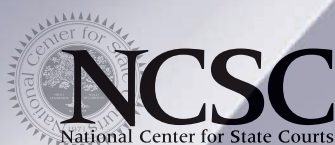


Civil Justice Initiative

Texas: Impact of the Expedited Actions Rules on the Texas County Courts at Law

Final Report: September 1, 2016



Williamsburg, Virginia





Note: The Fort Bend County Court at Law was one of five courts that participated in the evaluation of the Texas Expedited Actions Rules. The Fort Bend County Courthouse in Richmond, Texas features a Beaux Arts style. The building, originally dedicated in 1909, was designated a Recorded Texas Historic Landmark in 1980 and was listed on the National Register of Historic Places on March 13, 1980.

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Executive Summary

The Supreme Court of Texas, on November 13, 2012, adopted Rules for Dismissals and Expedited Actions intended to address the duration, cost, and degree of conflict in discovery, costs associated with mediation, time to disposition, and the length of trials in civil cases.

The new rules had several principal components:

- The rules are mandatory and apply to all civil cases involving exclusively monetary damages \$100,000 or below.
- Damages in cases subject to the expedited rules cannot exceed \$100,000 inclusive of penalties, costs, expenses, prejudgment interest, and attorneys' fees.
- Discovery in expedited actions commences immediately upon filing and must conclude within 180 days of the filing date of the first discovery request. Modifications to this timeline must be granted by the court.
- The scope of discovery in expedited actions must be limited to no more than 6 hours of oral deposition for all witnesses, 15 written interrogatories, 15 requests for production, and 15 requests for admission.
- Trial in expedited actions must be scheduled 90 days or less after completion of discovery.
- Court-ordered ADR in expedited actions cannot exceed one half-day, fees cannot be greater than twice the applicable civil filing fee, and all ADR procedures must be completed at least 60 days before the initial trial date.

Among the expected results of implementing the Expedited Action Rules are a reduction in discovery conflicts and time spent in discovery, more deliberative use of mediation, declining time to case disposition, and fewer delays between scheduled trial dates and trials held.

EVALUATION DATA AND METHODOLOGIES

The National Center for State Courts employed two distinct methodologies to evaluate the Expedited Action Rules. The first was an empirical analysis of case characteristics and outcomes of civil cases filed before and after implementation of the rules. This component was designed to focus on civil cases that Texas judicial leaders believed would most benefit from the Expedited Action Rules. Consequently, the samples were drawn from contested cases in which at least some discovery was likely to have taken place in five urban counties (Dallas, Fort Bend, Harris, Lubbock, and Travis) and that were disposed by settlement, by summary judgment, or by bench or jury trial.

In addition to the quantitative analysis of case-level data, the NCSC collected survey and interview data from attorneys and judges. Online surveys were distributed to attorneys listed as counsel of record for cases in the 2013 sample. The purpose of the survey was to confirm the accuracy and provide additional information about the case-level data, to obtain factual information about the cases that would not ordinarily be found in the court files, and to solicit the attorneys' opinions about the Expedited Actions Rules and their impact on case processing. A separate survey was distributed to attorneys whose 2013 cases were referred to mediation in order to investigate the role of mediation in civil case processing. Finally, the evaluation also benefited from interviews conducted by students at the Baylor University School of Law with attorneys and judges in the participating sites about their experiences with the Expedited Action Rules.

FINDINGS

COMPLIANCE WITH EXPEDITED ACTIONS RULES

A threshold question for the evaluation was the extent of compliance by lawyers with the new rules. Compliance could be investigated by analyzing observance with pleading requirements. Prior to adoption of the Expedited Action Rules, litigants were only required to state that monetary relief sought was within the jurisdictional limits of the court, but after implementa-

tion, parties were required to state expressly whether they sought monetary relief of \$100,000 or less, or greater than \$100,000 and/or non-monetary relief. The expectation was that the proportion of cases in which litigants failed to specify whether the relief sought was above or below \$100,000, instead requesting relief within jurisdictional limits, would decrease. However, the proportion observed a statistically and substantively significant increase. While some noncompliance following implementation of the rules is likely the result of a lack of awareness of the new requirements, evidence suggests that some of the noncompliance in the 2013 sample may have resulted from attorneys attempting to evade the Expedited Action Rules.

Another means of assessing compliance with the new rules is to examine conformance with and awareness of discovery limits. Consistent with expectations, motions to modify discovery were filed in a substantially larger portion of cases in the post-implementation sample than pre-implementation, and the average time to filing such motions fell, suggesting that attorneys and litigants recognized the substantive and timeframe limits and responded as necessary. Survey and interview responses also indicated very high compliance with discovery restrictions imposed on Expedited Action cases.

DISCOVERY DISPUTES

Although a decline in the proportion of cases featuring a discovery dispute was observed between the 2011 and 2013 samples, the change was not statistically significant. However, disputes in the later cases occurred earlier in the life of the case and involved significantly fewer motions on average, suggesting that the reduced scope of discovery under the rules eased such disputes. Survey results supported these findings.

REFERRALS TO ALTERNATIVE DISPUTE RESOLUTION (ADR)

The Expedited Action Rules were intended to affect not just the overall rate of court referral to ADR, but

the way in which referrals to ADR were utilized. Some evidence of both these outcomes was observed. The overall rate of referral to mediation experienced a modest, but statistically significant decline. Relatively substantial changes, however, were discovered in the means by which referrals to mediation proceeded. Referral to mediation on a motion from the parties increased at the expense of referrals via standing order, while referrals due to court order recorded a slight decrease that was not statistically significant.

CASE OUTCOMES

Excluding uncontested cases, the overall changes in case dispositions resulted in fewer trials and summary judgments and more settlements after implementation of the Expedited Action Rules. The preponderance of contract cases meant that changes in their disposition patterns tended to drive the overall trends, but there were some differences in the impact of the rules on outcomes between case types. Settlement rates in tort cases did not change, for example, but trial rates increased significantly. Differences between outcome effects were also observed among the five counties in the study, which could be a result of variation in the mix of civil case types disposed in different jurisdictions.

TIME TO DISPOSITION

The impact of the Expedited Action Rules on the time to disposition for cases overall and by case type were examined using Kaplan-Meier survival curves, which help to address issues arising from differing observation time and the persistence of pending caseloads. Kaplan-Meier curves also permit the calculation of confidence intervals, so differences in survival times can be evaluated in terms of statistical significance. Considering all disposition types, the rate of case disposition appears to be slightly lower, leading to longer duration, within the first three months after filing. For the remainder of the first year, dispositions occur at statistically indistinguishable rates, but the rate of disposition quickens after a year.

Because implementation of the rules affected the manner of dispositions as well, survival curves were used to examine the time to disposition by manner of disposition. After three months, the rate of settlement after implementation was significantly higher than before, producing faster resolution. Trials and summary judgments, however, were slower to occur after implementation of the rules, for about nine months in the case of trials and for three months in summary judgments. Examination of the average time from filing to the first scheduled trial date discovered that trials were scheduled somewhat later in the 2013 sample than in the 2011 sample, but the average time from the first scheduled trial date to actual trial date was lower in the 2013 sample. Tort cases experienced a different substitution pattern for dispositions, with trials replacing summary judgment, while settlements remained steady. The resulting impact of the rules on time to trial disposition, although difficult to estimate with precision due to small numbers, is to slow the rate of trials in the early months, but increase their rate after a year.

COMPETING RISKS ANALYSES

To supplement the Kaplan-Meier analyses, a competing risks model was used to estimate the impact of individual case-level characteristics on time to disposition, controlling simultaneously for the potential for multiple methods of disposition. Specifying disposition by trial or summary judgment as the primary risk, with settlement as the competing risk, the model estimated that implementation of the rules reduced the risk of judgment, producing longer durations to trial or summary judgment, although the primary explanation (based on comparison with a model without competing risks specified) appears to be that settlement is occurring earlier in the 2013 sample, removing cases that might have persisted to judgment under different circumstances. Cases referred to mediation, meanwhile, reached judgment quicker under the Expedited Action Rules.

ATTORNEY OPINIONS AND COMMENTS

The survey administered to attorneys involved in cases under the Expedited Action Rules did not produce a large number of responses, but among those who did respond, substantial majorities of attorneys reported that the Expedited Actions Rules provided sufficient time to complete discovery and information for parties to assess the merits of their respective cases, and, in cases involving discovery disputes, disputes were resolved in a timely manner. Most attorneys did not believe that discovery or disposition were quicker under the rules, or that discovery costs were reduced. Some differences in assessments emerged when responses were examined by the manner of case disposition.

About a third of responding attorneys offered open-ended comments, and a plurality of those comments tended to express negative reactions to the Expedited Action Rules. Although likely affected by self-selection bias, the comments raised several pertinent issues related to the perceived restrictiveness of the rules, the trial calendar, and conflicts between the rules and other civil rules.

MEDIATION SURVEY

Like the attorneys' survey above, the survey focused on cases sent to mediation did not result in a large response pool, but of the responses received only a quarter of cases referred to mediation actually resulted in mediation, although three out of four cases that did have mediation settled as a result.

JUDGE, LAWYER AND COURT COORDINATOR INTERVIEWS

Intended to supplement the responses to the surveys, interviews conducted with lawyers, judges, and coordinators involved in cases subject to the Expedited Action Rules discovered that a substantial number of attorneys and judges contacted did not believe they had experienced case processing under the new rules, despite some evidence from the case-level data that the rules had some impact on case dispositions and duration. Interviews with the court coordinators may provide a mechanism for such effects, however, as they note cases subject to the rules and represent the abbreviated timelines through docket control and scheduling order documents, which attorneys and judges may not realize are affected by the expedited timeline.

CONCLUSIONS AND RECOMMENDATIONS

Analysis of the case-level data appear to support the presence of a positive impact of the Expedited Action Rules on case processing in the participating courts. In contract cases, settlements increased at the expense of summary judgment and trial outcomes, while in tort cases trials grew more common, replacing summary judgment. The rules increased the pace of settlements, but judgment dispositions appear to have experienced initial delays, followed by quicker resolutions for cases lasting more than 9 to 12 months. No evidence arose suggesting significant noncompliance with the new rules, although operation of the rules may be more a function of court coordinators' communications of deadlines and other restrictions than of conscious decisions by judges and attorneys to change practices in conformance with the abbreviated timetables and other limitations. These and other issues could be addressed with educational initiatives.

Use of mediation appears to have been affected by the Expedited Action Rules, although emphasis of the orientation toward ADR reflected in the rules should be the focus of additional educational efforts. Action is also recommended to identify and address conflicts between existing procedural and substantive civil rules and the requirements of the Expedited Action Rules.

State and federal court policymakers have responded to concerns about the fairness, cost, and efficiency of the civil justice system with a wide variety of civil justice improvement efforts. For example, New Hampshire enacted the Proportional Discovery/Automatic Disclosure (PAD) Rules changing the form of the pleadings and introducing automatic disclosure for discovery.¹ Utah imposed significant restrictions on the scope of discovery based on the amount-in-controversy.² Other reforms have focused on specific types of cases, such as the Colorado CAPP procedures,³ the Business Litigation Session of the Massachusetts Superior Court in Boston,⁴ and summary jury trial programs in a variety of jurisdictions across the country.⁵ Most of these initiatives have been implemented either on a pilot basis or as a voluntary, “opt-in” alternative to existing rules of civil procedure.

In Texas, court policymakers took a different approach. Amendments to the Texas Rules of Civil Procedure were enacted by the Texas Supreme Court in response to legislative policy initiatives intended to reduce expense and delay of civil litigation while maintaining fairness to litigants.⁶ The 2013 amendments provided specific procedural rules for dismissals for baseless actions,⁷ and an expedited process and limitation on discovery for cases in which claimants seek monetary relief of \$100,000 or less (expedited actions).⁸

In many respects, the Texas Expedited Actions Rules are unique among the various civil justice improvement efforts that have been implemented in state courts in recent years. First, they are mandatory for all civil cases valued \$100,000 or less, and damages awarded for expedited cases cannot exceed \$100,000.⁹ Second, they specify an expedited timeline for discovery and trial in which discovery commences immediately upon filing and must be concluded within 180 days of serving the first discovery request unless a modification of the discovery control plan is granted pursuant to Rule 190.5. The trial must be scheduled no later than 90 days after the completion of discovery. Third, the rules significantly restrict the scope of discovery to no more than 6 hours of oral depositions for all witnesses, no more than 15 written interrogatories, no more than 15 requests for production, and no more than 15 requests for admissions.¹⁰ Finally, the rules impose restrictions on court-ordered ADR such that procedures cannot exceed a half-day in duration, fees cannot exceed a total cost of twice the amount of the applicable civil filing fee, and all procedures must be completed no later than 60 days before the initial trial setting.¹¹

The NCSC undertook this evaluation in cooperation with the Texas Office of Court Administration (OCA) to assess the impact of the Expedited Actions Rules.

¹ PAULA HANNAFORD-AGOR ET AL., NEW HAMPSHIRE: IMPACT OF THE PROPORTIONAL DISCOVERY/AUTOMATIC DISCOVERY (PAD) PILOT RULES (NCSC Aug. 2013). The PAD Rules were initially implemented on a pilot basis in two counties effective October 1, 2010, and were later extended statewide effective March 1, 2013.

² PAULA HANNAFORD-AGOR & CYNTHIA G. LEE, UTAH: IMPACT OF THE REVISIONS TO RULE 26 ON DISCOVERY PRACTICE IN THE UTAH DISTRICT COURTS (NCSC April 2015).

³ CORINA D. GERETY & LOGAN CORNETT, MOMENTUM FOR CHANGE: THE IMPACT OF THE COLORADO CIVIL ACCESS PILOT PROJECT (Oct. 2014).

⁴ JORDAN SINGER, SUFFOLK SUPERIOR COURT BUSINESS LITIGATION SESSION PILOT PROJECT: FINAL REPORT ON THE 2012 ATTORNEY SURVEY (2012).

⁵ PAULA HANNAFORD-AGOR ET AL., SHORT, SUMMARY & EXPEDITED: THE EVOLUTION OF CIVIL JURY TRIALS (NCSC 2012).

⁶ Adoption of Rules for Dismissals and Expedited Actions, Per Curiam Opinion, Misc. Docket No. 12-9191 (Tex. S. Ct., Nov. 13, 2012).

⁷ Tx. R. Civ. Proc. 91a.

⁸ Tx. R. Civ. Proc. 169; Tx. R. Civ. Proc. 190.2.

⁹ Tx. R. Civ. Proc. 190b.

¹⁰ Tx. R. Civ. Proc. 190.2(b).

¹¹ Tx. R. Civ. Proc. 190d(4). The original amended rules prohibited the court from ordering the parties to engage in ADR unless they had consented or were required to do so by contract. This provision was modified in response to public comment on the rules filed before the rules went into effect on March 1, 2013.

The intent of the evaluation was to determine if the rules are working as intended to reduce time and costs associated with civil litigation, to assess the role of mediation in civil litigation, to identify areas of strength and weakness in civil case processing, and to propose recommendations as appropriate to align the rules with desired outcomes. The modified rules were expected to have a variety of effects addressing the duration, cost, and degree of conflict in discovery, the costs associated with mediation, the time to disposition, and the length of trials. Among the expected results of implementing the Expedited Action Rules are a reduction in discovery conflicts and time spent in discovery, more deliberative use of mediation, decreased time to case disposition, and fewer delays between scheduled trial dates and trials held. The findings from this evaluation can be used to inform civil justice improvement efforts in other jurisdictions.

Project Methodology

The NCSC employed two distinct research methodologies to conduct the evaluation. The first was a comparison of case characteristics and outcomes of civil cases filed before and after implementation of the Expedited Actions Rules. This component was designed to focus on civil cases that Texas judicial leaders believed would most benefit from the Expedited Action Rules. Consequently, the samples were drawn from contested cases in which at least some discovery was likely to have taken place in five urban counties (Dallas, Fort Bend, Harris, Lubbock, and Travis). Although the District Court has concurrent jurisdiction with the County Court at Law for cases valued at \$201 to \$200,000, Texas court policymakers opted to restrict the evaluation to cases filed in the County Courts at Law on the theory that this would be the preferred venue for cases subject to the Expedited Actions Rules.¹² The evaluation also focused on cases disposed by settlement, by summary judgment, or by bench or jury trial. Cases disposed by default judgment, nonsuits, dismissals for failure to prosecute, and other

non-meritorious dispositions were excluded because the Expedited Actions Rules were not expected to have an effect on those types of cases.¹³

The evaluation samples consisted of 2,317 civil cases filed between July 1 and December 31, 2011 (2011 sample) and 2,501 cases filed between July 1 and December 31, 2013 (2013 sample). To select the cases, the OCA forwarded lists of qualified cases from the participating courts to the NCSC. The lists included 4,330 and 3,558 cases for the 2011 and 2013 periods, respectively. Because the volume of cases varied substantially both among the participating courts and between the pre and post-implementation periods, the NCSC developed sampling weights to ensure a minimum of 50 cases from each court and a total of 2,500 cases for each sample.¹⁴ In addition to the case number, the list of eligible cases included the case name, the case type recorded in the case management system, the filing and disposition dates, the disposition type, the answer date, and the amount

¹² The Expedited Actions Rules also apply to cases filed in the District Court, so there was no expectation that litigants would attempt to evade the rules by filing in a different court.

¹³ Cases that were pending at the time the samples were drawn were included, but only cases that settled or were disposed on the merits were ultimately included in the analyses for this evaluation.

¹⁴ The original samples included 2,500 and 2,506 cases, respectively, but 183 cases from the 2011 sample and 5 cases from the 2013 sample were landlord/tenant cases, which are exempt from the Expedited Actions Rules. Those cases were ultimately excluded from analysis.

in controversy alleged in the complaint. Tables 1 and 2 show the distribution of cases geographically and by case type for each sample.

The samples were not perfectly comparable. For example, the list of eligible cases from which the 2011 sample was drawn included smaller proportions of cases from Fort Bend and Travis Counties and correspondingly larger proportions of cases from Dallas, Harris and Lubbock Counties, than the list

from which the 2013 sample was drawn.¹⁵ There was also a substantially larger proportion of automobile tort cases and a substantially smaller proportion of debt collection cases in the 2013 sample.¹⁶

Staff from the OCA and students from the Baylor University School of Law supplemented the data extracted from the case management system with information gleaned from case documents available on the courts' online case management systems.¹⁷

Table 1: Cases Selected for Evaluation, by County

| | 2011 | | 2013 | |
|-----------|-------|-------|-------|-------|
| Dallas | 281 | 12.1% | 163 | 6.5% |
| Fort Bend | 56 | 2.4% | 112 | 4.5% |
| Harris | 1,481 | 63.9% | 1,476 | 59.0% |
| Lubbock | 58 | 2.5% | 58 | 2.3% |
| Travis | 441 | 19.0% | 692 | 27.7% |
| | 2,317 | | 2,501 | |

Table 2: Cases Selected for Evaluation, by Case Type

| | 2011 | | 2013 | |
|--------------------------------|-------|-------|-------|-------|
| Automobile Tort | 295 | 12.7% | 473 | 18.9% |
| Medical Malpractice | – | | 2 | |
| Other Professional Malpractice | – | | 3 | |
| Product Liability | 3 | 0.1% | 2 | 0.1% |
| Other Tort | 118 | 5.1% | 155 | 6.2% |
| Fraud | 5 | 0.2% | 9 | 0.4% |
| Debt Collection | 1,321 | 57.0% | 1,243 | 49.7% |
| Other Contract | 412 | 17.8% | 407 | 16.3% |
| Other Civil | 163 | 7.0% | 207 | 8.3% |
| | 2,317 | | 2,501 | |

¹⁵ This reflects normal geographical variation in filing and disposition rates over time across Texas.

¹⁶ An examination of civil case filings from 2011 through 2014 suggests that these differences are unrelated to implementation of the Expedited Actions Rules, but rather resulted from normal fluctuations in civil caseloads. The proportion of contract cases filed in County Courts at Law dropped steadily from 47 percent in 2011 to 34 percent in 2014, ostensibly as the impact of the economic recession dissipated. As the proportion of contract cases declined, the proportion of personal injury/property damage cases increased from 13 percent to 15 percent over the same period. ANNUAL REPORT FOR THE TEXAS JUDICIARY: FY 2011 59-60 (March 2012); ANNUAL REPORT FOR THE TEXAS JUDICIARY: FY 2012 56-57 (March 2013); ANNUAL REPORT FOR THE TEXAS JUDICIARY: FY 2013 59-60 (March 2014); ANNUAL REPORT FOR THE TEXAS JUDICIARY: FY 2014 73-74 (March 2015).

¹⁷ Review of online casefiles continued through February 13, 2015 for the 2011 sample and through August 12, 2015 for the 2013 sample.

Specifically, data were collected documenting the number and dates of motions and orders to modify discovery, motions and orders related to discovery disputes, motions and orders related to mediation, the scheduled trial date, the actual trial date, and the case outcome including the amount of any judgments entered.

In addition to case-level data, the NCSC distributed online surveys to 780 attorneys listed as counsel of record for 682 unique cases in the 2013 sample.¹⁸ The purpose of the survey was to confirm the accuracy and provide additional information about the case-level data, to obtain factual information about the cases that would not ordinarily be found in the court files, and

to solicit the attorneys' opinions about the Expedited Actions Rules and their impact on case processing. In addition, the NCSC distributed a separate survey to 316 attorneys whose 2013 cases were referred to mediation (236 cases). The mediation survey was designed to investigate the role of mediation in civil case processing.

As shown in Table 3, the survey response rates were less robust than anticipated.¹⁹ Although 105 attorneys responded to the Expedited Actions Rules survey (13%), only 95 reported that the case was fully resolved (12%), permitting them to complete the survey.²⁰ More than two-thirds of the responses reported on debt collection (44%) and automobile

Table 3: Survey Responses by County

| | TOTAL RESPONSES | | CLOSED CASES | |
|-----------|-----------------|------|--------------|------|
| | N | % | N | % |
| Dallas | 8 | 8% | 8 | 8% |
| Fort Bend | 4 | 4% | 4 | 4% |
| Harris | 40 | 38% | 38 | 40% |
| Lubbock | 4 | 4% | 4 | 4% |
| Travis | 49 | 47% | 41 | 43% |
| Total | 105 | 100% | 95 | 100% |

Case Types

| | N | % |
|---------------------|----|--------|
| Automobile Tort | 26 | 27% |
| Premises Liability | 6 | 6% |
| Product Liability | 2 | 2% |
| Other Tort | 4 | 4% |
| Debt Collection | 42 | 44% |
| Fraud | 1 | 1% |
| Other Contract | 8 | 8% |
| Other Real Property | 3 | 3% |
| Other Civil | 3 | 3% |
| | 95 | 100.0% |

¹⁸ Many attorneys were listed as counsel of record in multiple cases in the 2013 sample, but the survey asked attorneys to answer questions in the context of just one case. Consequently, the potential list of cases was reduced from 2,501 to 682 cases. As a result of selecting a single case for each attorney, the geographic distribution of attorneys differed from the 2013 sample of cases with attorneys from Fort Bend and Travis Counties underrepresented compared to the proportion of cases from those counties (3% and 19%, respectively), and attorneys from Dallas, Harris and Lubbock Counties overrepresented (14%, 63%, and 11%, respectively).

¹⁹ To boost response rates to the greatest extent possible, surveys were emailed to attorneys on three separate occasions: Sept. 28, Oct. 5, and Oct. 26, 2015. Before the third mailing, a separate email on behalf of Chief Justice Nathan Hecht was sent to all attorneys who had not previously responded to the survey requesting their participation in the survey.

²⁰ Ironically, attorneys from Travis County were overrepresented in the completed survey responses compared to the initial survey distribution list.

tort cases (27%). Only 10 percent of attorneys (31) responded to the mediation survey. Although the survey responses provide some insight into general trends, the poor response rates make them unreliable for detailed findings.

Due to concerns about the reliability of attorney surveys given the low response rates, the Texas OCA reached out to Baylor University School of Law for assistance in interviewing judges and attorneys in the participating sites about their experiences with the Expedited Actions Rules. The intent was to interview all of the judges in the County Courts at Law in the participating counties and at least five attorneys per county who had filed cases in the 2013 sample. To allow for replacement of attorneys who could not be located or who opted not be interviewed, the NCSC selected the names of 60 attorneys (10 attorneys per county plus an additional 10 attorneys who filed cases in multiple counties). To the extent possible, the NCSC selected attorneys with multiple cases in the sample on the theory that frequent users of the County Courts at Law would have a more informed context for discussing the impact of the Expedited Actions Rules. Attorneys identified as practicing in multiple counties were included separately due to the likelihood that they might be able to offer insights about local factors

that make the rules more or less effective. In addition to interviews with judges and attorneys, staff from the OCA also interviewed court coordinators in each of the County Courts at Law. Court coordinators are responsible for managing the judges' trial calendars and would be the most knowledgeable about steps that were undertaken to implement the Expedited Actions Rules in each court.

Unfortunately, this effort also produced less than ideal results. Despite numerous attempts to interview stakeholders, Baylor law students were only able to obtain the consent of five of the 60 lawyers and eight of 20 County Courts at Law judges to be interviewed, and the OCA was only able to solicit comments from five court coordinators. The Baylor students reported that many lawyers declined to be interviewed because they claimed not to have any experience with expedited action cases in spite of the fact that their names were selected from the 2013 sample, which consisted almost entirely of expedited action cases. Likewise, several judges reported that they were generally unaware of which cases on their dockets were subject to the Expedited Actions Rules. As discussed below, these responses are particularly ironic given the apparent impact that the rules have had on civil case processing in Texas.

COMPLIANCE WITH EXPEDITED ACTIONS RULES

To enable courts to identify cases subject to the Expedited Actions Rules at the time of filing, Rule 47(c) of the Texas Rules of Civil Procedure were amended in 2012 to require litigants to expressly state whether the party seeks monetary relief of \$100,000 or less, or if the party seeks monetary relief more than \$100,000 and/or non-monetary relief.²¹ A threshold question for the NCSC evaluation was the extent to which lawyers complied with Rule 47(c), which would both alert the courts to applicable case management deadlines and indicate the parties' awareness of their applicability. Table 4 documents the proportion of cases in the 2011 and 2013 cases that complied with this requirement.

Before implementation of the Expedited Actions Rules, Rule 47(c) only required litigants to state that the monetary relief sought was within the jurisdictional limits of the court.²² It is not surprising, therefore, that almost one-third of the cases (30.2%) in the 2011 sample failed to declare with specificity the amount of monetary relief sought. Of those that did, almost all

(98.6%) claimed unliquidated damages of \$100,000 or less.²³ In the 2013 sample, however, the proportion of cases in which the litigant failed to comply with Rule 47(c) not only failed to decrease as expected, but actually increased significantly to 34.9 percent.²⁴

Some of the noncompliance with amended Rule 47(c) may be partially, perhaps mostly, attributable to lack of awareness on the part of attorneys that the new rules had taken effect, so they failed to adjust their pleading practices accordingly.²⁵ This explanation likely accounts for the fact that the proportion of cases in which the amount in controversy was not declared did not decrease. However, the significant increase in noncompliance may indicate that some attorneys attempted to evade the Expedited Actions Rules. Anecdotal reports, for example, suggest that many attorneys were reluctant to declare that cases were subject to the Expedited Actions Rules due to the restriction on collecting judgments in excess of \$100,000, excluding post-judgment interest, pursuant to Rule 169(b).²⁶

Table 4: Declared Amount in Controversy

| | 2011 | | 2013 | | <i>p</i> |
|---------------------|-------|-------|-------|-------|----------|
| \$100,000 or less | 1,594 | 68.8% | 1,595 | 63.8% | * |
| More than \$100,000 | 24 | 1.0% | 34 | 1.4% | |
| Not declared | 699 | 30.2% | 872 | 34.9% | * |
| | 2,317 | | 2,501 | | |

* $p < .001$

²¹ TX. R. CIV. PROC. Rule 47. Litigants that fail to specify the monetary relief sought are not permitted to commence discovery until the pleadings have been amended to comply. Rule 47(e).

²² Rule 47(b).

²³ Rule 190.2 specifies that suits involving \$50,000 or less were subject to discovery limitations (Discovery Level 1). Of the 2011 cases in which a specific amount-in-controversy was claimed, 94.7 percent were for \$50,000 or less.

²⁴ Litigants were significantly more likely to comply in debt collection and other contract cases (81.4%) than in tort cases (68.5%) or other civil cases (61.8%).

²⁵ The case file reviews, for example, did not indicate that the participating courts themselves undertook steps such as rejecting complaints for failure to comply with Rule 47(c) that would have raised attorney awareness about the amendments to Rule 47(c).

²⁶ In the Attorney Survey, none of the respondents reported filing a motion to remove the case from the Expedited Actions process.

To investigate this possibility, the NCSC compared the damage awards entered in the 2013 sample cases to detect differences in the monetary value of cases in which the amount in controversy was declared versus those in which it was not declared. A monetary judgment greater than \$0 was entered in slightly less than half (47.1%) of the 2013 cases. As Table 5 shows, the average damage award for cases in which the amount in controversy was declared was \$13,385 compared to \$13,995 for cases in which the amount in controversy was not declared, which was not a statistically significant difference. There is no evidence, therefore, that cases in which litigants failed to comply with Rule 47(c) involved damages greater than \$100,000 and thus would have been exempt from the Expedited Actions Rules. For the purpose of this evaluation, subsequent analyses assume that these cases are subject to the rules.

In other respects, however, compliance with the Expedited Actions Rules appears to be fairly high. For example, the NCSC hypothesized that litigants who were aware that their cases were subject to the rules would be similarly aware of the applicable discovery deadlines and would seek modifications to the discovery schedule if needed. Motions to modify discovery were filed in 21 cases in the 2011 sample (less than 1%), but in 114 cases in the 2013 sample (4.6%).²⁷ Moreover, the motions to modify discovery were filed on average 7 months after filing in the 2013 cases compared to 13 months after filing in 2011 cases. Similarly, stipulations to extend discovery were filed in five of the 2011 cases (less than 1%), but 119 of the 2013 cases (4.8%).²⁸ These changes suggest that litigants were aware of the expedited timeframe in which to complete discovery and took steps as needed to ensure sufficient time to complete discovery.

Table 5: Damage Awards Exceeding \$0 Entered in 2013 Cases

| | PERCENTILE | | | | | |
|---------------------------------|------------|----------|---------|---------|----------|----------|
| | N | MEAN | 25TH | 50TH | 75TH | 90TH |
| Subject to Exp Actions Rules | 932 | \$13,385 | \$3,564 | \$8,478 | \$15,412 | \$28,034 |
| Amt in Controversy Not Declared | 229 | \$13,995 | \$3,430 | \$8,000 | \$19,566 | \$30,000 |

²⁷ Judges granted 92 percent of motions to modify discovery.

²⁸ Stipulations to extend discovery were also entered on average 7 months after filing in the 2013 cases compared to 5 months after filing in the 2011 cases.

Discovery is a somewhat unique stage of the civil litigation process insofar that, absent serious disagreements, the parties conduct discovery almost entirely without oversight or involvement by the court. Parties might file proof of service of discovery documents with the court, but otherwise a casefile review will not reveal whether the parties have complied with restrictions on the scope of discovery. In the survey responses, however, attorneys reported very high compliance with discovery restrictions on expedited actions cases.

Cases subject to the Expedited Actions Rules, for example, involved on average one fact witness each for the plaintiff and defendant. An expert witness was retained for the plaintiff in approximately one-third of the cases and for the defendant in approximately one-sixth of the cases. See Table 6. The parties completed depositions in 6 hours or less in all cases subject to the Expedited Actions Rules. In fact, the longest deposition length was only 4 hours and Requests for Production and Requests for Admission numbered less than 15 for both sides in all but 3 cases.

Table 6: Compliance with Discovery Restrictions on Expedited Actions Cases*

| | EXPEDITED ACTIONS REQUIREMENTS | PERCENT COMPLIANCE | |
|------------------------------------|--------------------------------|------------------------|------------------------|
| | | PLAINTIFF / PETITIONER | DEFENDANT / RESPONDENT |
| Average Number of Fact Witnesses | | 1.00 | 0.98 |
| Average Number of Expert Witnesses | | 0.33 | 0.14 |
| Time for Oral Depositions | 6 hours | 100 | 100 |
| Requests for Production | 15 | 95 | 95 |
| Requests for Admissions | 15 | 98 | 100 |
| Requests for Disclosures | Unlimited | | n/a |

* Only Cases Known to be Subject to Expedited Actions Rules (n=41)

Perhaps most surprising was the proportion of cases in which little or no discovery took place other than mandatory disclosures.²⁹ As shown in Table 7, only 12 percent of both plaintiffs and defendants took any depositions although more than half of the cases had at least one fact witness. Less than half of litigants made any Requests for Production (41% by plaintiffs, 36% by defendants). Only one-quarter of plaintiffs and one-tenth of defendants made any Requests for Admissions. Approximately half of litigants (54% by plaintiffs, 45% of defendants) made any Requests for Disclosure. Overall, 51 percent of plaintiffs and 56 percent of defendants reported no discovery other than mandatory disclosures, and 38 percent of cases involved no discovery by either party.

DISCOVERY DISPUTES

One of the working hypotheses about the Expedited Actions Rules is that the reduced scope and amount of time allotted for discovery would also reduce the incidence of discovery disputes. See Table 8. Overall, the proportion of cases in which discovery disputes arose declined from 4.5 percent in the 2011 sample to 4.0 percent in the 2013 sample. Although this was not a statistically significant difference, when disputes arose, they occurred on average approximately 2 months earlier under the Expedited Actions Rules and involved significantly fewer motions per case. Judges granted 92 percent of motions to compel discovery and motions for protective orders, suggesting that most were meritorious. Responses to the Attorney Survey

Table 7: Proportion of Discovery Exceeding Zero

| PERCENT EXCEEDING ZERO | PLAINTIFF / PETITIONER | DEFENDANT / RESPONDENT |
|--------------------------|------------------------|------------------------|
| Depositions | 12% | 12% |
| Requests for Production | 41% | 36% |
| Requests for Admissions | 26% | 9% |
| Requests for Disclosures | 54% | 45% |

Table 8: Discovery Disputes

| | 2011 | | 2013 | | <i>p</i> |
|--|------|------|------|------|----------|
| Number of Cases with Discovery Disputes | 104 | 4.5% | 98 | 4.0% | |
| Number of Motions | 1.47 | | 1.16 | | * |
| Days to 1st Mtn to Compel Discovery (mean) | 291 | | 225 | | ** |

* $p < .01$
 ** $p < .05$

²⁹ The NCSC found a similar lack of formal discovery in its evaluation of Rule 26 of the Utah Rules of Civil Procedure. In that evaluation, which involved cases in which an answer had been filed, one-third of cases involving amounts-in-controversy less than \$300,000 (Discovery Tier 1 and 2) and one-tenth of cases \$300,000 or more (Discovery Tier 3) had no discovery other than mandatory disclosures. PAULA HANNAFORD-AGOR & CYNTHIA G. LEE, UTAH: IMPACT OF THE REVISIONS TO RULE 26 ON DISCOVERY PRACTICE IN THE UTAH DISTRICT COURTS (April 2015).

were consistent with this finding of infrequent discovery disputes. Of 108 respondents with closed cases, only four (3.7%) reported filing a motion to compel discovery or a motion for a protective order. All of the motions to compel were granted, but the protective order was denied.

REFERRALS TO ALTERNATIVE DISPUTE RESOLUTION (ADR)

One provision of the Expedited Actions Rules restricted the circumstances under which courts could refer cases into alternative dispute resolution (ADR).³⁰ Reportedly, the provision was intended to address concerns that courts routinely ordered parties to participate in mediation (the most common type of ADR in Texas), resulting in increased costs and time to disposition. In its recommendations to the Texas Supreme Court, the Task Force explained that the expedited action procedures would provide the same benefits associated with pre-trial ADR, so parties should not be forced to participate in ADR if they were already following the new rules.³¹

Following implementation of the Expedited Actions Rules, the rate at which parties were referred to mediation decreased from 14.7 percent to 12.2 percent. See Table 9. Although only a modest decrease, it was statistically significant. The basis on which the referral was made showed substantial differences, however. The rate at which the parties entered motions affirmatively requesting mediation increased more than fivefold (0.4% to 2.1%), while the rate at which cases were referred to mediation by standing order decreased by more than half (5.6% to 2.4%). The combination of these two sources of ADR referral suggest the provisions are working as intended — that is, parties that believe that ADR would be a useful settlement tool are affirmatively requesting it and courts have significantly reduced the routine use of standing orders to compel ADR. Nevertheless, the rate at which cases were referred by mediation by court order, without a preceding motion from a party, decreased only slightly from 8.7 percent to 7.8 percent, which was not a statistically significant difference. It could not be determined from the casefile review whether these court orders were entered at the request of the parties following a

Table 9: Cases Referred to Mediation

| | 2011 | | 2013 | | <i>p</i> |
|-------------------|-------|-------|-------|-------|----------|
| By Motion | 9 | 0.4% | 51 | 2.1% | * |
| By Court Order | 199 | 8.7% | 193 | 7.8% | ns |
| By Standing Order | 129 | 5.6% | 58 | 2.4% | * |
| | 337 | 14.7% | 302 | 12.2% | ** |
| Not Referred | 1,956 | 85.3% | 2,165 | 87.8% | ** |
| | 2,293 | | 2,467 | | |

* $p < .001$

** $p < .05$

³⁰ TX. R. CIV. PROC. Rule 169(d)(4). Specifically, courts could not order parties into ADR without their consent. Moreover, courts could only refer a case to ADR provided that the procedure not exceed a half day in duration and the fees could not exceed twice the amount of applicable civil filing fees. ADR also had to be completed no later than 60 days before the initial trial setting.

³¹ THE TASK FORCE FOR RULES IN EXPEDITED ACTIONS: FINAL REPORT TO THE SUPREME COURT OF TEXAS 4 (Jan. 25, 2012).

case management conference or simply reflected the courts' standard practice in newly filed civil cases, but the overall decline suggests the latter. If so, additional judicial education about the ADR provisions related to Expedited Actions may be warranted.

CASE OUTCOMES

The case-level analyses were restricted to cases that either settled or were disposed on the merits (e.g., by bench or jury trial or by summary judgment) on the

theory that cases disposed by other means, especially uncontested cases, would not be expected to benefit from the Expedited Actions Rules and thus including them would dilute the impact of the rules on key measures of civil case processing. Overall, implementation of the Expedited Actions Rules resulted in a dramatic increase in the proportion of cases that settled and corresponding decreases in the proportion of cases that disposed by summary judgment or by bench or jury trial.³² See Table 10.

Table 10: Dispositions (Cases not Exempt from Expedited Actions Rules)

| | 2011 | | 2013 | | <i>p</i> |
|-----------------------------------|-------|-------|-------|-------|----------|
| Settlement | 698 | 48.6% | 795 | 66.2% | * |
| Judgment | 46 | 3.2% | 30 | 2.5% | ns |
| Summary judgment | 271 | 18.9% | 138 | 11.5% | * |
| Trial | 421 | 29.3% | 238 | 19.8% | * |
| Bench trial | 405 | 28.2% | 230 | 19.2% | |
| Jury trial | 16 | 1.1% | 8 | 0.7% | |
| | 1,436 | 71.4% | 1,201 | 51.0% | |
| Other non-meritorious disposition | 136 | 6.8% | 235 | 10.0% | |
| Pending | 438 | 21.8% | 919 | 39.0% | |
| | 2,010 | | 2,355 | | |

* $p < .001$

³² Due to the small number of jury trials in the 2013 sample, bench and jury trials were aggregated in subsequent analyses.

Due to the volume of cases, Harris County had an outsized effect on the impact of the Expedited Actions Rules on case outcomes. Those effects actually varied somewhat from county to county. For example, settlement rates increased in four of the participating counties, but actually decreased slightly, but not statistically significantly, from 50 percent to 49 percent in Dallas County. In contrast, summary judgment rates declined significantly except in Travis County, where they increased from 11 percent to 17 percent.³³ Trial rates decreased significantly in Harris, Lubbock, and Travis Counties, but increased in Dallas (23 percent to 39 percent) and Fort Bend Counties (25 percent to 38 percent).³⁴

Some of these differences may have been due to differences in the underlying civil caseload in each county. Tort cases comprised approximately one-fifth of the civil caseloads in both the 2011 and 2013 samples.³⁵ Overall settlement rates in tort cases did not change significantly, but summary judgment rates decreased by 74 percent (from 19 percent to 5 percent) and trial rates increased by 28 percent (from 29 percent to 37 percent). In contract cases, which comprised approximately three-quarters of the caseloads in each sample, settlement rates increased by 38 percent (from 48 percent to 66 percent), while summary judgment and trial rates decreased by 18 percent and 35 percent, respectively. Other civil cases comprised 7 percent and 5 percent, respectively, of the remaining portion of the caseloads in the 2011 and 2013 samples. There was no change in the settlement rate, but a statistically significant decrease in the summary judgment rate from 24 percent to 13 percent, as well as a not-statistically significant, but nevertheless sizeable decrease in the trial rate from 31 percent to 26 percent.

TIME TO DISPOSITION

One of the hypothesized impacts of the Expedited Actions Rules was that cases would resolve earlier. A comparison of time-to-disposition for 2011 and 2013 cases is complicated by the fact that some cases were still pending at the end of the data collection period. For these observations, known as “censored” observations, the observed time ended when the data collection period ended on February 13, 2015 for the 2011 sample and August 12, 2015 for the 2013 sample, which is earlier than the actual time to disposition. In addition, cases filed in 2011 obviously had more time for the disposition to be documented than cases filed in 2013 (up to 43 months and 25 months, respectively). Estimates of average (mean) time to disposition are therefore biased downward in both samples, especially in the 2013 sample. Consequently, comparisons of average time to disposition across the 2011 and 2013 cases might lead to erroneous conclusions. To analyze the impact of the Expedited Actions Rules on time to disposition, the NCSC employed Kaplan-Meier survival analysis. Survival analysis examines how long a unit (e.g., a civil case) “survives” in one state (e.g., pending) before experiencing failure or a transition to another state (e.g., disposed). Survival models take censoring into account, eliminating the associated bias.

Here, the unit of analysis is the case, failure is defined as disposition, and survival time is defined as the number of days from filing to disposition or the end of the follow-up period, whichever occurred first. Because the Expedited Actions Rules were not expected to affect non-meritorious dispositions (e.g., default judgment, nonsuit, other disposition), cases include only those cases that disposed by settlement, bench or jury trial, or summary judgment. Each survi-

³³ The summary judgment rate decreased 40 percent (from 20% to 12%) in Lubbock County. This decrease was not statistically significant due to the small number of cases in the court.

³⁴ Similarly, the 52 percent increase in the Fort Bend trial rate was not statistically significant due to the small sample size.

³⁵ Nineteen percent (19%) in the 2011 sample and 20 percent in the 2013 sample.

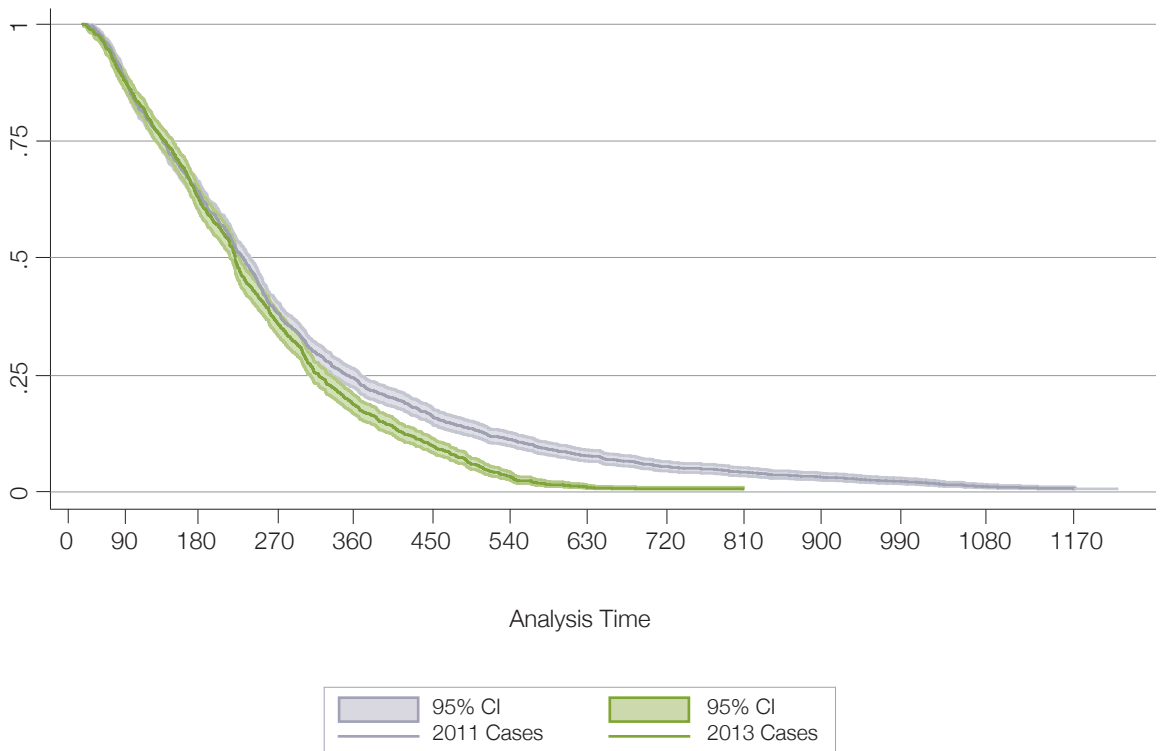
Survival function plots the cumulative probability of a case “surviving” without a disposition on the vertical axis up to a particular point in time on the horizontal axis.

Figure 1 below compares the survival functions for the 2011 and 2013 cases. The grey line represents the survivor function for the 2011 cases and the green line represents the survivor function for the 2013 cases. The shaded regions around each line are pairwise 95 percent confidence bands illustrating the statistical uncertainty of the estimates. The overlap of the

confidence bands indicates that cases subject to the Expedited Actions Rules disposed at approximately the same rate as cases filed before implementation of the rules for approximately the first year after filing. For a brief period of about three months at the beginning of the litigation, cases subject to the Expedited Actions Rules disposed slightly later than the 2011 cases, but after one year, cases subject to the Expedited Actions Rules disposed at a faster rate than cases filed before implementation of the rules.

Figure 1: Kaplan-Meier Survival Estimates

ALL CASES

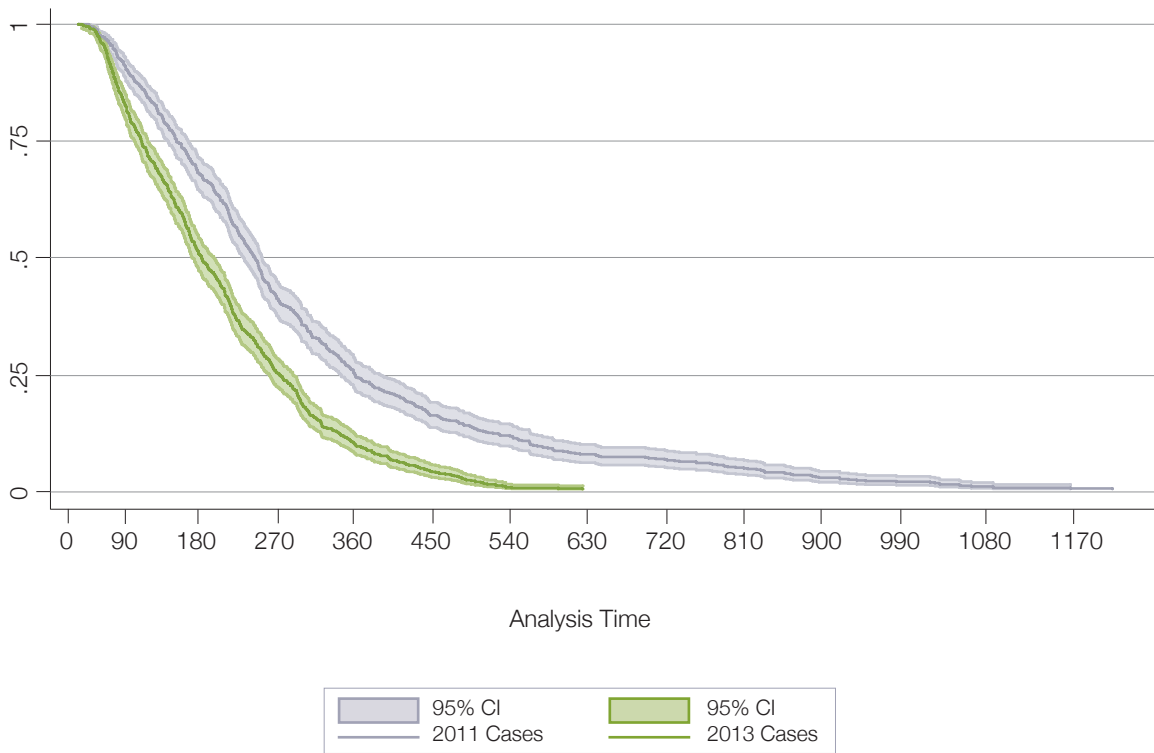


Due to the considerable change in how cases disposed before and after implementation of the Expedited Actions Rules, the NCSC also plotted Kaplan-Meier survival curves for cases that disposed by settlement, by bench or jury trial, and by summary judgment. For cases resolved by settlement, the rate of case disposition among cases filed post-implementation increased

over time compared with the 2011 sample (Figure 2). The survival curves diverge completely after about three months and the gap between the two series increases with time, indicating that settlements continued at a faster pace after the Expedited Actions Rules were implemented.

Figure 2: Kaplan-Meier Survival Estimates

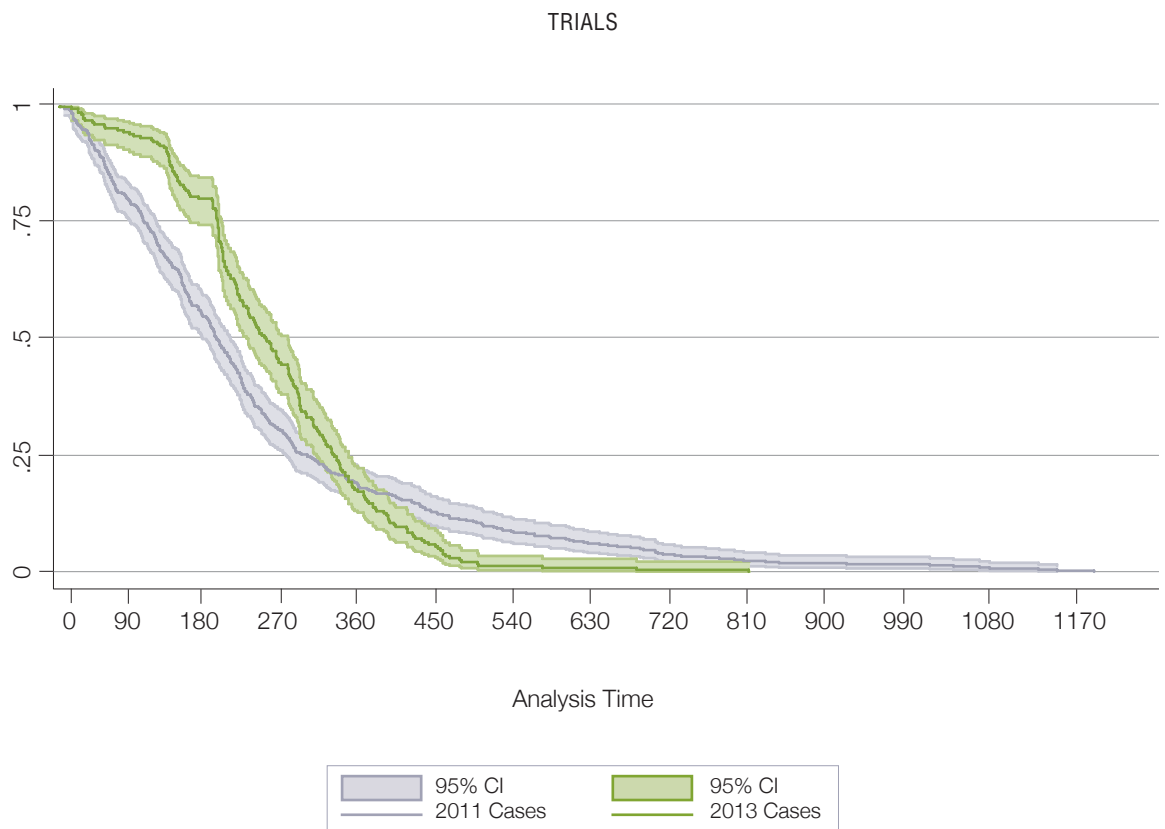
SETTLEMENTS



Cases disposed by trial and by summary judgment showed a very different pattern, however. Figure 3 shows the survival curves for cases disposed by bench and jury trial.³⁶ The survival functions diverge almost immediately after filing, with cases disposed under the Expedited Actions Rules resolving at a significantly slower rate compared to cases filed before

implementation of the rules. The rate of disposition begins to increase at approximately six months and by nine months the confidence bands again overlap. At approximately one year, the survival curves cross and thereafter cases disposed by trial resolve significantly faster under the Expedited Actions Rules.

Figure 3: Kaplan-Meier Survival Estimates



³⁶ Only 8 cases disposed by jury trial in the 2013 sample, which is too few to produce reliable results in a Kaplan-Meier survival analysis. Consequently, the jury and bench trials were aggregated for the purposes of this analysis.

In addition to the general rate of trial dispositions, the survival curve for the 2013 sample also shows two distinctive bumps at approximately six months and seven months after filing, which suggest the possibility that the County Courts at Law may have experienced an initial backlog that prevented cases from being scheduled for trial. Tables 11 and 12 compare the timing of trial scheduling for the 2011 and 2013 samples. Cases filed after implementation of the

Expedited Actions Rules were initially scheduled for trial on average 44 days later than cases filed before implementation of the Expedited Actions Rules. Half of the cases disposed by trial were tried on or before the scheduled trial date in both the 2011 and 2013 samples. In the remaining cases that were tried after the first scheduled trial date, 2013 cases were tried significantly earlier than 2011 cases.

Table 11: Days from Filing to First Scheduled Trial Date

| | N | MEAN | PERCENTILE | | | |
|---------------------|-------|------|------------|------|------|------|
| | | | 25TH | 50TH | 75TH | 90TH |
| Pre-Implementation | 1,302 | 206 | 137 | 187 | 238 | 377 |
| Post-Implementation | 1,327 | 250 | 152 | 192 | 257 | 404 |
| <i>Difference</i> | | 44 | 15 | 5 | 19 | 27 |

Table 12: Days from First Scheduled Trial Date to Actual Trial Date*

| | N | MEAN | PERCENTILE | | | |
|---------------------|-----|------|------------|------|------|------|
| | | | 25TH | 50TH | 75TH | 90TH |
| Pre-Implementation | 154 | 169 | 43 | 98 | 238 | 401 |
| Post-Implementation | 93 | 117 | 26 | 97 | 174 | 273 |

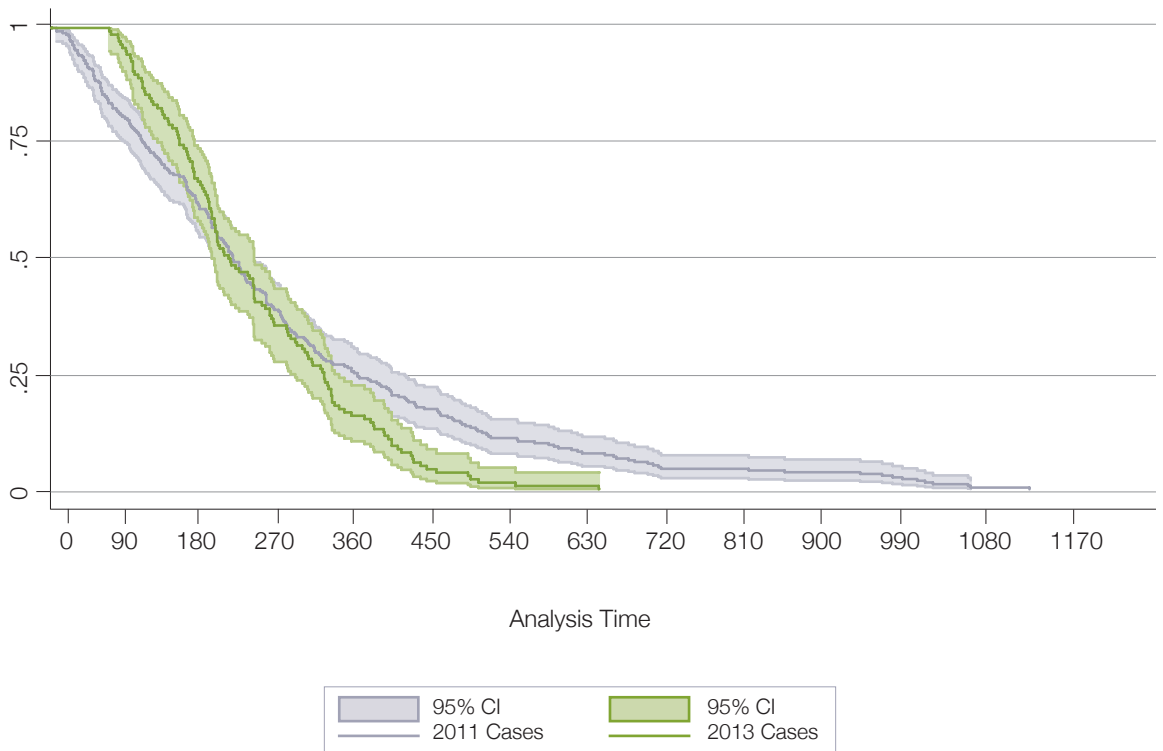
* Cases tried after first scheduled trial date

Similar to trials, 2013 cases disposed by summary judgment proceeded at a slower pace initially, relative to the 2011 sample. The survival functions in Figure 4 are distinct up to the six-month point, at which time the confidence intervals overlap and track one another until nearly the one-year mark. At one year the propor-

tion of 2013 cases disposed by summary judgment exceeds that of the 2011 sample. Also similar to trials, the 2013 survival curve shows an anomalous plateau during the first three months after filing in which summary judgments did not appear to be entered at all.

Figure 4: Kaplan-Meier Survival Estimates

SUMMARY JUDGMENTS



The 2013 cases were filed very shortly after the new Expedited Actions Rules went into effect. This led the NCSC researchers to suspect that some period of adjustment may be responsible for the differences between the 2011 and 2013 cases disposed by trial and by summary judgment. To investigate this possibility, another set of 2,500 cases from the participating courts was drawn consisting of cases filed between July 1 and December 31, 2014. Although these cases were not coded with the same set of variables as the previous two samples, case type and disposition information were used to ensure comparability for the Kaplan-Meier survival analyses.

The Kaplan-Meier survival curves compare the 2011 and initial 2013 samples with this subsequent set of cases (2014 sample), denoted by the rust-colored line in Figure 5, which includes all cases in the samples. The rate of disposition for 2014 cases initially appears to be even slower than the 2013 cases. However, the 2013 and 2014 lines appear to converge after three months and all three samples of cases are indistinguishable from one another until approximately the six-month mark. At six months, the 2014 cases dispose at a much faster rate than either the 2013 or the 2011 samples.

Figure 5: Kaplan-Meier Survival Estimates

ALL CASES

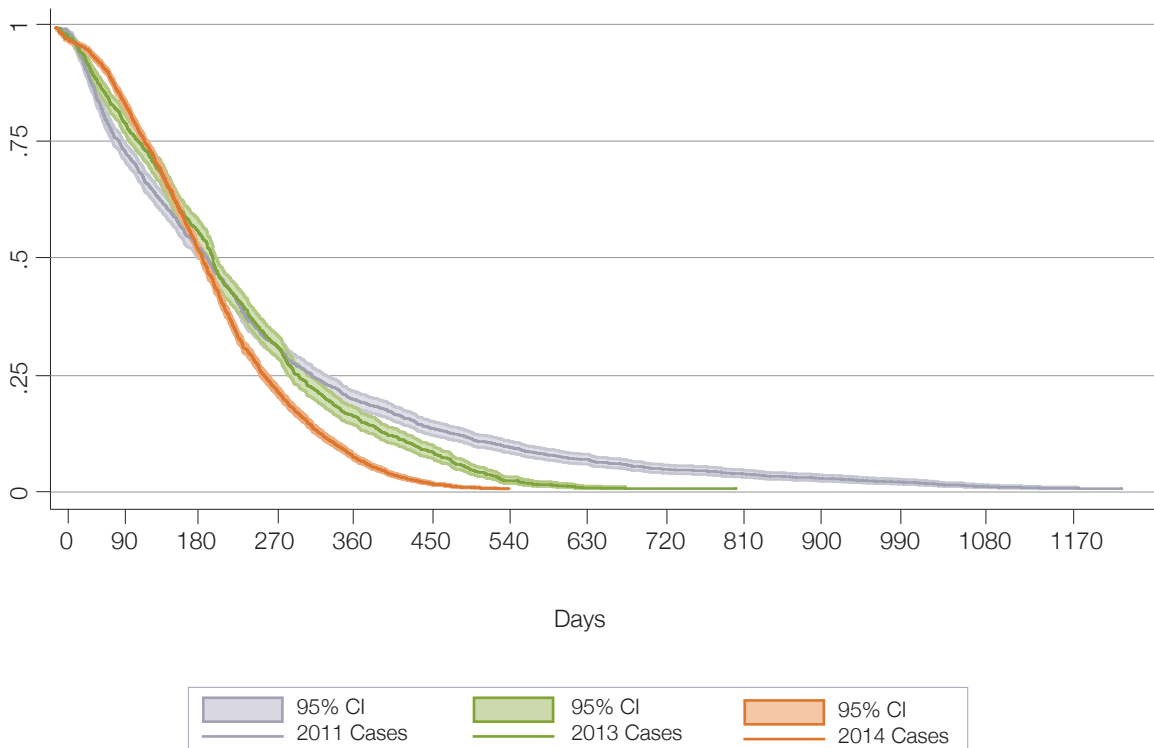
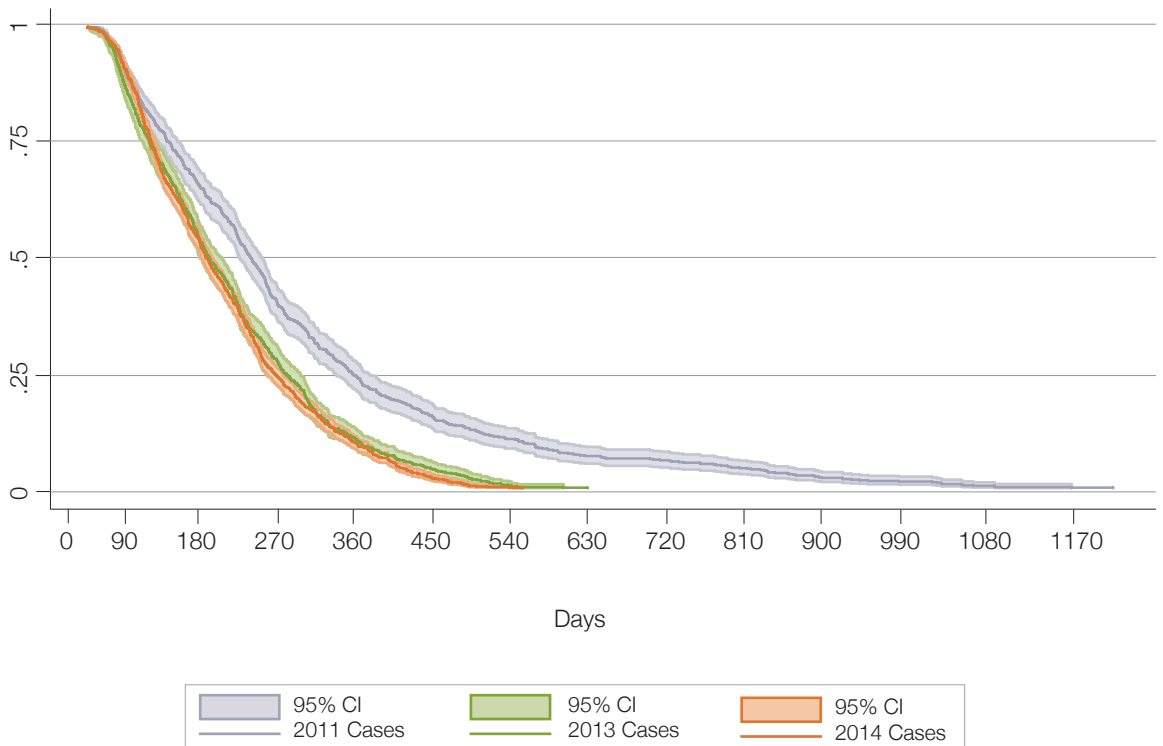


Figure 6 shows the survival curve for settlements. The curve for the 2014 cases is virtually indistinguishable from the 2013 curve, although it appears that the 2014 cases are consistently below the 2013 cases

after six months. The rate of dispositions for settled cases appears to be slightly faster from that point forward, although no statistical difference is apparent.

Figure 6: Kaplan-Meier Survival Estimates

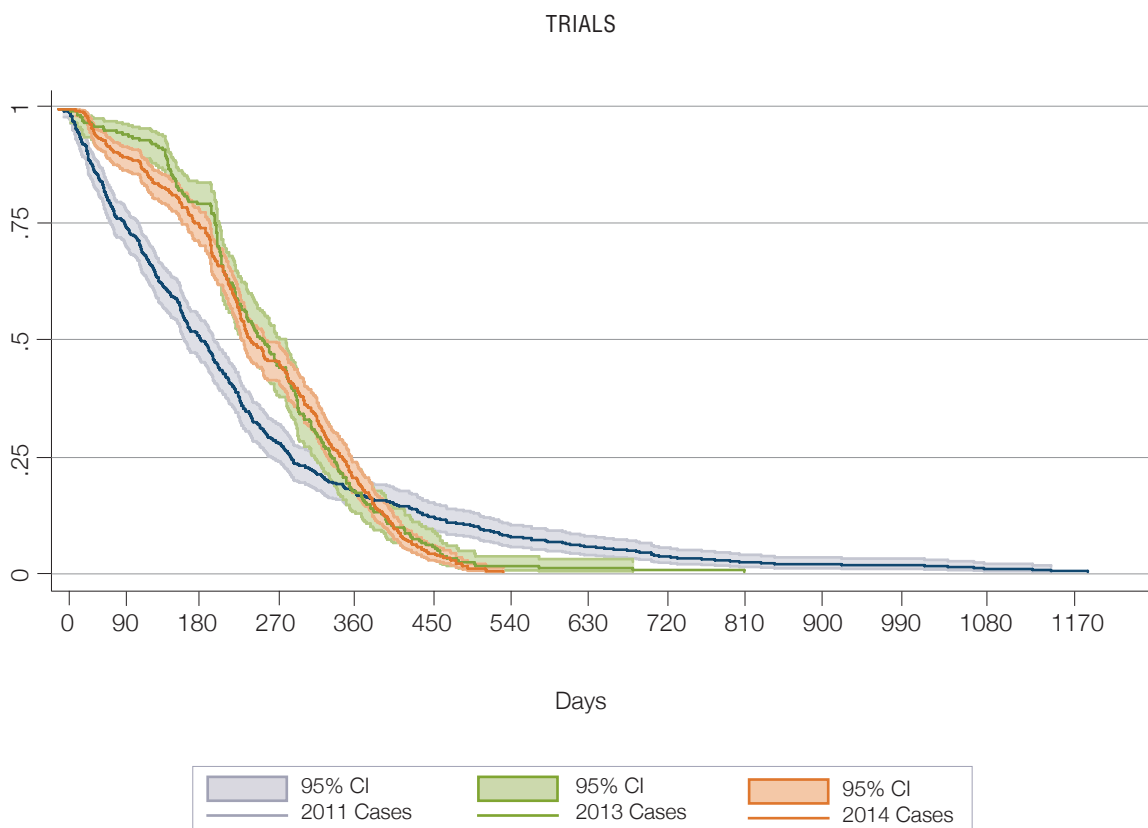
SETTLEMENTS



Trial dispositions for the 2014 proceed slightly faster in the first six months than in the 2013 sample, but both survival curves are above the 2011 sample (Figure 7). By the six-month mark, the 2014 and 2013 series have overlapped and are not distinguishable. In particular, the 2014 and 2013 curves converge with the 2011

curve at about one year. The pattern suggests that factors experienced in 2013 that tended to delay trial have been alleviated somewhat, but that both sets of cases are reaching trial more slowly than cases in the 2011 sample.

Figure 7: Kaplan-Meier Survival Estimates

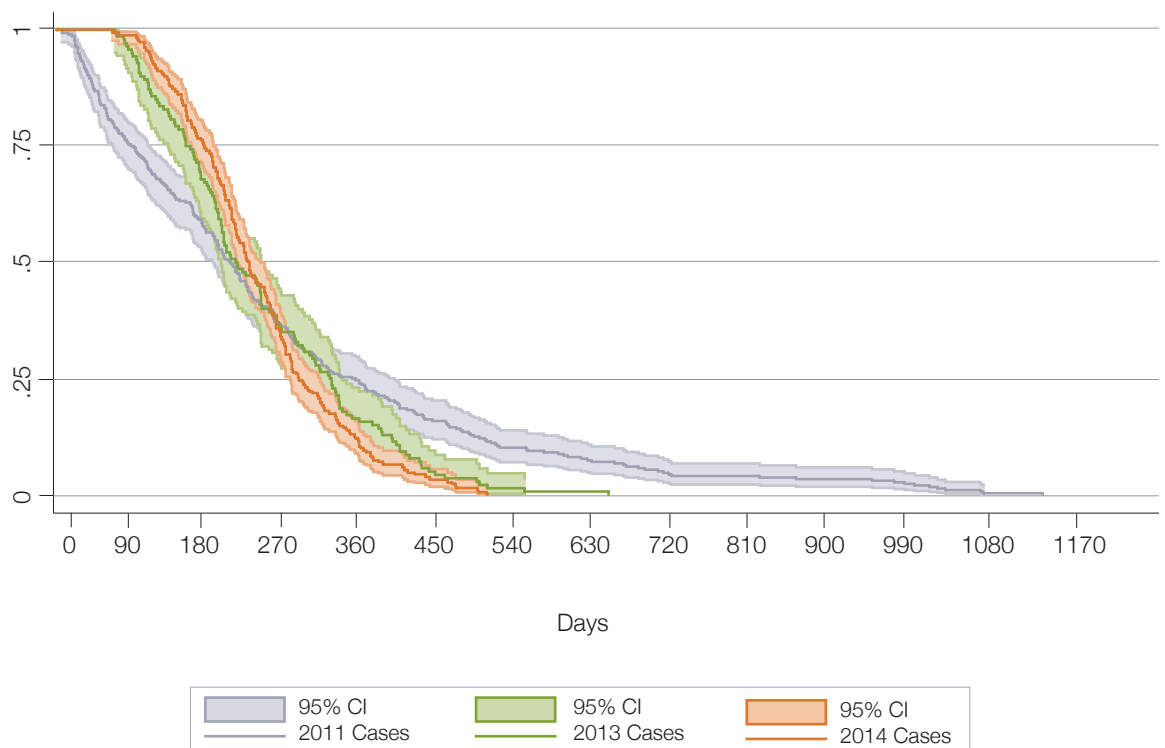


The general picture for summary judgments in the 2014 sample, shown in Figure 8, looks similar to the 2013 sample. Both feature the unusual hiatus in summary judgments for the first three months after filing. In the

2014 cases, summary judgments actually dispose even more slowly than the 2013 cases until approximately seven months, at which point the 2014 and 2013 curves converge.

Figure 8: Kaplan-Meier Survival Estimates

SUMMARY JUDGMENTS



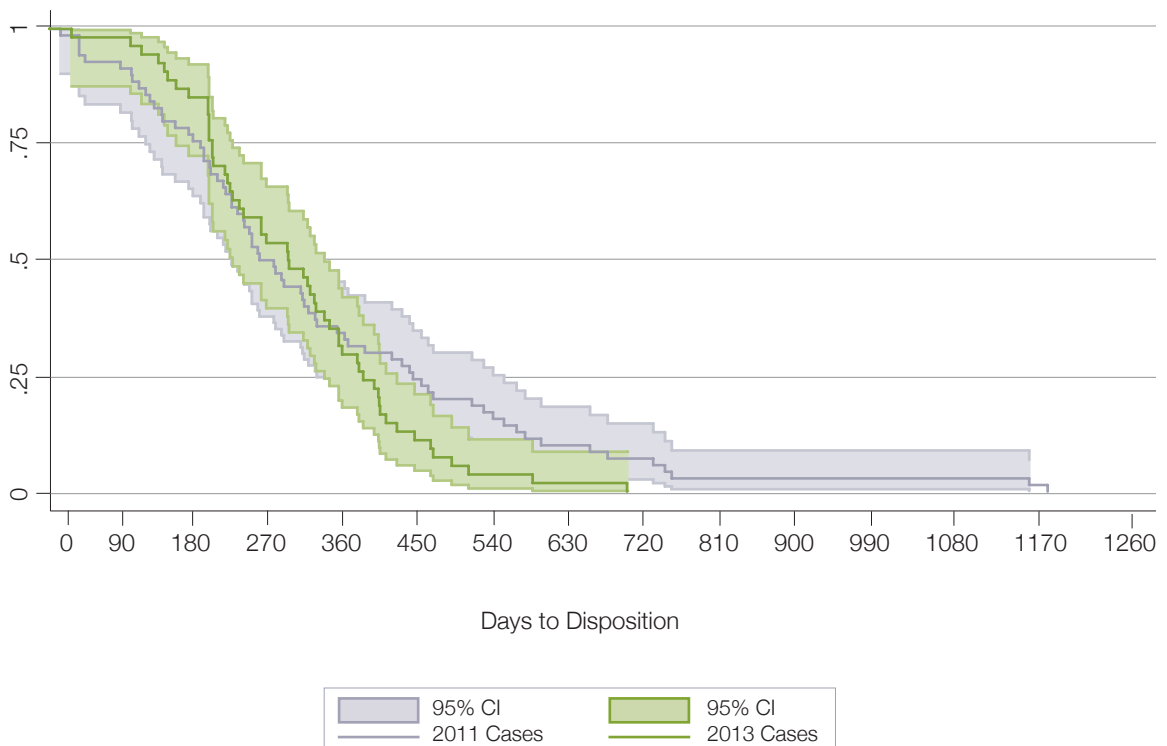
The overall similarity in the survival curves for trials and summary judgments between the 2013 and 2014 discredits the NCSC initial hypothesis that delays in setting cases for trial and summary judgment are responsible for the longer disposition times in the 2013 sample. The more plausible explanation is the change in the overall pattern of disposition types. Recall from Table 10 that the proportion of cases disposed by settlement increased overall, while trial and summary rates experienced commensurate decreases. These effects were especially pronounced in contract cases, which comprise approximately three-quarters of the civil caseload. Tort cases, on the other hand, saw no change in settlement rates, but experienced a significant decrease in summary judgment rates and a significant increase in trial rates.

It now appears likely that many of the cases that disposed by trial or summary judgment in 2011

involved relatively uncomplicated contract matters that were set for trial and disposed quite early in the case. As a result of the Expedited Actions Rules, comparable cases filed in 2013 settled rather than being disposed by trial or summary judgment, leaving more complicated tort cases to be disposed by trial later in the litigation process. The survival curves illustrate this dynamic for trials and summary judgments, but also confirm that by the 12-month mark, cases that likely involve comparable levels of complexity are being disposed earlier than they would have before the Expedited Action Rules were implemented. As Figure 9 shows, the survival curves for tort cases disposed by trial indicate that the disposition time for tort trials before and after implementation of the Expedited Actions Rules is roughly the same beginning at the 6-month mark and by the 12-month mark tort trials dispose at a much faster rate under the new rules.

Figure 9: Kaplan-Meier Survival Estimates

TORTS DISPOSED BY TRIAL



Applying a supplemental methodology — competing risks analysis — lends additional support to this conclusion as well as provides additional insights into the differential impact of the Expedited Actions Rules on the likelihood of settlement versus an adjudicatory disposition.

COMPETING RISKS ANALYSES

A closer look at the impact of individual case characteristics on the time to disposition, controlling for possible confounding factors, can be achieved with regression-based survival models. A survival model estimates the effect of observed factors on time to disposition by identifying the impact of that factor on the likelihood of a particular type of disposition occurring in a given period of time, assuming that the case did not resolve prior to that time by some other disposition type. The standard method of estimating multiple regression-type models using survival data is the Cox proportional hazards model. Effect estimates from a Cox model are not biased by the inclusion of “censored” observations (cases that have not been

disposed when data are collected). However, when observations are “at risk” of terminating in several different ways, such as cases that are subject to multiple disposition types, the estimates from Cox models are only valid for the hypothetical circumstance in which only one risk is present, or if multiple risks are entirely unrelated to each other.³⁷

Competing risks regression offers an alternative to the Cox model where the time until an event of interest, such as disposition of a case by judgment, may be unobserved due to the occurrence of another event that precludes judgment occurring, such as settlement of the case, as well as the possibility that the event has not yet occurred. Table 13 presents the results of a competing risks model, specifying the time to disposition by judgment as a function of a set of covariates. The sub-hazard ratios characterize the effect of the variable on the likelihood of judgment occurring, controlling for other factors in the model and the fact that some cases will settle, which prevents the case from reaching judgment.

Table 13: Competing Risks Model of Time to Disposition by Judgment (primary hazard)

| VARIABLE | SUB-HAZARD RATIO | Z-SCORE | P-VALUE |
|-------------------------------------|------------------|---------|---------|
| Expedited Action Rules (EAR) | 0.50 | -6.28 | 0.000 |
| Mediation by Motion/Order | 0.85 | -1.46 | 0.143 |
| Mediation * EAR | 1.52 | 2.45 | 0.014 |
| Subject to rules based on complaint | 1.28 | 3.38 | 0.001 |
| Subject based on complaint * EAR | 0.99 | -0.06 | 0.952 |

³⁷ See Janet M. Box-Steffensmeier and Bradford S. Jones, *EVENT HISTORY MODELING: A GUIDE FOR SOCIAL SCIENTISTS* (2004), pp. 166-178, for a description of the issues involved with estimating survival models in the presence of competing risks and methods for addressing them.

The variables presented in Table 13 are the primary variables of interest with statistically significant effects. Other factors included in the model include the number of discovery motions (and its interaction with the Expedited Action Rules) and controls for the counties of origin (and interactions with the Expedited Action Rules). All of the variables above are binary indicators, so each sub-hazard ratio can be interpreted as the ratio of the likelihood of judgment occurring in the case when the condition is present (e.g., when the Expedited Action Rules are in effect) to the likelihood of judgment when the condition is not present. Sub-hazard ratios that are substantially higher or lower than 1 indicate stronger relationships between the variable and the time to judgment, assuming that settlement has not already occurred. Thus, the sub-hazard ratio of 0.50 for the expedited actions variable indicates that the likelihood of judgment occurring in a case after the rules were implemented is half the likelihood before implementation, for an otherwise similar case, conditional on other factors specified in the model and the fact that settlement precludes judgment. In other words, the time to disposition by judgment is longer for cases under the Expedited Actions Rules.

The finding that cases were taking longer to reach judgment after the rules were implemented is consistent with the Kaplan-Meier results. However, the sub-hazard results, which are far stronger than similar results from a Cox model,³⁸ suggests that a substantial reason for the delay in time to judgment is that those disposition types are related. Cases that were previously being disposed by judgment appear to be more likely to settle faster under the rules, leaving cases that are more in need of an adjudicatory disposition.

The NCSC also employed competing risks analyses to investigate both the impact of mediation and the impact of compliance with Rule 47(c) on the time to disposition by judgment. Table 13 shows a not statistically significant sub-hazard ratio of 0.85 for cases referred to mediation either upon motion by

a party or by a case-specific court order (excluding cases referred by standing order). That is, there was no statistically significant difference in the time to disposition for cases that were referred to mediation but ultimately disposed by judgment. However, when both the referral to mediation and implementation of the Expedited Actions Rules are taken into account simultaneously, we find that cases in the 2013 sample that were referred to mediation but were ultimately disposed by judgment not only resolved sooner, as indicated by the sub-hazard ratio 1.52, but this effect was above and beyond the independent effects of the Expedited Action Rules and the mediation referral.

Cases in which the complaint specifies that the amount-in-controversy is less than \$100,000 serves in a very general sense as a proxy for the relative complexity of the case. That is, cases valued more than \$100,000 presumably involve more complex evidence or law, and would logically require additional time to fully investigate the claims and defenses. The sub-hazard ratio of 1.28 in Table 13 indicates that cases valued less than \$100,000 in both the 2011 and 2013 samples took significantly less time to reach disposition by judgment than cases valued \$100,000 or more or cases that declined to specify the amount-in-controversy. When the amount-in-controversy and implementation of the Expedited Actions Rules are considered simultaneously via interacting the two (subject to rules based on complaint * EAR), the effect of complexity is unchanged. The hazard ratio of the interaction between cases valued below \$100,000 and the Expedited Action Rules is virtually equal to 1, indicating that there is no difference between cases of lower value before implementation and after in terms of time to judgment, and the rules had the same impact on disposition time for cases regardless of whether they were valued at less or more than \$100,000.

³⁸ The hazard ratio for the EAR from a Cox model of time to judgment is 0.75, so the effect is twice as powerful when the sub-hazard is estimated.

ATTORNEY OPINIONS

Although the response rate for the Attorney Survey was less robust than desired, those responses do provide information about attorneys' general opinions about the Expedited Actions Rules. Table 14 displays the breakdown of agreement and disagreement for each of the survey questions posed to attorneys. Substantial majorities of attorneys reported that the Expedited Actions Rules provided sufficient time to complete discovery and provided sufficient information for parties to assess the merits of their respective

cases. In cases involving discovery disputes, substantial majorities of attorneys reported that disputes were resolved in a timely manner. Slightly less than half of attorneys reported that it would have been economically feasible to bring their case to trial under the Expedited Actions Rules. In contrast to the survival analyses reported above, substantial majorities of attorneys disagreed that discovery was completed more quickly, that the case resolved more quickly, or that discovery costs were less as a result of the Expedited Actions Rules.

Table 14: Attorney Opinions

| | N | Strongly Disagree | Disagree | Agree | Strongly Agree |
|---|----|-------------------|----------|-------|----------------|
| Sufficient information to assess merits | 79 | 10% | 15% | 48% | 27% |
| Sufficient time for discovery | 75 | 15% | 16% | 41% | 28% |
| Timely resolution of discovery disputes | 32 | 9% | 16% | 69% | 6% |
| Economically feasible for jury trial | 81 | 30% | 25% | 36% | 10% |
| Discovery completed more quickly | 60 | 28% | 45% | 23% | 3% |
| Case resolved more quickly | 65 | 35% | 42% | 19% | 5% |
| Reduced discovery costs | 61 | 33% | 39% | 23% | 5% |

Some attorney opinions differed based on case type and on how their cases were ultimately disposed. In cases that settled, attorneys were marginally more likely to agree that discovery costs were less expensive as a result of the Expedited Actions Rules, particularly if the case settled after discovery was completed. Ironically, they were also significantly more likely to agree that a jury trial was economically feasible, and marginally more likely to report that discovery disputes were timely addressed. But in cases that resolved by summary judgment, attorneys were marginally less likely to report that discovery disputes were addressed in a timely manner. Attorneys in automobile tort cases were significantly less likely to report that the Expedited Actions Rules provided sufficient time for discovery. They were also significantly more likely to report that a jury trial was economically feasible, while attorneys in debt collection cases were significantly less likely to report that a jury trial was economically feasible.

ATTORNEY COMMENTS

Approximately one-third of the attorneys who responded to the survey commented on their general impressions of the Expedited Actions Rules in response to open-ended questions. Although comments were optional, their distribution based on geography and case type was very similar to that of the overall respondent characteristics. Almost all of the comments were from cases filed in Harris or Travis County (43% and 51%, respectively). Two comments were from cases filed in Fort Bend County, and none from cases in Dallas or Lubbock Counties. Nearly two-thirds of comments were from debt collection (35%) and automobile tort (27%) cases, and the remaining third from a variety of “other contract”, “other tort”, “other real property”, and “other civil” cases. The only notable difference between the overall survey respondents and the open-ended comments respondents was a slightly larger proportion of plaintiffs (62%) providing comments compared to the overall survey (57%).

In terms of the overall tone, the largest single proportion of comments (41%) reflected negative opinions about the Expedited Actions Rules and their impact on civil case processing. In some respects, this is unsurprising because the optional nature of the open-ended comment field introduces a self-selection

bias. That is, attorneys with the strongest opinions about the Expedited Actions Rules are more likely to comment than those that with less strong opinions. Approximately one-third of the comments expressed only general opinions about the Expedited Actions Rules, but the remaining two-thirds offered more detailed descriptions of specific issues. Most only raised one issue for discussion, but over one-fourth raised two to three issues. The issues discussed in the comments tended to address three prevailing themes: the restrictiveness of the rules; issues related to calendaring cases for trial; and perceived conflicts between the Expedited Actions Rules and other evidentiary or procedural rules.

The single biggest complaint about the restrictiveness of the rules was the short timeframe between the completion of discovery and the trial date. For example, several plaintiffs in Harris County noted that their cases had been set for trial before the defendants had been served. Defendant attorneys, on the other hand, complained that the early trial settings disadvantaged defendants by forcing them to settle before they had time to prepare the case for trial. Other attorneys complained that the restrictions on mediation greatly reduced its availability as a settlement method unless the attorneys took affirmative steps to persuade their clients to try mediation or it was required in the contract on which the suit was based. Surprisingly given the concerns raised at the June 24, 2014 Steering Committee meeting, only one attorney complained about the exemption of attorneys’ fees from the amount in controversy in the context of a \$100,000 cap on damages.

Many of the comments focusing on the restrictive nature of the Expedited Actions Rules included language suggesting that the attorneys believed that the rules required the parties to opt in to the expedited procedures, rather than imposing mandatory requirements for cases under \$100,000. For example, a Travis County attorney explained that “because the legislature exempted attorney’s fees from the amount in controversy, the expedited rules are rarely invoked.” A Harris County attorney reported that “I file over 100 cases per year in various counties, seeking damages less than \$100K. I never know if the cases are expedited or not.” These types of comments indicate

the need for both additional education of the practicing civil bar and more uniform enforcement of the rules across the state.

The comments related to calendaring cases for trial focused mainly on problems related to overcrowded trial calendars and their impact on actually going to trial within the timeframe specified in the Expedited Actions Rules.³⁹ As one Harris County attorney explained,

on a Monday ... between 120–150 cases [are] set for trial with packed courtrooms because of the Expedited Actions mandate. Ninety percent or more are not ready for trial and will need a continuance. If you are further down the docket, you will wait over an hour before your case is called. ... If you are there to try a case, and have witnesses who flew in from out of town and want to move forward, you can't begin to present the case for several hours. Most of the time if the trial is going to take longer than an hour, the court advises that they cannot accommodate you and the matter will have to be reset.

A Travis County attorney also noted a change in the calendaring preference based not on the age of the case, but rather on the timing of the request for a particular date, which caused very old cases to be passed over if a newer case requested the date earlier. As a result, the pressure to get expedited actions pushed through the system further postpones the older cases. A number of attorneys also reported that some lawyers try to evade the time restrictions on setting the trial date by seeking continuances due to trial conflicts. The fact that so many of the expedited actions cases are set for trial early in the process has a cascading effect, creating the potential for even more conflicts.

The last set of comments focused on ambiguities in the Expedited Actions Rules or conflicts with other evidentiary and procedural rules. A Harris County attorney, for example, cited the rules concerning timely production of discovery documents.

Documents are to be produced 30 days before trial according to [TRCP] 190.2 and 193.6, however, [TRE 902(10) permits] the Plaintiff [to] wait until 14 days before trial and provide a business records affidavit with all attached documents that were not provided in response to requests for disclosures and still be considered timely. One uniform rule [requiring that records be provided] 30 days before trial would solve this substantial conflict.

Another Harris County attorney noted that there were “lingering questions regarding who may sign the petition and affidavits involved in [expedited actions].” He also complained that “jurisdictional issues arise more frequently along the border counties of Texas” and suggested that “a tutorial or discussion of the rules and jurisdiction should be held for non-attorney judges.” This attorney’s case involved a post-foreclosure eviction, which made it exempt from the Expedited Actions Rules pursuant to Rule 169(a)(2), but he did note a complication in post-foreclosure evictions.

TRCP 510.3 suggests that the landlord and tenant know of one another. However, in a post-foreclosure situation, a tenant at sufferance who may have a lease with a prior occupant will not have privity of contract with the purchaser of the property at foreclosure. I’ve noticed that counsels who represent the tenant ask for the plaintiff to serve their client and name them as a defendant in the lawsuit. However, the purchaser is unaware of the lease agreement nor do they know the leasee’s name. Such a request will only serve to delay the hearing or have it dismissed, only to be refiled by the plaintiff and causing harm to the leasee as they will have an eviction judgment against them, which can be easily found in a background check. ... It would be far better for the plaintiff to seek a judgment against “All Occupants” of the property instead of an innocent tenant of the premises.

³⁹ The NCSC attempted to investigate the legitimacy of complaints involving calendaring practices by assessing continuance rates for cases that disposed by trial. Unfortunately, case-level data on this issue was missing from the case automation system and online documents in several of the participating courts, making it impossible to make informed judgments.

MEDIATION SURVEY

Like discovery practice, mediation and other ADR proceedings generally take place outside of the formal litigation process. Notices of mediation are generally not entered into the formal court record. Consequently, the NCSC had to rely on attorney reports to determine the extent to which mediation contributed to case disposition, if at all. The attorney response rate for the mediation survey was only 10 percent (of 316 attorneys in 227 unique cases that were referred to ADR), so any conclusions about the role of ADR under the Expedited Actions Rules must necessarily be very tentative.

Of the 31 attorneys who responded, only eight reported that their cases were actually mediated (25.8%) and one case settled before the mediation was scheduled to take place. The other attorneys did not respond to questions about the mediation process, so no information is available about whether the mediation actually took place or, if so, how the mediation affected the outcome of the case. The relatively low rate of participation in mediation, even for cases referred to ADR, suggests that at least some of the value of mediation is that scheduling a mediation session provides the parties with a concrete incentive to examine the strength of their respective positions before engaging in formal settlement negotiations. After doing so, many (perhaps most) parties are able to agree on a settlement without actually going through the mediation process. In effect, a mediation referral may operate in much the same way as a firm trial date.

In more than half of the cases that mediated (55%), attorneys reported that the parties requested or the attorneys recommended that mediation be considered for resolving the case. The remaining cases were referred to mediation by court order (33%) or as recommended by the court (11%). In all but one case the mediator was selected by the parties. Of the eight cases that were mediated, three had completed some discovery before mediation and two had completed most (“a lot”), but not all, discovery. Discovery was completely done in the remaining three cases. The average mediation session was 3.75 hours and fee

per party ranged from \$400 to \$1,200 (average \$703). The mediator’s style was described as facilitative in five of the cases and evaluative in the remaining three.

Six of the eight cases resolved completely as a result of the mediation; in the remaining two cases, an unreasonable opposing party was reported as the explanation for why the case failed to resolve. Both the attorneys and the parties in the cases that resolved reported being satisfied or very satisfied with the outcomes of the mediation. The attorneys also reported that the mediators were generally well-prepared and effective even in the cases that did not resolve. For the cases that resolved as a result of the mediation, the attorneys reported that the resolution saved an average of 13 attorney/staff days, four days of trial, and an additional five months on the court calendars.⁴⁰ All of the mediation cases were subject to the Expedited Actions Rules, which restrict the amount of time for trial to 5 hours per side. Given the decrease in time to disposition for cases disposed by trial, see Figure 7 and accompanying text, these estimates appear highly inflated.

JUDGE, LAWYER AND COURT COORDINATOR INTERVIEWS

Due to the relatively low response rate for the Attorney Survey, the NCSC and the OCA enlisted students from the Baylor University School of Law to interview trial judges in the County Courts at Law in the participating counties and attorneys of record who had filed cases subject to the Expedited Actions Rules in the 2013 sample. In addition, the OCA reached out to the court coordinators in each of the County Courts at Law to ask about how the new rules had been implemented administratively in those courts. The effort was not a dramatic improvement over the survey component of the evaluation in terms of the overall response rate, but did permit more nuanced explanations about their respective experiences with the Expedited Actions Rules. Appendix B, prepared by the Baylor University School of Law students, summarizes the judge and attorney interviews.

⁴⁰ Tx. R. Civ. Proc. 169(d)(3).

Ironically, these conversations highlight an apparent contradiction. Many of the attorneys who were contacted declined to be interviewed due to their belief that they had no experience with expedited actions cases. This belief continued in spite of the fact that they were listed as the attorney of record on at least one, and usually multiple expedited actions in the 2013 sample of cases. Similarly, many of the trial judges explained that they had no way of distinguishing expedited actions cases from non-expedited actions cases on their calendars, and they consequently believed that the rules had no effect on civil case processing or changed their practices in any meaningful way. How is it that the case-level analyses show significant increases in settlement rates and reduced time to disposition, but the lawyers and judges involved in those cases not only were unaware of those effects, but did not even realize that the rules applied in their own cases?

Discussions with the court coordinators may shed some light on this question. Several of the court coordinators reported, for example, that they routinely identify expedited actions cases at the time they issue the docket control and scheduling orders, which set the date for trial and alert attorneys to other relevant deadlines. These orders are mailed to the lawyers, but in most instances the lawyers are probably not reviewing them in person, and certainly not closely. Instead, they rely on administrative and paralegal staff in their respective offices to make appropriate notations about deadlines on the lawyers' calendars

to ensure that deadlines are not inadvertently missed. Although the timeframe for completing various litigation tasks has been shortened under the Expedited Actions Rules, many lawyers may not recognize this change or appreciate the impact it has on dispositions. Similarly, the age of the cases being set for trial or summary judgment on the judges' calendars has not changed appreciably and enough such hearings are taking place that judges are still presiding over full calendars each day. Since they do not have to review and approve settlements on a routine basis, judges may not realize that a greater proportion of cases are settling, and settling much earlier, under the new rules. On the other hand, some court coordinators reported that they are not following the rules, but instead have continued to employ caseload management based on the previous discovery levels.

If this is actually the primary explanation for the impact of the Expedited Actions Rules, it offers a potentially powerful lesson about effective implementation of rule changes — namely, that an essential linchpin of the reform process must involve training for court coordinators so that they can develop and launch the administrative infrastructure (case automation software including e-filing triggers, revised standardized forms, etc.) and routine business practices that ensure that civil cases proceed according to the established rules. Additional effects might be obtained by offering training to the administrative and paralegal staff in law firms.

Conclusions and Recommendations

This evaluation focused on contested civil cases filed in the County Courts at Law in five relatively high-volume counties in Texas. This sampling design was adopted specifically to be able to detect effects of the Expedited Actions Rules in cases in which an effect would be expected and desired. Uncontested cases (e.g., default judgments) and voluntary dismissals and nonsuits were excluded from the study. The impact of the new rules was not studied for cases filed in the District Courts, which has jurisdiction over civil cases valued \$201 and over, on the rationale that the majority of cases for which the Expedited Actions Rules would apply would be filed in the County Courts at Law, which has jurisdiction over civil cases valued up to \$200,000. Because the new rules apply to cases under \$100,000 regardless of the court in which they are filed, there is no logical incentive for litigants to choose the District Courts as a way to evade the rules. An important caveat about generalizing findings from this evaluation to cases filed in the District Courts, however, is awareness that the decentralized nature of court administration in Texas may have resulted in uneven administrative implementation of the rules across the state.

It is clear from the case-level data that the Expedited Actions Rules have had an overall positive impact on civil case processing in the participating courts. Overall, settlement rates increased by 26 percent with commensurate decreases in summary judgment and trial rates. The impact on settlement rates took place primarily in contract cases. Settlements in contract cases also took place on average three months earlier under the Expedited Actions Rules. To the extent that settlements reflect presumptively fair outcomes for the parties, this effect should be considered a normatively positive outcome.

Tort cases, in contrast, experienced no change in settlement rates, but saw a dramatic increase in the trial rate from 29 percent to 37 percent, and a corresponding decrease in the summary judgment rate from 19 percent to 5 percent. Although the average

time to disposition for cases disposed by trial and summary judgment within the first year of filing actually increased under the Expedited Actions Rules, most of this effect was due to decreased trial and summary rates, especially for contract cases. Less complicated cases that were trial ready relatively early in the 2011 sample were instead being settled in the 2013 sample. The remaining cases involved more complicated evidence associated with tort cases. These often required more time for discovery, which revealed material disputes over facts and law. These cases were more likely to be disposed by trial or summary judgment, which occurred within the same comparative timeframe in the first year after filing, and actually in less time beginning after the first year. One of the intended results of the Expedited Actions Rules was to ensure that litigants who wanted to proceed to trial would have a meaningful opportunity to do so. This objective seems to have been met, particularly given that attorneys also reported that it would have been economically feasible to take cases to trial, even if they had declined to do so in any given case.

There is no evidence from either the case-level analyses or the attorney survey responses and interview comments to suspect widespread noncompliance with the Expedited Actions Rules, at least with respect to restrictions imposed on the scope of permitted discovery.⁴¹ Part of the success in the high compliance rates may be that cases that require extensive discovery or involve heated discovery disputes are the exception, not the rule. Cases in the 2013 sample saw no change in the overall rate of discovery disputes, but when they occurred, they took place on average two months earlier and involved fewer motions to resolve than in the 2011 sample. These two factors also help explain why most lawyers disagreed with statements that Expedited Actions Rules reduced discovery costs or expedited the discovery process and the final disposition of the case. It is quite likely that most civil cases are relatively straight-forward affairs that require only minimal discovery.⁴² The ceilings and discovery

⁴¹ There was some indication that lawyers are failing to affirmatively state the amount-in-controversy in the complaint as an indirect way of avoiding the caps on damages including attorneys' fees under the Expedited Actions Rules, especially in tort cases, but some of this effect may also result from insufficient education of the bar.

⁴² The Conference of Chief Justices and the Conference of State Court Administrators recently approved a resolution endorsing recommendations for a civil case triage process that streamlines caseload management for uncomplicated cases. CCJ CIVIL JUSTICE IMPROVEMENTS COMMITTEE, A CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL 20-22 (2016).

deadlines imposed by the Expedited Actions Rules appear more than sufficient to permit the litigants to assess the merits of the case and make informed decisions about the appropriate manner of disposition.

The Expedited Actions Rules also placed additional restrictions on cases referred to mediation. Although the overall rate of ADR referrals changed only modestly, the case-level data confirmed that those referrals were being made more frequently on motion from the parties or by an individual court order, rather than by standing order for all civil cases. In addition, the competing risks analyses suggest that the mediation referrals were entered more discriminately in cases involving more highly contested facts and law. The majority of these cases did not ultimately participate in the mediation; they either settled or were formally adjudicated, and if the latter, tended to do so earlier under the Expedited Actions Rules. Thus, moving the ADR deadline earlier in the litigation process appears to operate in a fashion similar to a firm trial date — namely, that it prompts the parties to closely examine the merits of their respective claims and defenses and to either negotiate a settlement or seek an adjudicatory disposition sooner than they otherwise would if the ADR deadline had not been imposed.

One of the great ironies from this evaluation was the fact that many judges and lawyers claimed that they had not experienced any changes in their respective caseloads as a result of the new rules.⁴³ Not only are these perceptions demonstrably false, as the case-level data show, but it appears that many of these individuals did not even realize that the rules had been in effect at all. The most significant factor producing these effects did not involve a conscious decision on the part of lawyers and judges to manage these cases differently. Rather communication about the deadlines and other restrictions in the docket control and scheduling orders issued for expedited actions cases and subsequently documented by legal support staff in the lawyers' offices appears to prompt earlier, more effective attention to these cases. In hindsight, this dynamic appears obvious, but the

NCSC believes that the importance of actively engaging court administration in implementing reforms is an under-appreciated and often neglected step in many civil justice reform efforts, to their great detriment.

RECOMMENDATIONS

- 1. Specify that cases in which the parties fail to comply with Rule 47(c) are presumed to be subject to Expedited Actions Rules by default. Implement this condition as a business decision rule in the e-filing interface to prevent cases from being filed without the mandatory declarations.**

With the exception of Rule 47(c), compliance with the Expedited Actions Rules appears to be quite satisfactory and is clearly having its intended effect, especially for those cases that can be immediately identified in the complaint as subject to the rules. After implementation of the Expedited Actions Rules, the proportion of litigants who failed to state whether the party seeks only monetary relief of \$100,000 or less did not decrease as expected, but actually increased from 30 percent to 35 percent.⁴⁴ Based on the amount of monetary judgments entered, as shown in Table 5, there is no basis to conclude that those cases involved damages greater than \$100,000. Without that declaration, the court coordinators are unable to issue the docket control and scheduling orders that appear to be the real drivers of the reform effects.

- 2. Educate judges, court coordinators, and court clerks about provisions concerning referrals to mediation, especially the disfavored use of standing orders.**

There was evidence that some judges are still routinely ordering parties to participate in mediation. It is not clear if such orders include the caveats outlined in Rule 169(d), or if they are being entered in response to verbal requests from the parties during case management conferences. Mediation may be a helpful, and appropriate, process in more complicated or emotionally charged cases, but the current version of the rule

⁴³ Some respondents in the lawyer survey complained about the time restrictions imposed by the rules, but the opinion data suggest strong agreement with statements that the rules permit adequate scope and time for discovery needed to make informed judgments about the merits of civil cases.

⁴⁴ Tort cases were less likely to comply with Rule 47(c) than contract or other civil cases.

implicitly suggests that judges should first ascertain whether the parties have already agreed not to participate in ADR before entering a referral for mediation. The continued prevalence of standing orders indicates that this preliminary step is not undertaken on a routine basis.

As a practical matter, routine mediation referrals do not cause any significant harm given the strong likelihood that the majority of cases ultimately resolve without mediation, and the majority of cases referred to mediation ultimately settle. Indeed, there may be some benefit to setting a deadline for completing mediation insofar that it prompts the parties to thoroughly evaluate the merits of the case on a timely basis to avoid mediation fees if the case is amenable to settlement without the assistance of a trained ADR professional. As a matter of court policy, however, rules should not be routinely ignored in practice. If the benefit of setting a firm deadline for completing mediation is deemed to outweigh potential risks that litigants might incur unnecessary expenses, then the conditional phrase in Rule 169(d)(4)(A) that “[u]nless the parties have agreed not to participate in alternative dispute resolution” should be deleted. To preserve the parties’ right to opt out of ADR, Rule 169(d)(4)(A) could be amended to read “The court must grant objections to the referral, including the parties’ agreement not to participate in alternative dispute resolution, unless prohibited by statute.”

3. Investigate the legitimacy of complaints that Expedited Actions Rules cases are routinely being calendared ahead of older cases.

Some attorneys in the survey commented on the frequency with which expedited actions cases were being prioritized over older cases that had already been scheduled for trial, forcing those cases to be continued, causing additional delays and expense for litigants who had prepared by subpoenaing trial witnesses including expert witnesses. The effect of this practice was exacerbated in courts that allocated substantial time on the calendar to enter continuances for cases that are not prepared for trial. If these complaints are verified, judges and court coordinators

should develop an effective mechanism to ensure that trial ready cases are not denied the opportunity for a timely adjudication on the merits.

4. Review reported instances of conflicts between the Expedited Actions Rules and other evidentiary or procedural rules, and make appropriate amendments as necessary.

Several attorneys identified apparent conflicts between the Expedited Actions Rules and other evidentiary or procedural rules. Those complaints should be forwarded to the relevant rule-making body for consideration about whether amendments are necessary to resolve the conflict, and if so, how those conflicts should be resolved.

5. Provide additional training to court coordinators and other court administration professionals in the District Courts and County Courts at Law on effective caseflow management under the Expedited Actions Rules.

Perhaps the greatest irony in this evaluation was the number of attorneys in the 2013 sample who were unaware that any of their cases were subject to the Expedited Actions Rules and the number of the judges who claimed no difference in how they managed those cases on their calendars. The observed effects on manner of disposition and on time to disposition are apparently due to communication of the earlier deadlines and other case restrictions in the docket control and scheduling orders issued by many, but not all, of the court coordinators. Lawyers in these cases do not appear to notice that the deadlines have shifted, and judges have not noticed that cases are being set for trial or summary judgment earlier. Some court coordinators contacted by the OCA were not aware of the Expedited Actions Rules, however, and were continuing to issue docket control and scheduling orders according to the discovery level assigned to the case under the previous rules. Consistent administration of the Expedited Actions Rules would likely produce an even greater overall effect, providing greater benefit to litigants in these cases.

Appendix A: Attorney Survey

The Texas Judicial System has requested that the National Center for State Courts (NCSC) evaluate the impact of the Texas Rules of Civil Procedure governing expedited actions. This survey is intended to document your experience with those rules. You have been selected to participate because, according to the case management system for the [COUNTY] County Court at Law, you were an attorney of record in a civil case filed between July 1, 2013 and December 31, 2013 that has since fully resolved.

We anticipate that the survey will take approximately 20 minutes to complete. Your responses will be kept strictly confidential and the evaluation findings will be presented only in aggregate form. If you have questions about the survey or the Texas Expedited Actions Evaluation, please contact Paula Hannaford-Agor at phannaford@ncsc.org.

Please confirm that the case listed below has been fully resolved:

- Yes
- No

If no...

This survey is intended only for attorneys in cases that have been fully resolved.

Thank you for your time and assistance.

If yes...

Confirm Case Information

According to the case management system for the [COUNTY] Court at Law, you are an attorney of record in the following case. Please verify that this information is correct. If it is incorrect, please edit.

| | Please edit if incomplete or incorrect | Correct |
|------------------------------|--|-----------------------|
| Case Number: | _____ | <input type="radio"/> |
| Case Name: | _____ | <input type="radio"/> |
| Case Type: | <input type="radio"/> Automobile tort <input type="radio"/> Intentional tort <input type="radio"/> Medical malpractice <input type="radio"/> Other professional malpractice <input type="radio"/> Premises liability <input type="radio"/> Product liability <input type="radio"/> Slander/libel/defamation <input type="radio"/> Other tort <input type="radio"/> Debt collection <input type="radio"/> Mortgage foreclosure <input type="radio"/> Landlord/tenant <input type="radio"/> Fraud <input type="radio"/> Employment <input type="radio"/> Other contract <input type="radio"/> Eminent domain <input type="radio"/> Other real property <input type="radio"/> Other civil | <input type="radio"/> |
| Representing: | <input type="radio"/> Plaintiff/Petitioner <input type="radio"/> Defendant/Respondent <input type="radio"/> Other | |
| Filing Date (MM/DD/YY): | _____ | <input type="radio"/> |
| Disposition Date (MM/DD/YY): | _____ | <input type="radio"/> |

Was this case subject to the Texas Expedited Actions Rules?

- Yes
- No
- Don't know

Please indicate how this case was disposed:

- Non-suit; case voluntarily dismissed by plaintiff/petitioner
- Default judgment for plaintiff/petitioner
- Agreed dismissal with prejudice or agreed judgment (settlement) by parties before discovery completed
- Agreed dismissal with prejudice or agreed judgment (settlement) by parties after discovery completed
- Summary judgment
- Non-jury (bench) trial
- Jury trial
- Other disposition (please specify): _____
- Not applicable. This cases is still pending in the [COUNTY] County Court at Law

Actions Subject to Expedited Actions Rules

Did you file a motion pursuant to Rule 169(c) to remove the case from the expedited actions process?

- Yes
- No

If yes...

What was the justification for removing the case from the expedited actions process? (Check all that apply)

- The amount of monetary relief claimed exceeded the \$100,000 threshold for expedited actions;
- Parties sought non-monetary relief in addition to money damages;
- Case presented legal or evidentiary issues requiring more discovery than permitted under the Expedited Actions Rules;
- Other justification (please specify): _____

Was the motion granted?

- Yes
- No

Please indicate the amount of discovery undertaken by the parties in this case.

| | Plaintiff/Petitioner | Defendant/Respondent |
|---|----------------------|----------------------|
| Indicate the number of... | | |
| Fact witnesses | _____ | _____ |
| Expert witnesses | _____ | _____ |
| Requests for production | _____ | _____ |
| Requests for admission | _____ | _____ |
| Requests for disclosure | _____ | _____ |
| Hours (rounded to nearest 30 minutes) of depositions of witnesses | _____ | _____ |

Did you file a motion to expand the number of deposition hours?

- Yes
- No

If yes...

Was the motion granted?

- Yes
- No

Did you file a motion to compel discovery?

- Yes
- No

If yes...

Was the motion granted?

- Yes
- No

Did you file a motion for a protective order?

- Yes
- No

If yes...

Was the motion granted?

- Yes
- No

How many motions for a continuance were granted?

- None
- One
- Two or more

Indicate the extent to which you agree or disagree with the following statements based on your experience in this case.

| | Strongly Disagree | Disagree | Agree | Strongly Agree | Not applicable |
|---|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------|
| The standard discovery permitted by Rule 190.2(b) provided sufficient information to inform my assessment of the merits of the opposing party's claims or defenses. | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| The amount of time permitted by Rule 190.2(b) was sufficient to complete discovery in this case. | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Discovery disputes that arose in this case were resolved in a timely manner. | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| It was/would have been economically feasible to try this case to a jury. | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

Compared to similar cases filed before March 1, 2013

| | Strongly Disagree | Disagree | Agree | Strongly Agree | Not applicable |
|--|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------|
| Discovery was completed more quickly due to the restrictions imposed by the Expedited Actions Rules. | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| The case was resolved more quickly due to the restrictions imposed by the Expedited Actions Rules. | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| The discovery costs were lower due to the restrictions imposed by the Expedited Actions Rules. | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

Alternative Dispute Resolution (ADR) Experience
Did the parties employ ADR to resolve the case?

- Yes
- No

What type(s) of ADR was employed?
(check all that apply)

- Mediation
- Binding arbitration
- Nonbinding arbitration
- Neutral evaluation
- Settlement conference
- Summary jury trial
- Other (please specify): _____

Why was mediation considered for resolving this case?

- Parties were contractually obligated to use mediation to resolve disputes.
- Mediation was requested by a party.
- Mediation was recommended by counsel for a party.
- Mediation was recommended by the court.
- Mediation was ordered by the court.
- Other reason (please specify): _____

How was the mediator selected?

- Designated in court order
- Substituted for court designation by agreement of the parties
- Selected by agreement of the parties
- Selected or assigned from county dispute resolution center
- Other (please specify): _____

When did the mediation take place? (Please enter date mm/dd/yyyy)

- N/A. Case settled before scheduled mediation date

How much discovery had been completed when the mediation took place?

- None
- Very little
- Some
- A lot
- Discovery complete

How long did the mediation session last?

Number of hours (rounded to the nearest half hour, no commas): _____

What was the fee per party charged by the mediator?
(Please do not use commas)

\$ _____

Would you characterize the mediator's style in this case to be primarily:

- Facilitative (assisting the parties only in the negotiating process)
- Evaluative (actively evaluating the respective merits of each side's case)

What impact did the mediation have on the resolution of the case?

- The case completely resolved as a result of the mediation session or follow-up by the mediator.
- The case resolved partially as a result of the mediation or follow-up by the mediator.
- The case resolved after the mediation session.
- The case did not resolve at all and was ultimately tried.

Why was the case not fully resolved by mediation?

- Insufficient discovery at the time of the mediation
- Case not amenable to resolution because a court decision is necessary
- Opposing party unreasonable in demands
- My client opposed resolution
- Wrong mediator chosen for this particular case
- Other reason (please specify): _____

How much did the mediation help frame the issues for subsequent settlement negotiations?

- Not at all
- A little
- Somewhat
- A great deal

What was the total settlement amount (including attorney's fees, court costs, other costs)?

- Less than \$25,000
- \$25,000 to \$49,999
- \$50,000 to \$74,999
- \$75,000 to \$99,999
- \$100,000 to \$249,999
- \$250,000 to \$499,999
- \$500,000 to \$999,999
- \$1,000,000 or more
- N/A Case did not settle and was ultimately tried

How satisfied was your client with the outcome of the mediation?

- Very unsatisfied
- Unsatisfied
- Satisfied
- Very satisfied

How satisfied were you with the outcome of the mediation?

- Very unsatisfied
- Unsatisfied
- Satisfied
- Very satisfied

Estimate the number of pretrial attorney and staff work days saved because the case settled at mediation rather than went to trial.

Days (numeric values only) _____

Estimate the number of days the case would have required for trial.

Days (numeric values only) _____

If the case had not settled, estimate how many more months the case would have remained on the court docket. Months (numeric values only) _____

What benefits, if any, were achieved from the mediation?

- Progress in negotiations
- Issues narrowed for trial
- Improved communication with opposing party and/or counsel
- Discovery issues resolved or narrowed
- Other benefits (please specify): _____
- N/A No benefits were achieved from mediation

How well prepared was the mediator?

- Unprepared
- Slightly prepared
- Adequately prepared
- Quite well prepared
- Extremely well prepared

How effective was the mediator?

- Not at all effective
- Slightly effective
- Effective
- Quite effective
- Extremely effective

Jury Trial Experience

When did the trial take place? (Please enter date)

How long (in hours) did the trial last?

Hours (numeric values only) _____

What was the size of jury impaneled?

- 12 jurors
- 6 jurors
- Other size (please specify number of jurors): _____

What was the jury's verdict?

- Verdict for plaintiff
- Verdict for defendant
- Mixed verdict
- N/A. Jury did not reach a verdict in this trial

Was the verdict unanimous?

- Yes
- No

What was the damage award, if any?

(Please do not use commas)

\$ _____

- N/A. No damages were awarded.

Indicate the extent of your agreement with the following statements:

| | Strongly Disagree | Disagree | Agree | Strongly Agree |
|--|-----------------------|-----------------------|-----------------------|-----------------------|
| The amount of time spent on voir dire was sufficient to make informed decisions about the suitability of prospective jurors to sit on this trial. | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| The jury pool reflected a fair cross section of the community. | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| I was satisfied with the jurors who were ultimately selected as trial jurors. | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| The amount of time allocated for the presentation of evidence at trial was sufficient for jurors to understand and make informed judgments about the merits of the case. | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

All things considered, how close was this trial?

- Evidence strongly favored the plaintiff
- Evidence favored the plaintiff
- Evidence slightly favored the plaintiff
- Evidence was evenly balanced
- Evidence slightly favored the defendant
- Evidence favored the defendant
- Evidence strongly favored the defendant

How complex was the factual evidence presented at trial?

- Not at all complex
- Slightly complex
- Complex
- Extremely complex

How complex was the applicable law for this case?

- Not at all complex
- Slightly complex
- Complex
- Extremely complex

How well did the jurors understand the key evidentiary and legal issues in the trial?

- Not at all well
- Only slightly well
- Somewhat well
- Well enough
- Extremely well

How satisfied were you with the jury's verdict?

- Extremely unsatisfied
- Somewhat unsatisfied
- Somewhat satisfied
- Extremely satisfied

General Comments: The Texas Supreme Court is interested in any favorable or unfavorable critical analysis that you may have about how the Expedited Actions Rules operate in practice. Please provide your comments in the space below.

Appendix B: Summary of Attorney and Judge Interviews by Baylor University School of Law

TEXAS EXPEDITED ACTIONS PROJECT — SUMMARY*

Tex. R. Civ. P. 169 establishes a process for the prompt, efficient and cost effective resolution of certain civil actions filed after March 1, 2013. Tex. R. Civ. P. 169, cmt 1. The expedited action (EA) process is intended to be mandatory for suits meeting two criteria: (1) the parties seek only monetary relief; and (2) the aggregate of the relief requested by all claimants, other than counter claimants, is \$100,000 or less inclusive of penalties, costs, expenses, prejudgment interest, and attorney's fees but exclusive of post-judgment interest. Parties may not bring suits under the Family Code, Property Code, Tax Code, and Chapter 74 as expedited actions. Discovery, governed by Level 1, opens when a party files suit and ends 180 days after service of the first discovery request. Each party may have no more than six hours in total to examine and cross-examine parties on oral depositions; the parties may expand this limit by agreement up to ten hours but not more. In addition to requests for disclosure, any party may serve no more than 15 interrogatories, 15 written requests for production, and 15 requests for admission. A party may serve requests for disclosure as well. The trial court must, on request by any party, set a trial date within 90 days after the discovery period ends. See, generally, Tex. R. Civ. P. 190.2.

Since March 1, 2013, however, there is little data on judicial and attorney perception on the rule's use and effectiveness. In coordination with the Texas Supreme Court, the Texas Office of Court Administration, the National Center for State Courts and Baylor Law School set out to survey attorneys and judges who had experience with expedited actions. The study involved a sample of some 5,000 cases filed in County Courts at Law in Dallas, Fort Bend, Harris Lubbock and Travis Counties, both before and after the rule when into effect. The NSCS researchers analyzed a review of sampled cases and surveyed attorneys involved in the sample cases. The final phase of the project

involved Baylor Law Students surveying attorneys and judges in each of the five counties for their views on and experience with expedited actions. The Office of Court Administration wrote each judge about the survey. The letter explained that a law student would contact the judge since the sampling data indicated that judge had presided over an expedited action and asked for their participation. A similar letter was sent to the attorneys selected. NSCS initially identified 5 attorneys per county with expedited action cases per the sample data. The survey examined experiences with expedited action cases, the perceived impact of limits on time, discovery tools and damages, and what specific actions courts take to handle these cases.

Two factors impacted our survey results: (1) poor judicial and attorney response rates, despite a direct request from the office of Court Administration that they participate; and (2) somewhat perplexingly, a subset of judges and attorneys who had had EA cases per the sampling but were unaware of that fact. Given these limitations, we broadened the survey group to include more attorneys and judges but still experienced less than optimal response rates of approximately 30 percent. Nonetheless, the survey provided insight into experience with EA and need for administrative changes.

THE ATTORNEY PARTICIPANTS

Of the attorneys interviewed, 60 percent self-identified as defense attorneys and 40 percent as plaintiffs' counsel. No mixed-practice attorneys responded to the survey. All of the defense attorneys worked either in insurance defense (including as captive counsel for an insurance company), collections, or personal injury defense.

Almost half (40%) of the attorneys interviewed had been in practice for approximately 6 years. The remainder were more experienced attorneys, averaging a decade in practice.

* Summary prepared by Leda Juengerman (team leader) and Professor Elizabeth M. Fraley.

Every attorney who responded to the survey has had experience with expedited action cases. Only one respondent characterized his experience with expedited action cases as “not a lot,” while 80 percent felt they had extensive experience.

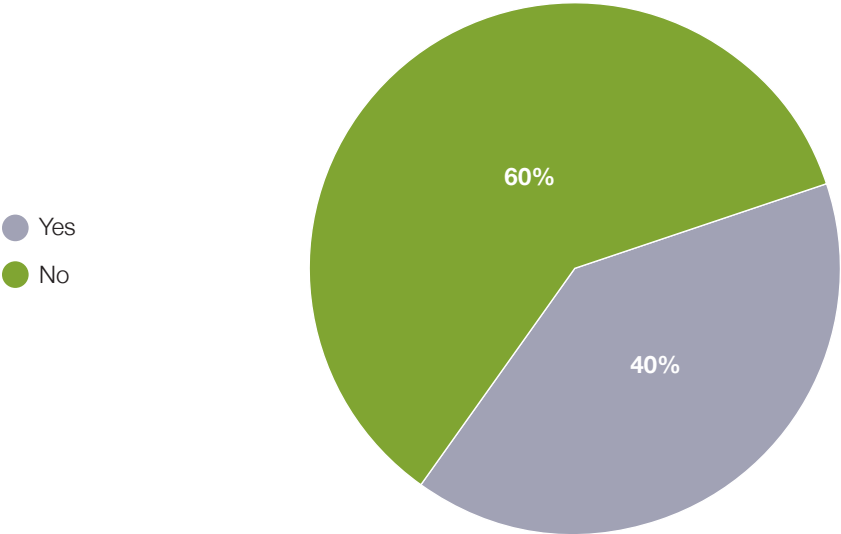
EXPEDITED ACTION CASE SELECTION

The respondents disagreed as to whether there were particular types of cases best suited for the expedited action system, and, if so, how to identify those cases. Forty percent (40%) said smaller injury claims with

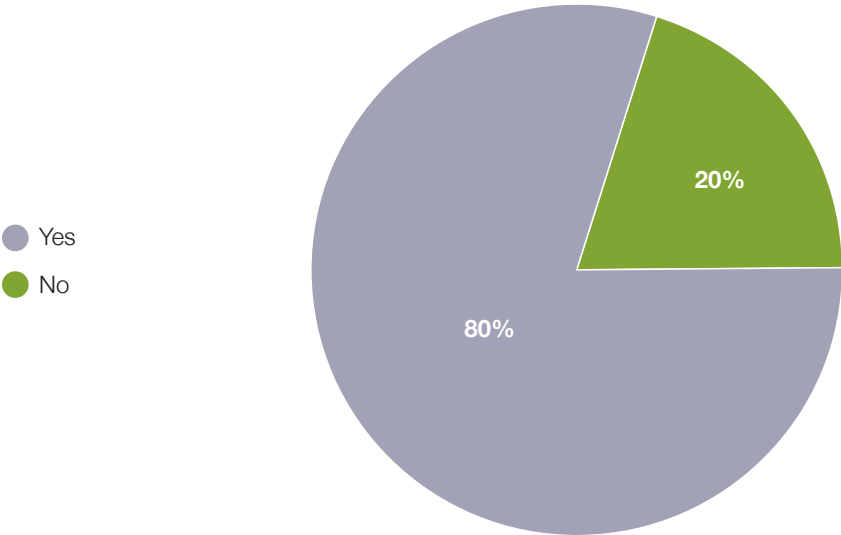
limited damages and limited documents are ideal, and more specifically, those cases where the economic damages are restricted to past damages. The speculative and uncertain nature of future damages made fitting under the \$100,000 cap more difficult from a pleading perspective. Respondents reported limited-damage cases fit well in the EA framework because they require relatively less discovery.

The survey revealed greater agreement on cases which do not fit well within the Expedited Actions

Are there particular types of cases for which the Expedited Actions Rules are especially useful?



Are there particular types of cases that are inappropriate for the Expedited Actions Rules?



Rules. Eighty percent of the attorney respondents said attorneys should not pursue larger or more controversial cases under the Expedited Actions Rules. Most respondents defined such inappropriate cases as those they deemed higher exposure cases, more complex cases, multiparty cases, family law cases (which Rule 169 excludes by definition), car accidents involving death, discovery-intensive cases, and cases with medical expenses over \$25,000.

APPLICATION OF THE EXPEDITED ACTION RULES

The interviews with attorneys and judges demonstrate that the supposedly mandatory nature of EA is anything but. Attorneys frequently disregard the EA rules, and the courts rarely enforce them. The EA rules allow for removal of cases from the EA track. When asked whether such removal was easy or difficult, 60 percent responded that removal was easy. The remaining 40 percent reported that the process of pleading out of the application of the Expedited Actions Rules was neither easy nor difficult. Not a single attorney responded that removal was difficult. These responses were tempered, however, by the fact that 80 percent of the attorney respondents had never removed cases from application of the expedited actions rules. When removal had been sought, the attorneys identified the basis as either “good cause” or “complicated discovery.”

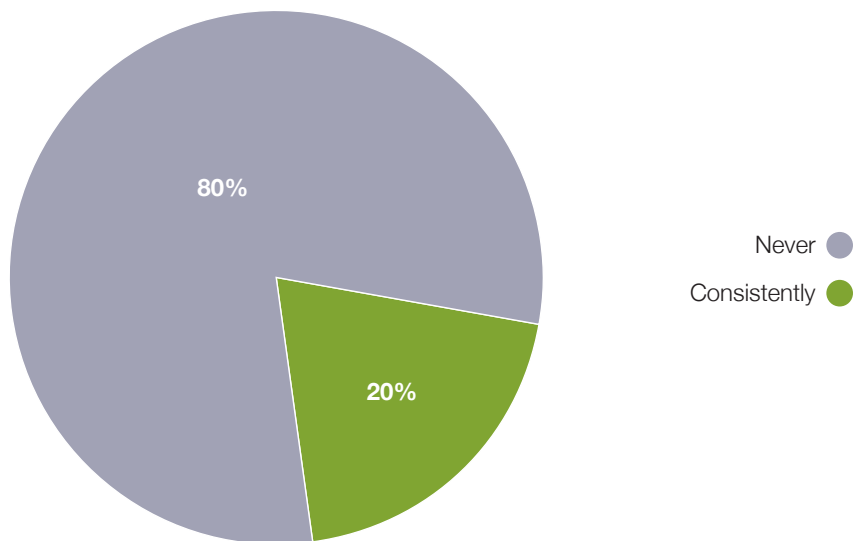
The EA rules did not substantially change the pace or nature of cases filed under Rule 169. More than half of the respondents reported no changes at all; some respondents found changes in the pacing of discovery.

Additionally, 60 percent of the respondents reported that attorneys stipulate around the rules more often than not. Forty percent (40%) of the respondents, however, never experienced attorneys stipulating around the rules. Respondents felt there generally was good attorney compliance with the rules, although even attorney compliance was subject to exceptions. Respondents largely reported these exceptions as broadening the number of interrogatories allowed and expanding the time periods for trial.

IMPACT ON DISCOVERY AND TRIAL

A likely reason for the perception that EA does not affect discovery or trial of a case (despite stringent deadlines) is the lack of judicial response to the rule. An overwhelming majority of the respondents (80%) reported that judges never enforce the Expedited Actions Rules. Only 20 percent of the respondents reported that judges consistently enforce the Expedited Actions Rules. As noted below, judge respondents confirmed rare enforcement of the rules and the absence of mechanisms for enforcement.

Are judges consistently enforcing the Expedited Actions Rules?



When asked about the effects of the Expedited Actions Rules on case outcomes, 60 percent of the attorney respondents reported no change. 40 percent of the respondents said the rules in fact allow more trials to go to a jury or otherwise be dismissed. When asked how the rules affected damage awards, none of the attorneys reported any effect. The rules did favorably affect litigation costs: 40 percent reported there was some change in the expense of litigation. Factors reducing litigation costs were identified as less time required to answer discovery and less time spent in trial. Despite the stringent time frames for the discovery period and trial, most attorneys reported no changes in time to dispose of their cases. One attorney did report a quicker disposition as a direct outcome of the rules, reporting that judges in his experience would set expedited action cases for trial within 9 months to a year of filing. This response was an outlier; 80 percent of the attorneys questioned reported limited rates of actually getting a case to trial, much less on an expedited basis. The judicial results confirmed this attorney perception.

When asked to comment on whether the rules impacted sufficiency of time to assess the merits of a case, only 20 percent of the respondents reported no effect. Eighty percent (80%) felt the rules limit their ability to assess the merits of a case; that they could not assess more complex cases properly; and that cases with damage amounts within the rule's limits were still too complex factually for the attorney properly to assess the merits in the allotted time.

The rules generally provided sufficient time for discovery: only 20 percent responded that the rules did not allow enough time for discovery. Forty percent (40%) of attorneys surveyed reported enough discovery time. The remaining attorneys reported no change in the time for discovery, but highlighted that attorneys taking on cases controlled by the Expedited Actions Rules need to plan better and give more thought to their discovery and case management strategy.

When asked about the impact of the rules on the timeliness of the completion of discovery, 40 percent of the respondents reported no impact. Twenty percent (20%) reported that the time allotted was not sufficient to complete discovery. The remainder felt the time periods were appropriate for handling the case.

While some reported that the timelines are “arbitrary,” that fact did not interfere with the attorneys’ practice.

None of the attorneys surveyed reported any impact of the rules on the nature of the resolution of the case.

Anecdotally, attorneys reported that courts will not give priority to expedited actions on their trial docket. Thus, attorneys who followed all the EA rules, completed discovery, requested and were given a timely trial setting under the rules still did not get to trial because of the judge’s refusal to actually try the cases. Comments such as “I’m not going to bump a complex, multi-party case for your one-day trial” were common.

RECOMMENDATIONS FOR CHANGE

When asked for recommendations to improve the effectiveness of the rules, 20 percent of the attorneys surveyed gave no suggestions. Others listed a need for uniformity in enforcing the rules, a need for automatic notices and settings, mechanisms to allow the court to enforce a case’s status as an expedited action, or rules requiring a conference when a case falls under the rules (even a brief telephone conference to educate the parties). Some suggested the rules provide a longer discovery period and more trial time. Defense attorneys felt the rules gave plaintiffs an unfair time advantage. While most felt the courts should enforce the rules more rigorously (or at all), a few suggested more flexibility due to the “arbitrary” nature of the time limitations. One attorney suggested that the amount in controversy requirement be lowered, because in West Texas, a \$100,000 case is a big case, not a small case.

The key takeaway was lack of consistent enforcement, which limits the impact of the expedited action rules. One respondent felt strongly that the rules did reduce litigation costs and got lawyers back to the goal of trying more jury trials.

THE JUDGE PARTICIPANTS

The survey contacted judges in Dallas, Lubbock, Fort Bend, Harris and Travis counties. Most of the courts surveyed (more than 50%) had encountered cases subject to the Expedited Actions Rules, but several believed they had not had expedited action cases on

their docket, despite data suggesting such cases had been filed in their courts.

COURT PROCEDURES FOR EXPEDITED ACTIONS

The courts surveyed had no procedures to identify EA cases, to alter docketing, or to enforce EA rules. Overwhelmingly, the judges either allowed or required the attorneys to seek enforcement of the rules. Only one respondent reported using a differentiated case management approach, where the attorneys file a case information sheet with the clerk and identify a pleading as an expedited action. In the absence of this identification, the court itself looks at the case to determine the damages and identify the level of discovery in order to create a scheduling order. One respondent reported that the court has a different scheduling order for each discovery level, including one for expedited actions.

Judges perceive no need for protocols or procedures to differentiate expedited actions from other cases on the docket. The same was true for formatting changes in the case caption. Generally, courts either were content with the filing attorneys designating their

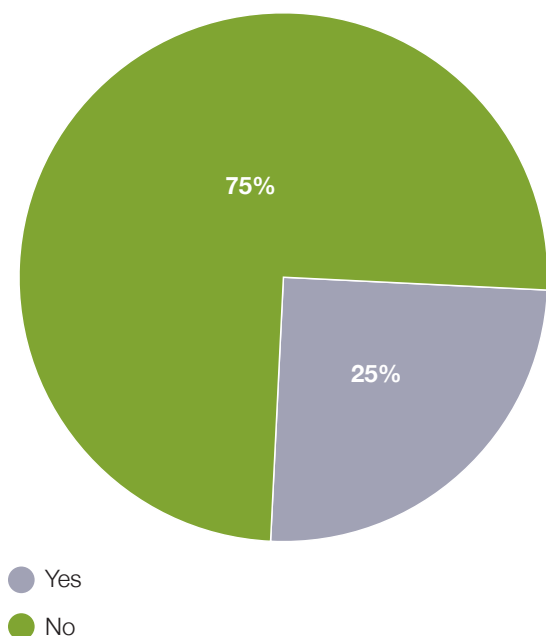
cases as expedited actions in whatever form the attorney deemed suitable or simply saw no need to identify EA cases. One court recognized that formatting EA cases distinctly would help the judges prioritize the expedited cases and would help the court staff in setting such cases for trial.

Consistent with the lack of procedures for identifying EA cases, the judges also responded that they rarely enforced the Expedited Actions Rules unless specifically asked to do so by the parties or their attorneys. Only 25 percent of respondents reported initiating any type of rules enforcement.

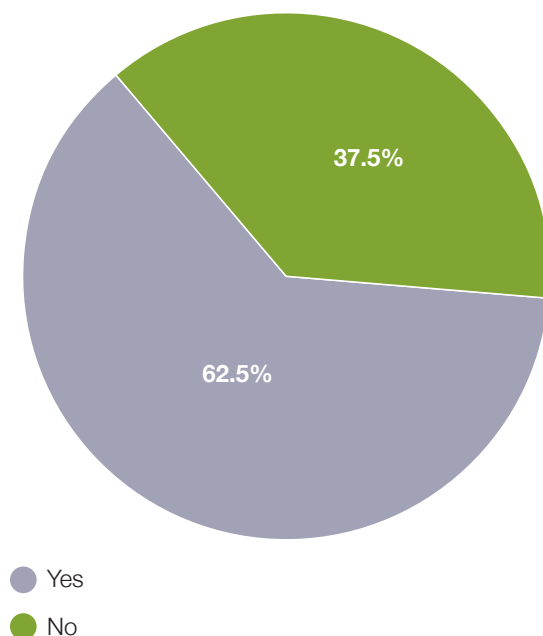
CASE SELECTION AND APPLICATION

The judges, like the attorneys surveyed, reported that some cases fit the Expedited Action Rules more than others, although 37.5 percent of those surveyed reported no such difference. They cited debt collection, matters normally in county or JP courts, smaller cases with less discovery or limited future damages, and contract cases for debts or with liquidated damages as good fits for EA.

Do you enforce the limitations in the Expedited Actions Rules without being requested to do so by one of the parties or attorneys?



Have you noticed that the Expedited Actions format works best for certain types of cases?



Given the strictures of the EA rules, there was early concern attorneys would plead around the damage requirements to avoid the rules. Such conduct was not the general experience of those polled. Judges generally felt that attorneys did not inflate Tex. R. Civ. P. 47 damage estimates to avoid Expedited Actions Rules, with damage inflation reported by only 25 percent of the respondents. Those respondents reporting attorneys pleading around the EA limits cited pleadings between \$100,000 and \$200,000 while the case was “nowhere near that value.”

None of the respondents noticed any difference in the number of discovery disputes brought for resolution under the Expedited Actions Rules. Whether this fact has to do with the rules themselves, the number of disputed or undisputed facts in the case, or the temperament of the attorneys and parties involved is not clear.

OVERALL IMPACT

The judges were largely unimpressed with the effect of the expedited action rules, with 50 percent reporting being neutral on their impact, 25 percent reporting a positive regard for the rules, and 25 percent reporting a negative reaction.

This neutrality stems largely from the perception that EA rules have neither affected the judges’ dockets nor moved cases more quickly. Because attorneys have not sought enforcement of the EA rules, one court posited that the rules primarily affect the discovery phase rather than the docket.

Those respondents who favored the rules did believe the faster timeline of EA had proven effective. Courts did not report any difficulty with the transition to EA, although that may be more indicative of the timelines

already in place before the rules were implemented. One court applauded the rules as a response to public opinion regarding the expense and length of litigation.

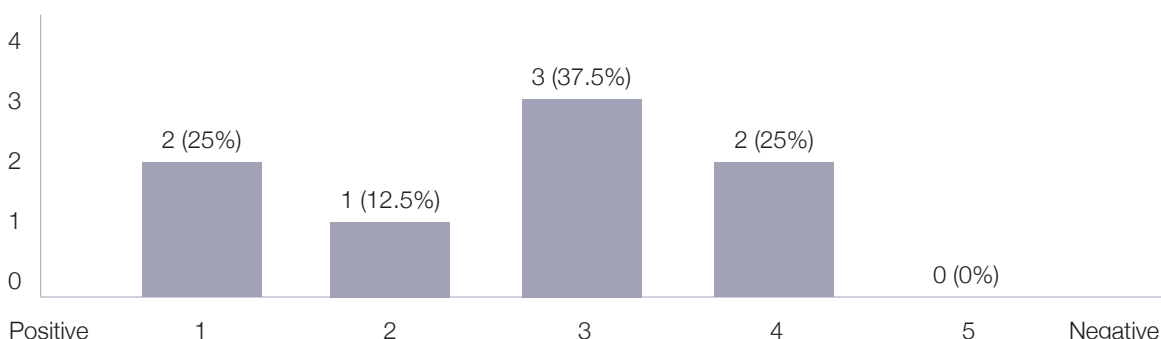
Some responded that the rules were unnecessary and added an extra level of data collection and segregation of cases without benefit. Other courts report that attorneys do not follow the rules. Even when followed, their implementation is disproportionately “hurtful” to the defense side. The rules give plaintiffs twice as long to prepare a case. One respondent reported that the downside of applying the rules is that lawyers opt out of mediation more frequently.

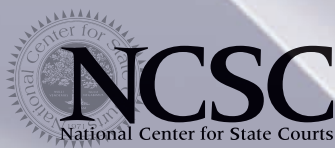
RECOMMENDATIONS FOR CHANGE

Actions become expedited only if those attorneys involved recognize their case’s status under Rule 169 and apply the supposedly mandatory rules. Virtually all respondents commented on the lack of any procedural support for EA actions. Requiring litigants filing an expedited action to add a docketing sheet identifying the matter as an EA would alert district clerks to the cases’ special status. Courts (or clerks) could then send notice of a trial setting within 210 days, prompting the parties to get the discovery process underway. Adding an “EA” to the end of the case’s docket number would similarly identify the case status and help the Courts prioritize the trial docket. Courts could also identify an EA docket week during each month or quarter, set all EA cases old enough for trial that week, and try 3-5 EA cases back to back. A set EA week would address the court’s potential concern about postponing more complex cases but also effectively dispose of multiple EA cases in a single week.

Rule 169 has laudatory goals, many of which have been undermined by inconsistent enforcement. Thus far, mechanisms for that enforcement do not exist.

In general, do you regard the Expedited Action Rules more positively or more negatively?





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