on the pending cases to ensure continuity and predictability throughout the case.

The Branch intends to expand individual calendaring to additional judicial districts throughout the state. As the program is expanded to additional locations, judicial administration should make maintaining uniformity of procedures on the individual calendaring docket a priority. Judicial administration will also be using performance measures that have been developed to track the success of the program in addressing the issues that were raised by the focus groups.

Enhanced Administrative oversight

Another aspect of litigation management that came from the focus group discussions was the need for greater oversight by judicial administration. Many of the issues and proposed solutions from the groups can only be addressed by a pro-active administrative structure that is responsive to an ever-changing environment. These items include the assignment of judges to various dockets, the oversight of judge trial referees, attorney trial referees, mediators, and arbitrators, and the recognition and promotion of appropriate alternative dispute resolution options.

For example, the key player in the individual calendaring program and in the complex litigation docket is a judge who is proficient not only in substantive and procedural law but also in the basic principles of litigation management. It is incumbent upon judicial administration to make certain that judges assigned to the individual calendaring program and the complex litigation docket have the necessary knowledge, skill and qualities to allow

them to successfully manage their caseloads. Judicial administration must provide to the judges the tools needed to effectively and efficiently manage an individual docket, including training on best principles of case management and effective use of alternative dispute resolution.

Careful consideration of the assignment of judges to the individual calendaring program and the complex litigation docket is critical to the success of the programs, but many other cases will not be part of these programs. Judicial administration is also responsible for oversight of all other judges, judge trial referees, attorney trial referees, mediators and arbitrators. Part of that oversight may include monitoring the overall caseloads at a particular location to keep an appropriate number of judges available in that location throughout the assignment year to respond to fluctuations in those numbers over a twelve month period.

Unquestionably, one of the most valuable assets of the Branch is its judge trial referees. They can bring a wealth of knowledge and experience to the litigation process, and judicial administration must work closely with administrative judges and presiding judges in each judicial district to effectively utilize their expertise and strengths. Judicial administration should look into additional methods of obtaining feedback on judge trial referees to assist in the process of optimizing their assignment and ensuring the continuing confidence of attorneys, litigants and the public in the courts. Similarly, judicial administration must work with administrative judges and presiding judges to ensure that the attorney trial referees, small claims magistrates, special masters, mediators and arbitrators are also effectively utilized and appropriately monitored.

A final area within the purview of judicial administration is the promotion of voluntary mediation and other types of alternative dispute resolution. Promotion of alternative dispute resolution should include valuing judges, senior judges and judge trial referees, and attorneys with superior mediation skills and ensuring that individuals involved in ADR programs merit the confidence of all participants in the process. Judicial administration should also closely monitor mediation and other types of ADR programs to

ensure that they are relevant and effective. As part of the monitoring process, judicial administration should re-examine the types of statistical information collected and the reports generated to determine whether other information is needed in order to properly evaluate these programs and their role in dispute resolution.

Alternative dispute resolution is an integral part of the dispute resolution process, and a further discussion of ways to enhance and expand the alternative dispute resolution options provided by the Branch is included in this document.

Ongoing Education for All Participants in the Litigation Process

Connecticut's Superior Court is the court of general jurisdiction for the state, and the cases that come to the court include everything from the simplest slip and fall case to mass tort and commercial construction litigation. With Connecticut's unified court structure, any judge can be assigned to hear any type of case, which could result in a less than perfect match between a judge's experience and a case. Judges come to the bench from various backgrounds: criminal, civil, probate, and family, to name a few. Some have a great deal of experience as criminal or civil litigators; others spent time litigating complex commercial disputes or mass torts; still others spent less time in the courtroom and more time in negotiating resolutions or arguing appeals. The composition of the bench, therefore, reflects broad and diverse legal experience.

The Judicial Branch will continue to provide ongoing training and educational opportunities for judges and judge trial referees in civil matters, particularly in three general areas: case management, substantive law and evidence, and settlement techniques and strategies.

Today more than ever before, a judge must be an able case manager, to ensure that each case receives the attention it needs in order to reach a fair and timely resolution. Managing a case as a judge is, however, entirely different from managing a case as an attorney. Therefore, it is not surprising that it is a skill that must be taught and nurtured through training and education.

Although it is particularly important for complex litigation and individual calendaring judges, all judges must be afforded educational opportunities on case management techniques and best practices. This training should include information on the availability and utilization of technology in the case management process: for example, how to incorporate telephone and video conferencing into the case management process for status conferences, quick discovery disputes or pretrials. Keeping judges apprised of available technology and the many ways it can be used in the management of cases is an important component of training. Providing information and guidance on various aspects of civil litigation for judges with less experience in that area could also be a part of case management training. For example, a newly-appointed judge who practiced criminal law may be unaware of some of the practical realities of obtaining medical reports from doctors, the intricacies of a residential or commercial foreclosure, or the difficulty caused by holding to a firm trial date without enforcing deadlines for discovery. Regular roundtable discussions among judges would provide the opportunity for a sharing of information in all these areas. These kinds of roundtable discussions could also include the exchange of information about ways to effectively use scheduling orders while not sacrificing flexibility, which is so critical to the management of a case. Finally, part of the training should include basic information on the appropriate and timely use of alternative dispute resolution options.

In addition to providing case management education and training, the Judicial Branch should continue in its efforts to provide broad-based educational programs in substantive law and evidence for judges and judge trial referees on an annual basis. The law is constantly evolving and increasing in complexity in response to economic, social and technological changes. Continuing to provide ongoing educational programs to judges and judge trial referees is critical to maintaining the confidence of attorneys, business and individual litigants, and the public in the judicial system.

The third general area is of particular concern to the bar: the need for training on settlement strategies and techniques. Attorneys in the focus groups related some very

positive experiences with judges and judge trial referees who conducted effective pretrials and status conferences that resulted in efficient and satisfactory resolution of a particular dispute or an entire case. However, some experiences were somewhat less positive: people being pressured to resolve a dispute by the setting of unrealistic trial dates or the imposition of other potentially burdensome requirements. In several different focus groups, attorneys expressed frustration at having to endure a very unpleasant meeting with a judge before being able to have a jury trial, even though it was clear that no other resolution was possible. Another frequently employed tactic was telling the attorneys that “judicial administration is pressuring me to resolve these cases”, which does not reflect the position of judicial administration. A final concern in the area of settlements mentioned at the focus groups relates to time. Often, it can take some time to elicit the positions of the parties to a case, and if the person conducting the pretrial is not familiar with the facts and status of the case, it can take even longer. Attorneys commented that generally, there is not sufficient time allocated to a pretrial, resulting in frustration and wasted time. The experiences of the bar demonstrate that more training and education in the area of settlement strategies and techniques would be helpful: ensuring that litigants, attorneys and judges can participate in a process that is predictable, positive and meaningful.

Of course, it is not only judges who can benefit from education and training. It is also important for the Judicial Branch to provide the bar with information, through focus groups, presentations or written material, on various programs that are rolled out. For example, as the individual calendaring program is rolled out in each district, the Judicial Branch must educate the bar so that they know what to expect, including the schedule for the implementation of the program, what the program is expected to accomplish, what the bar can expect from the individual calendaring judges, and how the program will be evaluated. A mechanism to solicit feedback from members of the bar regarding the program will be an integral on-going part of this process.

Confronting Current Discovery Issues

A report in January 2013 from the National Center for State Courts presented a study demonstrating the use of a civil litigation cost model in estimating the cost of civil litigation. The model broke cases down into six stages: initiation, discovery, settlement, pretrial, trial and post-disposition. Not surprisingly, the discovery stage and the trial stage together represented between 53 and 75% of the total litigation time. The findings reaffirm what many lawyers, businesses and court personnel have observed about the ever-increasing expense of discovery, including electronic discovery. Although not a part of the recent report, it is important to include the cost of the time expended by judges and court staff in handling repeated discovery motions and requests, which would serve to increase the already high percentage of costs attributable to discovery.

The report reflected that the cost of a trial is the largest expense in civil litigation. However, a trial does not take place in every case; discovery generally does. Therefore, in addressing the costs of litigation, it is essential to look at the cost of discovery, which is a major factor impacting the affordability, fairness and timeliness of dispute resolution in the civil justice system. The cost of discovery, however, is more the symptom of other issues underlying the entire discovery process.

In virtually every focus group, attorneys voiced their frustration with the current discovery rules and practice: the frequent filing of objections to clearly appropriate discovery requests; the need for filing multiple motions to compel discovery or depositions; the absence of any clear cut-off on discovery requests; the difficulty of obtaining sanctions in the event of discovery abuse; and the impossibility of meeting a firm trial date when discovery deadlines are not enforced. These issues serve not only to increase costs, but also to negate the possibility of early settlement through offers of compromise or other early negotiation. Without the information gathered through discovery, litigants cannot settle. Mention was also made of the issue of electronic discovery and the potentially

prohibitive costs of that discovery. These issues all contribute to the spiraling discovery costs, which often force litigants to settle because proceeding is completely unaffordable.

The focus groups suggested many solutions to discovery issues that can be considered. As a means of eliminating unwarranted objections to discovery requests, standardized discovery could be expanded to additional types of cases, such as employment and medical malpractice. This concept could be extended further by implementing “automatic disclosure orders” based upon case types and requiring compliance with the orders within a set period of time by the plaintiff and by the defendant. These automatic disclosure orders would eliminate the need for parties to serve discovery or notices of discovery on other parties, and would substantially eliminate objections and associated arguments, thereby reducing costs and some frustration. Focus group discussions also included the possibility of imposing restrictions on discovery, such as limiting the number of interrogatories, production requests or depositions based upon the type or value of the case, exploring the possibility of an expedited litigation docket with limited discovery and simplified rules, or considering the implementation of the pretrial disclosure process of the federal rules.

Connecticut is not alone in facing discovery issues. Some of the solutions suggested here have been implemented already in other states around the country. For example, Iowa has implemented an expedited civil action program, which is voluntary, for cases in which the only relief is money damages in the amount of \$75,000 or less against any one party. The program has special rules for discovery that require all discovery be completed no later than 60 days before the trial date; limit the number of interrogatories, production requests and requests for admission to ten, limit the number of depositions of a party to one and of non-parties to two; limit each side to one expert witness. Iowa also has a three-year pilot business specialty court for complex commercial cases with damages in excess of \$200,000. All parties must agree to litigate in this specialty court.

In Texas, in response to legislative direction, the Judicial Branch implemented an expedited action process with the goal of providing prompt, efficient and cost-effective

resolution of civil actions. Inclusion in the program is mandatory for civil actions in which the demand is only for monetary relief of \$100,000 or less. Some of the special rules include a time limit of five hours for each side to complete jury selection, opening statements, presentation of evidence, examination and cross-examination of witnesses and closing arguments; the completion of discovery within a discovery period that begins when the suit is filed and continues until 180 days after the date the first discovery request is served on a party; a limit of six hours on oral depositions; and a limit of fifteen on the number of interrogatories, requests for production and requests for admission.

Utah has divided litigation matters for discovery purposes into three tiers based upon the total amount of damages claimed by all parties to the litigation. If the parties plead into a lower tier, they waive the right to recover damages about the tier limits. A new rule specifically requires that the cost of discovery be “proportional” to what is at stake in the litigation. “Proportional” is defined as “reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties’ resources, the importance of the issues and the importance of the discovery in resolving the issues.” Discovery limits are based upon the tier and the overriding principle of proportionality. The tiers are under \$50,000, over \$50,000 but under \$300,000 or non-monetary relief, and over \$300,000. Each tier has limits on discovery requests, time to complete fact discovery, total fact deposition hours and expert disposition hours, and a party is required to make more comprehensive initial disclosures.

Several other states have expedited litigation tracks or dockets and special rules that include automatic disclosures, limits on discovery, proportionality requirements and limits on expert witnesses. A review of the experiences of these other states with expedited litigation tracks and other discovery reforms will be undertaken as part of the re-engineering process. Learning what is successful in other states will provide Connecticut with a clearer path to follow in addressing discovery issues here.

In addition to proposals to revise the rules governing discovery, much discussion in the focus groups concerned ways of keeping discovery on track in a case. Attorneys at the

focus groups find that scheduling orders, when they are used, do not necessarily address the problem of late compliance with discovery requests. Often, trial dates or deadlines for filing a motion for summary judgment are enforced, but discovery deadlines are not. This discrepancy can cause problems for attorneys and litigants attempting to evaluate a case and determine the best course to follow. Developing scheduling orders for specific case types in conjunction with the bar is one solution to the problem. The scheduling orders would include a reasonable deadline for the completion of all discovery, which would allow sufficient time for all parties to be prepared to make decisions on settlement or trial.

These proposals could be referred to the Civil Commission, which includes representatives from the plaintiff and defense bars, small and large law firms, and municipal and corporate attorneys. The Commission could discuss these ideas, draft proposed rules and standard discovery, and circulate them to bar groups for comment from the civil litigation bar. The proposals would then be submitted to the Rules Committee for discussion and implementation.

Standard discovery, automatic disclosure orders, and scheduling orders will, alone, not address the entire problem. Attorneys expressed concern over the difficulty in obtaining sanctions against people who abuse the discovery process by ignoring scheduling orders or rules, providing incomplete information, late responses, and manipulating the process in any way possible. Unquestionably, most attorneys comply with the rules of practice and the orders of the court, but when faced with an adversary who does not, attorneys need the support of the court in enforcing the rules and the scheduling orders. An on-going dialogue between the bench and the bar will help to ensure that this issue is addressed.

Some issues identified by the focus groups are not strictly discovery issues, but they do involve rules, statutes or procedures in the civil litigation process and could most appropriately be referred to the Civil Commission. For example, participants in the focus groups pointed out that neither the right to an extension of time nor any process to ask for such an extension for accepting an offer of compromise currently exists. Without this

option, parties are hampered in their ability to accept such offers and conclude a case more efficiently. Often an offer is made before all information on a plaintiff's injuries has been obtained, preventing a defendant from evaluating the potential exposure in a meaningful way. The Civil Commission should consider the possibility of proposing an amendment to the statute and rules on offers of compromise to provide for the option of additional time to accept or reject an offer.

Another suggestion involving rules and statutes was to permit the clerks to grant an application for commission to take a foreign deposition. Currently these applications must be ruled on by a judge after an action is filed. This proposal could initially be referred to the Civil Commission for review and discussion. It may also need to be referred to the Family Commission.

Enhancing Alternative Dispute Resolution Options

On December 16, 2010, Chief Justice Chase T. Rogers formed the Commission on Civil Court Alternative Dispute Resolution (ADR Commission) and charged the commission with assessing existing civil alternative dispute resolution programs and making recommendations to improve the utilization and effectiveness of court-sponsored ADR. The Commission was chaired by the Hon. Linda K. Lager, Chief Administrative Judge for the Civil Division, and included members from the bench, bar, academia, and the business community.

In addressing its charge, the Commission conducted focus groups and surveys of attorneys, bar associations, judges and Judicial Branch staff to identify the stakeholders, the types of cases those stakeholders bring to the court, their needs and priorities, and the effectiveness of existing ADR programs in meeting their needs. After almost a year of work by the Commission and its four subcommittees, the Commission report and recommendations were submitted to the Chief Justice in December of 2011. The full report, including the summary of information gathered in the course of its work, an analysis

of the strengths and weaknesses of the then-existing Judicial Branch alternative dispute resolution programs, the reports of each subcommittee and the recommendations of the Commission, can be viewed on the Judicial Branch website at www.jud.ct.gov.

The Commission report provides background on the role of alternative dispute resolution in the overall civil dispute resolution structure in Connecticut. For the purposes of this discussion, it is sufficient to note that the roots of alternative dispute resolution, including court-sponsored and private sector arbitration and mediation, run deep in Connecticut. Although the traditional focus of the civil justice system is the resolution of disputes by way of jury or bench trials, the Judicial Branch has for many years provided several other options for resolving disputes. As the Commission's report points out, the Branch also, by rule and by custom, provides litigants with opportunities to settle their disputes or resolve certain issues in a case through judicially-supervised pretrial or settlement conferences. The report points out that the private sector also offers dispute resolution options, including arbitration and mediation. While not every case can be resolved through alternative dispute resolution, providing and encouraging the use of this option, when appropriate, can result in a more efficient and satisfactory result for civil litigants, while simultaneously, leaving more judges free to conduct jury and bench trials.

When the Commission began its work, the Judicial Branch had eleven court-sponsored civil ADR programs. As a result of the review and recommendations of the Commission, several of those programs have been eliminated. The Commission recommended no changes for some programs, such as the housing mediation and foreclosure mediation programs. For others, such as court-annexed mediation, the Commission recommended several changes, including a change of name to Judicial-ADR. The Commission's report also contained a clear statement of the goals and objectives of the civil ADR programs. Stated simply, the goals of ADR programs are to allow the parties to achieve an acceptable resolution of their case or a portion of their case, through an efficient process for parties and the Branch, that is procedurally and substantively fair, and involves skilled neutrals with appropriate education, experience, process skills and knowledge of

subject matter, and succeeds in identifying and addressing underlying issues in the case and in satisfying party interests. The substance of these goals and many of the recommendations of the Commission were echoed in the comments and suggestions from the civil re-engineering focus groups that were conducted over the past eight months.

Many of the re-engineering focus groups commented on the Judicial-ADR program, saying that it was a good program, but its efficacy was hampered because of difficulties in finding mediators with the appropriate expertise and sufficient time to mediate a dispute. Without appropriately-trained mediators who have sufficient time to mediate, the Judicial-ADR program cannot be successful. The re-engineering focus groups observed that the skill set needed for mediation is quite different from that needed for adjudication of a dispute. To a certain extent, what makes someone a skilled mediator may be innate or a matter of an individual's personality. In the Judicial-ADR program, people have selected the same mediators over and over, some of whom have now left the bench. It is, therefore, important that judicial administration take the necessary steps to identify more judges and judge trial referees with the talent and interest to serve as effective mediators. Once these individuals are identified, special training and educational opportunities should be made regularly available and, in some instances, required. The training curriculum should include courses and programs on the role of the mediator, the goals of the mediation process, methods of facilitating communication, techniques to assist in identifying underlying issues between and interests of the parties, and ongoing education on substantive law. The details on who would provide this training and how it would be provided will require further discussion.

Discussion at the re-engineering focus groups included the idea of creating a mediation docket. There was great interest in exploring this concept. A mediation docket would ensure that effective and skillful mediation is a widely-available option for all parties, not just those who can afford private mediation.

At a minimum, a mediation docket could have two or three highly skilled and trained judges and judge trial referees dedicated to providing mediation services for cases. The

docket could be in any court facility in the state. Judges and judge trial referees could be assigned to the mediation docket only after the completion of a basic training curriculum. Provision could be made for extended hours to allow mediation to continue beyond the traditional 9 to 5 work day or into the weekend. The possibility of creating a space dedicated to mediation, with larger conference rooms and smaller comfortable break-out rooms, which would be more conducive to communication, could also be considered.

As a first step, however, the chief court administrator should solicit input from focus groups of judges and judge trial referees to determine whether there are judges and judge trial referees who are willing to serve a lengthy period as a mediator. These focus groups of judges and judicial trial referees could provide feedback on whether the mediation docket would be another type of assignment or whether judges or judge trial referees would prefer to do mediation one or two days per week or one week per month. Feedback could also be obtained on the re-engineering focus group suggestion that the Branch have a dual system for mediation, maintaining the flexibility of the existing Judicial-ADR program that allows parties to select any judge in the state as a mediator in addition to a mediation docket.

The development of a mediation docket would address the concerns of the bar about finding a mediator with sufficient time to mediate a case. It would also ensure that judges who serve as mediators are recognized and valued for their expertise.

Whether judges and judge trial referees are serving as mediators specifically assigned to a mediation docket or providing mediation under the auspices of the existing Judicial-ADR program, it would be helpful for parties and attorneys to have additional information about their experience and practices. Providing this type of information was a recommendation of the ADR Commission as well as a need expressed by the focus group participants.

The success of any mediation is dependent upon the dispute resolution skills and expertise of the mediator and the confidence of the participants in the mediator and in the process. Knowing the qualifications and experience of a potential mediator, such as any specialized substantive expertise, would assist parties in selecting a mediator in those

situations where specific subject matter knowledge may be critical. In addition, it is helpful to know a mediator's practices. Does the mediator meet directly with the parties or only with counsel? Will the mediator handle a matter involving a self-represented party? Does the mediator use a facilitative approach, assisting parties in reaching an acceptable agreement, or an evaluative process, providing a non-binding confidential evaluation of a case? This type of information on mediators, including information regarding their areas of substantive expertise should be gathered from those who want to serve as mediators so that it can be provided to parties and counsel as they choose a mediator.

Re-engineering focus groups also suggested having attorneys serve as mediators. The attorneys would receive a stipend on a per diem basis, like an attorney trial referee. For example, attorneys with particular expertise in construction law, commercial disputes, or probate law, could be an invaluable asset in resolving those kinds of cases, where the substantive expertise in a specialized area is essential to understanding the issues of the case. These attorneys would be provided the same training and educational opportunities that are provided to judges and judge trial referees.

Comments from the re-engineering focus groups once again echoed the recommendations of the ADR Commission in the area of arbitration. The existing arbitration program is intended to provide a non-binding process in jury cases with a value of less than \$50,000 for parties to be heard and achieve a disposition prior to trial. The hearing is before an arbitrator, is not on-the-record and can be mandated by the court. There is a right to a trial de novo after the arbitration.

The report of the ADR Commission recommended that the Judicial Branch develop uniform criteria for the appointment of arbitrators, provide training for appointed arbitrators, and adopt uniform, formal procedures for hearings. Similarly, the re-engineering focus groups pointed out that as it exists currently, court-mandated arbitration is not effective for many of the same reasons addressed by the ADR Commission's recommendations: the lack of expertise and overall qualifications of available arbitrators; and a lack of agreement on the process and procedures of arbitrations, such as when the

collateral source hearing should occur, if a bill of costs is required when the nonbinding arbitration becomes a judgment or whether the parties must attend the proceedings. A further complication is the common perception that, in some places, the reason for the referral is solely to allow the assignment of a judge trial referee to preside over the trial de novo. As a result of this perception, arbitrations are ineffective, costly and almost inevitably result in a trial de novo. Using arbitration in this way can be viewed as a waste of time and resources for the Judicial Branch, the arbitrator, the attorneys and the parties. It is rarely used willingly by parties for these reasons. In line with the recommendations of the ADR Commission, the Branch should establish specific uniform criteria for recruiting and selecting attorneys to serve as arbitrators and should require them to participate in a Branch-created and administered training program upon appointment and on a continuing basis during the term of their appointment. Similar requirements would be appropriate to consider for attorney fact-finders and attorney trial referees. There is a great deal of experience and expertise among the members of the bar, and in several jurisdictions, attorneys have been more than willing to serve as special masters to resolve discovery disputes or facilitate the settlement of administrative appeals, such as tax or unemployment appeals. Encouraging the use of these types of programs in every district will require collaboration with the bar, administrative judges and judicial administration. An additional suggestion from the re-engineering focus groups was to raise the limit on the value of cases from \$50,000 to \$75,000 or even \$100,000, to broaden the availability of arbitration, and perhaps increase its use.

In short, it is incumbent upon judicial administration to develop uniform criteria to identify judges, judge trial referees and members of the bar with the skills, expertise and interest to serve as effective mediators, arbitrators, special masters or other ADR resources; to provide necessary training and educational opportunities; to review the current limit on the value of cases; and to ensure that ongoing monitoring and evaluation of alternative dispute resolution programs and providers is accomplished. As part of this monitoring

process, efforts should be made to identify the success of programs as a whole and of mediators, for example, in resolving cases.

Finally, several of the re-engineering focus groups touched on the availability of new technology on the Internet, to resolve some disputes. Dispute resolution at its basic level involves communication between and among parties who disagree and a neutral, and the processing of the information gleaned from those communications to arrive at a resolution. Rather than avoiding these alternative options, the Judicial Branch may consider exploring these new kinds of options, such as algorithm-driven case resolution or electronic submission and adjudication in place of case resolution that must take place in front of a judge or within the four walls of a courthouse to streamline the small claims process. The Branch may consider developing a pilot program using these new technologies in small claims matters while providing the option of the traditional hearing in the small claims court as a way to evaluate the efficacy of such an option in a court environment, ensuring that it is feasible, reliable and continues to engender the trust and confidence of those who come to the courts for assistance.

Addressing the Needs and Impact of Self-represented Parties

The re-engineering of the civil justice system cannot be accomplished without addressing the needs and impact of the ever-increasing number of self-represented parties in civil cases. Some people are forced to represent themselves because the cost of legal representation is too high. Others choose to represent themselves, believing that they can navigate the court system effectively on their own, without the assistance of an attorney. Regardless of the reasons behind the choice, undoubtedly the self-represented population is increasing, and their presence is impacting judges, court staff, attorneys and the entire civil justice system in critical ways.

Focus group attendees expressed concern over the lack of representation for so many people. The adversary system, with two legally-trained opponents presenting

evidence and making arguments in front of a neutral judge, is the cornerstone of the court system in Connecticut and elsewhere. However, when one side is represented by counsel and the other side is not, there is no longer equal representation. As was pointed out by the focus groups, this inequality is particularly evident in collections and foreclosure matters, where so many defendants are trying to navigate the unfamiliar world of the civil non-family courts. Often a self-represented party does not understand what must be done to avoid a default or judgment, and as a result, judgments can be entered based upon insufficient documents, for example. At the very least, self-represented parties can unintentionally cause delays and extended time at court for all participants in the process. This is completely understandable: the rules of practice can be confusing for attorneys, who have had years of legal education. How much more confusing must concepts like “return date” or “special defenses” be for a self-represented party?

To try to address the needs of self-represented parties, for many years, the Judicial Branch has been committed to a variety of programs and services. Court Service Centers and Public Information Desks have been established in almost every judicial district; volunteer attorney programs in the areas of foreclosure and family law have been implemented in six locations and the Judicial Branch has partnered with the CBA to implement two additional volunteer attorney programs in Small Claims in the Hartford and Middletown Judicial Districts. With the continued generous cooperation of the bar, such programs will be expanded further. The Branch may also want to look at the possibility of expanding the existing pilot on limited scope representation in family matters to civil matters. In addition, materials and forms on the Judicial Branch website are being revised and simplified on an ongoing basis; and tutorials and guides to assist self-represented parties in defending lawsuits and filing appearances, for example, are continuously being developed by the law librarians; and the Branch has established close ties with the Legal Services Community, partnering in making videos to assist self-represented parties and address their needs in other ways.

These various programs and efforts have been undertaken by the Branch under the auspices of several committees, most recently through the Access to Justice Commission, which is co-chaired by the Hon. Elliott Solomon and the Hon. Maria Kahn. Those efforts will continue. The Branch recently held the second Pro Bono Summit, bringing both the needs and the opportunities available to meet those needs to the attention of the entire legal community. Attendees at the focus groups were clear that pro bono alone is not sufficient to address the needs of the self-represented parties; help for people with moderate means is also necessary. Too many people are in the position of having too much money to qualify for free legal services, but not having enough to retain private legal counsel. The Connecticut Bar Association and its Young Lawyers Section are working on the development of a modest/moderate means program, sometimes referred to as “low bono,” to assist those people who cannot get help from traditional Legal Services organizations. The Judicial Branch is participating in this effort as part of a work group formed under the auspices of the Access to Justice Commission, to assist in appropriate ways with the implementation and fostering of such a program.

Specifically through the civil re-engineering process, it may be possible to address some of the issues that contribute to the high cost of litigation, for example through reforms to the discovery process or changes in the way matters are scheduled to get lawyers in and out of court more quickly. Such changes would also benefit attorneys providing pro bono and low bono assistance to self-represented litigants. The focus groups proposed a number of other options to assist self-represented parties for the Branch’s consideration. One suggestion was to expand the volunteer program specifically into the consumer collections area, where so many litigants must represent themselves. Another was to consider the development of some type of notice to be served in all cases that could more fully explain the process and who a defendant can contact with questions. Several people suggested that the limit on small claims jurisdiction should be raised to \$10,000 so that self-represented parties would have a forum with more relaxed rules and procedures in which to litigate. Similarly, focus groups proposed the creation of a docket with

simplified rules and limited discovery options as a means of simplifying the entire litigation process for self-represented parties. As a part of this re-engineering process, the Judicial Branch should explore ways to ensure that the needs of self-represented parties are being met. The Judicial Branch could refer some of these suggestions to the existing Access to Justice Commission for review and discussion.

A final issue that was raised by the focus groups in connection with self-represented parties is the disparity of treatment of self-represented parties in court. Several people observed that a self-represented party is not held to the same standard as an attorney in terms of following the rules and orders of the court. Striking a balance between flexibility for the sake of a confused self-represented party and fairness to all other parties is not an easy task. The Judicial Branch may want to consider providing training specifically geared toward assisting judges as they negotiate this difficult line.

Conclusion

The general concepts and recommendations discussed briefly in this report are not, of course, the end of the civil-re-engineering process. The areas to be addressed are many: reviewing and analyzing case management and scheduling practices; developing appropriate training and education options; expanding and monitoring individual calendaring programs statewide; discussing and drafting rules and statutes to address discovery issues and other aspects of litigation practice; expanding and enhancing available alternative dispute resolution options; and addressing the challenges of self-represented parties. The tasks that will result in the re-engineering of the civil litigation system will be accomplished through existing committees and commissions, such as the Civil Commission, the Rules Committee and the Access to Justice Commission, judicial administration, judges, Judicial Branch staff and members of the bar.

As the next step in the re-engineering process, the chief court administrator has convened a small steering committee to meet and develop a detailed plan with a specific

timeline to accomplish the implementation of the recommendations and the evaluation and possible implementation of the general concepts. The steering committee will also monitor the implementation of the plan on an ongoing basis, to evaluate the progress that is made and to make adjustments to the plan in response to changing circumstances.

Re-engineering the civil litigation system is another step in the ongoing efforts of the Branch to realize its vision of ensuring access to the courts and delivering effective, uniform and consistent services to a diverse public. It is also an essential step toward fulfilling the mission of the Judicial Branch “to serve the interests of justice and the public by resolving matters brought before it in a fair, timely, efficient and open manner.”