

Civil Justice Initiative

New Hampshire: Impact of the Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules

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Acknowledgements



Note: The Carroll County Superior Court was one of two courts to implement the PAD rules on a pilot basis beginning October 1, 2010. The Strafford County Superior Court was the second pilot court.

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Across the nation, a growing chorus of judges, lawyers, business leaders, and consumer advocates is calling for reforms to the American civil justice system. Civil litigation, they argue, has become too time-consuming, too expensive, and too unpredictable. Both plaintiffs and defendants claim they are forced to settle cases because the cost of pursuing litigation through trial greatly outweighs settlement costs. For some litigants, the costs of initiating litigation are so high that they are effectively excluded from the civil justice system entirely; plaintiffs forego filing claims and defendants accept a default judgment rather than respond to a complaint. Recent surveys of judges and lawyers have identified discovery as a frequent source of unnecessary cost and delay.¹ Other factors perceived to be driving up costs are excessively adversarial relationships between opposing counsel, too little pretrial supervision by judges, and complications with electronic discovery.²

To address these concerns, many state and federal courts have begun to develop and implement civil justice reform efforts intended to streamline the litigation process, to minimize the potential for discovery disputes, and to expedite the fair resolution of civil cases.³ New Hampshire was one of the first jurisdictions to revise its rules of civil procedure with these objectives in mind. The project began under the leadership of Chief Justice John Broderick (ret.) of the Supreme Court of New Hampshire. In 2009 he appointed eight members of the New Hampshire Fellows of the American College of Trial Lawyers. Their task was to review the report and recommendations of the Institute for the Advancement of the American Legal System (IAALS), which outlined 29 principles concerning effective civil procedure, and to recommend appropriate revisions to the New Hampshire Rules of Civil Procedure given the unique characteristics of civil practice in the New Hampshire Superior Court. Justice Robert Lynn, then Chief

Justice of the New Hampshire Superior Court, and Philip Waystack co-chaired the committee.⁴

Based on their discussions, the committee ultimately proposed the Proportional Discovery/Automatic Disclosure (PAD) Rules, a set of five rules governing pleadings, case structuring orders, automatic disclosure, written interrogatories and depositions, and discovery of electronically stored information (ESI).⁵ To test the rules' effectiveness, the committee also recommended that the rules be enacted on a pilot basis in Carroll and Strafford Counties. These courts were selected in part because their respective Chief Judges and Clerks of Court⁶ had expressed interest in the proposed reforms and were willing to cooperate in a pilot test. In addition, both courts had recently converted to a new case management system, which was being implemented on a rolling basis statewide, so court administrative staff had time to assist in the implementation of the new rules. On April 6, 2010, the Supreme Court of New Hampshire entered an Order adopting the PAD rules on a pilot basis in Carroll and Strafford Counties effective October 1, 2010 with the expectation that the rules would apply to all newly filed civil cases. Before the rules went into effect, the PAD Pilot Rules Committee and the pilot courts undertook a fairly extensive effort to educate the local bar about the changes.

State and federal courts across the nation are very interested in the impact of these and other civil justice reform efforts. To ensure that state courts would have access to reliable information on which to judge the efficacy of those efforts, the National Center for State Courts (NCSC) secured a grant from the Bureau of Justice Assistance of the U.S. Department of Justice to conduct evaluations of civil rules reform projects in up to four jurisdictions.⁷ With the support of the Supreme Court of New Hampshire, the PAD Pilot Rules were selected as the first project to be evaluated.

¹ CORINA GERETY, EXCESS & ACCESS: CONSENSUS ON THE AMERICAN CIVIL JUSTICE LANDSCAPE 8 (2011).

² *Id.*

³ Civil justice reform efforts encompass a range of initiatives including efforts to ensure that discovery activity is proportional to the issues at stake in the litigation, to expedite trial dates, and to restrict the amount of time expended in trial.

⁴ In November 2010, Justice Lynn was appointed to the Supreme Court of New Hampshire.

⁵ PAD Pilot Rules Project: Report and Proposed Rule Changes.

⁶ Judge Kenneth C. Brown and Clerk of Court Julie Howard, and Judge Steven M. Houran and Clerk of Court Patricia Lenz agreed to oversee the implementation of the rules in Strafford and Carroll Counties, respectively.

⁷ BJA No. 2009-D1-BX-K038. In addition to the New Hampshire PAD Pilot Rules Evaluation, the NCSC is evaluating the impact of civil justice reforms in Utah (revisions to U.R.C.P. Rule 26) and Oregon (Expedited Civil Jury Trial Program), and recently completed a series of case studies of summary jury trial programs in six jurisdictions.

Summary of PAD Pilot Rules and Evaluation Hypotheses

The PAD Pilot Rules enacted on October 1, 2010 apply to all newly filed non-domestic civil cases.⁸ The rules are not retroactive and thus do not apply to cases filed before October 1, 2010.

Pilot Rule (PR) 1 changed the pleading standard in New Hampshire from notice pleading to fact pleading. Parties are required to file a Complaint or Answer and to state the material facts on which any claim or defense is based. The intent of this rule is to expedite the case initiation process for both the plaintiff and the defendant by providing each with sufficient factual information to begin evaluating the merits of their respective positions. This rule replaces the previous system of notice pleading in which plaintiffs filed a writ providing notice of the suit, and defendants entered an appearance acknowledging the suit, but neither party was required to specify the factual basis for the suit or defenses until discovery was underway.

PR 2 requires the parties to meet and confer within 20 days of the filing of the Answer to establish deadlines for various discovery events, alternative dispute resolution (ADR) proceedings, dispositive motions, and a trial date, and submit a written stipulation to the court, which becomes the case structuring order. If the parties are unable to agree on these deadlines or other pretrial matters, the court will schedule a structuring conference and will issue a case structuring order accordingly. For parties who are able to reach an agreement on all aspects of case structuring, the revised rule eliminates the need for a case structuring conference. The rule also specifies the use of telephonic structuring conferences rather than in-court structuring conferences to reduce costs and increase efficiency. Finally, PR 2 extends the period for holding the case structuring conference from 45 days to 75 days after filing in light of the revisions to

PR 1 and PR 3 requiring fact pleadings and automatic disclosure to provide counsel with sufficient time to consider these materials.

PR 3 requires the parties to automatically disclose the names and contact information of individuals with information about the disclosing party's claims and defenses, and a brief summary of the information possessed by each person. The rule also requires the parties to automatically disclose all documents, electronically stored information, and tangible things to support the disclosing party's claims and defenses including a computation of damages (by category) and insurance agreements or policies under which any damages might be paid. Under PR 3, the parties have an affirmative duty to supplement their disclosures with any newly acquired information, and the court may impose sanctions against any party that fails to make these disclosures including barring the use of evidence related to those disclosures at trial.⁹ Like PR 1, the revision is intended to expedite discovery and to minimize gamesmanship and delay in the pretrial process.

PR 4 restricts the number of interrogatories that any party may serve to no more than 25, and the number of hours of deposition to 20 hours. These restrictions were put in place in light of the amount of information that parties are now entitled to under PR 1 and PR 3, which are expected to greatly reduce the amount of discovery needed to prepare for trial. These limitations may be waived by stipulation of the parties or by the court for good cause.

PR 5 establishes a separate meet and confer requirement for counsel to discuss the preservation of electronically stored information (ESI), and to agree on deadlines and procedures involving the production of ESI. PR 5(c) specifically requires that requests for ESI be proportional to the significance of the issues in dispute.

NCSC staff reviewed background information about the purposes of and expectations for the PAD Pilot Rules, flowcharts depicting case events and timelines required under the PAD Pilot Rules, and court forms to correspond to these PAD requirements. They also conducted interviews with a number of individuals, including judges, attorneys, court clerks and staff of the Administrative Office of the Courts, who were involved in drafting the PAD Pilot Rules and implementing them in Carroll and Strafford Counties. Based on this information, NCSC identified the following working hypotheses about the expected impact of the PAD Pilot Rules on civil case processing.

- The introduction of fact pleadings (PR 1) and automatic disclosures (PR 3) are expected to reduce the time from filing to disposition. This effect will occur primarily through a reduction in the amount of time expended on case initiation and discovery.
- The introduction of fact pleading (PR 1) and automatic disclosure (PR 3) are expected to reduce the number of discovery disputes. This effect will occur primarily by making most of the previously discoverable information (and thus subject to dispute) routinely available to the parties without the need for court intervention, and thus not as amenable to strategic gamesmanship. Alternatively, the introduction of fact pleading (PR 1) and automatic disclosure (PR 3) may delay the onset of discovery disputes as counsel become aware of additional information needed at a later stage in litigation.
- The requirement to meet and confer regarding case structuring (PR 2) is expected to reduce the number of in-court case structuring conferences. The reduction in in-court case structuring conferences will be partially offset by an increase in the number of telephonic case structuring conferences.

The PAD Pilot Rules enacted on October 1, 2010 apply to all newly filed non-domestic civil cases. The rules are not retroactive and thus do not apply to cases filed before October 1, 2010.

• The amount of time between the filing of the Answer and the date of the case structuring conference (PR 2) is expected to increase due to the extension of time from 45 days to 75 days specified in the rule. Alternatively, telephonic case structuring conferences may be scheduled more quickly than in-court conferences, which may offset some of the time differential.

• Litigation costs are expected to decrease as a result of the reduction in the amount of time expended in case initiation and discovery.

• Litigation costs are expected to decrease due to the use of telephonic case structuring hearings.

⁸ The PAD Pilot Rules exempt some types of civil matters, primarily filings related to criminal matters (e.g., civil stalking petitions, grand jury matters, habeas petitions, bond claims) and agency appeals (e.g., Labor Board, Dept. of Motor Vehicles).

⁹ Pursuant to Rule 35(g)(2) of the Rules of Superior Court, permissible sanctions for discovery abuse include imposing monetary sanctions, ordering that designated facts be taken as established by the party adversely affected by the abuse, prohibiting the offending party from introducing certain matters into evidence, striking all or part of the claims or defenses, entering full or partial judgment in favor of the plaintiff or defendant, or staying the proceedings ordered discovery has been provided.

Evaluation Methodology and Data

This evaluation employs a quasi-experimental design that compares case processing outcomes for cases filed in the pilot courts under the PAD Pilot Rules with those for cases filed under the previous rules of civil procedure. By restricting the analysis to the pilot courts instead of comparing the pilot courts to other Superior Courts in New Hampshire, this strategy avoids potential bias associated with baseline differences in case processing practices and outcomes between the pilot courts and other courts that are unrelated to the PAD Pilot Rules. This is especially important in a small state such as New Hampshire, where the individual practices of a single judge or court clerk can have a

large influence on case processing statistics for an entire court, making it impossible to isolate the impact of other factors such as variations in court rules.¹⁰

The pre-implementation data cover Superior Court cases filed in Carroll and Strafford Counties between July 1, 2008 and June 30, 2010. The post-implementation data describe cases filed between October 1, 2010 and September 30, 2012.¹¹ Each group includes all case types subject to the PAD Pilot Rules filed in the pilot counties during the time period in question. Both pre-implementation and post-implementation cases were followed until February 1, 2013.

The final data set comprises 2,947 cases.¹² Sixty-eight percent (1,999 cases) were filed in Strafford County, with the remaining 32 percent filed in Carroll County (see Table 1). Just under half (47%) were processed under the PAD Pilot Rules.

Table 2 compares the caseload composition for the pre-implementation and post-implementation data. During both the pre-implementation and post-implementation periods, debt collection cases represented the largest share of civil caseloads, followed by tort cases. There is a small but statistically significant difference in caseload composition between

the pre-implementation and post-implementation periods, driven primarily by a decrease in the proportion of contract/commercial cases and an increase in the proportion of petitions for equitable relief (e.g., accountings, partnership dissolution, receivership, specific performance, and injunctive relief).

Table 3 shows the length of observation and the percentage of cases that reached a disposition during the observation period for the pre-implementation and post-implementation data. Each case was observed until the entry of the initial judgment or until February 1, 2013, whichever occurred first.

Table 1: Civil Cases Filed in Carroll and Strafford Counties, July 1, 2008 – June 30, 2010 and October 1, 2010 – September 30, 2012

COUNTY	PRE-IMPLEMENTATION	POST-IMPLEMENTATION	TOTAL
Carroll			
number	475	473	948
percentage	50%	50%	100%
Strafford			
number	1,098	901	1,999
percentage	55%	45%	100%
Total			
number	1,573	1,374	2,947
percentage	53%	47%	100%

notes: Includes only case types subject to PAD rules. 24 additional cases excluded due to missing data or as duplicates.

Table 2: Civil Caseload Composition for Carroll and Strafford Counties

CASE TYPE	PRE-IMPLEMENTATION	POST-IMPLEMENTATION
Contract/commercial	14%	10%
Debt collection	34%	34%
Tort	29%	29%
Real property	5%	6%
Petition	15%	18%
Administrative agency appeal	2%	2%
Other	1%	1%
Total	100%	100%
Chi-square	191,167	
Degrees of freedom	6	
p(x ²)	.004	

n = 2,947

notes: Includes cases filed July 1, 2008 – June 30, 2010 and October 1, 2010 – September 30, 2012. Includes only case types subject to PAD rules.

¹⁰ The evaluation team explored the possibility of comparing the change in case processing statistics over time between the two pilot courts and two similar courts that did not implement the PAD Pilot Rules, in order to isolate the impact of the PAD Pilot Rules from the influence of any statewide phenomena that might have occurred over the same period. This approach proved impracticable due to small sample sizes and the appointment of a new court clerk in one of the comparison courts during the evaluation period, an event that was associated with dramatic changes in case processing practices in that court.

¹¹ The three-month gap in filing dates between the end of the pre-implementation period and the beginning of the post-implementation period was designed to avoid potential complications related to strategic filing in advance of the PAD implementation date by attorneys wishing to litigate their cases under the previous rules of civil procedure. Due to constraints in the project timeline, it was not possible to allow a similar gap between the PAD implementation date of October 1, 2010 and the beginning of post-implementation data collection.

¹² Twenty-four additional cases were excluded from the analysis due to missing disposition dates or because they appeared to be duplicate records.

Because the pre-implementation cases were filed earlier, it was possible to follow them for a longer period of time. The average length of observation was 55 days longer for pre-implementation cases than for post-implementation cases (289 days versus 234 days); the maximum period of observation was nearly twice as long (1,662 days versus 846 days). The longer time horizon for data collection provided a greater opportunity for pre-implementation cases to reach a disposition during the period of observation: 99 percent of pre-implementation cases were resolved within the observation period, as compared to 75 percent of post-implementation cases. To avoid any bias in the evaluation results associated with the

different follow-up periods for pre-implementation and post-implementation cases, the evaluation team employed survival analysis techniques as well as restrictions on the timing of certain case events.

To provide a broader context for the evaluation findings, in October 2011 NCSC staff conducted qualitative interviews with key stakeholders involved in the development and implementation of the PAD Pilot Rules, including judges, court clerks, court staff, staff of the New Hampshire Administrative Office of the Courts. To gain the perspectives of practitioners, NCSC staff also interviewed attorneys who had litigated cases under the PAD Pilot Rules but had not been involved in the development of the rules.¹³

Table 3: Length of Observation and Percentage Disposed for Cases in Evaluation Data Set

	PRE-IMPLEMENTATION	POST-IMPLEMENTATION	TOTAL
Time observed (days)			
mean	289	234	263
maximum	1,662	846	1,662
Percentage disposed	99%	75%	87%
n	1,554	1,362	2,916

notes: Includes Superior Court cases filed in Carroll and Strafford Counties July 1, 2008 – June 30, 2010 and October 1, 2010 – September 30, 2012. Includes only case types subject to PAD rules.

¹³ NCSC also pilot tested a new methodology for estimating civil litigation costs with a small sample of extremely experienced civil trial attorneys who routinely practice in counties other than Strafford and Carroll Counties and a second sample of attorneys who routinely practice in the PAD courts. See PAULA HANNAFORD-AGOR & NICOLE L. WATERS, CASELOAD HIGHLIGHTS: ESTIMATING THE COST OF CIVIL LITIGATION (Jan. 2013). Unfortunately, the attorney characteristics for the two samples were sufficiently different in terms of law firm size, client base, and the size of the local population that differences in the cost estimates could not be attributed solely to the implementation of the PAD Pilot Rules rather than to differences among the survey respondents.

The most important working hypothesis concerning the impact of the PAD Pilot Rules was an expected reduction in the time from filing to disposition. Virtually all of the PAD Pilot Rule provisions were intended to expedite the pleading and discovery process, permitting litigants to resolve cases more quickly. Of course, a necessary condition for this impact to take place is litigant awareness of and compliance with the rules changes. This section examines the pre-implementation and post-implementation case-level data to determine whether civil cases filed in Carroll and Strafford Counties resolve more quickly after implementation of the PAD Pilot Rules and the extent to which litigants complied with the new requirements.

TIME TO DISPOSITION

To analyze the impact of the PAD Pilot Rules on time to disposition, the NCSC employed survival analysis techniques. Survival analysis examines how long a unit (e.g., a civil case) “survives” in one state (e.g., pending) before experiencing “failure,” or a transition to another state (e.g., disposed). In practice, it is not possible to observe the event of failure for each unit in a sample because some units will not fail until after the study has concluded. For these observations, known as “censored” observations, the observed survival time ends when the study’s follow-up period ends, which is earlier than the actual point of failure. Because the observed survival times of the censored observations are shorter than their actual survival times, classical linear regression would produce biased estimates of the effects of the independent variables on survival time and might lead to erroneous conclusions about these impacts. Unlike linear models, survival models take censoring into account, eliminating the associated bias.¹⁴

Here, the unit of analysis is the case, failure is defined as the first disposition, and survival time is defined as the number of active days from filing until disposition or the end of the follow-up period, whichever occurred first.¹⁵ Kaplan-Meier survival analysis was employed to provide a graphical comparison of the survivor functions for pre-implementation and post-implementation cases. The Cox proportional hazards model then controlled for the influence of multiple explanatory variables, such as case type and pilot court, on the probability of disposition.

Figure 1 shows the Kaplan-Meier survivor functions for pre-implementation and post-implementation cases.¹⁶ Each survivor function plots the cumulative probability of a case’s “surviving” without a disposition (on the vertical axis) up to a particular point in time (on the horizontal axis). If the PAD Pilot Rules reduce the time from filing to disposition — and hence the cumulative probability of survival at any given point in time — the curved line illustrating the survivor function for post-implementation cases should lie below the curved line illustrating the survivor function for pre-implementation cases. Contrary to expectations, however, the two survivor functions are virtually identical.¹⁷ The log-rank test confirms that there is not a statistically significant difference in the time path of case dispositions between the two groups of cases.¹⁸

To provide a more nuanced picture of the PAD Pilot Rules’ impact on time to disposition, the NCSC employed the Cox multivariate survival analysis. Unlike the bivariate Kaplan-Meier technique, the Cox model can account for the impact of multiple explanatory variables on survival time. If factors other than whether the case was subject to the PAD Pilot Rules — such as case type — are correlated both with time to disposition and with whether the case was subject to

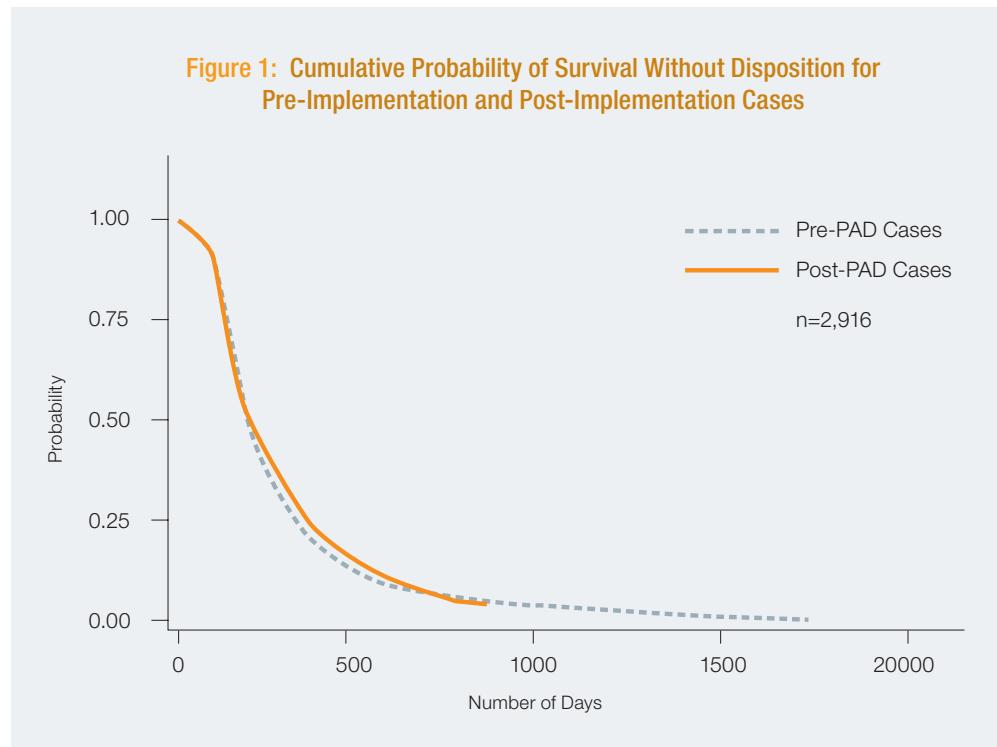
¹⁴ See JANET M. BOX-STEFFENSMEIER & BRADFORD S. JONES, EVENT HISTORY MODELING 7-16 (2004).

¹⁵ Survival time does not include time spent in an inactive pending status.

¹⁶ The Kaplan-Meier technique relies upon no assumptions regarding the shape of the baseline survivor function, estimating the function entirely on the basis of the available data and eliminating the possibility of bias due to faulty assumptions about the functional form. The technique estimates the survivor function by calculating the cumulative probability of survival at each failure point. Each case in which the event of failure was observed is factored into the analysis along the entire curve. A censored observation, in which the event of failure was not observed, is only factored into the analysis up to the time when observation ceased.

¹⁷ Because pre-implementation cases were observed for a longer time than post-implementation cases, the survivor function for pre-implementation cases can be estimated over a longer period than the survivor function for post-implementation cases. This is why the survival curve for post-implementation cases appears to be shorter than the survival curve for pre-implementation cases.

¹⁸ The log-rank test fails to reject the null hypothesis that the survivor functions for the two groups are equivalent ($\chi^2 = 1.30$, 1 degree of freedom, $p(\chi^2) = 0.255$).



the PAD Pilot Rules, failure to include these variables in the model may lead to a biased estimate of the PAD Pilot Rules' impact on time to disposition. The Cox model accommodates these additional explanatory variables, eliminating that bias.

The primary variable of interest in the Cox model is an indicator for cases filed after implementation of the PAD Pilot Rules. Because the caseload composition differs somewhat between the pre-implementation and post-implementation groups, and because case type affects time to disposition, our Cox model includes a set of dummy variables for case type. Because case processing practices may have differed between the

two pilot courts, the model also includes an indicator variable for court.¹⁹

The estimated effects of the explanatory variables in the Cox model are presented in terms of hazard ratios. Each hazard ratio shows the impact of a one-unit change in the value of the explanatory variable on the probability of a case disposition's occurring at any particular point in time, provided that the case has remained open up until that time.²⁰ A hazard ratio greater than one indicates that the explanatory variable increases the probability of disposition at any given point in time, decreasing overall time to disposition. Conversely, a hazard ratio less than one indicates that

the explanatory variable decreases the probability of disposition at any given point in time, increasing time to disposition. If the PAD Pilot Rules have the intended effect of reducing time to disposition, the hazard ratio on the PAD indicator should be greater than one.

Table 4 displays the estimated Cox model. Contrary to expectations, the hazard ratio of .94 on the PAD indicator does not differ significantly from 1.00. In other words, the model does not show that the PAD Pilot Rules have a statistically significant impact on the

probability of a case disposition. Taken together, the results of the Kaplan-Meier and Cox analyses provide no evidence that the PAD Pilot Rules have had the desired effect of reducing time to disposition. To confirm that the lack of an impact on time from filing to disposition is due to the PAD Pilot Rules themselves rather than to litigant noncompliance with the rules, the next several analyses investigate the extent to which legal practice changed in response to the new rules.

Table 4: Estimate Relative Risks of Case Disposition, Cox Proportional Hazards Model

VARIABLE	HAZARD RATIO	P(Z)
Filed after PAD implementation	.94	.130
Case type (reference = tort)		
Contract	1.12	.104
Debt collection	2.95	< .001
Real property	1.05	.639
Petition	20.66	< .001
Agency appeal	.02	.002
Other	1.35	.153
Carrol County (reference = Strafford)	1.84	.006
Time-varying effects*		
Debt collection	.95	.290
Petition	.60	< .001
Agency appeal	2.36	< .001
Carrol County	.86	< .001

n= 2,916; 2,549 failures

*Variables with time-varying effects interacted with ln (survival time).

¹⁹ The Cox model relies upon the assumption that the impact of each explanatory variable on the risk of failure remains constant over time; this assumption is also known as the proportional hazards assumption. When the data do not support this assumption with respect to a particular variable, it is necessary to model the time-dependence of that variable's effect by including an interaction between the variable in question and a function of time. Here, interactions between the natural logarithm of survival time and the dummy variables for collections cases, petitions, agency appeals, and cases filed in Carroll County were included in the analyses.

²⁰ More formally, a hazard ratio is the ratio of the hazard rate associated with a one-unit change in the value of the explanatory variable to the baseline hazard rate, holding the values of all other explanatory variables constant. Each hazard rate represents the conditional probability of a failure's occurring within some particular interval of time, conditional on the unit's survival until the beginning of the interval. See BOX-STEFFENSMEIER & JONES, *supra* note 14, at 13-15, 50.

ANSWERS

PR 1 requires each defendant to file an Answer to the Complaint. Under the previous rules of civil procedure, an Answer was not required. The PAD Pilot Rules are therefore expected to greatly increase the proportion of cases in which an Answer is filed. The facts alleged or denied in the Complaint and Answer were intended to inform litigants of their opponents' positions and expedite their assessment of those allegations. To ascertain whether this impact occurred, the NCSC compared the proportion of cases in which an answer was filed within 120 days after the filing of the complaint before and after the implementation of the PAD Pilot Rules (Table 5).²¹ This proportion rose from 15 percent to 56 percent, a statistically significant increase. The qualitative interviews indicated that many New Hampshire attorneys are familiar with the Federal Rules of Civil Procedure (which also require fact pleading and an Answer) because they also practice in federal court or in Maine, which follows the federal rules, and younger attorneys have recent exposure to the federal rules in law school. These attorneys reported that they routinely engaged in fact pleading and sometimes filed Answers in Superior Court even before the PAD Pilot Rules were implemented. This phenomenon likely explains the 15 percent answer rate observed before the implementation of the PAD Pilot Rules.

PR 1 requires the defendant to file an Answer within 30 days. Because the PAD Pilot Rules do not explicitly abolish the existing requirement that the defendant enter an appearance within seven days after the return date,²² the Superior Courts in Stafford and Carroll Counties also require the defendant to enter an appearance within 30 days after service of the Complaint.²³ During the pilot period, a defendant's failure to file an Answer and/or enter an appearance within 30 days after service of the Complaint resulted in the automatic issuance of a notice of conditional default. The court then allowed the defendant to cure the default by filing an Answer and/or entering an appearance.²⁴

Table 6 shows the percentage of cases in the post-implementation group in which a notice of conditional default for failure to file an Answer and/or appearance was issued within 120 days of case filing.²⁵ The rate of conditional default involving failure to file an Answer (13 percent) was slightly less than the rate of conditional default due solely to failure to file an appearance (14 percent).²⁶

Table 7 shows the percentage of conditional defaults for failure to file an Answer that led to the subsequent filing of an Answer. Overall, 37 percent of defendants

Table 5: Percentage of Cases With Answer Filed Within 120 Days of Case Filing for Pre-Implementation and Post-Implementation Cases

ANSWER FILES WITHIN 120 DAYS	PRE-IMPLEMENTATION	POST-IMPLEMENTATION
No answer	85%	44%
Answer filed	15%	56%
Total	100%	100%
Chi-square	568,031	1
Degrees of freedom		< .001
p(x ²)		

n = 2,947

notes: Includes cases filed July 1, 2008 – June 30, 2010 and October 1, 2010 – September 30, 2012. Includes only case types subject to PAD rules.

Table 6: Rate of Conditional Default for Failure to File Answer and/or Appearance, Post-Implementation Cases

TYPE OF CONDITIONAL DEFAULT	PERCENTAGE OF CASES
Failure to file answer and appearance	7%
Failure to file answer	6%
Failure to file appearance	14%
All types	27%

n = 1,374

notes: Includes cases filed October 1, 2010 – September 30, 2012. Includes only case types subject to PAD rules.

Table 7: Percentage of Conditional Defaults For Failure to File Answer With Answers Subsequently Filed, Post-Implementation Cases

TYPE OF CONDITIONAL DEFAULT	PERCENTAGE WITH SUBSEQUENT ANSWER
Failure to file answer and appearance	16%
Failure to file answer	62%
Failure to file answer and appearance or answer only	37%

n = 175

notes: Includes cases filed October 1, 2010 – September 30, 2012, of case types subject to PAD rules, in which a notice of conditional default due to failure to file answer and appearance or failure to file answer was filed within 120 days after case filing. Includes only answers filed subsequent to notice of conditional default and within 120 days after filing.

²¹ In order to avoid bias due to the fact that cases filed earlier were observed for a longer period, it was necessary to consider only answers filed within a fixed window of time. PR 1 requires that the answer be filed within 30 days after the complaint is served on the defendant, which may occur 45 days or more after the complaint is filed in court. To allow sufficient time for service and to accommodate extensions of time to file the answer, a window of 120 days after filing was selected for purposes of this analysis.

²² N.H. SUP. CT. R. 14(a) (2013).

²³ Memorandum from Julie W. Howard, Clerk, Strafford County Superior Court to Attorneys, Legal Assistants & Litigants 7 (Jan. 22, 2013), available at <http://www.courts.state.nh.us/superior/civilrulespp/PRIMER-on-PAD-Rules.pdf>.

²⁴ As of October 1, 2012, a notice of default replaced the notice of conditional default for failure to file an answer or failure to file an answer and appearance. Because the PAD Pilot Rules neither require nor explicitly eliminate the requirement that the defendant enter an appearance, a notice of conditional default is still issued when the defendant files an answer but not an appearance. *Id.* at 10.

²⁵ The pre-implementation data did not reliably indicate conditional default rates for failure to file an Appearance. Consequently, the NCSC was unable to compare the pre-implementation and post-implementation data.

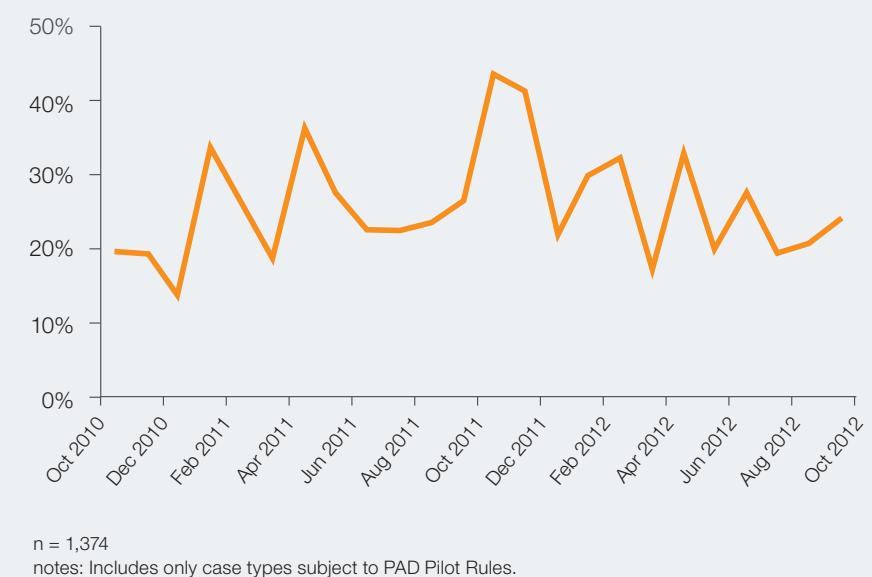
²⁶ The focus on notices of conditional default for failure to file an Answer and the responses to those notices is intended to measure the extent to which litigants are complying with the provisions of the PAD Pilot Rules. As a practical matter, approximately 11% of the pre-implementation cases ultimately resolved by default judgment because the defendant declined to challenge the plaintiff's claims. See Tables 13-15, *infra*. The frequency of strategic default should not be confused with that of unintentional non-compliance with the rules.

who received a notice of conditional default for failure to file an Answer went on to file an Answer. Answers were much more common in cases where the notice of conditional default was issued only for failure to file an Answer (62 percent) than in cases where the conditional default was due to failure to file both an Answer and an appearance (16 percent).²⁷

To determine whether compliance with the Answer and appearance requirements improved as attorneys

gained familiarity with the PAD procedures, Figure 2 plots the rate of conditional default for failure to file an Answer and/or appearance by month of case filing for post-implementation cases.²⁸ The rate ranges from 14 percent to 44 percent, with no trend evident over time. This suggests that there was no significant “learning curve” as lawyers acclimated to the new rules, but rather reflects normal fluctuations in the conditional default rate over time.

Figure 2: Rate of Conditional Default for Failure to File Answer and/or Appearance By Month for Post-Implementation Cases



STRUCTURING CONFERENCES

The requirement in PR 2 for the attorneys to meet, confer, and file a proposed structuring order within 20 days after the filing of the Answer is designed to reduce the need for structuring conferences, saving time and money for litigants, attorneys, and the court. When the parties cannot agree on a complete structuring order on their own, PR 2 instructs the court to hold the structuring conference by telephone whenever possible. This measure is intended to produce further cost savings by eliminating the need for attorneys to appear for in-court hearings, many of which were perfunctory matters.

To address the question of whether the PAD Pilot Rules have reduced the need for structuring conferences, Table 8 compares the proportion of cases in which a structuring conference was held within 270 days

after the filing of the Complaint before and after the implementation of the PAD Pilot Rules.²⁹ To ascertain the degree to which telephonic structuring conferences have replaced in-person structuring conferences, Tables 9 and 10 compare the proportion of cases in which each type of structuring conference was held within 270 days after filing. The proportion of cases in which any structuring conference was held within 270 days fell from 34 percent to 9 percent after implementation of the PAD Pilot Rules (Table 8). At the same time, the proportion of cases in which an in-person structuring conference was held within 270 days dropped from 31 percent to 2 percent (Table 9), while the proportion of cases in which a telephonic structuring conference was held within 270 days rose from 3 percent to 7 percent (Table 10). All of these differences are statistically significant.

Table 8: Percentage of Cases With Structuring Conference Within 270 Days of Filing for Pre-Implementation and Post-Implementation Cases

STRUCTURING CONFERENCE HELD WITHIN 270 DAYS	PRE-IMPLEMENTATION	POST-IMPLEMENTATION
No structuring conference	66%	91%
Structuring conference held	34%	9%
Total	100%	100%
Chi-square	214.784	
Degrees of freedom	1	
p(x ²)	< .001	

n = 2,699

notes: Includes cases filed July 1, 2008 – June 30, 2010 and October 1, 2010 – May 7, 2012. Includes only case types subject to PAD rules.

²⁷ The post-implementation data did not reliably indicate whether an appearance was filed in cases involving a conditional default for failure to file an answer.

²⁸ The focus on conditional default by month of filing, rather than month of entry of judgment, eliminates the potential for higher rates related to periodic sweeps for defaults by court clerks.

²⁹ The 270-day time window was selected to allow sufficient time for service of the complaint, the filing of the answer, and the scheduling of the structuring conference. Only cases filed at least 270 days before the end of the follow-up period were included in this analysis. As a practical matter, however, three-quarters of case structuring conferences were held within the first five months after filing (148 days). Half of the case structuring conferences took place within approximately 3.5 months after filing (111 days), significantly earlier than the 270-day margin employed in these analyses.

Table 9: Percentage of Cases With In-Person Structuring Conference Within 270 Days of Filing for Pre-Implementation and Post-Implementation Cases

IN-PERSON STRUCTURING CONFERENCE HELD WITHIN 270 DAYS	PRE- IMPLEMENTATION	POST- IMPLEMENTATION
No in-person structuring conference	69%	98%
In-person structuring conference held	31%	2%
Total	100%	100%
Chi-square	356.765	
Degrees of freedom	1	
p(x ²)	< .001	

n = 2,699

notes: Includes cases filed July 1, 2008 – June 30, 2010 and October 1, 2010 – May 7, 2012. Includes only case types subject to PAD rules.

Table 10: Percentage of Cases With Telephonic Structuring Conference Within 270 Days of Filing for Pre-Implementation and Post-Implementation Cases

TELEPHONIC STRUCTURING CONFERENCE HELD WITHIN 270 DAYS	PRE- IMPLEMENTATION	POST- IMPLEMENTATION
No telephonic structuring conference	97%	93%
Telephonic structuring conference held	3%	7%
Total	100%	100%
Chi-square	28.613	
Degrees of freedom	1	
p(x ²)	< .001	

n = 2,699

notes: Includes cases filed July 1, 2008 – June 30, 2010 and October 1, 2010 – May 7, 2012. Includes only case types subject to PAD rules.

Although the PAD Pilot Rules appear to have reduced the frequency of structuring conferences and replaced the majority of in-person structuring conferences with telephonic conferences, judges and court clerks report that many attorneys are failing to adhere to the meet-and-confer requirement or to file a proposed structuring order. Anecdotal reports from attorneys suggest that the timeline for the meet and confer

requirement is too brief for attorneys who are unfamiliar with the PAD Pilot Rules or with federal practice, as well as for self-represented litigants. There is also anecdotal evidence that, contrary to the assumption behind the rules, courts are finding telephonic structuring conferences cumbersome to schedule.³⁰ For these reasons, some judges are reportedly moving towards scheduling in-court compliance hearings

in place of telephonic case structuring conferences. During these hearings, the attorneys are required to explain why they have not filed a proposed structuring order in accordance with the PAD Pilot Rules.

Table 11 explores the sequence of the filing of the first structuring order³¹ and the first structuring conference for cases filed before and after implementation of the PAD Pilot Rules.³² Under the existing rules of civil procedure, many attorneys and litigants were already filing structuring orders either in place of a structuring conference (14 percent of cases) or in advance of the structuring conference (14 percent). After implementation of the PAD Pilot Rules, the proportion of cases in which a structuring order entirely replaced a structuring conference more than doubled to 34

percent, while the proportion of cases in which a structuring order was filed before a conference was held dropped to 2 percent. Consistent with the overall decline in the number of structuring conferences, the proportions of cases in which a structuring conference was held before the filing of a structuring order, and in which a structuring conference was held but no order was filed, each fell by more than one-half following implementation of the PAD Pilot Rules. These changes in event sequencing were statistically significant. Taken together, these observations suggest that, although many attorneys and litigants were already reaching agreement on some aspects of case structuring prior to the implementation of the PAD Pilot Rules, the new rules appear to encourage more frequent stipulation to complete structuring plans.

Table 11: Sequence of Structuring Order and Structuring Conference, Pre-Implementation and Post-Implementation Cases

SEQUENCE OF STRUCTURING ORDER AND CONFERENCE	PRE- IMPLEMENTATION	POST- IMPLEMENTATION
Neither order nor conference	53%	57%
Order only	14%	34%
Order before conference	14%	2%
Conference before order	14%	6%
Conference only	6%	2%
Total	100%	100%
Chi-square	291.347	
Degrees of freedom	4	
p(x ²)	< .001	

n = 2,699

notes: Includes cases filed July 1, 2008 – June 30, 2010 and October 1, 2010 – May 7, 2012. Includes only case types subject to PAD rules. Includes only events occurring within 270 days of case filing and before initial case disposition. Sum of percentages may exceed 100% due to rounding.

³¹ For purposes of this analysis, “structuring order” is defined as any type of structuring order, structuring conference order, or structuring conference statement, including proposed, stipulated, and final orders.

³² To avoid bias due to the varying length of follow-up, this analysis is limited to cases filed at least 270 days before the end of the study period and counts only events that occurred within 270 days after case filing and prior to the initial disposition.

³⁰ Memorandum from Julie W. Howard, *supra* note 23, at 8-9.

DISCOVERY DISPUTES

The automatic disclosure requirement in PR 3 is designed to forestall discovery disputes, thereby decreasing the potential for expensive satellite litigation related to discovery. To determine whether the requirement had an impact on the frequency of discovery disputes, we calculated the percentage of cases in which an event indicating the onset of a discovery dispute occurred within 365 days of case filing.³³ Such events included the filing of a motion for production of documents, motion for discovery, motion for protective order, motion to compel, motion to produce, motion for conditional default (which may be filed when interrogatories are not answered within 30 days), or petition for discovery, an objection to a request for admissions, and a hearing on a motion to compel or motion for discovery. Table 12 compares the frequency of discovery disputes for cases filed before and after the implementation of the PAD Pilot Rules.

Prior to the PAD implementation, discovery disputes were litigated in just 9 percent of cases. Contrary to expectations, there was not a statistically significant change in the proportion of cases in which a discovery dispute was litigated.

It is important to note that these discovery disputes were litigated in approximately one-tenth of civil cases in both the pre-implementation and post-implementation periods, which does not on its face suggest an overly litigious legal culture in which lawyers routinely complain of excessive discovery demands. The New Hampshire legal community has a reputation for collegiality. It is likely that when disagreements occur, most are resolved without court involvement. This does not discount the possibility that discovery disputes occur, but apparently they take place without court oversight and thus would be difficult to control through procedural rules.

Table 12: Percentage of Cases With Event Indicating Discovery Dispute Within 365 Days of Filing for Pre-Implementation and Post-Implementation Cases

DISCOVERY DISPUTE WITHIN 365 DAYS	PRE-IMPLEMENTATION	POST-IMPLEMENTATION
No event indicating discovery dispute	91%	90%
Event occurred indicating discovery dispute	9%	10%
Total	100%	100%
Chi-square	.467	
Degrees of freedom	1	
p(x ²)	.494	

n = 2,515

notes: Includes cases filed July 1, 2008 – June 30, 2010 and October 1, 2010 – February 2, 2012. Includes only case types subject to PAD rules.

DEFAULT JUDGMENTS

Finally, the attorney interviews suggested that the PR 1 requirements of fact pleading and an answer might have the effect of decreasing the number of default judgments. Two possible explanations for this effect are that the writ system created the impression among some defendants that it was not necessary to appear on the return day unless the defendant wished to contest the suit, or that the fact pleading requirement provides defendants with more information upon which to base a defense. To assess the validity of the assumption that PR 1 leads to fewer defaults, Table 13 compares the proportion of cases in which a default judgment occurred within 365 days after

filing.³⁴ As predicted, the proportion of default judgments fell by approximately one-quarter, from 11 percent to 8 percent of cases. This difference was statistically significant at the .05 level.

Because the majority of default judgments occur in debt collection cases, the NCSC also analyzed changes in the default rate separately for debt collection cases (Table 14) and cases of other types (Table 15). The decrease was roughly proportional across both groups of cases, providing no evidence that the PAD Pilot Rules' impact on the default rate was limited to debt collection cases.³⁵

Table 13: Percentage of Cases With Default Judgment Within 365 Days of Filing for Pre-Implementation and Post-Implementation Cases

DEFAULT JUDGMENT WITHIN 365 DAYS	PRE-IMPLEMENTATION	POST-IMPLEMENTATION
First judgment other than default	89%	92%
Default is first judgment	11%	8%
Total	100%	100%
Chi-square	5.033	
Degrees of freedom	1	
p(x ²)	.025	

n = 2,515

notes: Includes cases filed July 1, 2008 – June 30, 2010 and October 1, 2010 – February 2, 2012.

Includes only case types subject to PAD rules.

³⁴ To avoid bias associated with the varying length of follow-up, we limited the analysis to cases filed at least 365 days before the end of the data collection period, and counted only default judgments that occurred as the first judgment event and within 365 days of case filing.

³⁵ Although the decrease in the default rate among non-collections cases from 3 percent to 2 percent does not appear statistically significant at conventional levels, its magnitude renders it logically relevant. The small chi-square statistic and correspondingly large p-value result in part from the generally low rate of default judgments for these types of cases.

³³ Three-quarters of discovery disputes are first raised by the tenth month (319 days) after filing; half are first raised within 6 months (193 days) after filing.

Conclusions and Recommendations

Table 14: Percentage of Cases With Default Judgment Within 365 Days of Filing for Pre-Implementation and Post-Implementation Debt Collection Cases

DEFAULT JUDGMENT WITHIN 365 DAYS	PRE-IMPLEMENTATION	POST-IMPLEMENTATION
First judgment other than default	74%	80%
Default is first judgment	26%	20%
Total	100%	100%
Chi-square	4.071	
Degrees of freedom	1	
p(χ^2)	.044	

n = 844

notes: Includes debt collection cases filed July 1, 2008 – June 30, 2010 and October 1, 2010 – February 2, 2012.

Table 15: Percentage of Cases With Default Judgment Within 365 Days of Filing for Pre-Implementation and Post-Implementation Cases, Other Than Debt Collection

DEFAULT JUDGMENT WITHIN 365 DAYS	PRE-IMPLEMENTATION	POST-IMPLEMENTATION
First judgment other than default	97%	98%
Default is first judgment	3%	2%
Total	100%	100%
Chi-square	1.470	
Degrees of freedom	1	
p(χ^2)	.225	

n = 1,671

notes: Includes cases filed July 1, 2008 – June 30, 2010 and October 1, 2010 – February 2, 2012. Includes only case types subject to PAD rules. Excludes debt collection cases.

The comparison of cases filed before and after implementation of the PAD Pilot Rules as well as interviews with lawyers who regularly practice in Carroll and Strafford County provides a mixed and somewhat curious picture about the PAD Pilot Rules impact on civil case processing. The fact pleading and automatic disclosure provisions were intended to provide the parties with an earlier opportunity to assess the legal merits and evidentiary strengths of their respective cases, which was ultimately expected to reduce the overall filing-to-disposition time. Anecdotal reports from attorneys who regularly practice in the pilot sites suggested that these provisions were working as intended. Most attorneys were delighted to abandon the practice of filing writs, and several expressed the opinion that fact pleading seemed to get the case moving along faster. Yet analysis of the rate at which cases were disposed showed no difference between cases filed before implementation of the PAD Pilot Rules and cases filed after implementation.

On the other hand, close examination of the case outcomes showed a dramatic decrease in the proportion of cases that were disposed by default judgment. Ostensibly, the fact pleading and automatic disclosure provisions provided defendants in the PAD cases with sufficient information on which to contest claims alleged by the plaintiff and possibly obtain a fairer resolution to the case, albeit one that might take somewhat longer to resolve. One attorney who regularly files debt collection cases first reported this effect during the NCSC site interviews in October 2011, but the case-level data show that the impact affects both debt collection and non-debt collection cases. Although the proportional difference in default judgments in non-debt collection cases was not statistically significant due to the very small proportion of default judgments in those cases, the reduction in default judgments in non-debt collection cases was actually greater (66%) than that in debt collection cases (23%).

Previous civil justice reform efforts in other jurisdictions have sometimes failed due to lack of compliance with the rules, but this does not appear to be a significant problem in the New Hampshire PAD Pilot Rules. Anecdotal reports suggested that attorneys initially experienced some confusion about the rules, prompting the Superior Court to issue conditional default notices in cases for failure to file an Answer or to schedule in-court compliance hearings for litigants that failed to comply with the meet-and-confer requirement to agree on and file a proposed Case Structuring Order. Overall, compliance with the PAD Pilot Rules was fair. The percentage of cases in which an Answer was filed pursuant to PR 1 increased from 15 percent to 56 percent. Ten percent (10%) of the cases ultimately were disposed by default judgment, leaving approximately one-third of the cases in which an Answer was not filed within 120 days of the initial filing date. The percentage of cases in which a proposed Case Structuring Order was filed pursuant to PR 2 increased from 14 percent to 34 percent which eliminated the need to hold a Case Structuring Conference in 91 percent of cases compared to 66 percent of cases filed before implementation of the PAD Pilot Rules. The majority of those cases in which a Case Structuring Conference was necessary were conducted telephonically (89) rather than during an in-court hearing (25).³⁶

A number of factors may explain the failure to detect any significant decrease in the time from filing to disposition for cases filed under the PAD Pilot Rules. First, this evaluation is based on a relatively small number of cases observed over a fairly short period of time. It is possible that observing a larger sample of cases over a longer period of time might have detected a statistically significant impact on the final disposition rate. However, given the almost identical slopes of the survival function curves, any difference in the impact of

³⁶ Two cases involved both in-court and telephonic case structuring conferences.

the PAD Pilot Rules that might be detectable in a larger sample of cases would be insignificant for practical purposes, even if statistically measurable.

Another possible explanation may be the fact that most New Hampshire lawyers were already familiar with the fact pleading and automatic disclosure requirements through practice in the Maine state courts, the federal courts, or though law school training. Lawyers were already filing Answers in nearly one in six cases in response to a Complaint. So the PAD Pilot Rules did not necessarily impose a radical change in the general approach to legal practice. Indeed, it is possible that other than adhering to some new rule-based benchmarks (e.g., filing an Answer, filing a case structuring order), civil litigation is largely conducted by lawyers without excessive reliance on court rules to move the process along. Indeed, even though attorneys are now required to meet, confer, and file a proposed case structuring order, there is no explicit requirement in the PAD Pilot Rules that imposes restrictions on the time in which discovery, ADR, and other pretrial matters are completed. Ostensibly, those self-imposed deadlines largely mirror the deadlines imposed in similar cases filed before implementation of the new rules. Ironically, the fact pleading provisions of the PAD Pilot Rules may have counteracted any shift toward shorter filing-to-disposition time by permitting some cases to survive that would have otherwise defaulted under a notice pleading standard. Case-level data confirm this effect across all case types.

Finally, the budgetary constraints imposed on the Superior Courts over the past two years also may have mitigated the impact of the PAD Pilot Rules with respect to the rate of final disposition. Court restrictions on the number of civil cases that are scheduled for trial may have an especially pernicious effect insofar that

they permit cases to languish indefinitely while giving one or both parties little incentive to settle. Moreover, the restrictions on scheduling cases for trial may have also undermined the severity of penalties associated with failure to comply with the automatic disclosure requirements of PR 3. The threat of being denied the opportunity to present evidence or testimony at trial because the basis for that evidence or testimony was not disclosed to the opposing party in a timely manner has little weight if the likelihood of ever getting to trial decreases to almost nothing.

Noncompliance with the PAD Pilot Rules does not appear to be a plausible explanation for the absence of a significant impact on the rate of final dispositions. The rate at which defendants filed Answers more than tripled in the post-implementation period compared to the pre-implementation period. Conditional default notices for failure to file an Answer or an appearance were issued in only 27 percent of cases, and more than one-third of those cases ultimately cured the noncompliance by filing an Answer or appearance. The proportion of cases in which a default judgment was ultimately entered likely reflects the defendant's decision not to contest the plaintiff's claims. Cases in which no Answer was filed, but were resolved by some disposition other than a default judgment, likely reflect out-of-court settlements.

Similarly, the incidence of case structuring orders being filed without the need for case structuring conferences increased as expected, suggesting that many lawyers stipulated to complete case structuring orders rather than filing partial case structuring orders and finalizing the remaining issues in a case structuring conference. Cases lacking both a case structuring order and a case structuring conference likely indicate that the parties settled or otherwise resolved the case before the time allotted for filing the case structuring order expired.

While the rate of discovery disputes did not decrease as a result of the automatic disclosure requirements, by the same token they did not increase due to allegations of failure to timely disclose pursuant to PR 3. Of particular significance is New Hampshire's longstanding culture of collegiality among practicing attorneys. Even before implementation of the PAD Pilot Rules, there was little empirical or anecdotal evidence of excessively aggressive or contentious litigation, which virtually all attorneys, judges, and court staff viewed as a unique and highly valued characteristic of the New Hampshire legal community. Thus, when the pre-implementation data show a baseline of relatively few instances of discovery disputes or other indicia of bad faith non-compliance with procedural rules, it will be extremely difficult to detect the impact of rule changes intended to reduce the frequency of those events even further.

In fact, the Superior Court judges themselves may have inadvertently hindered the beneficial impact of the meet-and-confer provisions intended to eliminate the need for in-court case scheduling hearings. Anecdotal reports suggest that some judges have scheduled in-court "compliance hearings" when the lawyers fail to file a complete proposed case scheduling order, rather than holding a teleconference to settle any remaining issues in the case scheduling order pursuant to PR 3.³⁷ Some of the reluctance to schedule telephonic hearings apparently stems from the judges' own preference for in-court hearings over telephonic conferences. Ostensibly, block calendaring of in-court hearings provides trial judges greater flexibility for starting and ending hearings in individual cases. The Superior Court judges and court staff may need to explore the functionality of the teleconference system and experiment with different approaches to scheduling telephonic hearings to fully achieve the convenience and cost-savings to lawyers and litigants while preserving the efficiency of court operations.³⁸

RECOMMENDATIONS

The Superior Court of New Hampshire evidently heard sufficiently positive reports about the PAD Pilot Rules before the completion of this evaluation to recommend that the rules be expanded statewide. The Supreme Court of New Hampshire accepted that recommendation earlier this year, and the PAD Pilot Rules were adopted statewide effective March 1, 2013. Nevertheless, the NCSC offers several additional recommendations to address some of the issues identified in both the case-level evaluation data and the reports from individual lawyers, judges and court staff.

1. Clarify the existing ambiguity in the Appearance requirement.

Before implementation of the PAD Pilot Rules, a defendant in a civil action was required to file an appearance within 30 days of service. Failure to do so resulted in the Superior Court issuing a notice of conditional default. Under the PAD Pilot Rules,

Noncompliance with the PAD Pilot Rules does not appear to be a plausible explanation for the absence of a significant impact on the rate of final dispositions.

³⁷ Some attorneys report that in some cases telephonic conferences also become forums to chastise attorneys for not stipulating to all aspects of case scheduling, rather than an opportunity to move the case along. In some instances, attorneys welcome the intervention of the judge to resolve issues impeding progress of the case.

³⁸ Some options to explore include calendaring telephonic hearings on a block basis and keeping the teleconference line open for lawyers to call in and wait for their case to be called – essentially an audio version of an open court calendar as was being tried on a pilot basis, then implemented, in one of the pilot courts toward the end of the pilot period. Alternatively, the court can advise attorneys of the approximate timeframe and order in which telephonic hearings will be held by emailing the attorneys directly or posting the calendar on the court's website. The court would then initiate those conferences with individual attorneys.

there is no explicit appearance requirement. In most jurisdictions that have adopted a Complaint and Answer process, the filing of the Answer provides formal acknowledgement of the receipt of service and of the jurisdictional authority of the court over the case. Nevertheless, the Superior Court has continued to require by local court order the filing of an appearance in addition to the Answer, issuing a notice of conditional default even if the defendant had already filed an Answer pursuant to PR 1. The fact that the appearance requirement is not mandated in the PAD Pilot Rules and is inconsistent with federal court practice has caused some confusion among attorneys. Unless there is another purpose to the Appearance requirement other than acknowledging the court's jurisdictional authority, the NCSC recommends that New Hampshire eliminate the filing of an Appearance as a separate requirement. The PAD Pilot Rules may be modified to specify that if the defendant intends to contest the jurisdiction of the court, the defendant may file a Special Appearance for that purpose in lieu of an Answer pursuant to Superior Court Rule 14.

2. Establish a firm trial date in the case structuring order.

The sanction for failure to timely disclose relevant information pursuant to PR 3 involves restrictions on the ability of a party to introduce evidence at trial that was not timely disclosed. Due to budgetary constraints, the New Hampshire Superior Courts have greatly restricted the availability of trial calendars for civil matters. For the purposes of the automatic disclosure requirement, if cases cannot be scheduled for trial, much less actually tried, the threatened sanction has no deterrent value. As a practical matter, civil trials were extremely rare events in New Hampshire even before the 2008 economic downturn and the resulting budget cuts. Nevertheless, experience in New Hampshire and elsewhere confirms that a firm trial date is the single most effective means of moving

cases toward resolution. The NCSC recommends that the New Hampshire Superior Court reinstitute the practice of scheduling civil cases for trial on a date certain and specifying that date in the case structuring order. The existence of a firm trial date raises at least the possibility of a meaningful enforcement mechanism for the automatic disclosure requirements even with the expectation by both parties and the court that the case will ultimately resolve without a trial.

3. Avoid aggressive enforcement of the rules except for intentional or bad faith noncompliance.

Almost without exception, attorneys, trial judges, and court staff emphasized the importance of maintaining the collegiality of the New Hampshire legal community. To do so, it is important that the New Hampshire bench not introduce perverse incentives for satellite litigation about whether the parties have fully complied with the rules. The rules themselves should explicitly adopt a "reasonableness" standard and a safe harbor provision with sanctions only imposed for intentional or bad-faith noncompliance. This is especially important insofar as the decline in in-court structuring conferences will necessarily reduce the number of opportunities for trial judges to establish the tone for collegial litigation and for lawyers to become sufficiently acquainted with one another to develop collegial relationships. An overly aggressive approach to enforcement would likely exacerbate tensions.

4. Establish a uniform time standard for return of service.

The PAD Pilot Rules do not specify a timeframe in which a plaintiff must file proof of service. Currently, local court rules in Carroll and Strafford Counties require proof of service to be filed within 7 days of service. To avoid potential confusion for litigants concerning multiple deadlines involved in case initiation (e.g., service within 45 days of Orders of Notice date, Answer within 30 days of service date), a return day should be specified in the PAD Rules and this timeframe should be adopted statewide.



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