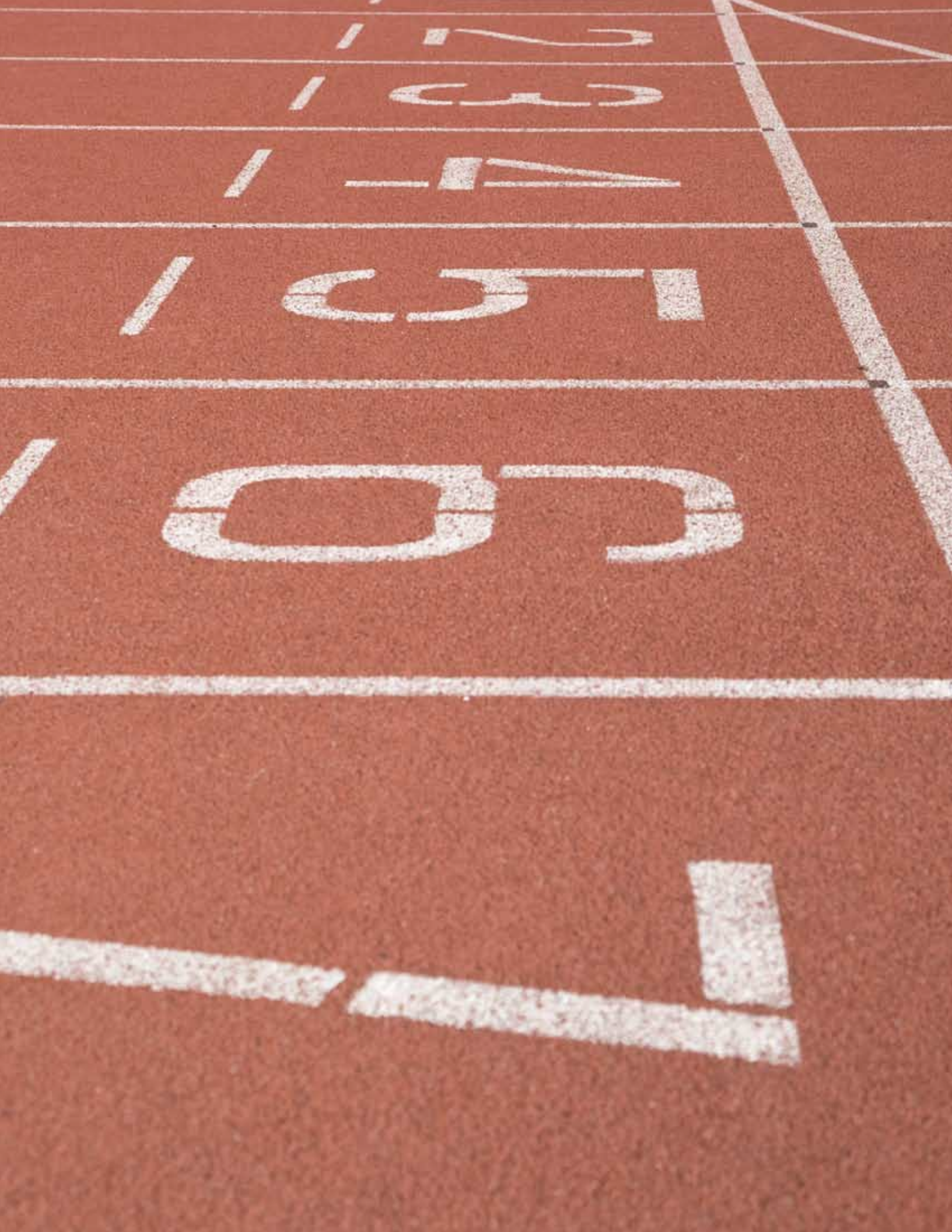


# A RETURN TO TRIALS:

IMPLEMENTING EFFECTIVE  
SHORT, SUMMARY,  
AND EXPEDITED  
CIVIL ACTION PROGRAMS





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# A RETURN TO TRIALS:

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IMPLEMENTING EFFECTIVE  
SHORT, SUMMARY,  
AND EXPEDITED  
CIVIL ACTION PROGRAMS

October 2012

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INSTITUTE *for the* ADVANCEMENT  
*of the* AMERICAN LEGAL SYSTEM



## **IAALS—Institute for the Advancement of the American Legal System**

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IAALS, the Institute for the Advancement of the American Legal System, is a national independent research center at the University of Denver dedicated to continuous improvement of the process and culture of the civil justice system. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications, and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models, and will to advance a more accessible, efficient, and accountable civil justice system.

Rebecca Love Kourlis    Executive Director

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



*Rule One* is an initiative of IAALS dedicated to advancing empirically informed models to promote greater accessibility, efficiency, and accountability in the civil justice system. Through comprehensive analysis of existing practices and the collaborative development of recommended models, *Rule One Initiative* empowers, encourages, and enables continuous improvement in the civil justice process.

AMERICAN  
BOARD  
OF TRIAL  
ADVOCATES



## About ABOTA

The American Board of Trial Advocates, founded in 1958, is an organization dedicated to defending the American civil justice system. With a membership of 6,800 experienced attorneys representing both plaintiffs and defendants in civil cases, ABOTA is uniquely qualified to speak for the value of the constitutionally mandated jury system as the protector of the rights of persons and property. ABOTA publishes *Voir Dire* magazine, which features in-depth articles on current and historical issues related to constitutional rights, in particular the Seventh Amendment right to trial by jury.

ABOTA's National Board of Directors has taken a stand regarding expedited jury trials and unanimously passed the following resolution:

### Expedited Jury Trials

Whereas, ABOTA recognizes that the number of civil cases in the United States actually tried to a jury is rapidly decreasing and that litigation costs and delays are a major contributor to the reduction in the number of civil juries trials, and

Whereas, ABOTA recognizes that several states have adopted expedited jury trial programs which provide for streamlined pretrial procedures and abbreviated jury trials in many civil cases in an effort to thereby reduce the cost and time involved, yet preserving the civil jury system in this Country,

It is therefore, RESOLVED, that ABOTA supports the concept of streamlined pretrial procedures and expedited jury trials and that ABOTA, through its leaders and members, should support existing expedited jury trial programs and encourage the adoption of similar programs throughout all jurisdictions.

— Jan. 14, 2012

### American Board of Trial Advocates

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**National Center for State Courts**

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The National Center for State Courts (NCSC) is a nonprofit organization dedicated to improving the administration of justice by providing leadership and service to the state courts and courts around the world. Founded in 1971, the NCSC provides education, training, technology, management, and research services to the nation's state courts. The NCSC Center for Jury Studies engages in cutting-edge research to identify practices that promote broad community participation in the justice system, that enhances juror confidence and satisfaction with jury service, that provides jurors with decision-making tools necessary to make informed and fair judgments in the cases submitted to them, and that respects jurors contributions to the justice system by using their time effectively and making reasonable accommodations for their comfort and privacy. The NCSC is headquartered in Williamsburg, Virginia and has offices in Denver, Colorado, Arlington, Virginia, and Washington, DC.

Mary C. McQueen President

Richard Schauffler Director of Research Services

Paula Hannaford-Agor Director, NCSC Center for Jury Studies

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# INTRODUCTION

There is a widespread perception—among lawyers and litigants—that the civil justice system is too complex, costs too much, and takes too long. There is also data documenting that civil jury trials have decreased precipitously over the last decade.<sup>1</sup> The decline in jury trials has meant fewer cases that have the benefit of citizen input, fewer case precedents, fewer jurors who understand the system, fewer judges and lawyers who can try jury cases—and overall, a smudge on the Constitutional promise of access to civil, as well as criminal, jury trials.

As one response to these realities, various jurisdictions—both state and federal—have implemented an alternative process that is designed to provide litigants with speedy and less expensive access to civil trials. The programs involve not only a simplified pretrial process, but also a shortened trial on an expedited basis. While some programs focus on jury trials, the overall goal of such programs is to provide access to a shorter pretrial and trial procedure, both for jury and bench trials. For purposes of this report, we are calling these programs Short, Summary, and Expedited Civil Action programs (SSE programs).

The National Center for State Courts (NCSC) has just completed a report detailing the elements of various examples of these programs.<sup>2</sup> In the wake of that report, the NCSC, IAALS (the Institute for the Advancement of the American Legal System at the University of Denver), and the American Board of Trial Advocates (ABOTA) have taken on the task of collating information about what seems to be working in these programs, how to use the process well, and how a jurisdiction might choose to put a program in place if it does not now have one.

For all three organizations, this work represents an ongoing commitment to processes that provide less expensive access to the civil justice system and a commitment to the preservation of the civil jury trial.

In preparation for the drafting of this report, the three organizations formed a Committee (members listed on Appendix A), agreed upon a charge to the Committee (Appendix B), and reviewed all available information regarding existing programs around the country. The Committee then met in person and thereafter worked collaboratively on the report. The Committee was chosen on the basis of balance, knowledge about different programs, and experience.

The recommendations that follow are designed to assist those around the country who are considering implementing an SSE program. Because of the variability

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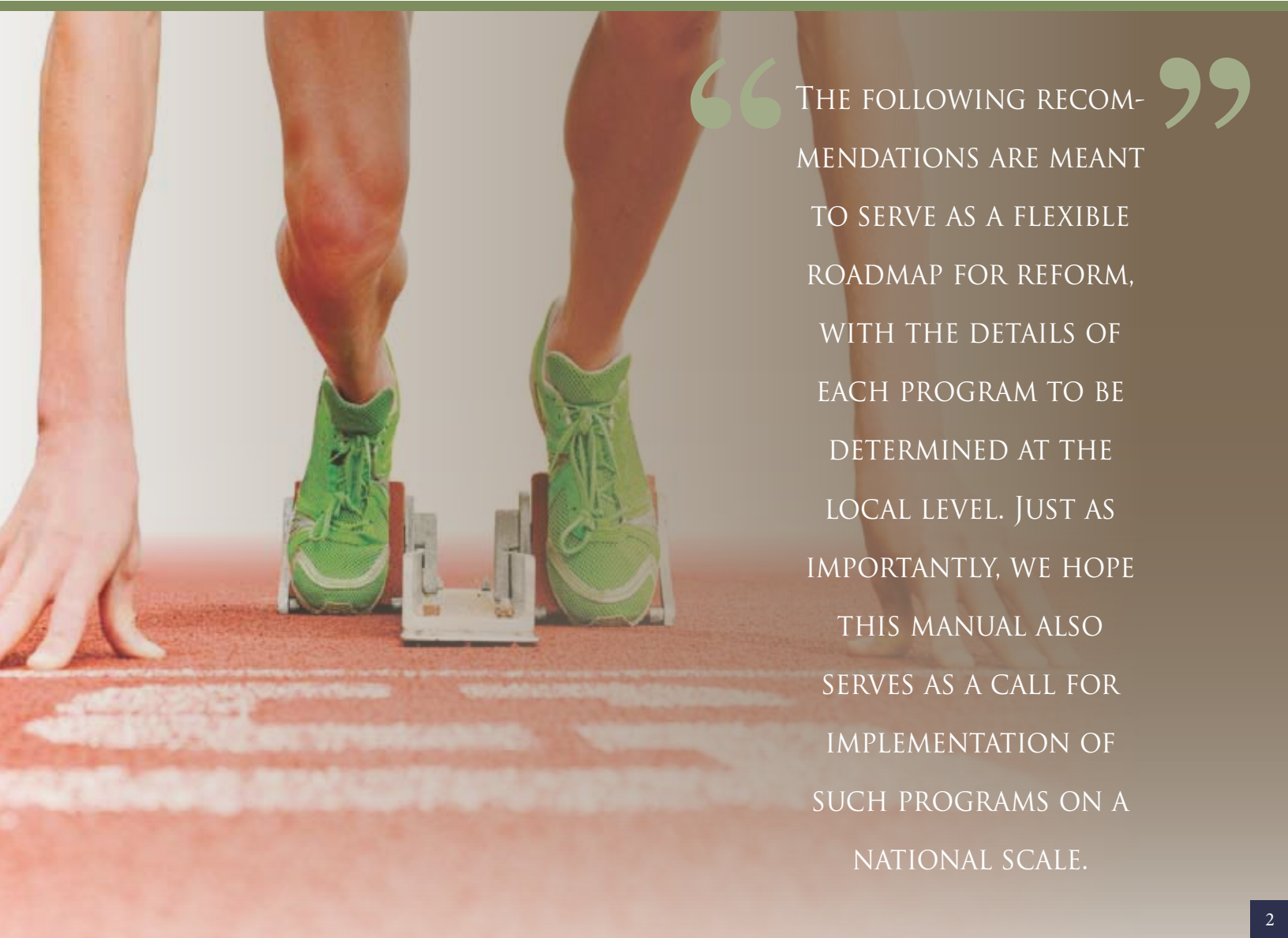
<sup>1</sup> According to state court disposition data collected by NCSC from 2000 to 2009, the percentage of civil jury trials dropped 47.5% across the period to a low 0.5% in 2009. Data on federal civil cases shows a decline in cases resolved by trial from 11.5 percent in 1962 to 1.8 percent in 2002, illustrating the historic trend away from trials. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461, 464 (2004) (noting that in 1938, “the year that the Federal Rules of Civil Procedure took effect, 18.9 percent of terminations were by trial”).

<sup>2</sup> NATIONAL CENTER FOR STATE COURTS, SHORT, SUMMARY & EXPEDITED: THE EVOLUTION OF CIVIL JURY TRIALS (2012), available at <http://www.ncsc.org/SJT/>.



of existing programs, and the different needs that each of these programs meet in their respective jurisdictions, the Committee has chosen not to recommend a specific set of parameters to be implemented in every program and for every case. Instead, the following recommendations are meant to serve as a flexible roadmap for reform, with the details of each program to be determined at the local level.

Just as importantly, we hope this manual also serves as a call for implementation of such programs on a national scale. The organizations and individual members who make up this Committee believe in the importance of Rule One of the Federal Rule of Civil Procedure's goals of a "just, speedy, and inexpensive determination" of every civil action. Yet today, pressures on client and court resources have only increased, making access even more problematic. While these pressures make attainment of this goal more difficult, they also create space for innovation. Our organizations hope that what follows is a resource for creating and implementing these innovative programs in your jurisdiction.



“ THE FOLLOWING RECOMMENDATIONS ARE MEANT TO SERVE AS A FLEXIBLE ROADMAP FOR REFORM, WITH THE DETAILS OF EACH PROGRAM TO BE DETERMINED AT THE LOCAL LEVEL. JUST AS IMPORTANTLY, WE HOPE THIS MANUAL ALSO SERVES AS A CALL FOR IMPLEMENTATION OF SUCH PROGRAMS ON A NATIONAL SCALE. ”



## WHAT IS A SHORT, SUMMARY, AND EXPEDITED (SSE) CIVIL ACTION PROGRAM?

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Before trying to identify what works and what does not, it is important to define the characteristics of an SSE program for purposes of this Report. The programs vary greatly across the country, and none are identical.

However, there are five constants that the Committee suggests are present in almost all of the programs and are critical for success:

### FIRST, THE TRIAL ITSELF IS SHORT.

Most jurisdictions limit the trial to one or two days. The Committee believes that the length is not necessarily dispositive, but there must be an expectation that the trial will be short and to the point. By necessity, the evidence also must be limited. Length of trial is a critical component, both for purposes of the trial itself and for purposes of structuring the pretrial process, which is then necessarily focused and abbreviated.

### SECOND, THE TRIAL DATE MUST BE CERTAIN AND FIXED.

The trial date must not be susceptible to continuance, at the behest of the court or counsel, except in extraordinary circumstances. One of the key features of the programs is the fact that litigants know they must be prepared for the trial on the date on which it is set. Such certainty drives the pretrial process and many of the benefits of the programs. In some of the more successful programs, the litigants also know who their judge will be if they choose the SSE program: either they have access to a judge pro tempore, whom they jointly choose, or they know who the judge assigned to the case will be. Hence, the program achieves a level of certainty and predictability that may not otherwise be available.

### THIRD, THE PROGRAM EXTENDS TO THE WHOLE LITIGATION PROCESS—NOT JUST THE TRIAL.

The pretrial process is also expedited and focused.

### FOURTH, THE PROGRAM ENCOURAGES ISSUE AGREEMENTS AND EVIDENTIARY STIPULATIONS.

Rules promoting evidentiary agreements, encouraging stipulations, and allowing relaxed evidentiary foundational standards save time and narrow the focus to the key issue(s) to be addressed at trial.<sup>3</sup>

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<sup>3</sup> For examples of pretrial and trial agreements, see Stephen D. Susman, TRIAL BY AGREEMENT, <http://trialbyagreement.com> (last visited Sept. 24, 2012).

FIFTH, ALMOST ALL OF THE PROGRAMS ARE EITHER PARTIALLY OR WHOLLY VOLUNTARY.

The litigants have the option of choosing this particular track for their case, and they are not forced to do so. Although voluntary processes are often slow to catch on, because people in general—and attorneys in particular—do not embrace change, voluntary programs nonetheless preserve the right of the litigants and counsel to decide whether the case at issue is appropriate for an abbreviated process and the program.

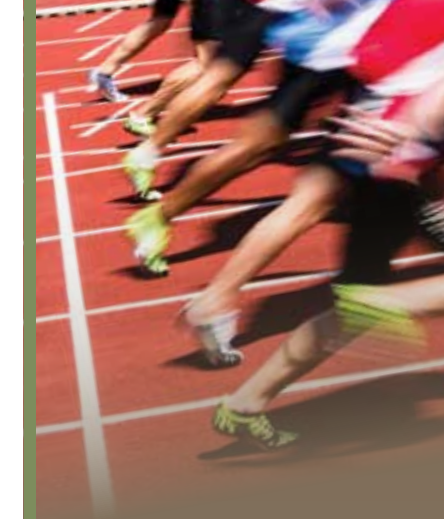
While one or a few of these characteristics may be instrumental in achieving greater access and quicker resolution, such as establishing a firm trial date and utilizing agreements and stipulations to achieve a more streamlined trial, the SSE programs discussed here generally include most, if not all five, of these characteristics. While generally applicable rules and case management techniques that mandate streamlined pretrial process and expedited trial settings do not in and of themselves satisfy the defining characteristics of an SSE program (such as voluntariness), the Committee does not mean to infer that such procedures may not also be an effective means of assuring access and efficiency.

Beyond these fundamental characteristics, however, there are a host of variations. All of these variations are components that the local bench and bar can review and build upon. The program characteristics chosen by a particular jurisdiction should be responsive to its needs and is likely to be quite individualized.

## BENEFITS OF SSE PROGRAMS

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There are a variety of benefits that SSE programs can provide. First, the BENEFITS TO THE COURT SYSTEM itself include the dedication of fewer judicial officers and court staff to the process. In one jurisdiction, the whole process happens without any involvement from the court, except for the assignment of a courtroom and the summoning of jurors. In other jurisdictions, sitting judges oversee the process, but it takes far less time than civil cases handled under the traditional rules of civil procedure. Once judges become familiar with the SSE program, they tend to like the process because it allows them to clear their docket, achieve better closed case numbers, and preside over jury trials, without investing weeks of court time. The system also benefits from the increased numbers of jury trials, which involve more people in the system and inform them about the process. More broadly, by making good on the promise of access to a civil jury trial, it is possible that such a program can revive confidence in the jury system to some extent, particularly if jury trials increase in frequency and the quality of the verdicts is well-regarded. The court system benefits equally from SSE bench trials. Judges are able to resolve matters more quickly and efficiently, with streamlined procedures and a short trial that resolves the case in a day or two.



“ BY MAKING GOOD ON THE PROMISE OF ACCESS TO A CIVIL JURY TRIAL, IT IS POSSIBLE THAT SUCH A PROGRAM CAN REVIVE CONFIDENCE IN THE JURY SYSTEM TO SOME EXTENT, PARTICULARLY IF JURY TRIALS INCREASE IN FREQUENCY AND THE QUALITY OF THE VERDICTS IS WELL-REGARDED.”



“SSE PROGRAMS SEEK TO ADDRESS INEFFICIENCIES THAT CURRENTLY EXIST IN OUR CIVIL JUSTICE SYSTEM BY STREAMLINING BOTH PRETRIAL AND TRIAL PROCEEDINGS IN SELECT CASES.”

The **BENEFITS FOR THE LITIGANTS** are, first and foremost, that their case will take less time and cost less money than if they had proceeded along a regular case track. In short, the process increases access to the system and decreases expense and time. But there are additional benefits as well. The process may provide more certainty. This can include certainty of trial date and perhaps of judge assignment. In some programs, this can include certainty of outcome, with limited appeal rights, and possible risk containment, if damages are limited or agreed to on a high-low basis.<sup>4</sup>

**BENEFITS FOR JURORS** include more opportunity to participate and a shorter, more focused process when they do participate. Jurors benefit from serving for both a shorter and more defined period of time.<sup>5</sup> Because of the streamlined process, and resulting streamlined issues, SSE programs also create less confusion and greater clarity for jurors about what is being asked of them. For these reasons, SSE programs may actually result in a better process for the jurors.

**BENEFITS FOR ATTORNEYS** are both immediate and long-term. First, these trials may provide an opportunity for younger attorneys to handle jury trials. Second, being able to take smaller or less complex cases for less investment on a per-case basis may actually serve to increase an attorney's client base and build good will. Lastly, an expedited process forces attorneys to focus very acutely on what is important in a case—and to shape both the discovery and the trial presentation around those key issues. It improves case management skills, attention to what is important, and clarity and brevity of trial presentations. It can also encourage cooperation in the discovery process in order for the attorneys to get the discovery they need in a short period of time. In jurisdictions where the whole process is the result of attorney negotiation, there is additional incentive to cooperate. Appendix C identifies a set of criteria that counsel can use to identify appropriate cases for an SSE program, as well as recommendations for maximizing effective preparation for and presentation at an SSE trial.

The development of all of those skills has possible pervasive implications. The current litigation process encourages attorneys to develop an all-inclusive, litigious approach to cases, whereas the SSE program prioritizes and hones the skill of highlighting only what is important. SSE programs seek to address inefficiencies that currently exist in our civil justice system by streamlining both pretrial and trial proceedings in select cases. It is also possible to make the pretrial and trial process more efficient in non-SSE program cases by incorporating some of these same principles. Moreover, the more attorneys try cases in front of juries, the more comfortable they become both with the process and the potential outcome. Thus, it is possible that use of SSE programs could actually change the litigation culture as a whole over time.

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4 Some parties that agree to a short, summary, and expedited procedure also enter into a high-low agreement, where both parties agree that the outcome of the case will be no less than the low amount, nor in excess of the high amount.

5 Employers also benefit significantly from reduced employee absence and, as a result, employers may be more willing to pay employee wages even when not required by law.

# IMPLEMENTING AN SSE PROGRAM

## THE DESIGN

The Committee has pooled both anecdotal and empirical data about SSE programs around the country and has drawn from the individual expertise of the Committee members. Out of that pool of information, the Committee has distilled the elements that characterize the more successful programs and has also created a check-list of decisions that a jurisdiction should review when designing a program.

The SSE program should be designed to address existing obstacles that impede efficient case processing and resolution in that jurisdiction, but without introducing procedures or requirements that affect otherwise well-functioning processes. The table below identifies some common obstacles described in the NCSC study and the solutions that the SSE programs implemented to address those obstacles. At the same time, changes in procedures should be made only as needed to craft an effective SSE program. For example, jury procedures should be the same in the SSE programs as in regular civil litigation wherever possible.

The obstacles posed, and the corresponding SSE program benefits that may be achieved, may also shift during the course of an individual case. For this reason, programs should be sufficiently flexible to permit early entry, for those who seek a streamlined pretrial procedure, and late entry, for those who just want an abbreviated trial, perhaps because only one issue remains after summary judgment. Other components of successful programs appear to be presenting the option to counsel and the parties on an individualized basis (through case management orders or at status conferences) and creating certainty regarding who the judge will be for the case.

COMMON OBSTACLES	POTENTIAL SSE PROGRAM SOLUTIONS
Civil case backlogs create scheduling delays for civil trials with regularly assigned civil trial judges	Permit SSE program trials to be tried to non-judicial personnel (e.g., special referees, judges pro tempore) or magistrate judges
Calendaring preferences for non-civil trials undermine trial date certainty	Permit SSE program trials to be tried to non-judicial personnel (e.g., special referees, judges pro tempore) or magistrate judges
Pretrial case management does not permit early identification of trial judge	Assign SSE program cases to one or more highly qualified and SSE designated trial judges
Length of civil trials makes it difficult to calendar cases for trial	Restrict trial length; restrict amount or form of trial evidence
Length of voir dire makes civil jury trials too lengthy	Designate smaller jury panel size; provide fewer peremptory challenges; shorter voir dire time
Expert witness fees make it too expensive to take cases to trial	Restrict expert evidence (number and/or form)
Discovery process is disproportionately excessive for lower value or less complex cases	Restrict the scope and/or time limit for discovery
Discovery disputes take too long to resolve, increasing expenses and delaying trial readiness	Create a process to expedite resolution of discovery disputes, including more immediate access to trial judge or discovery master and preference for informal telephonic conferences rather than formal motions, briefs, and hearings
Mandatory ADR creates needless procedural hurdles without significantly improving case resolution rates	Permit SSE program cases to opt out of mandatory ADR



When implementing a program, the local jurisdiction should review the following checklist of possible components:

- Rigid versus tailor-made procedures:
  - Some programs allow counsel great latitude in deciding upon the particular rules that will govern both the trial and the pretrial process.
  - Other jurisdictions have fairly rigid procedures that apply to every case submitted to the program.
- The questions to be addressed—either by counsel in a stipulation, or by rules or case management orders—are:
  - Time limits: How much time is allotted for discovery, as well as the length of the trial itself?
  - Rules of evidence: Do they apply, and to what extent?
  - Discovery: Requests for production, depositions, and interrogatories—what will be allowed?
  - Experts: Are expert witnesses allowed? If so, do they provide a report, can they be deposed, and do they testify at trial?
  - Motions: Will motions be allowed? If so, what kinds of motions? Does the court provide an expedited process for the resolution of those motions?
  - Client consent: Is a client's signature documenting informed consent required?
- Selection of judge: Will the judge be assigned or chosen by the parties (e.g., a senior judge, judge pro tempore, magistrate judge, or sitting judge)?
- When opt-in may occur: Is there a limited window of time at the beginning of the case when the parties may opt in, or is it available throughout the litigation process?
- Number of jurors (almost all specify a smaller panel than other civil jury trials).
- Unanimous jury verdict? If non-unanimous verdicts are permitted, what decision rule applies?
- Binding decision or not?
- On the record or not?
- Appealable decision or not?
- Is the program perceived as a form of alternative dispute resolution (this relates directly to whether it is binding)?
- Is the program statutory, supported by statewide rules, or put in place by a particular judge in his or her courtroom?
- Extent of informal versus formal procedures recognized.
- Restrictions on the amount of trial time and division of that time between the parties.
- Calendaring variations (some programs mandate a trial within four months, others within six months).
- Limits on damage awards coming out of the process: Many jurisdictions specifically limit the process to smaller cases and cap damage awards; other jurisdictions make the process available more broadly, but attorneys often agree to high-low parameters for the verdict.

This list illustrates the variation in program elements across the country. As a jurisdiction is designing an SSE program, it should balance the tailoring of the above variations to meet its specific needs with the benefits of uniformity and consistency. There is value in uniformity where program elements have continually been successful, and we encourage anyone implementing a program to look both at what works within their own jurisdictions already and the successful elements of existing SSE programs around the country.

The New York model provides a useful example. What began as a local Summary Jury Trial (SJT) program on a pilot basis has since expanded to all thirteen judicial districts in the state. The New York program was not expanded wholesale, but rather has been implemented with flexibility to allow the program to meet local needs. Nevertheless, there are rules and procedures that are consistent across the program, including

(1) an evidentiary hearing before trial; (2) a statement determining whether the SJT is binding or nonbinding; (3) expedited jury selection with limited time for attorney voir dire; (4) opening statements limited to ten minutes; (5) case presentation limited to one hour; (6) modified rules of evidence, such as acceptance of affidavits and reports in lieu of expert testimony; and (7) presentation of trial notebooks provided to the jury, and closing statements limited to ten minutes.<sup>6</sup>

Judicial support of the program has been a hallmark since its inception, first under Justice Joseph Gerace's guidance, and today with the efforts of the program's statewide coordinator Justice Lucindo Suarez.<sup>7</sup>

In contrast, the South Carolina's Summary Jury Trial program is an attorney-controlled program that takes advantage of relatively abundant court resources such as courtrooms and jurors, while addressing the need for additional judicial resources by utilizing temporary judges.<sup>8</sup> Because jury trials are assigned to a rolling docket in South Carolina's circuit court such that the cases are on call for trial, everyone involved also benefits from a firm trial date. The South Carolina program has evolved to meet the needs of the legal community and stands as a testament to the importance of considering what resources a jurisdiction brings to the table, as well as those that may be in scarce supply, when designing a program.

## THE IMPLEMENTATION PROCESS

First and foremost, the program should be developed by the bench and bar—and perhaps community—in an individual jurisdiction, and it should be responsive

<sup>6</sup> NATIONAL CENTER FOR STATE COURTS, *supra* note 2, at 35.

<sup>7</sup> See generally Lucindo Suarez, *Summary Jury Trials: Coming Soon to a Courthouse Near You*, NYSBA TRIAL LAW SEC. DIG., Fall 2007.

<sup>8</sup> See NATIONAL CENTER FOR STATE COURTS, *supra* note 2, at 12-25.



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to the needs of that jurisdiction. There is no one-size-fits-all formula. Further, when the program is the result of local investment, it is much more likely to succeed. The first step, therefore, should be to identify the problems that the program is intended to address. The bench and the bar in a jurisdiction interested in building out an SSE program should identify a small group of individuals who can assess the problems of the jurisdiction and build the specifics of a program designed to address those problems. The group should then distribute their proposal broadly and invite input.

There must be broad judicial and administrative support for the program. It cannot just be one judge who champions it, but rather a full bench or court system. If one judge takes the lead, as is true with many other programs, when that judge rotates or leaves, the program falters. Similarly, there must be broad-based administrative support. Court staff must view the program as good for the system, and cooperate in making it work. The program should NOT be viewed as a second-class program designed for less important matters. Rather, it should be viewed as an expedited process, available to all litigants for any appropriate case.

Communications and training are essential. When the program is launched, there should be widespread communication. The program should be touted in terms of benefits that the system, the attorneys, jurors and—most importantly—litigants stand to gain. Judges, court staff, and attorneys all need training on the benefits and application of the program. Because of their length, SSE trials can also more easily be taped and used for education and promotion, for practicing attorneys and law students. In the Eighth Judicial District Court of Nevada, instruction has been an important tool in selling the program, in addition to educating participating attorneys about the process. Several short trials have been conducted at the William S. Boyd School of Law at the University of Nevada, Las Vegas, and observed by attorneys, law students, and faculty. If there is a failure in either communication or training, the program will remain dormant—few will use it. Investing in a central coordinator can be valuable in ensuring that the communication and training component has adequate planning and support.

Judges should make counsel and litigants aware of the program on a case-by-case basis, not just as an existing rule. The challenges that any jurisdiction will face are in building trust in the bench and the bar. Attorneys will inherently distrust the process because of concerns that it will limit their ability to discover and present information, and could limit their possible damages. The South Carolina model, where attorneys design every aspect of the process on a case-by-case basis, seems to enjoy greater attorney acceptance. On the other hand, it may also create an advantage for experienced, knowledgeable attorneys and a disadvantage for younger, inexperienced attorneys, which undermines one of the potential goals of the program.

As a related matter, attorneys may have malpractice concerns. For example, if they lose their case in an SSE process, will their client assert malpractice against them?



There are multiple ways to address this issue, such as in California where the client's signature is required to document informed consent. Addressing those concerns in advance would go a long way toward alleviating attorney reticence.

The most effective way to defuse distrust is through data and education. In the New York model, using data from other jurisdictions with such programs to convince attorneys of its utility is very powerful. Attorneys from those other jurisdictions are also generally very willing to share their experiences with other program users and offer advice.

Each jurisdiction should develop a system for keeping data about the program from the beginning, and should share that information with other jurisdictions around the country experimenting with similar programs. The jurisdiction should make a commitment to reexamine the program—perhaps every year for the first two or three years—to tailor and adapt it based upon the data. After at least two years of annual review, reexamination can be moved to every other or every third year.

## THE IMPORTANCE OF DATA

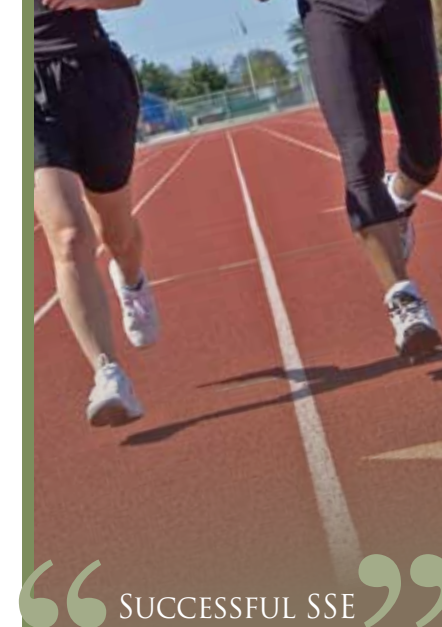
Historically, SSE programs were developed as a creative reframing of how to reach a resolution in a civil dispute, capitalizing on the inherent strengths of a jury as the fact-finder. Successful SSE programs today both enhance access to justice for litigants and remove numerous local or state-level barriers to trials. However, for these programs to be effective, they must document not only program operations, but also measure the program's performance through sound performance management.

Brian Ostrom and Roger Hanson of the NCSC have proposed a High Performance Framework as best practices for performance measurement and performance management. Within this Framework lies the concept of perspectives, which are “how the interest and positions of different individuals and groups involved in the legal process are affected by administrative practices.”<sup>9</sup> The four perspectives include: 1) the customer perspective; 2) the internal operating perspective; 3) the innovation perspective; and 4) the social value perspective.

Applying these principles, SSE programs are encouraged to:

- Collect data to monitor performance on an ongoing basis so as to be responsive to fluctuations in performance over time;
- Conduct analyses of the program's performance to ensure compliance with program requirements;
- Supplement performance data for use in education and training programs for participants; and
- Communicate the program's results to its partners, policy makers, and the public to promote support and buy-in.

<sup>9</sup> BRIAN OSTROM & ROGER HANSON, NATIONAL CENTER FOR STATE COURTS, ACHIEVING HIGH PERFORMANCE: A FRAMEWORK FOR COURTS v-vi (April 2010).



“ SUCCESSFUL SSE PROGRAMS TODAY BOTH ENHANCE ACCESS TO JUSTICE FOR LITIGANTS AND REMOVE NUMEROUS LOCAL OR STATE-LEVEL BARRIERS TO TRIALS.



“WHILE PROGRAMS  
ARE MOST SUCCESSFUL  
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CHANGING NEEDS.”

Unfortunately, data collection and performance management, a key component of program development, are often left to the last minute or even overlooked completely. Of the six SSE programs examined in the NCSC monograph, for example, only the New York State and the Eighth Judicial District Court of Nevada programs have implemented rigorous data collection and reporting strategies.<sup>10</sup> Our Committee cannot overemphasize the importance of collecting data and assessing the program regularly. Only through the use of empirical data will any jurisdiction truly be able to determine what is working to correct the problems of cost, delay, and access to jury trials. Likewise, only through empirical data will jurisdictions be able to determine what efforts have failed to achieve their goals and to understand why. Innovation is extremely important—but not blind innovation.

Appendix D contains a detailed set of recommendations about how to design and execute an effective data collection program. Any committee charged with creating an SSE program should become familiar with the data collection requirements; and any court charged with implementing an SSE program should put the data collection process in place from the beginning.

## SUSTAINING AN SSE PROGRAM

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Experience from existing programs around the country proves that sustaining an SSE program is just as important, and often just as challenging, as implementing one. The same requirements for creating a solid program—including leadership by the bench and bar, training, and publicizing the benefits and data—are essential for sustaining a program long term.

While programs are most successful when they are designed to meet the particular needs of jurisdictions, similarly, the most sustainable programs are those that evolve to meet changing needs. Where the needs and circumstances change, and the program does not keep pace, the program falters. For this reason, it is essential that these programs be revisited regularly to determine whether changes need to be made. Data collection plays a key role in monitoring the success of the program and providing support for needed changes.

Finally, it is also critical to create a broad base of judicial and administrative support. Where programs have been championed by a single judge or administrator who subsequently retires, the program has waned. While such a champion can be the key to a program's success in the first instance, jurisdictions must strive for underlying support and ensure that there is someone or some group to continue the charge.

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<sup>10</sup> See NATIONAL CENTER FOR STATE COURTS, *supra* note 2, at 33-57.

## CONCLUSION

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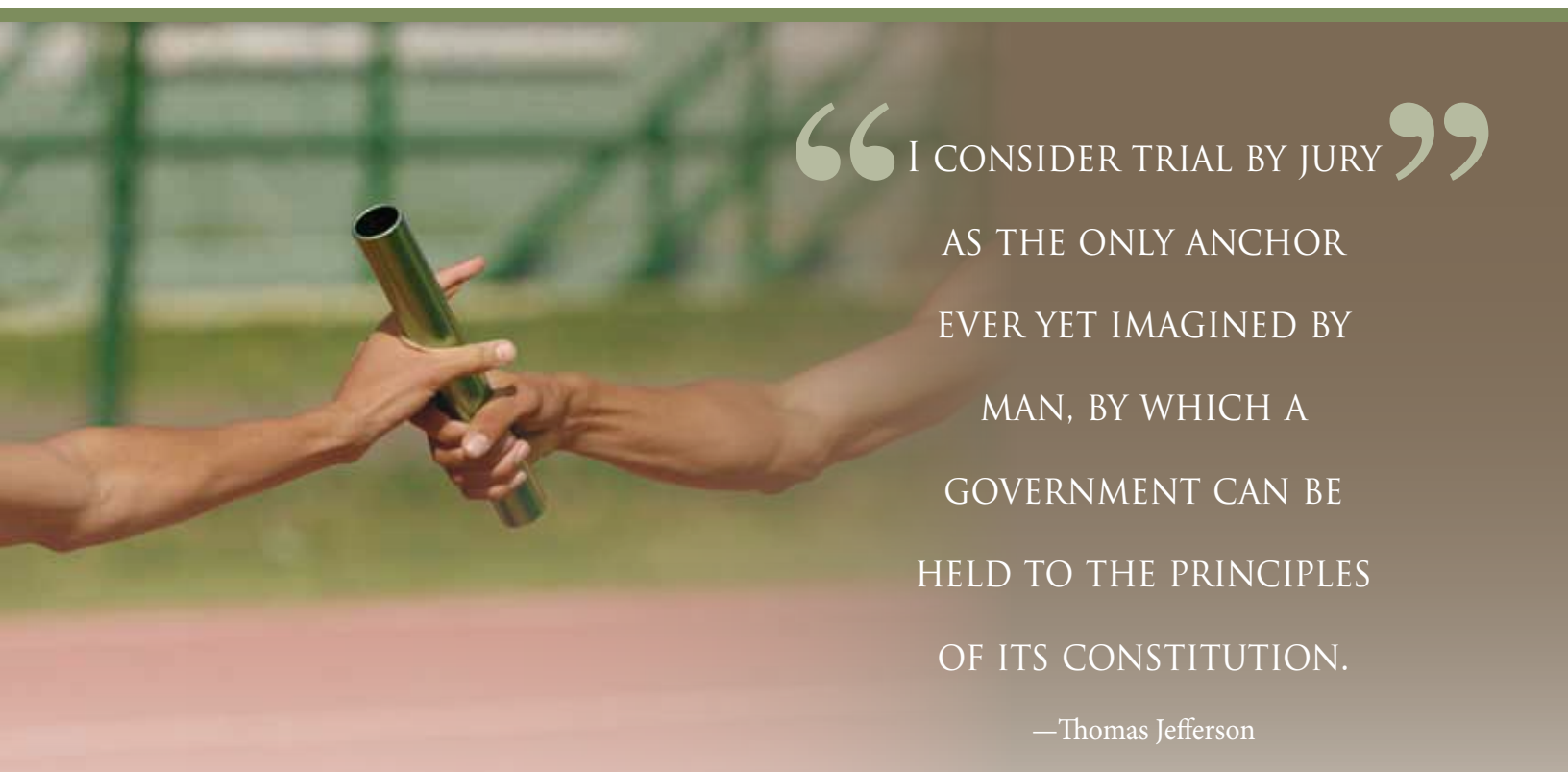
The general themes of this report have broad application across a variety of court reform efforts.

TO SUCCEED, COURT REFORM MUST HAVE THE FOLLOWING COMPONENTS:

- Initial and continuing judicial and court leadership;
- Buy-in from the bar;
- Responsiveness to real needs of the jurisdiction;
- Training available in advance and on an ongoing basis; and
- Data collection and assessment to ensure continuous improvement.

More specifically, jurisdictions interested in building or improving upon an SSE program can benefit from the experience of other jurisdictions as set out in this report.

Indeed, a just, speedy, and inexpensive resolution of every action is the goal, and SSE programs are one of the vehicles that may achieve that goal—both for an individual case, and perhaps, over time, in changing the culture of the legal system. The mere process of pulling together a group of judicial, bar and administrative leaders, identifying problems within a jurisdiction, coming up with proposed solutions for those problems, and experimenting with different procedures is, in and of itself, a step in the right direction.



“ I CONSIDER TRIAL BY JURY ”

AS THE ONLY ANCHOR  
EVER YET IMAGINED BY  
MAN, BY WHICH A  
GOVERNMENT CAN BE  
HELD TO THE PRINCIPLES  
OF ITS CONSTITUTION.

—Thomas Jefferson

# APPENDIX A

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## SSE COMMITTEE MEMBERSHIP

**Chris A. Beecroft, Jr.**

ADR Commissioner  
Eighth Judicial District Court, Nevada

**Paula Hannaford-Agor**

Director, Center for Jury Studies  
National Center for State Courts

**Richard Gabriel**

President  
Decision Analysis Trial Consultants  
American Society of Trial Consultants Foundation

**Paul E. Gibson**

American Board of Trial Advocates

**Brittany K.T. Kauffman**

Manager, Rule One Initiative  
IAALS

**Rebecca Love Kourlis**

Executive Director  
IAALS

**Michael P. Maguire**

Michael P. Maguire & Associates  
American Board of Trial Advocates

**Judge Adrienne C. Nelson**

Multnomah County Circuit Court, Oregon

**Justice Lucindo Suarez**

Statewide Coordinating Judge for Summary Jury Trials  
Bronx County Supreme Court

**Nicole L. Waters, Ph.D.**

Principal Court Research Consultant  
National Center for State Courts

**Magistrate Judge Bernard Zimmerman**

Northern District of California

## APPENDIX B

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### SSE COMMITTEE CHARGE

The American Board of Trial Advocates, IAALS—the Institute for the Advancement of the American Legal System, and the National Center for State Courts wish to undertake a joint project. This Charge outlines the reasons for the project, the allocation of responsibilities, the goals, and the time line.

ABOTA, IAALS, and NCSC are all organizations that have, as part of their missions, a focus on access to the civil justice system in general and to jury trials in particular.

Certain jurisdictions have developed what have come to be called “Expedited” or “Summary” Jury Trial procedures that are designed to provide an alternative for certain types or sizes of cases. Some of the procedures have pretrial components; others relate exclusively to the shortened trial itself. In each instance, the intent is to increase access to the process.

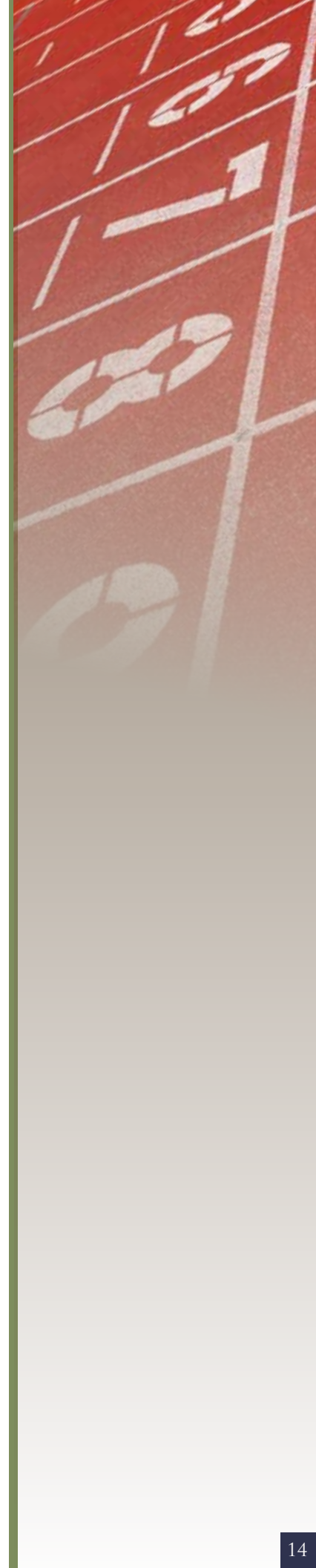
ABOTA, IAALS, and NCSC wish to compile information about the procedures and from that information develop a manual that can be distributed nationally to identify what emerge as best practices, both in developing and implementing a Short, Summary, and Expedited (SSE) procedure and in maximizing the effectiveness of such a procedure once implemented.

The joint project SSE Committee shall consist of two representatives from ABOTA, IAALS, and NCSC each and up to five additional members from around the country—judges, lawyers, researchers and academics who have experience with EJT procedures. The additional members shall be chosen by the six ABOTA, IAALS, and NCSC members.

The Committee shall convene at IAALS in Denver as soon as schedules permit. Each member of ABOTA, IAALS, or NCSC shall pay their own (or their organization shall pay) associated expenses.

IAALS shall staff the Committee, by compiling and distributing information in advance and taking the lead in drafting a manual/template/report (to be determined) that shall then be distributed among all members for comment. NCSC has already done the research about SSE procedures around the country. That information will be the starting place for the project.

The Committee shall make every possible effort to produce a product by the end of September of 2012. The product will bear the logos of all three organizations (unless one organization wishes to withdraw from the project at any time) and shall be available on all three websites.





## APPENDIX C

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### BEST PRACTICES FOR CASE IDENTIFICATION, PREPARATION, AND PRESENTATION

Assuming that the process is completely optional, the choice falls to counsel to decide which cases might be amenable for resolution through an SSE process. It may well be true that once the attorneys and litigants are familiar with the process, the list of appropriate cases can begin to expand. In reality, it is not just the small case, the low-dollar case, or the simple case that can benefit from an expedited and streamlined process. Many cases can benefit from a process that costs less and that forces litigants, their attorneys, and the fact-finders to focus on the most important issues in the case.

**But, in the first instance, the cases that are most likely to be appropriate for this process are:**

- Cases with single or limited issues to be resolved;
- Cases where many facts can either be stipulated or determined by the uncontested admission of reports or documents;
- Cases where the likely value doesn't warrant the expense of live expert testimony or exhaustive trial;
- Cases where it is desirable to limit exposure or guarantee recovery (high-low agreements);
- Cases that can be resolved in one or two days of testimony and deliberations;
- Cases involving limited witness testimony;
- Time sensitive cases where the usual docket wait will be prejudicial to a party's ability to present its case;
- Cases where the parties desire a certain (or almost certain) trial commencement date;
- Cases in which the parties fully understand the benefits and risks of participating in the SSE program and have consented to those risks;
- Cases with insurance coverage limit concerns where a high-low agreement is desirable;
- Cases involving insurance coverage where the carrier has consented to be bound by the proceeding.

### GUIDELINES FOR PREPARATION AND PRESENTATION

These guidelines have been developed for participants engaged in SSE programs. If properly organized and presented, the trier of fact, be it the court or a jury, will be able to understand complex case issues and evidence in a shortened trial setting. By participating in this program, the participants agree that they have chosen to be bound by statutory or contractual obligations in presenting their cases. This guide is intended to help participants better prepare, organize, and present their cases to accommodate this shortened trial format so that the judge or jury will be able to clearly understand the case in order to make their most informed decision.

**Known Limitations:**

Participants should thoroughly review the statutory or contractual language to understand the time limitations and evidentiary restrictions in presenting the case. As SSE trials are conducted in such a limited fashion, each moment is precious, including that of the judge and the jury. Participants should endeavor to be timely and respectful of all the time limits.

**Cooperation:**

SSE trials necessitate greater agreement and cooperation between the parties. This usually means revealing more information to opposing parties prior to trial than in a traditional trial. This in no way diminishes the ability of counsel to be a zealous advocate for their client. In fact, the ability to have greater knowledge about the scope of evidence and testimony that will be presented in these trials allows the attorneys to better plan their presentations and to concentrate on the meritorious issues in the case. By necessity, attorneys for both sides in an SSE trial must exchange exhibits, including any highlighting or additional emphasis, in advance of the trial. These trial formats are not conducive to gamesmanship. And while this does not demand that counsel reveal all of their strategies regarding the way they conduct the case, they must reveal the substantive nature of their evidence. Agreed-upon evidentiary booklets also facilitate cooperation, remove surprises, and help keep the trial short, summary, and efficient.

**Pretrial Hearings:**

An effective pretrial hearing is essential for achieving a short, summary, and expedited trial. Many jurisdictions with SSE programs include specific requirements for the pretrial hearings, as this hearing is essential for a streamlined and efficient trial. The court and the parties should utilize this hearing to address any questions and concerns regarding all aspects of the trial, and review parameters and expectations of the trial from voir dire to verdict. The court can make rulings on previously exchanged evidentiary submissions, proposed Pattern Jury Instruction charges, and proposed verdict sheet questions. Some of these matters may involve the increase and or redistribution of peremptory challenges where more than two attorneys appear on a case, the need for an interpreter, and physical disability issues with parties.

**New Information:**

In preparing the case presentations, SSE participants should remember that the jury is hearing evidence for the first time. They do not have the background or familiarity with the subject matter that the attorneys, experts, and parties have. In preparing the evidence, it is important for participants to constantly evaluate the information that must be conveyed so that the jury will understand the testimony or exhibit. A commonly asked question to discern needed information for the jury would be, "If you were listening to this for the first time, what would you need to know?" If there are issues of some complexity in the case that may require time to explain in order for the jury to have context or background for the evidence, the attorneys should consider whether they would wish to draft an agreed upon tutorial to be read by the judge in the case or a glossary of terms to familiarize jurors with acronyms or terminology. This should not only address potential confusion but also potential misconceptions the jury may have about the issues in the case.

**Theme:**

Jurors respond best to a narrative framework or story of the case. This story helps them to organize and understand the evidence. Every case has a central theme or organizing principle. This is usually a single phrase or sentence. One of the easiest ways to develop a theme is to fill in the phrase, "This case is about . . ." While development of a theme is important in every case, it is even more so in SSE programs, where jurors need to quickly understand the case and render a verdict.

### **Three to Five Points:**

Once counsel has developed the theme, it is best to identify the three to five main evidentiary points that support this central principle. While this does not preclude counsel from having a different number of points, three to five main points have been shown to provide a better organizing structure to ease the comprehension level of the jury. Moreover, this will assist attorneys in narrowing the focus of their presentation so as to fit within the constraints of an SSE trial. If possible, each of these main points should be stated in a single sentence, like a headline for a news article. These single sentence headlines help jurors to retain and organize the main issues in the case. These main points should be selected because counsel believes these issues will lead the jury to an appropriate verdict in the case. This is not to exclude other important points or evidentiary issues.

Other salient issues should be examined to see if they could fit into the categories of the main points. In determining these main points, the attorneys can ask themselves several questions:

- 1) **Why is this one of the most important points in the case?**
- 2) **What do you want the jury to conclude from this point?**
- 3) **How does this point connect to the verdict you want the jury to render in the case?**

Distinguish between what the jury needs to know about the case from what the attorneys want them to know. Remember to connect all of the dots in the narrative story of the case in order to avoid leaving the jury with unanswered questions. Although pretrial rulings or time constraints may not allow the attorneys to answer all of the jury's questions in the case, they should endeavor to answer the main questions the jury will have:

**Who are the parties?**

**What happened?**

**What is the dispute?**

**What am I supposed to decide?**

While it may not be essential to script out the entire presentation of the case, it is advisable to create a detailed outline in order to ensure that each side is able to present the optimal amount of essential evidence the attorneys feel is necessary to meaningfully represent their client's case. While there is a tendency in a standard trial to repeat information in the belief that this repetition will influence the jury, one of the most common complaints of jurors is their belief in the needless redundancy of testimony or issues.

### **Outline for the Case:**

These three to five main points can become an outline for presenting the case and they help the attorney to organize the testimony and exhibits. And while it is understandable that attorneys would want to include as much as they can about what they have learned about the case, given the time constraints of an SSE trial, it is advantageous to keep the presentation focused on these main points.

### **Sequence:**

Because of the shortened time in these trials, it is also advisable to put these main points in a prioritized, sequential order that makes the best sense for the case. In other words, one point should lead to the next point, which would lead to the next point. This sequence can be organized in chronological order of the events in the case that counsel wants to describe, but can also be organized by legal issues, main conclusions of expert witnesses, or other sequential ordering.



### **Scheduling:**

Many attorneys are not used to the rigorous scheduling of an SSE trial. It is advisable, once the attorneys have agreed upon the schedule for voir dire, opening statements, and case presentations, that they consciously plan out and allocate the amount of time they need for each of their witnesses according to the priority of issues in their case. They should then confirm that the witnesses are available on the date and time of their scheduled testimony.

### **Witnesses:**

SSE trials generally allow attorneys to present most of their case directly to the judge or jury. However, if the attorney is able or wishes to present witnesses, include only those witnesses that are most essential to the case. For this, attorneys can ask themselves which witnesses will reasonably illustrate the three to five main points outlined above. As the rules for laying foundation or qualifying experts may be relaxed in these trials, attorneys should try and focus the testimony on the most needed areas to illustrate the main issues in his or her case. In most cases, these witnesses will have prescribed or agreed upon time for their testimony.

To ensure conformance with the agreed upon testimony, in preparing both lay and expert witnesses, it is advisable to go over these few needed questions in advance. If there is agreement to have the witness testify by videoconferencing, make sure that the internet, phone or videoconferencing equipment is tested and working at the time of testimony. If there is an agreement to include recorded witness testimony, either from deposition or by mutual consent on direct and cross examination, attorneys should conform the testimony to the time limits and the agreed upon scope of the testimony, as well as the form of the testimony (recorded testimony only, recorded testimony with subtitles, recorded testimony with deposition transcript). The attorneys should decide whether the recorded testimony will be available for later review by the jury. To help focus the testimony of each witness, the attorney may ask himself or herself what they would ask the witness if they only had five questions. That way, they can prioritize the testimony of the witness into the most germane areas. Additionally, if attorneys will be presenting a witness' testimony (such as an expert's) themselves, either by reading deposition transcripts, or presenting the report of that witness, it is advisable to present the written testimony or exhibit on a document projector or electronically through an LCD projector as well as giving the jurors individual copies.

### **Exhibits:**

Similarly, in preparing exhibits for the trial, the attorney should only include exhibits that illustrate the key points the attorneys are trying to make in their presentations or illuminate the witnesses' testimony. If there is agreement to include these in an exhibit notebook, it is important that these be clearly tabbed, marked, and limited to the information related to specific testimony. If additional exhibits are included in the document notebooks that have not been approved or have no relation to the testimony the jurors are hearing, it is counter-productive and can be misleading, causing more confusion for the jury. If the exhibit includes attorney highlighting, make sure these are pre-approved by opposing counsel before including these in the jurors' books. Pre-approval is important to ensure that there are not later disputes about the inclusion or argumentative nature of the exhibits.





### **Trial Presentation:**

If any of the presentations and exhibits will be shown in a PowerPoint, Trial Director, or other trial presentation system, ensure that these presentations are approved by the judge and opposing counsel before trial. Additionally, it is essential that these presentation systems be tested before the trial day to ensure they are in working order. If the attorneys would like to use blowups, a flip chart, a white board, or a Smart Board for their presentations, it is advisable that they obtain agreement on their use and practice with this media prior to the actual trial. Attorneys should also strive to be consistent in how they highlight information on a document or a demonstrative exhibit to avoid juror confusion.

### **Juror Note-Taking and Questions:**

Whenever possible, jurors should be encouraged to take notes to aid their case organization and comprehension. Although the time frame is extremely tight, if agreed, attorneys and their clients should consider allowing juror questions. This will hopefully highlight for counsel the information jurors need to better understand and make decisions in the case.

### **Practice:**

After months or more of working on a case, there is a natural tendency when one is working from an outline to add in details from the extensive knowledge that the attorney has of the case. When this happens in an SSE trial, with the strict time constraints, attorneys may simply run out of time to present their case, perhaps even leaving essential evidence or important issues out of their presentation. One of the ways for attorneys to avoid this unfortunate situation is to practice in order to time their presentations precisely. Additionally, with practice sessions, the attorneys may hear arguments or issues that simply seem less important when they say them out loud. This also allows counsel to avoid unwanted confusion or argumentation.

### **Jury Instructions and Verdict Forms:**

In a short, summary, and expedited trial, the jury instructions and verdict questions are decided in advance of the beginning of the trial. This should help counsel to focus their presentations, both in their openings statements and in their presentation of evidence. In submitting instructions to the court, it is advisable to focus on only the special instructions or key definitions that are the most salient to the case. If allowed, these relevant instructions and verdict questions should be introduced to jurors at the beginning of the case to allow them to become more familiar with these legal guidelines and the questions they will need to answer. Many of the pattern jury instructions do not need to be submitted to the judge. The parties and the judge should evaluate the necessary scope of the instructions, given the limited length of the trial and deliberations. In prioritizing the evidence, counsel can ask themselves which testimony and demonstrative evidence will best address the verdict questions the jury has to answer and the instructions they will have to follow. The particular wording of a pattern jury instruction charge should be stipulated to before the evidentiary hearing. If opposing counsel does not agree, the attorney should be prepared with a draft of the charge with possible case or statutory support, and the reasons for inclusion of the charge. If attorneys are allowed closing arguments, it is advisable to use the stipulated juror instructions and verdict form in the closing argument, while showing jurors the instructions and walking them through the form, illustrating how counsel feels the evidence supports particular conclusions.

**Simplify:**

After the attorneys have fully planned their trial presentations, it is prudent for them to re-examine them prior to the actual trial to test the presentations for comprehension. For this, they should examine whether they can state any of the evidence or issues in a simpler and more direct manner in order for the jurors to fully understand the case. It is important that they not only analyze this simplicity themselves but also discuss the case with laypeople to assure that the comprehension levels are appropriate for the jury.

**Voir Dire:**

The attorneys will have extremely limited voir dire in a short, summary, and expedited trial, if allowed at all. Thus, it is important to identify the central issues that may create a bias for potential jurors in the case. After these issues have been identified, counsel should write the three main questions that identify a bias, negative predisposition, or side preference that they would not want on the jury. In asking these questions of the panel, it is important to ask open-ended questions that require the jurors to speak about the experiences or attitudes that may affect their ability to be fair and impartial in the case. It is not a good use of the limited voir dire time to ask indoctrination or leading agreement or promise questions. If there are additional concerns, the attorneys may also submit these questions for the judge to ask the jurors with support as to why the particular questions address a bias. Counsel are advised to review the voir dire and jury selection rules in an SSE trial in order to better understand whether there is attorney-conducted voir dire, the length of time allotted for questioning, how cause and peremptory challenges are conducted, and how many jurors and alternates are seated, as well their seating order.

**Avoid Excessive Argument:**

In an SSE trial, jurors assimilate a large amount of information in a short period of time. Thus, they will respond better to a clear presentation of evidence than to a great deal of argument. If jurors hear too much argument before closing statements in the case when they have no context, they may minimize or discredit the evidence they do hear.

## APPENDIX D

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### BEST PRACTICES FOR DATA COLLECTION

This section describes best practices for developing and implementing a data collection plan for your SSE program.

#### TYPES OF DATA COLLECTION

Court-based programs typically collect two different types of information about program performance: case-level data and participant feedback. Case-level data documents objective information about the trials that take place through the program, such as the number of trials, the types of cases, trial length, and trial outcomes. Ideally, information of this type should be collected by a single person with direct knowledge or involvement in the trial, such as the trial judge or courtroom staff. Participant feedback typically focuses on the individuals who participated in the trial or have a direct investment in the trial outcome—lawyers, litigants, and jurors—to document their perceptions about program effectiveness and fairness and to solicit recommendations for program improvement. Most participant feedback methods consist of questionnaires or focus groups.

#### FOCUS OF DATA COLLECTION

Some basic information should be collected about all SSE trials such as the case number, the case name, the type of case (e.g., automobile tort, premises liability, breach of contract, etc.), the trial start and end date(s), and the trial outcome. This type of basic information accomplishes three things: (1) it documents the actual volume of program activity; (2) it facilitates comparison of the SSE cases with non-SSE cases and with jury trials under similar SSE programs in other jurisdictions; and (3) provides empirical evidence of fairness by documenting plaintiff versus defendant win rates.



In addition to basic information, the program should document other aspects of the SSE program. In developing the data collection methods, the overriding philosophy should be to tailor the data collection efforts to program objectives. This approach will ensure that program developers and participants can point to solid, empirical information about program accomplishments. Table D-1 below illustrates some common objectives of SSE programs and applicable data elements to measure to assess performance.

**Table D-1**

IF THE PURPOSE OF THE PROGRAM IS TO ...	DATA COLLECTION SHOULD FOCUS ON ...
Bring cases to trial faster	Case filing date (or date case entered program)
Reduce trial costs	Trial length Amount and form of evidence introduced at trial: <ul style="list-style-type: none"> <li>• Number of witnesses</li> <li>• Live witness/expert testimony vs. written reports</li> </ul>
Provide a venue for younger, less experienced lawyers to gain trial experience	Attorney characteristics: <ul style="list-style-type: none"> <li>• Number of years in practice</li> <li>• Law firm size</li> </ul> Assessments of the program as an educational opportunity
Continue to attract participants (growth)	Names of the participating insurance carrier Insurance policy limits Existence and range of high-low agreements Identify other repeat players

The SSE programs in New York and the Eighth Judicial District Court of Nevada offer useful illustrations of how the program managers developed their respective data collection strategies to further program objectives. See State of New York Summary Jury Trial Data Collection Form (attached as Exhibit B) and Eight Judicial District Court of Nevada Sample Data Collection Form (attached as Exhibit C). Both programs identify the case name, case number, trial date, jury verdict, and the amount of damages awarded. Because the New York State program is statewide, the NY Data Collection Form also identifies the specific type and the location of the court in which the trial took place.

The Short Trial Program in the Eighth Judicial District Court of Nevada operates under the auspices of the ADR Office. Thus, much of the detail captured on the Short Trial Information Sheet was designed to provide the ADR Commissioner with a view of Short Trial performance compared to other ADR options, including the total number of cases proceeding on the arbitration and Short Trial tracks, the number of cases scheduled for Short Trial or arbitration, and the number of completed Short Trials or arbitration decisions entered. Because many of the Short Trial cases are appeals from mandatory arbitration, the Short Trial Information Sheet also collects detailed information about the amount of damages claimed by the plaintiff and the actual damages awarded by the jury for medical expense reimbursement, pain and suffering, and lost wages, which permits a detailed comparison between jury and arbitrator decision-making in the same case. Because the decision to include previous arbitration decisions in the materials provided to the jury was somewhat contentious, the Short Trial Juror Exit

Survey largely focused on the impact that knowledge about the arbitration decision had on the jury verdict. Both the Juror Exit Survey results and the comparison of arbitration decisions with jury verdicts demonstrated that the impact was negligible, putting to rest concerns that the practice interfered with the jury's independent judgment.

The NY Data Collection Form continues to evolve over time. In addition to basic identifying information, the current version was designed to measure the efficiencies introduced by Summary Jury Trials compared to non-Summary Jury Trial cases. For example, information about the anticipated trial length for a non-Summary Jury Trial (Question 8) provides a concrete measure for the number of trial days saved using the SSE procedures. Similarly, details about the amount of time allotted for the various segments of the summary jury trial provide benchmarks for the "normal" timeframe for conducting these trials. (The forthcoming version of the data collection form will eliminate many of these questions because they revealed almost no variation in these measures across case types or among judicial districts.) A unique feature of the NY Data Collection Form is the identification of the insurance carrier representing the defendant. This information serves as a barometer to both plaintiff and defendant's bars, as do the insurance policy limits and high-low agreement parameters, of the breadth of acceptance of Summary Jury Trials as a method of case resolution. Over time, this information has documented significant growth of participating carriers, with policy limits and high-low parameters trending higher.

Exhibit A provides a template of data elements that SSE program developers may consider when designing their own data collection instruments. Ideally, comparable information about non-SSE program trials should be routinely available or easily compiled from existing sources to provide baseline information.<sup>11</sup>

In developing case-level data collection forms or SSE participant surveys, it is often tempting to collect extremely detailed information about the cases and trials adjudicated. Program developers should keep in mind that, as the data collection process becomes lengthier and more detailed, it also becomes more time and labor-intensive and requires more resources to support. A useful technique to keep data collection objectives from eclipsing the broader objectives of the SSE program is to review each proposed data element or survey question with the following criteria in mind.

#### **Is/Does the data element or survey question . . .**

Essential documentation of basic program operations?

Clearly measure the performance of key program objectives?

Readily available from the case management system, case files, or trial participants?

Duplicate other data elements or survey questions?

### **PROCESS OF DATA COLLECTION**

An important part of the data collection strategy is ensuring that this task is undertaken by individuals with the appropriate skills, resources, and authority to do so.

#### **Questions that SSE program developers should address are:**

- Who is responsible for collecting the data, reviewing the data to ensure its completeness, and compiling the data for analysis?
- What authority does that individual or agency have to enforce compliance with data collection efforts?
- Is any of the information collected confidential? If so, who should have access to that information? What procedures should be implemented to ensure confidentiality?

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<sup>11</sup> For more information about effective program evaluation, see IAALS, *A ROADMAP FOR REFORM: MEASURING INNOVATION* (2010).



- How frequently are the data compiled and analyzed? To whom and in what format are findings reported?
- Where are program reports and data archived?

Data collection should not be undertaken for its own sake, but rather to support program maintenance and sustainability. As such, it is important that program participants from whom or about whom information is collected understand the purpose of data collection and how the information will be used. Program developers should also consider the form of data collection. Electronic forms such as online surveys or fill-in PDF forms require more technological expertise to develop, but offer greater accuracy and legibility and are less labor-intensive to compile. In addition to streamlining the data collection process, involving individuals with technology expertise in the design process can facilitate the process of generating both routine and ad hoc reports.

Program developers should also have a plan to disseminate the findings from data collection efforts. In the Eighth Judicial District Court of Nevada, the ADR Commissioner provides reports detailing the number of cases that entered the Short Trial Program, were scheduled for trial, and were completed to the local court administration and to the Nevada Administrative Office the Courts. Because the Eighth Judicial District Court is largely funded by local taxpayers, the Short Trial Program reports are routinely shared with the local Board of Commissioners to show how the Short Trial Program helps the court use those resources more effectively. The statewide ADR reports, including Short Trial statistics, are provided to the Nevada Legislature as mandated by statute. Under the mandatory arbitration program, arbitrators are supposed to make decisions according to how a jury would decide the case. Thus, the arbitration versus Short Trial verdict comparisons provide valuable training for and feedback to the arbitrators assigned to those cases. In addition, those comparisons are also excellent tools for dispelling common myths circulating in the legal community about how juries evaluate and assign monetary values to different categories of damage awards.

In New York State, Justice Lucindo Suarez provides quarterly reports detailing the number of Summary Jury Trials held for each of the 13 judicial districts to the Chief Administrative Judge of the New York Judicial Branch and to each of the district administrative judges. He also sends copies of the reports to each of the judges who presided in a Summary Jury Trial during the preceding quarter and their judicial clerks who submitted the data collection forms. This approach provides further encouragement for the judges and clerks to submit their data and ensures that the reports accurately reflect the actual volume of Summary Jury Trials conducted in those courts. “The judges and clerks will always let me know if they think I’ve made a mistake by omitting any of their trials from the total counts,” he explained. “I then make the corrections and resend the corrected reports with the subsequent quarterly reports.” Justice Suarez also uses the data during training workshops with judges and lawyers across the state to illustrate details about these trials such as the amount of time typically allocated for various segments of the trial or the proportion of trials undertaken with high-low agreements.

# EXHIBIT A

## SAMPLE DATA COLLECTION FORM

Case name: \_\_\_\_\_

Case number: \_\_\_\_\_

Case type (check one):

auto tort     premises liability     contract     other (please specify) \_\_\_\_\_

Filing date: \_\_\_\_/\_\_\_\_/\_\_\_\_

Trial date(s): \_\_\_\_/\_\_\_\_/\_\_\_\_ to \_\_\_\_/\_\_\_\_/\_\_\_\_

Insurance carrier: \_\_\_\_\_

Not applicable

Policy limits: \_\_\_\_\_

Not applicable

High/low agreement range: \_\_\_\_\_ to \_\_\_\_\_

Arbitration decision: \_\_\_\_\_

Not applicable

Damages claimed:

Medical expenses: \$ \_\_\_\_\_

Pain & suffering: \$ \_\_\_\_\_

Lost wages: \$ \_\_\_\_\_

Other damages: \$ \_\_\_\_\_

Jury size (if variable): \_\_\_\_\_

Length of ... (in minutes)

Voir dire: \_\_\_\_\_

Opening statements: \_\_\_\_\_

Plaintiff evidence: \_\_\_\_\_

Defendant evidence: \_\_\_\_\_

Closing arguments: \_\_\_\_\_

Jury deliberations: \_\_\_\_\_

Plaintiff evidence:

Number of fact witnesses: \_\_\_\_\_

Number testifying in person: \_\_\_\_\_

Number of expert witnesses: \_\_\_\_\_

Number testifying in person: \_\_\_\_\_

Defendant evidence:

Number of fact witnesses: \_\_\_\_\_

Number testifying in person: \_\_\_\_\_

Number of expert witnesses: \_\_\_\_\_

Number testifying in person: \_\_\_\_\_

Verdict:

Plaintiff                       Defendant

Unanimous verdict:

Yes                               No

Damages Awarded:

Medical expenses: \$ \_\_\_\_\_

Pain & suffering: \$ \_\_\_\_\_

Lost wages: \$ \_\_\_\_\_

Other damages: \$ \_\_\_\_\_

# EXHIBIT B



## STATE OF NEW YORK UNIFIED COURT SYSTEM

## SUMMARY JURY TRIAL DATA COLLECTION FORM

UCS-413 (08/11)

Please mail, fax or scan this Data Collection Form for every Summary Jury Trial. Submit to Hon. Lucindo Suarez, Supreme Court - Bronx County, 851 Grand Concourse, Bronx, NY 10451; Fax: 718-537-5076. Attention Hon. Lucindo Suarez; Scan: lsuarez@courts.state.ny.us

1. INDEX NUMBER: \_\_\_\_\_ 2. CASE NAME: \_\_\_\_\_
3. COUNTY: \_\_\_\_\_ 4. COURT:  Supreme  NYC Civil Court  County  City/District
5. CASE TYPE:  Commercial  Tort  Motor Vehicle  Other: \_\_\_\_\_
6. NUMBER OF ATTORNEYS: Plaintiff(s)  Defendant(s)  7. INSURANCE CARRIER: \_\_\_\_\_
8. EXPECTED NUMBER OF JUDICIALLY DETERMINED TRIAL DAYS IF NO SJT:
9. DATE OF SUMMARY JURY TRIAL:  /  /  (month / day / year)
10. ISSUES:  Liability only  Damages only  Liability and damages 11. WAS SJT:  Binding  Non-binding
12. IF THERE WAS A HIGH/LOW AGREEMENT, PLEASE INDICATE: \$ \_\_\_\_\_ High \$ \_\_\_\_\_ Low  None  
12a. Carrier(s): \_\_\_\_\_ 12b. Policy Limit(s) \$ \_\_\_\_\_
13. DID THE CASE SETTLE?  No  Yes 13a. When?  Before SJT  During SJT  After SJT  
13b. What was the settlement amount?  \$ \_\_\_\_\_  Don't know  Not applicable

### THE PROCEEDINGS

14. WAS THE SUMMARY JURY TRIAL PRESIDED OVER BY A:  Judge  JHO
15. HOW MANY JURORS WERE ON THE PANEL CALLED FOR THE SUMMARY JURY TRIAL?   Don't know
16. HOW MUCH TIME (IN MINUTES) WAS ALLOTTED FOR VOIR DIRE?
- |              |                          |                          |                          |                                    |
|--------------|--------------------------|--------------------------|--------------------------|------------------------------------|
| Judge        | <input type="radio"/> 20 | <input type="radio"/> 30 | <input type="radio"/> 40 | <input type="radio"/> more than 40 |
| Plaintiff(s) | <input type="radio"/> 5  | <input type="radio"/> 10 | <input type="radio"/> 15 | <input type="radio"/> more than 15 |
| Defendant(s) | <input type="radio"/> 5  | <input type="radio"/> 10 | <input type="radio"/> 15 | <input type="radio"/> more than 15 |
17. HOW MUCH TIME (IN MINUTES) WAS ALLOTTED FOR...
- |                         |              |                                  |                          |                          |                                    |
|-------------------------|--------------|----------------------------------|--------------------------|--------------------------|------------------------------------|
| ... opening statements? | Judge        | <input type="radio"/> 20         | <input type="radio"/> 30 | <input type="radio"/> 40 | <input type="radio"/> more than 40 |
|                         | Plaintiff(s) | <input type="radio"/> 5          | <input type="radio"/> 10 | <input type="radio"/> 15 | <input type="radio"/> more than 15 |
|                         | Defendant(s) | <input type="radio"/> 5          | <input type="radio"/> 10 | <input type="radio"/> 15 | <input type="radio"/> more than 15 |
| ... case presentation?  | Plaintiff(s) | <input type="radio"/> 30 or less | <input type="radio"/> 40 | <input type="radio"/> 50 | <input type="radio"/> 60 or more   |
|                         | Defendant(s) | <input type="radio"/> 30 or less | <input type="radio"/> 40 | <input type="radio"/> 50 | <input type="radio"/> 60 or more   |
| ... closing statements? | Judge        | <input type="radio"/> 20         | <input type="radio"/> 30 | <input type="radio"/> 40 | <input type="radio"/> more than 40 |
|                         | Plaintiff(s) | <input type="radio"/> 5          | <input type="radio"/> 10 | <input type="radio"/> 15 | <input type="radio"/> more than 15 |
|                         | Defendant(s) | <input type="radio"/> 5          | <input type="radio"/> 10 | <input type="radio"/> 15 | <input type="radio"/> more than 15 |
18. HOW MANY WITNESSES TESTIFIED (LIVE OR BY VIDEO) FOR THE...
- |              |                         |                         |                         |                                   |
|--------------|-------------------------|-------------------------|-------------------------|-----------------------------------|
| Plaintiff(s) | <input type="radio"/> 0 | <input type="radio"/> 1 | <input type="radio"/> 2 | <input type="radio"/> more than 2 |
| Defendant(s) | <input type="radio"/> 0 | <input type="radio"/> 1 | <input type="radio"/> 2 | <input type="radio"/> more than 2 |
19. HOW MANY EXPERT REPORTS WERE SUBMITTED FOR THE...
- |              |                         |                         |                         |                                   |
|--------------|-------------------------|-------------------------|-------------------------|-----------------------------------|
| Plaintiff(s) | <input type="radio"/> 0 | <input type="radio"/> 1 | <input type="radio"/> 2 | <input type="radio"/> more than 2 |
| Defendant(s) | <input type="radio"/> 0 | <input type="radio"/> 1 | <input type="radio"/> 2 | <input type="radio"/> more than 2 |
20. WAS ANY DOCUMENTARY OR DEMONSTRATIVE EVIDENCE GIVEN TO THE JURY?  Yes  No

### THE VERDICT

21. FOR HOW LONG (IN MINUTES) DID THE JURY DELIBERATE?  30 or less  40  50  60 or more
22. VERDICT:  Plaintiff  Defendant  Split  Hung
23. DAMAGES AWARDED: \$ \_\_\_\_\_  Settled before deliberations

### WHO COMPLETED THIS FORM?

NAME: \_\_\_\_\_  
PHONE NUMBER: \_\_\_\_\_ DATE: \_\_\_\_\_



# EXHIBIT C

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## ***QUESTIONS TO THE JURY ABOUT THE SHORT TRIAL PROGRAM***

### **EIGHTH JUDICIAL DISTRICT COURT**

PLEASE MAIL WITHIN 10 DAYS OF THE COMPLETION OF THE TRIAL TO:

ADR Commissioner  
c/o ADR OFFICE  
330 S. Third St.  
Las Vegas, NV 89155  
Fax...(702) 671-4484  
ATTN: STP Jury Survey

1. How did you feel this morning when you were advised that you would be participating in the Short Trial Program (“STP”)?
2. How did you feel when you learned that you would be a juror for just one day?
3. How do you feel about the fact that only four jurors were chosen?
4. [If applicable] Did the jury instruction regarding the fact that an arbitrator had previously heard this case and rendered an award have any impact on your verdict today?
5. [If applicable] If so, how (i.e., did it help or hinder you reaching a verdict)?
6. [If applicable] How do you feel about being given this information?
7. What did you think about the evidentiary booklet?
8. How did you feel when you were able to reach a (unanimous?) verdict?
9. What did you like most about the STP?
10. What did you like least about the STP?
11. If summoned, would you sit as a juror in the STP again?
12. If you could recommend any change(s) be made to the program, what would it/they be?

# EXHIBIT C

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## SHORT TRIAL INFORMATION SHEET

1. Case Name: \_\_\_\_\_.
2. Case No.: \_\_\_\_\_ 3. Trial Date: \_\_\_\_\_.
4. **NAME of COUNSEL (@ TRIAL) for:** Plaintiff: \_\_\_\_\_.
- Defendant: \_\_\_\_\_.
- Other Party: \_\_\_\_\_.
5. **Nature** of Damages: (e.g., soft tissue, broken bones, contractual, etc.): \_\_\_\_\_.
- \_\_\_\_\_.
6. Damage **Amounts** Claimed (e.g., medical expenses incurred, property damage amount, amount of lost wages, etc.): \_\_\_\_\_.
- \_\_\_\_\_.
7. Testimony from [**please use NAMES of ALL witnesses**] Oral   Written
- |                              |                          |                          |
|------------------------------|--------------------------|--------------------------|
| Plaintiff(s): _____          | <input type="checkbox"/> | <input type="checkbox"/> |
| Plaintiff's expert(s): _____ | <input type="checkbox"/> | <input type="checkbox"/> |
| Defendant(s): _____          | <input type="checkbox"/> | <input type="checkbox"/> |
| Defendant's expert(s): _____ | <input type="checkbox"/> | <input type="checkbox"/> |
| Other(s): _____              | <input type="checkbox"/> | <input type="checkbox"/> |
| Other's expert(s): _____     | <input type="checkbox"/> | <input type="checkbox"/> |
8. Verdict:      Party                      Verdict Amounts (e.g., meds, P & S, LW)
- \_\_\_\_\_
- \_\_\_\_\_
9. Verdict Unanimous: \_\_\_\_\_ Y / N      10. Liability Admitted: \_\_\_\_\_ Y / N
11. Length of: Trial (EXCL. lunch): \_\_\_\_\_; Jury deliberation: \_\_\_\_\_.
12. Interesting Notes: \_\_\_\_\_
- \_\_\_\_\_.

**PLEASE RETURN WITH FILE-STAMPED VERDICT FORM TO ADR OFFICE**



2

3

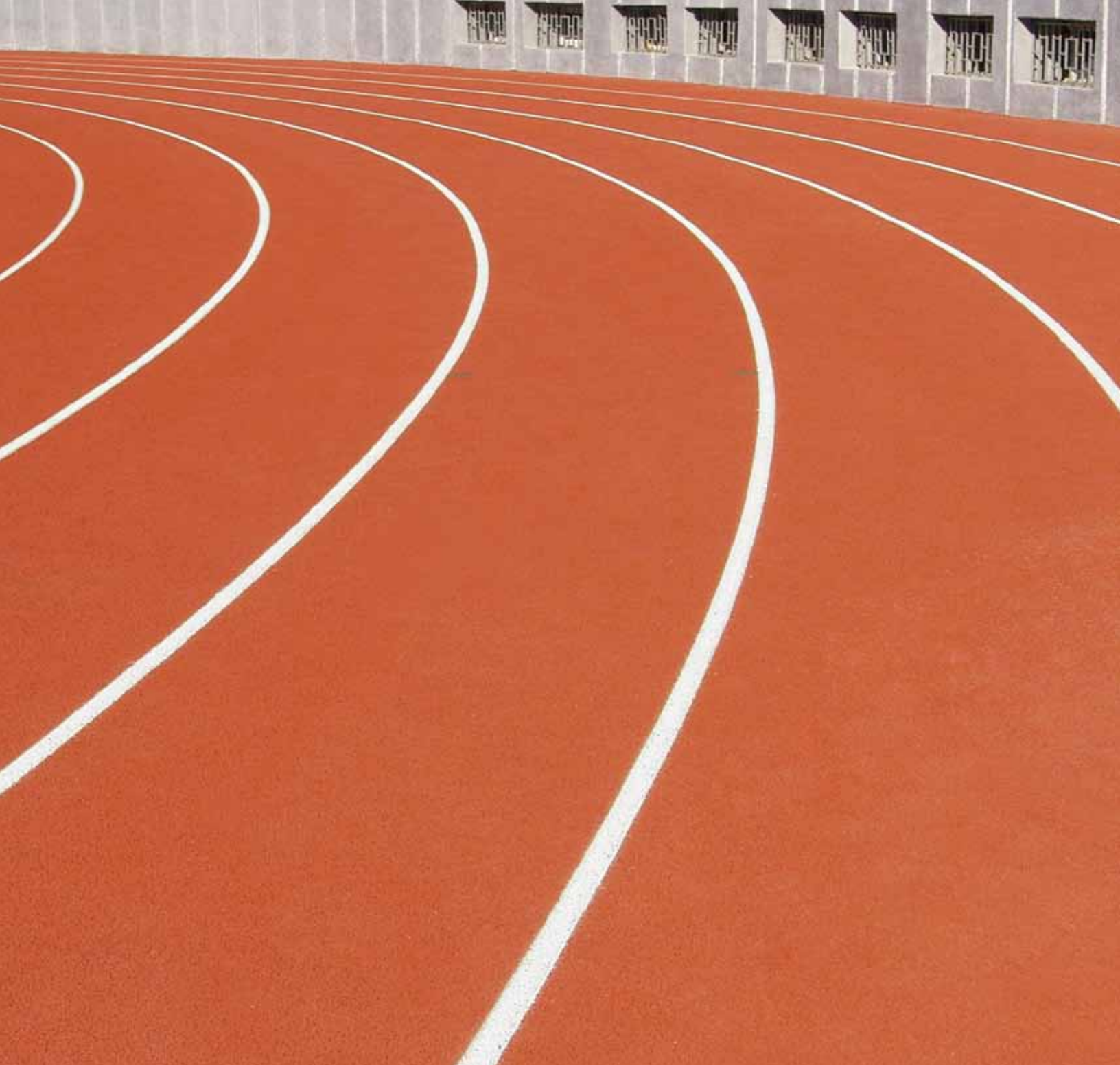
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INSTITUTE *for the* ADVANCEMENT  
*of the* AMERICAN LEGAL SYSTEM



UNIVERSITY *of*  
DENVER

Institute for the Advancement of the American Legal System

University of Denver

John Moyer Hall, 2060 South Gaylord Way

Denver, CO 80208

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