



INTERIM REPORT CIVIL JUSTICE COMMITTEE

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PREFACE

These interim reports outline the work-to-date of the North Carolina Commission on the Administration of Law and Justice (NCCALJ). Chief Justice Mark Martin convened the independent, multidisciplinary commission in September of 2015, and charged the members to evaluate the North Carolina judicial system and provide findings and recommendations for strengthening our courts within the existing administrative framework.

Sixty-five voting members and additional non-voting guests were asked to serve, drawn statewide from business, academia, the bar, the non-profit sector, the Legislature, and the Judicial Branch, to ensure a well-rounded evaluation of the judicial system. Each of the members serves on one of five NCCALJ committees studying the areas of civil justice, criminal investigation and adjudication, legal professionalism, public trust and confidence, and technology. Over the past 10 months, these committees have held forty meetings where members heard presentations from more than ninety different national and statewide experts, practitioners, and court officials, resulting in productive and focused dialogue.

The NCCALJ Wants to Hear From You

The NCCALJ recognizes the vital importance of public participation in the process of court system improvement. The interim reports that follow are intended to inform the public of the relevant issues the committees are addressing and to invite input and feedback. Submit comments online at www.nccalj.org/interim-reports or sign up to speak in person at one of the four public hearings scheduled for August 2016. The dates, locations, and sign-up forms for those meetings are also at the commission's website.

In the fall of 2016, the NCCALJ's five committees will incorporate the public feedback into final recommendations to be presented to the Chief Justice, the Legislature, and the public in early 2017.

The NCCALJ thanks you for your feedback on how North Carolina courts can best meet institutional needs and 21st century public expectations. We look forward to hearing from you.

I. INTRODUCTION AND GUIDING PRINCIPLES

The North Carolina Commission on the Administration of Law and Justice is an independent, multidisciplinary advisory body convened by the Chief Justice of the Supreme Court of North Carolina to recommend improvements to the judicial system for the residents of North Carolina, which include individuals, organizations, businesses, and other entities. The judiciary is a co-equal and separate branch of state government, along with the executive and the legislature, and is responsible for exercising the judicial powers exclusively conferred upon it by the North Carolina Constitution. The Civil Justice Committee is a committee of this commission, charged with evaluating the civil justice system in North Carolina, identifying areas of concern, and making preliminary recommendations for reform. Civil justice is the process whereby North Carolina's courts resolve or assist in resolving disputes between individuals, private entities, and governmental bodies. The North Carolina civil justice system is comprised of residents, lawyers and officers of the court, magistrates, clerks of courts, District Courts, the Superior Courts, the North Carolina Court of Appeals, the Office of Administrative Hearings, the Industrial Commission, and the Supreme Court of North Carolina, as well as all the supporting staff, including the Administrative Office of the Courts. Although some courts also have jurisdiction over criminal matters, this committee's task is to examine only the civil justice system.

The committee has developed five guiding principles for our work. The committee believes that a modern civil justice system should be **fair, accessible, transparent, efficient, and effective**.

What do we mean by these principles?

- A system is **fair** when cases are decided based on the principles of law and justice and the facts and circumstances of the particular case, and are not biased by the wealth, political influence, or identity of the parties. Partisanship and prejudice have no place in a fair decision.
- A system is **accessible** when the courts and court-assisted processes are open and available to all persons who wish to participate, without barriers or costs, financial or otherwise, that are so high as to deter residents from using the courts.
- A system is **transparent** when participants understand how their case will be assigned, processed, and adjudicated, and when records of the proceedings are open and available to the public except when privacy or safety concerns require otherwise.
- A system is **efficient** when time and resources expended are proportionate to the needs of the case, and when litigation, lawyers, or courts do not generate unnecessary costs or delay.
- A system is **effective** when judicial officers have sufficient support, resources, and administrative structures to permit quality and timely decision-making and processing of cases, and when the system generates data to evaluate performance as measured by relevant benchmarks.

These are the guiding principles the committee believes are essential to a modern civil justice system able to meet the needs of and provide justice to the residents of North Carolina. The

committee has used these principles to determine the principal areas of focus for study and improvement, and to develop the recommendations outlined below. Going forward, these principles will inform the relevant benchmarks to assess progress toward ensuring all residents of North Carolina have confidence in the civil justice system.

II. AREAS OF FOCUS

The committee held six public meetings at which various individuals spoke. Among those attending, speaking, or presenting at the meetings were members of the business community, sitting judges on the Business Court, the Superior and District Courts, court administrators, members of the Administrative Office of the Courts, court executives and judges from other jurisdictions, legal aid professionals, representatives from the North Carolina Bar, the North Carolina Conference of Clerks of the Superior Court, law students, legislative liaisons, and other members of the public.

After consulting with these stakeholders, experts, and researchers, the committee decided to focus on the following areas, recognizing that there may be other areas of concern raised by stakeholders or the public not identified here.

- Technology
- Case management and tracking
- Judicial assignment system
- Legal support staff
- Legal assistance and self-represented litigation
- Civil fines, fees, and penalties

Technology

North Carolina was once a leader in using technology in its civil justice system, but today lags behind other jurisdictions. The federal government's court system and states like Utah have adopted a uniform and comprehensive electronic filing and document management system. In comparison, electronic filing is available for only a fraction of the cases in North Carolina, primarily in the Court of Appeals, the Supreme Court, the Business Court, and certain pilot programs in four of North Carolina's one hundred counties. Electronic management of cases, from filing to dismissal, is not uniform throughout North Carolina. Despite security risks and substantial taxpayer expense in terms of storage and administration, paper filing and documentation remain the norm in most North Carolina courts. This paper system is also prone to inefficiencies and transcription errors when files are processed or converted to other formats, such as for database entry. Members of the legal aid community observed that the lack of uniform technology-enhanced filing in North Carolina makes representation of indigent clients burdensome both for the lawyers and for the litigants themselves. The committee also heard speculation that some potential litigants may not file claims at all because of perceived barriers to access, such as the need to visit a courthouse, read, understand, and complete a legal form, or other costs that could be mitigated with technology.

There was substantial agreement across different stakeholder groups that increased use of technology has the potential to substantially improve the civil justice system as a whole and for all its participants: businesses, individuals, lawyers, judges, and court staff.

Case Management and Tracking

The North Carolina civil justice system currently uses the dollar amount in dispute as a rough estimate for complexity. With some exceptions, whether a case ends up before a magistrate, a clerk, a District Court Judge or a Superior Court Judge (including the Business Court) depends largely on how much money is at issue. Once a case is before a certain judicial officer, the process of how the case is managed from filing to disposition depends on a patchwork of statewide rules, local rules, and specific practices of individual courts. Cases are managed by agreement of the parties, by court administrators, or by judicial assistants, rather than by a standard case management order. One court administrator referred to the case management system there as “management by event” or “management by the passage of time.” The lack of uniformity also contributes to the difficulty of gathering reliable data about the performance of the civil justice system across the entire state, as comparisons are often inaccurate or misleading. Without standard measures of evaluation, the performance of the state’s judicial system cannot be assessed.

Although some courts seem to process cases fairly efficiently, stakeholders generally expressed dissatisfaction with the lack of uniformity between judicial districts, and the resulting delays that enter into the system, especially at the Superior Court level. A recent High Point University Survey showed that a majority of North Carolina residents believe that the court system does not resolve cases in a timely manner. Best practices suggested by the National Center for State Courts, such as “right-sizing” court resources to the complexity of the case, may help resolve some of these issues.

Judicial Assignment System

North Carolina’s judicial assignment process is difficult to navigate, particularly for self-represented litigants and others who do not interact regularly with the court system. District Court Judges are assigned to dockets, on a certain date, typically by the Chief District Court Judge. Therefore, a person may not have the same judge from the beginning to the end of her case. Superior Court Judges rotate according to the North Carolina Constitution, which provides that “[t]he principle of rotating Superior Court Judges among the various districts of a division is a salutary one and shall be observed.” Currently, there are eight divisions and 50 districts across the state. Superior Court judges rotate through the districts in their respective divisions on a six-month cycle. As a result, in Superior Court, like in District Court, a single case can be heard by more than one judge. Though the rotation system is intended to help avoid favoritism that could result from having a permanent judge in one district, the system can also lead to inefficiency and judge-shopping. The exceptions to the rotation system are the special superior court judges, including those who make up the Business Court. Under Rule 2.1 of the North Carolina General Rules of Practice, some cases that are not in the Business Court can be specially designated as “exceptional” by the Chief Justice, and receive a single judge for the duration of the litigation.

The Superior Court assignment system is implemented primarily through the North Carolina Administrative Office of Courts, working with the office of the Chief Justice. The District Court assignment system is typically administered by the Chief District Court Judge. The personnel in these courts work very hard to ensure that cases do not linger, that judicial personnel are staffed to cases as necessary, and that all participants adhere to the six-month rotation system when required

and to the extent possible, while also emphasizing access and fairness. The assignment system is critically dependent upon the competence and integrity of just a few individuals and therefore is sensitive to any change in personnel. The committee heard mixed reviews from many stakeholders about the rotation system, with no clear consensus across different perspectives.

Legal Support Staff

Legal support staff includes legal assistants, clerks, and court administrators. These staff are responsible for processing cases, and, in the case of Clerks of Court, for adjudicating certain kinds of claims. At the trial level, only the North Carolina Business Court uses staff trained to assist the judges in investigating the law and helping the judge make legal rulings. Although they may confront complex evidentiary or constitutional issues, Superior Court judges and District Court judges have little to no such research support. This lack of legally trained support staff takes place in an environment where there are significant numbers of law graduates looking for full-time employment, suggesting a potential opportunity for matching supply with demand.

Legal Assistance and Self-Represented Litigation

For those who cannot afford representation, a number of legal aid organizations, as well as private lawyers, offer free legal counsel in North Carolina. In 2014, the North Carolina Equal Access to Justice Commission estimated that private attorneys supplied approximately 18,000 hours of legal services worth more than an estimated \$3.6 million on a pro-bono basis, that is, for little or no pay for their time and expertise. Notwithstanding their efforts, one-half of the approximately 70,000 individuals who seek a lawyer are turned away without one, with eighty percent of the civil legal needs of poor people in North Carolina unmet. Legal aid is supported by private donations, members of the legal profession, and by federal, state, and local funding. All these funding levels have dropped by one-third to one-half since 2008. Over the same time period, the need for legal aid has increased by 30 percent, with many clients who present significant literacy and language challenges to representation. Attorneys working in legal aid face challenges including low wages, high debt burdens from law school, and heavy caseloads.

Where litigants do not want, cannot afford, or cannot find a lawyer, they sometimes represent themselves. The number of self-represented litigants is a significant issue in North Carolina as they are in most major states. The number of self-represented litigants has been increasing. Because self-represented litigants must navigate complex procedures, they challenge the resources of the court system and can lead to delays, further exacerbated by the same types of literacy and language barriers faced by many legal aid clients. System-wide data on the number of self-represented litigants, the types of claims most likely to involve self-represented litigants, and how their cases compare to the others in the system are scarce, partly because of the technology and case management process outlined above. County-level analyses in the early 2000s and self-reporting by judges suggest that self-represented litigation is concentrated in areas like domestic relations, housing, and debt collection, and self-represented litigants can account for up to half of the docket in those matters.

Civil Fines, Fees, and Penalties

The use of civil fines, fees, and penalties is an area of concern in North Carolina and nationwide, as reflected in recent reports by government agencies and private organizations. Courts that use fines, fees, and penalties to finance their operations, as well as the potential domino effect of unpaid fines,

fees, and penalties on residents, can undermine confidence in the judicial system as a whole and potentially create a “destitution pipeline” and debtors’ prison. In North Carolina, fees generated during a criminal proceeding are turned into civil judgments for which the individual is responsible. Furthermore, court costs and fees currently go into general state revenues. While there are constitutional due process prohibitions on jailing persons for failure to pay debts who are unable to pay, and state constitutional checks on using fees to support local or court budgets, these legal mechanisms are imperfect and not self-executing.

III. PRELIMINARY RECOMMENDATIONS

Consistent with the guiding principles and findings outlined above, the Civil Justice Committee offers the following preliminary recommendations. It offers these recommendations as an invitation for comment and discussion, rather than as firm commitments. Further, these recommendations are not meant to be exclusive. They may be modified, supplemented, or discarded as the public comment and discussion period progresses.

The committee also observes that, while these recommendations can be debated or adopted separately, some of them may be interlinked with recommendations from this committee, or from other committees on the commission.

Electronic Filing and Management of Cases

Electronic filing and case management holds the potential to make the civil justice system more equitable, accessible, and efficient. In addition, it can generate data that will better enable evaluation of the performance of the entire system according to benchmarks designed to measure progress toward each of the guiding principles outlined above. Adoption of comprehensive electronic filing and case management in Utah and in the federal system can serve as a model for North Carolina. Personnel currently managing a paper system in the judicial system may then be reassigned and retrained, where appropriate, to spend time and resources on other important case management tasks not well suited for automation.

Create an Efficient Rule-Making Process for Implementation of Electronic Filing and Management

Without a rule-making process that is suitably flexible, the substantial cost savings over time of electronic filing and management may not be fully captured. As the experience of other jurisdictions has shown, adopting an electronic filing system without rules that offer certainty about the legal significance of the electronic filing can generate expense without a corresponding benefit to the civil justice system. The legislature already has provided the courts with rule-making authority in this area. The Chief Justice should appoint a rules committee that represents the bench, bar, and staff of the courts. An academic expert in procedure may be appointed as a reporter for the committee. Proposed rules should go through a public comment process and become final upon approval of the Supreme Court, unless the General Assembly votes to defer, alter, or reject those rules.

Identify and Track Cases According to Three Categories: Simple, General, Complex

Cases at every level of the civil justice system should be identified early and designated as simple, general, or complex. Resources should be matched with the complexity of the case, and metrics in addition to the amount in dispute should be used to determine where a case should be tracked. This “right-sizing” in case management will increase efficiencies throughout the system and ultimately should contribute to greater access as cases and claims are disposed of without expending unnecessary time or resources. “Right sizing” cases acknowledges the unique nature, complexity, and sensitivity of some types of cases and recognizes that not all cases require the same kind of system resources. For example, domestic relations cases may require different forms of processing and management than other types of cases, particularly since mandatory mediation is often a part of such cases. Cases with particular features could be referred for alternative dispute resolution processes such as mediation, arbitration, and collaborative law. Data gathered from such a tracking system can also be used for future evaluation of performance of specific tracks and other measures.

Require Use of Uniform Case Management Orders in All Courts

One of the principles and achievements of the Bell Commission was the establishment of a unified court system throughout the State of North Carolina. However, local rules and practice still vary considerably across the different judicial districts. The committee believes that efficiency, fairness, and transparency may be furthered by the use of uniform case management procedures and civil rules that are based on best practices. A case assignment system that matches the conduct of the case to the needs of the case will require new rules and case management orders, depending on whether the case is simple, general, or complex. The rules and orders will require modification over time as cases and best practices change. The Chief Justice should appoint a civil rules committee modeled on civil rules committees that exist in the federal judiciary and in other states. This committee shall propose rules of procedure for adoption by the Supreme Court and made binding on all lower courts, unless the General Assembly votes to defer, alter, or reject those rules.

Reassign and Retrain as Necessary Court Support Staff and Supply Judges with Research Staff

Some of the anticipated savings the system generates through improved technology and streamlined procedures can be directed to improving the quality of justice delivered in the system as a whole. The committee suggests that some portion of expected savings from the transition to technology be used to reassign, retrain, or reinvest in judicial system support staff, including trial court administrators, clerks of court, and pools of research support personnel, so that a more precise, accurate, and efficient disposition of cases can occur early in any case.

Increase Use of Technology for Remote Communications

Use of technology for remote communication (including teleconferencing and videoconferencing) in certain cases, such as for arbitration, mediation, custody, and domestic relations matters, can be used to reduce travel and expense and make the proceedings more accessible for those with limited resources or mobility.

Restore Funding for Legal Assistance Programs Including Loan Repayment Relief

Resources are at the heart of access to justice. Since the 2008 economic downturn, civil legal aid funding has decreased from virtually every source while the number of North Carolinians living in poverty has increased. When individuals are represented by legal aid, they are able to meaningfully access the court system and their interests are protected regardless of how much money they have. With skilled advocates that pursue only meritorious cases and settle many matters outside of court, legal aid conserves judicial resources.

Civil legal aid is an excellent investment of state resources that generates over \$2 in economic benefits for every \$1 in funding. The value of stopping domestic abuse, preventing unnecessary homelessness, and blocking illegal and predatory consumer practices is incalculable. The committee recommends restoring state legal aid funding, including loan repayment assistance for lawyers who serve North Carolinians in need.

Enhanced Use of Online Forms, Explore Use of Self-Help Kiosks and Centers

To assist self-represented litigants, forms and instructions should be improved and made available online. These online resources would help streamline common and non-technical matters such as small claims, simple divorces, or simple landlord-tenant cases. Self-help kiosks or centers, online court assistance, and online dispute resolution mechanisms should be explored as a way to match appropriate judicial resources with self-represented litigants. However, the committee agrees that none of these resources should be viewed as a substitute for trained competent counsel in appropriate cases. Through technology-enhanced tools as well as case management orders, self-represented litigants should be notified as early as practicable of the availability of legal services and how to obtain those services. Such a system should be designed to better distribute and designate the limited legal aid and pro bono attorney resources to litigants who are most in need of, and would most benefit from, their services.

Study Single Judge Assignment in District Court, and in Superior Court within Spirit of Rotation Required by the North Carolina Constitution

The committee agrees that there are cases beyond those handled in the Business Court or under Rule 2.1 that should be heard by a single judge. These cases typically involve multiple hearings, discovery and discovery motions, motions to dismiss and for summary judgment, and numerous court dates. The committee believes that the judiciary should further study a method that would identify those disputes for which single judge assignment is most efficient and create a transparent, neutral, and reliable method of making single judge case assignment. Such a method could comply with the spirit of the state constitutional requirement that Superior Court judges rotate through districts by assigning such cases on a rotating basis so that the assigned superior court judge has cases from different districts. The Chief Justice may encourage experimentation and pilot projects in the different districts and divisions to determine what method of assignment is most appropriate to satisfy the guiding principles of fairness, accessibility, transparency, efficiency, and effectiveness.

Ensure That Laws and Procedures Respecting Civil Fines, Fees, and Penalties Do Not Cause or Aggravate Poverty and Inequality Issues

The committee believes that further study of the effects of civil fines, fees, and penalties and their collateral consequences is warranted to ensure that an inequitable system is not taking root in North Carolina. Such study may include a cost-benefit analysis of the practice of converting criminal

finances or penalties into civil judgments, the effect of monitoring fee waivers on judicial independence, and the effect of penalties such as suspension of licenses and criminal sanctions for failure to pay child support.