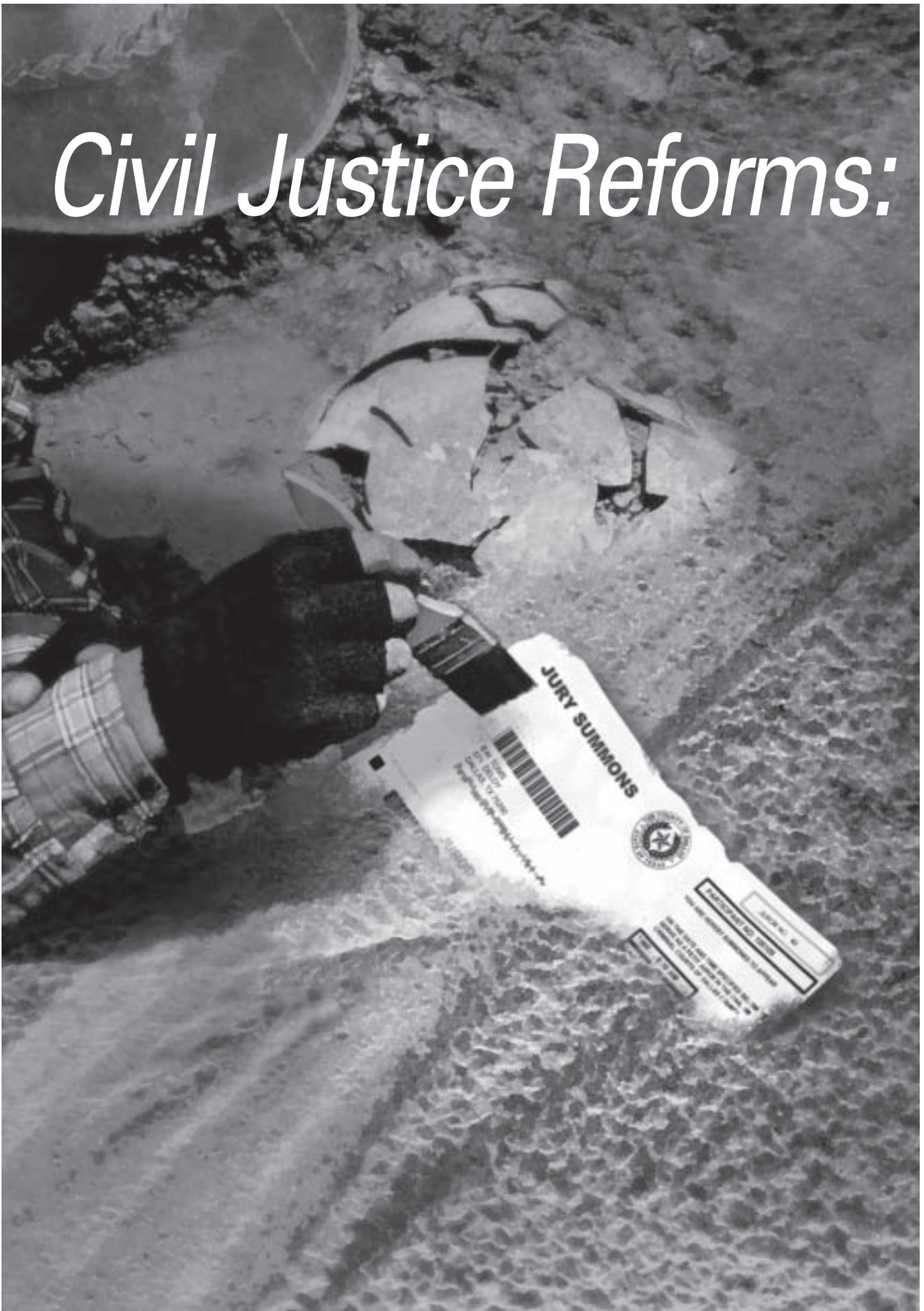


Civil Justice Reforms:



Why the disappearance of civil jury trials is not acceptable

By Rebecca Love Kourlis and Gilbert A. Dickinson

John Adams said that “Representative government and trial by jury are the heart and lungs of liberty.” Unfortunately, trial by jury, especially in civil cases, is on life support at the beginning of the twenty-first century. This is an unfortunate development, but it is not irreversible. Those who are involved in the civil jury process know first-hand of the genius and value of trial by jury. Juries represent the collective wisdom and objectivity of a group of citizens who are called together to apply their common sense and agree on a verdict. It is indispensable to our system of justice, and our way of life. At least one of the reasons for the disappearance of the jury trial is the COST of the pretrial process. More and more litigants are worn down (financially and emotionally) by the pretrial process, and decide to settle the case rather than push forward to a jury trial. Additional cases with merit are never filed because the litigant cannot afford the process. To preserve and restore the civil jury trial, we must make the pretrial process faster, cheaper and more user-friendly. The focus of this article will be to highlight a pilot project proposal under development in Colorado to do just that.

But first, let’s examine the problem.

The Reality of the Vanishing Jury Trial

The reality of the vanishing trial has become increasingly clear. The decline in trials is recent and steep. In the last half-century, civil trials as a percentage of total dispositions in United States District Courts have declined precipitously from 11.5% in 1962 to 1.8% in 2002.¹ The number of jury trials in District Courts is reaching historic lows despite the fact that the number of civil filings in District Courts has increased fivefold since 1962.² Per capita civil filings in District Courts have also increased significantly.³ Recent data show that the number of trials is still declining, and the ratio of trial to filings as of 2009 is about one-twelfth what it was in 1962.⁴

This trend is not confined to federal courts. In state courts, where most trials take place, there is a similar decline. In a survey of 22 sample states, the number of civil jury trials decreased by 32% from 1976 to 2002,⁵ during which time dispositions overall doubled in these courts.⁶ During this same time period, the states’ populations increased by only 39 percent.⁷

Many might argue that the decrease in the number of trials is a good thing. It might be said that this demonstrates people’s ability to resolve their disputes without the need to involve a jury. If so, then we question whether those settlements

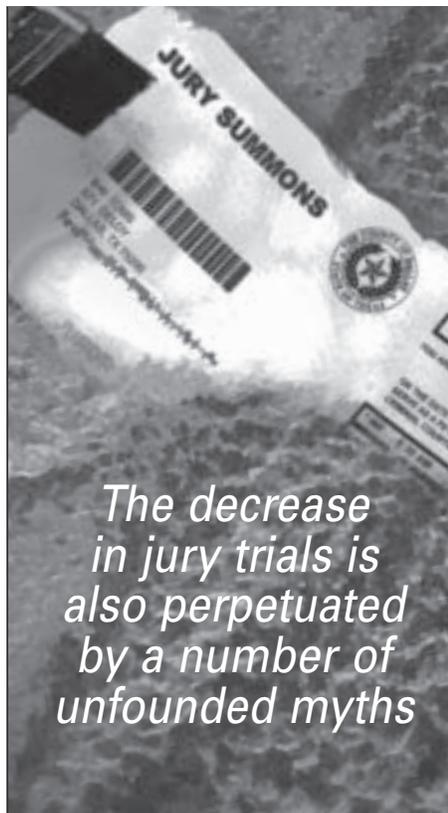
are based on preference or financial mandate. And, if the argument is based on a sense that the jury trial is a bad thing—that runaway juries are rampant and civil jurors cannot possibly understand the complexity of modern issues — then we respectfully disagree. The jury trial is a treasure; juries are reasonable people and their involvement in the system is a form of accountability that we should never be willing to forego.

The Consequences of the Vanishing Jury Trial

Our society benefits immensely from jury trials. Alexis de Tocqueville said that “to look upon the jury as a mere judicial institution is to confine our attention to a very narrow view of it; for, however great its influence may be upon the decisions of the law-courts, that influence is very subordinate to the powerful effects which it produces on the destinies of the community at large.”

Apart from voting, serving on a jury may be the closest many citizens get to participating in government. According to a 2004 Harris Poll prepared for the American Bar Association, 84% of citizens surveyed agree that jury duty is an important civic duty that should not be ignored, even if it happens to be inconvenient.⁸ The rate of agreement is higher among respondents who have actually been called to serve on a jury—87% agreed, compared to 80% of respondents who have not been called.⁹ In general, those who have served as jurors feel as confident in the justice system as they did before they served (63%); 11% of respondents reported that their confidence in the civil justice system increased (17% didn't know).¹⁰ Forty-five percent of respondents who served as a juror felt their experience was in line with what they expected; 22% felt it was better than they expected (23% didn't know).¹¹ Of those who have served on a jury, a majority (63%) would serve again,¹² and 75% of citizens surveyed would want their case to be tried to a jury rather than a judge.¹³

The decrease in jury trials is



also perpetuated by a number of unfounded myths; for example, that jurors are pro-plaintiff. Numerous studies have shown this not to be the case. In a review of tort cases decided by juries in the 75 most populous counties in the United States, plaintiffs prevailed on average in 51% of cases (the exact percentage varies by case type).¹⁴ Studies have also shown that juries are not slanted toward plaintiffs in comparison to the judges who presided over the same trials on which they sat as jurors.

In a nationwide survey of judges who presided over jury trials, the jury found for the plaintiff in 12% of the cases in which the judge would not have agreed, while in 10% of the cases, the judge would have entered a verdict for the plaintiff, but the jury did not.¹⁵ Plaintiffs in medical malpractice and product liability cases would have prevailed at trial at a much higher rate if the judge had been making the decision (48%), than they did with juries rendering the verdict (28%).¹⁶

In fact, data show that juries are just as reliable as judges. In a seminal 1950s nationwide survey of the presiding judges in 4,000

state and federal civil jury trials, asking judges how they would decide those same cases, the data showed a 78% agreement between judge and jury on liability.¹⁷ This figure is better than the rate of agreement found between scientists doing peer review and psychiatrists and physicians when diagnosing patients.¹⁸ This figure is even more significant when compared to the 79-80% rate of agreement that a mid-1980s study found to exist between judges themselves when making sentencing decisions in an experimental setting.¹⁹ Additional studies support this conclusion.²⁰

Another common misperception of juries assumes that jurors are incapable of understanding complex issues and accompanying expert testimony on these issues. This myth assumes that jurors, in response to complicated expert information and the impressive-looking résumé of the expert and apparent expertise, will uncritically accept the testifying expert's claims. Data show, however, that juries use reasonable strategies to evaluate expert testimony, for example, drawing on the experience and expertise of their most educated/competent member to make sense of the evidence and looking for cues relating to the trustworthiness or potential biases of the source.²¹ Additionally, the complexity of issues and expert evidence can be a challenge for judges as well. While more sophisticated with respect to legal issues, judges are often just as unfamiliar with the substance of expert testimony as the jury. There is no evidence that complexity induces a greater rate of disagreement between judges and juries on the appropriate verdict, suggesting that juries are as capable as judges of understanding complex issues and expert testimony.²²

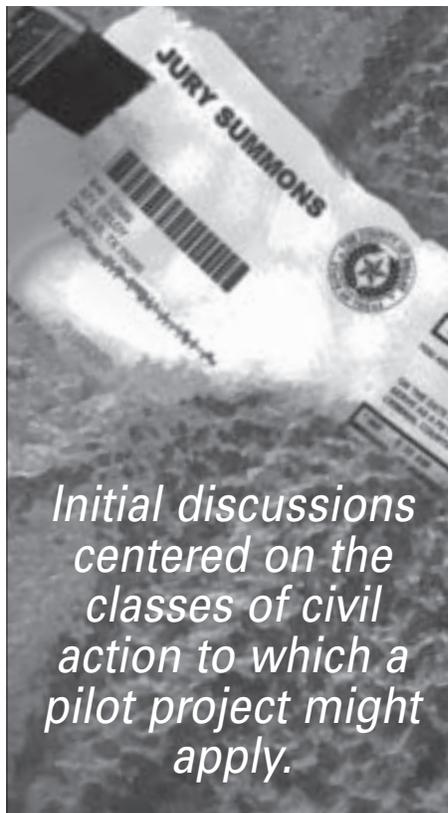
What Should We Do?

There are a number of factors that likely contribute to the decline in trial rates, two of which are the cost and time associated with modern litigation. Cost and delay impact the decision to bring the dispute into the civil justice system in the first instance. If a claim is brought, cost and delay impact

whether plaintiffs and defendants alike are able to remain in the system long enough to have their case resolved by a judge or jury.

An effort is underway in Colorado to address the issues of cost and delay. In August 2009, the Institute for the Advancement of the American Legal System at the University of Denver (IAALS), convened a committee to explore whether Colorado courts might be a viable jurisdiction in which to propose a pilot project, designed to make Colorado state courts more affordable and accessible, and to increase the number of jury trials. Initially composed of a few members of the Colorado judiciary and leadership of the local chapters of the American College of Trial Lawyers (ACTL) and American Board of Trial Advocates (ABOTA), after several meetings, committee membership expanded to include leadership from the Colorado Bar Association (CBA), Colorado Trial Lawyers Association (CTLA), Colorado Defense Lawyers Association (CDLA), and other experienced members of the Colorado trial bar and judiciary.

Initial discussions centered on the classes of civil action to which a pilot project might apply. After considering case filing data and discussing the particular problems and challenges raised by various case types, the committee narrowed the focus to medical malpractice and business disputes. The full committee split into two subcommittees, utilizing the American College of Trial Lawyers (ACTL) Task Force on Discovery and Civil Justice and IAALS *Pilot Project Rules* as a template.²³ The result is a set of pilot project rules that can be applied to any area of civil litigation. In addition, appendices with special application to business and medical malpractice claims have been prepared as examples of enhancements that would be created by specialized bars in order streamline other areas of litigation. These proposed Colorado Pilot Project Rules are in the process of being submitted for approval and implementation by the Colorado Supreme Court in selected jurisdictions.



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The Colorado Pilot Project Rules have several focus areas that are designed to reduce cost and streamline litigation. The overarching goal is to allow greater access to the courts, especially for lower-value cases, and allow cases to be settled or tried on their merits rather than aborted due to litigation-related expense.

NARROWING THE ISSUES at an EARLY STAGE: While retaining notice pleading as the legal standard, the rules require fact-specific pleading in both complaints and answers. This provision is designed to narrow the issues to the extent possible without penalizing a party who has not had access to discovery. The ability of a defendant to be specific with regard to admissions, denials, and affirmative defenses will be enhanced by staged disclosures, requiring the plaintiff to make initial disclosures prior to the due date for an answer.

The rules provide for early mandatory disclosure of exhibits and witnesses, whether favorable or unfavorable to the parties' position, with appropriate sanctions for disclosure violations. Plaintiff's initial disclosures are to be filed

within 15 days after the service of the complaint. Defendant's Answer is due 15 days after plaintiff's disclosure, and defendant's disclosures are due 15 days after service of the Answer. The purpose of the disclosure requirement is to provide the parties the opportunity to identify quickly and narrow key issues, to the extent possible, without the expense and delay of formal discovery. The rules contain an appendix of required disclosures for medical malpractice cases, as an example of the anticipated customization of the rules for specialized areas of litigation.

ACTIVE JUDICIAL CASE MANAGEMENT: The committee is promoting a "one case/one judge" approach for pilot project cases. The meaningful involvement of the judge from beginning to end can foster cooperation, help parties narrow issues and determine the need and scope for both fact discovery and expert testimony early in the litigation process, in order to allow for cost-effective discovery.

Through early case management, the judge can set discovery and expert disclosure deadlines, along with a trial date early in the process. The rules specifically provide for an initial case management conference within 45 days of the entry of appearance of all parties, and a second conference within 30 days after the completion of fact discovery.

The focus of case management should be to manage the case towards trial, not necessarily towards settlement. It is understood that some cases need to be resolved by settlement, and that some cases need to be tried. The goal of the pilot project is to allow that determination to be made in a manner as cost-effective for the court and parties as possible.

LIMITS on DISCOVERY: Under the proposed Colorado Pilot Project Rules, the preliminary mandatory disclosures are designed to reduce the amount of discovery following the disclosures, and to allow specifically focused written discovery requests. Presumptive limits will be placed on the numbers of discovery requests and fact witness depositions. The parties

and judge will address the extent of written discovery and the number of fact depositions needed during the initial case management conference, with the judge having discretion to alter the presumptive limits based on the character of the case and the needs of the parties. The underlying purpose of these provisions is to change the default from unlimited to limited discovery.

Expert discovery poses unique problems, as it is the primary driver of costs in medical malpractice cases and in many commercial cases. The rules address this issue by limiting the number of experts to be endorsed, and by eliminating expert depositions. This is made possible by the requirement of detailed, signed reports and the mandatory exchange of the experts' work product. The specifics provided for in the rules include the following:

- Early determination of the categories of expert testimony needed, in order to allow both sides to focus their efforts and avoid the expense related to the retention of unnecessary experts.
- Limitations on the number of experts that may be endorsed, including the requirement that multiple defendants utilize joint experts in given specialties unless disparate interests are demonstrated.
- Signed reports or certified endorsements, including the initialing of each paragraph, that would follow a template setting out the opinions of the expert, the basis of opinions, and the materials reviewed and relied upon, including specific literature.
- Disclosure of testimonial history.
- Production of expert work product, correspondence and billing documentation.
- The elimination of depositions of retained experts.

The goals of the Colorado Pilot Project Rules are to streamline the litigation process so that the key issues can be ascertained and

focused on as early and as efficiently as possible, and to minimize the cost of discovery while preserving due process. The proposed rules are designed to accommodate cases of lesser value, as well as larger and more complex cases.

Drafts of rules have been presented to civil judges in districts across Colorado who have expressed a strong interest in participating in a pilot project. The proposed rules will require approval by the Chief Justice and the Colorado Supreme Court. It is the hope of the committee that, with approval of the Court, the pilot project rules will be implemented in particular courts by operation of a Chief Justice Directive, with a mandate to collect data about the projects that will allow the courts to measure whether the innovations are working to achieve better access to our justice system, including resolution by jury trial where appropriate, without an adverse impact on justice.

Conclusion

Civil jury trials are a hallmark of our civil justice system and democratic government. Where the system has become so expensive and time-consuming that plaintiffs and defendants cannot afford to have their case heard by a jury, the system is broken. Civil justice reforms should be designed to address the issues of cost and delay directly so that the right of access to a jury trial will be preserved. Our hope is that the use of pilot projects will allow continued innovation and improvement in Colorado state courts and, as the results are studied, will provide a model for other states to consider.

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¹ Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 462-63 (2004).

² *Id.* at 486.

³ *Id.* at 489.

⁴ Marc Galanter & Angela Frozema, 'A grin without a cat': Civil Trials in the Federal Courts 3 (May 1, 2010) (unpublished paper, prepared for presentation at the 2010 Civil Litigation Conference).

⁵ Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976-2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 769 (2004).

⁶ *Id.* at 768.

⁷ *Id.*

⁸ HARRIS INTERACTIVE, PREPARED FOR: THE AMERICAN BAR ASSOCIATION, JURY SERVICE: IS FULFILLING YOUR CIVIL DUTY A TRIAL? 9 (2004).

⁹ *Id.*

¹⁰ *Id.* at 18.

¹¹ *Id.*

¹² *Id.* at 19.

¹³ *Id.* at 11.

¹⁴ Shari Seidman Diamond, *Beyond Fantasy and Nightmare: A Portrait of the Jury*, 54 BUFF. L. REV. 717, 730 (2006).

¹⁵ Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 145 (2002).

¹⁶ *Id.*

¹⁷ *Id.* at 144 (citing HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (Univ. of Chi. Press 1971) (1966)).

¹⁸ *Id.* at 144-45.

¹⁹ *Id.* at 145.

²⁰ See e.g., Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 LAW & HUM. BEHAV. 29, 46 (1994); Shari Seidman Diamond, *Convergence and Complementarity between Professional Judges and Lay Adjudicators*, in ADVERSARIAL VERSUS INQUISITORIAL JUSTICE: PSYCHOLOGICAL PERSPECTIVES ON CRIMINAL JUSTICE SYSTEMS 321, 324 (Peter J. van Koppen et al., ed. 2003).

²¹ Diamond, *supra* note 14, at 747-48.

²² *Id.* at 749.

²³ The ACTL/IAALS *Pilot Project Rules and IAALS Caseload Management Guidelines* may be downloaded at <http://www.du.edu/legalinstitute>.