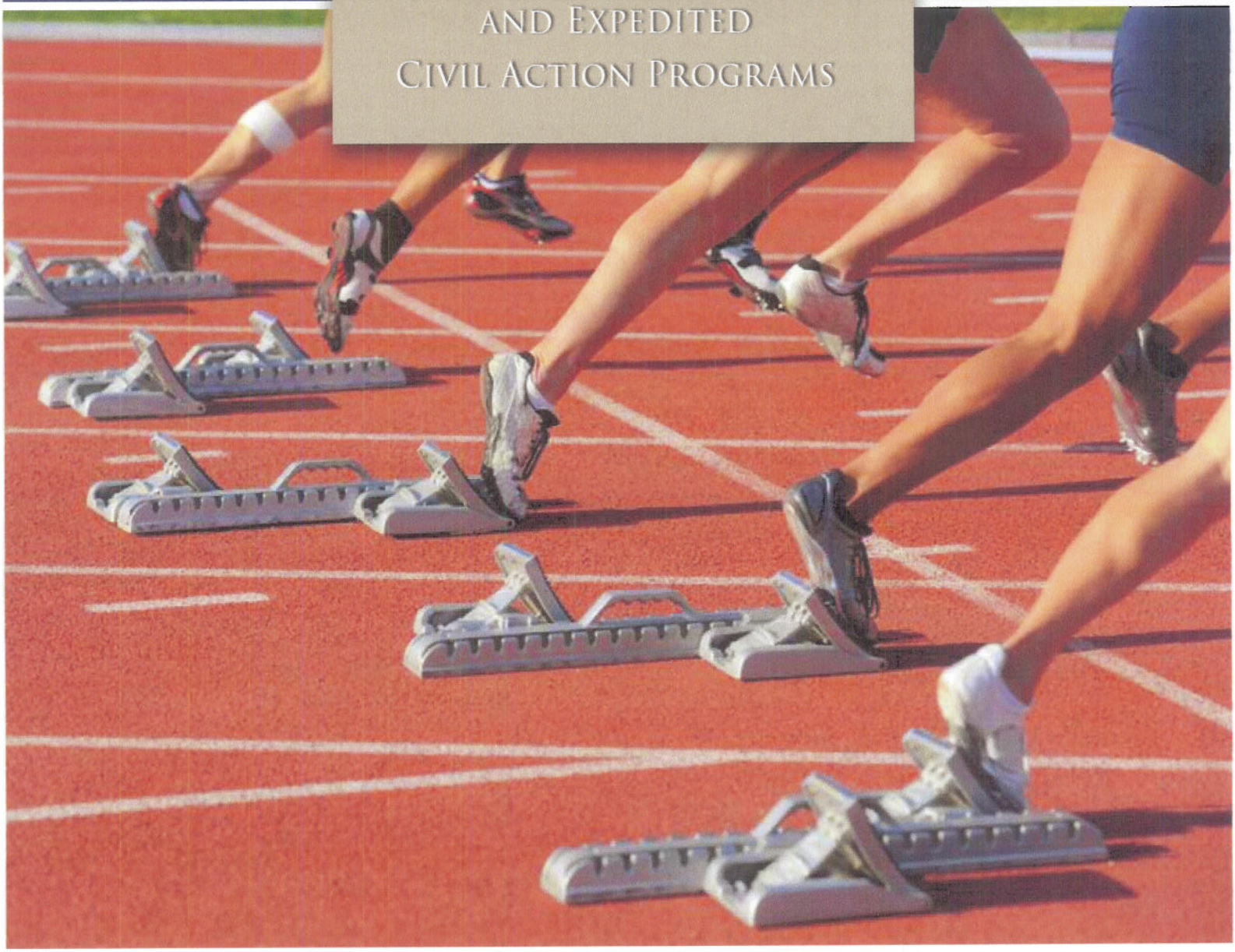
A Return to Trials:

Implementing Effective Short, Summary, and Expedited Civil Action Programs



Rule One Initiative

IAALS
Empowering Improvement. Advancing Excellence.
Institute for the Advancement of the American Legal System
University of Denver

American Board of Trial Advocates

NCSC
National Center for State Courts

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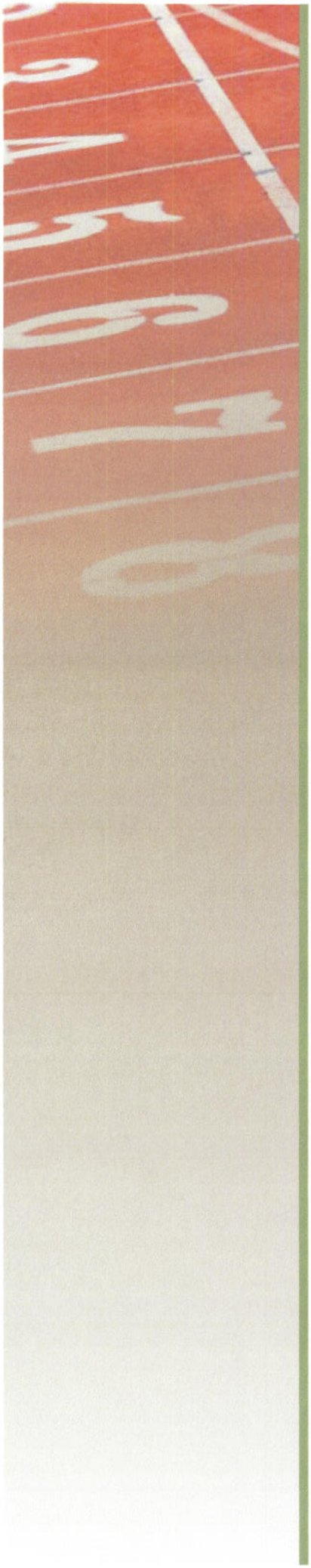
Implementing Effective Short, Summary, and Expedited Civil Action Programs

October 2012



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 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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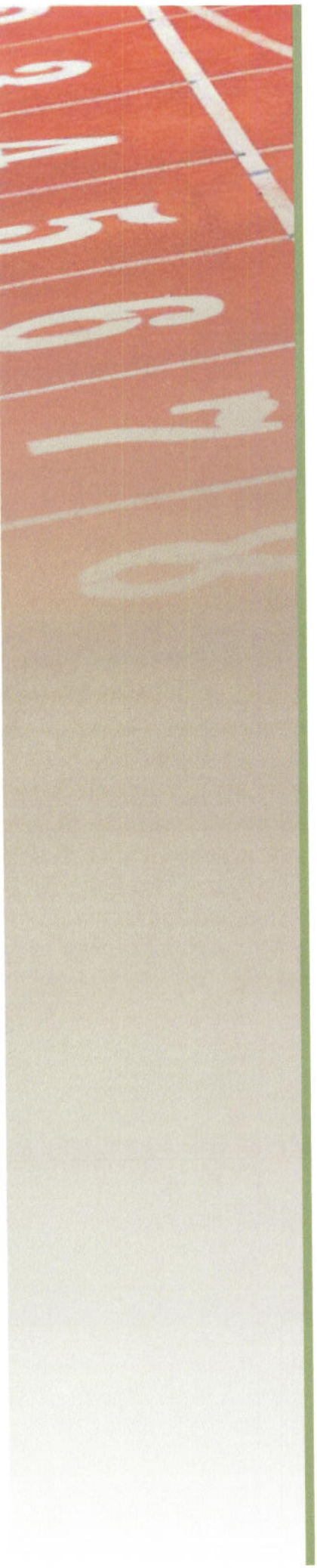


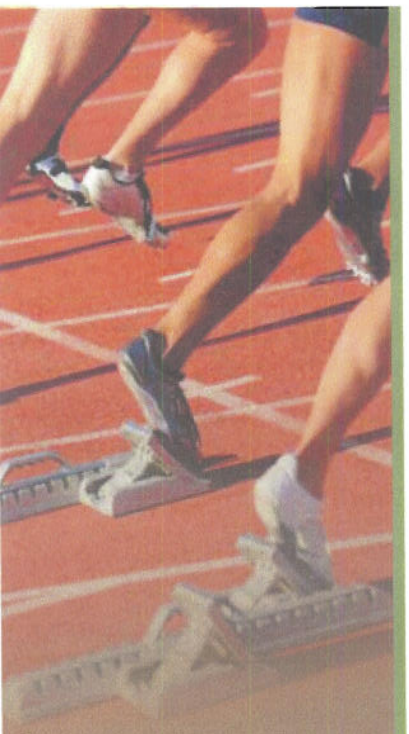
National Center for State Courts
300 Newport Avenue
Williamsburg, Virginia 23185
Phone: 800-616-6164
www.ncsc.org

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



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.[1] 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.[2] 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.

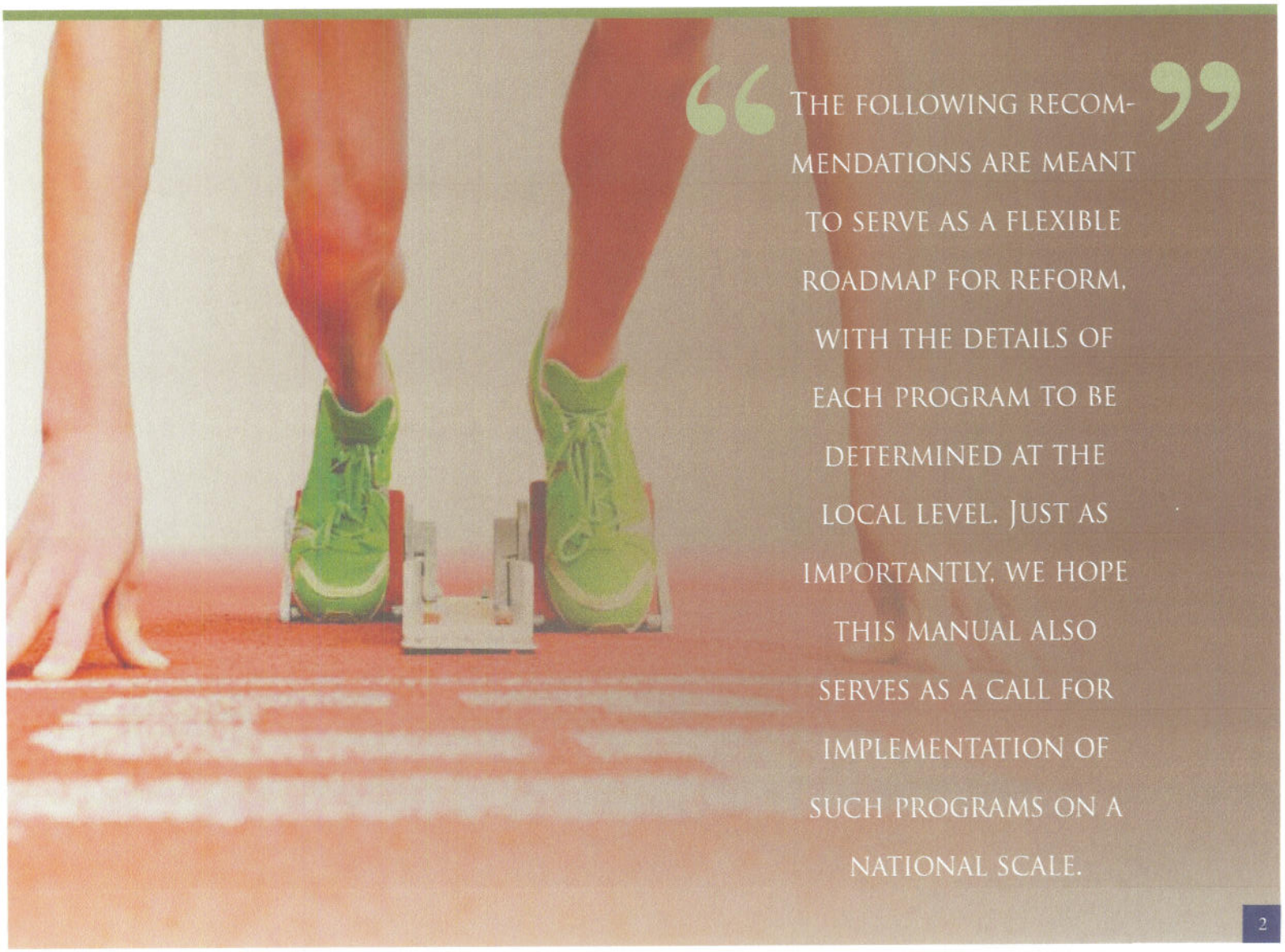
The recommendations that follow are designed to assist those around the country who are considering implementing an SSE program. Because of the variability

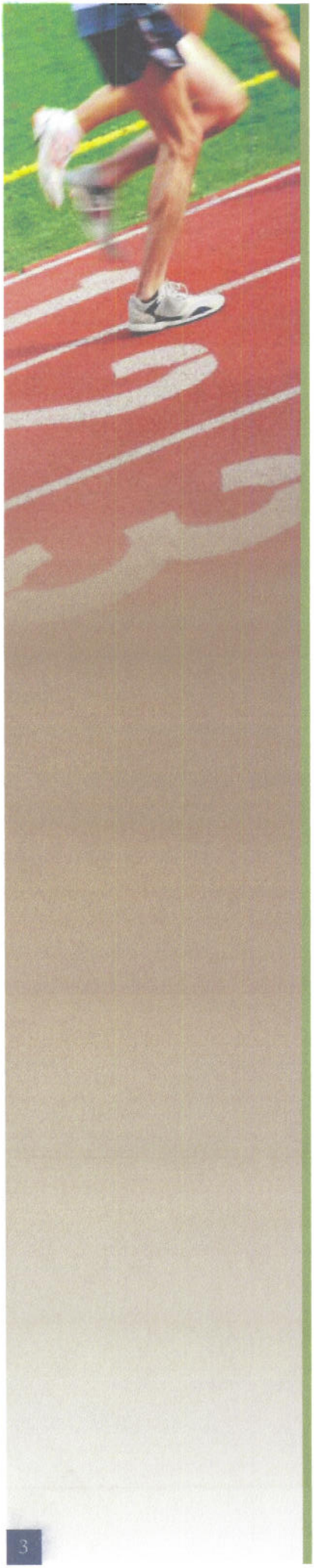
1 According to state court disposition data collected by NCSC from 2000 to 2009, the percentage of civil jury trials dropped 47.5% across the period to a low 0.5% in 2009. Data on federal civil cases shows a decline in cases resolved by trial from 11.5 percent in 1962 to 1.8 percent in 2002, illustrating 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").

2 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.





What is a Short, Summary, and Expedited (SSE) Civil Action Program?

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.[3]

3 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.

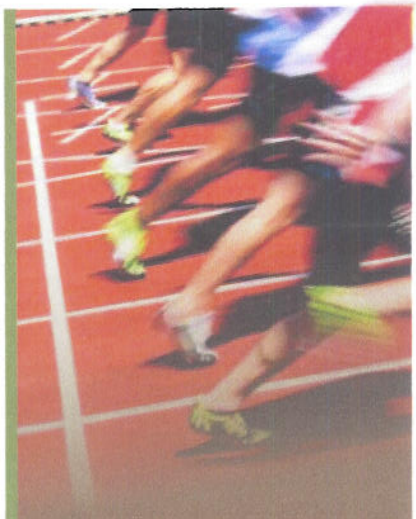
The litigants have the option of choosing this particular track for their case, and they are not forced to do so. Although voluntary processes are often slow to catch on, because people in general—and attorneys in particular—do not embrace change, voluntary programs nonetheless preserve the right of 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 Commitee 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

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.[4]

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.[5] 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.

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

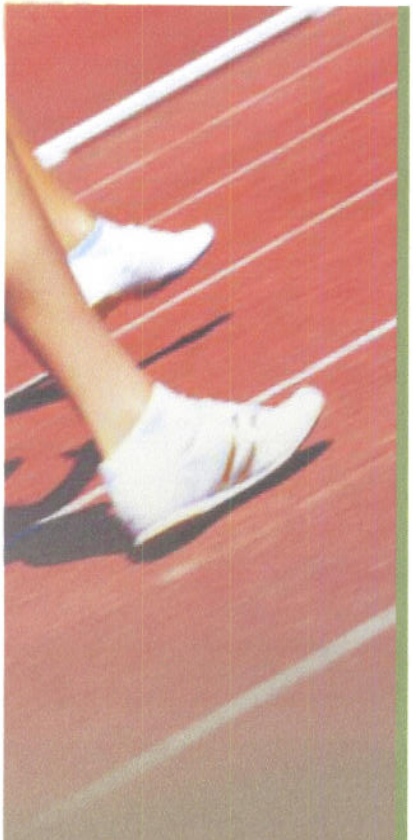
The Design

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.