

**Joint Study of the Delaware Courts  
Conducted by the Delaware State Bar Association  
and the Delaware Chapter of the  
American College of Trial Lawyers**

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\*Prepared by the Administrative Office of the Courts in conjunction with the ACTL and DSBA

**JOINT STUDY OF DELAWARE COURTS  
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## **INTRODUCTION**

At the request of the Delaware Supreme Court, the Delaware Chapter of the American College of Trial Lawyers and the Delaware State Bar Association jointly conducted a study designed to determine the extent to which the courts of our State are effectively and efficiently administering and adjudicating the cases that come before them, identifying best practices and determining what if any changes should be considered in order to effect improvement.

Data was collected through two methods. First, respected practitioners in each of the courts were identified, as well as sitting and former members of the Delaware bench. Each was then interviewed in person (almost exclusively by Fellows of the ACTL), using a prepared list of questions specific to the relevant court. In the interviews, respondents, who were assured of anonymity, were asked to provide explanations and elaborations of their answers to the prepared questions, and their responses were reported in detail. In total, more than 100 in-depth interviews were conducted; the interviews typically lasted at least 90 minutes each. Second, an online survey was made available to all members of the Delaware bar, which addressed the same courts and many of the same issues that were the subject of the in-person interviews. Like the interviewees, online survey respondents were assured of anonymity, and were also given the opportunity to expand on their answers to the survey questions. More than 700 responses to the online survey were received and compiled.

Set forth below are reports on each of the Delaware courts, prepared from the interview and survey data.

## ACKNOWLEDGEMENTS

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## **DELAWARE SUPREME COURT**

### **EXECUTIVE SUMMARY**

ACTL Fellows conducted approximately a dozen interviews with experienced Delaware Supreme Court practitioners and current and former Justices, using a prepared list of questions. In addition, there were 130 responses from DSBA members to the Supreme Court electronic survey. The information gleaned from the ACTL/DSBA Survey with respect to practices and procedures specific to the Delaware Supreme Court may be grouped into four general themes.

- First, the question of timeliness was explored. There was a strong consensus among responding practitioners that our Supreme Court currently handles appeals with efficiency and that they are typically resolved in a timely fashion. In response to questions addressed to specific policies and procedures, there was general agreement that the Supreme Court takes appropriate advantage of its ability to dismiss non-meritorious appeals, though some expressed the view that the Court should evidence a greater willingness to dismiss appeals challenged by way of motions to affirm. In addition, the respondents were divided regarding the effect of the Court's policy to forego the scheduling of oral arguments in July and August of each year.
- Second, the survey and interviews addressed the question of appellate administrative efficiency. Respondents roundly approved of the Supreme Court's disciplined adherence to Rule 8, which precludes challenges on appeal with respect to questions not fairly presented to the trial court. Indeed, some urged a more rigid application of that Rule. The Court's enforcement of limitations on the length of appellate briefs received overwhelming support. Respondents generally endorsed existing limitations of the time allotted for oral argument, and the reasonableness with which the Supreme Court resolves

applications for additional argument time. The Supreme Court’s internal operating procedures received generally positive reviews with one exception: the policy that forbids the Justices from discussing a case before oral argument was notably divisive.

- Third was the question of the Supreme Court’s invocation of its jurisdiction over interlocutory appeals. The Court’s existing approach to the acceptance of such appeals was generally well regarded. But a significant number of respondents urged a less restrictive test that focused more heavily on the likelihood that an interlocutory appellate decision would resolve the case and eliminate otherwise unnecessary proceedings.
- Fourth, the study examined the practical quality and value of appellate precedents. A commanding majority of respondents endorsed Supreme Court precedent as consistent, sensible and instructive. Nonetheless, the Court’s perceived preference for unanimity was highly controversial. While supporters found value in the Court’s ability to speak with a single voice, many expressed the view that the quest for unanimity can be a source of doctrinal weakness and an obstacle to clarity.

## **THEMES**

### **I. RESOLVING APPEALS IN A TIMELY FASHION**

**Theme One: Appeals are scheduled and resolved in a timely fashion, but a few minor improvements could be made.**

#### **A. Scheduling and Time to Decision**

Respondents were nearly unanimous in their belief that appeals are generally scheduled and resolved in a timely fashion. One hundred twelve of 115 respondents agreed. The comments of one interviewee aptly reflect the overwhelming consensus: “Delaware’s appeal resolution times far exceed ABA Standards and the practices of other courts.” Indeed, the Court’s performance in this regard is exemplary. For fiscal year 2014, the average elapsed time

from filing to disposition was only 154.2 days, and the average elapsed time from submission to disposition was only 27.3 days. These disposition times are much better than ABA Time Standards for courts of last resort. Moreover, given the fact that there is no intermediate appellate court in Delaware, litigants are able to obtain a final decision much more quickly here than in most other jurisdictions.

This ringing endorsement of the overall efficiency of appellate procedure in Delaware did not preclude respondents from identifying areas in which they believed improvements could be made. For example, a Supreme Court Justice asserted that “the approach to scheduling could be more thoughtful,” explaining:

The relevant issue to litigants is the total time on appeal, not the time from the conclusion of briefing to decision. For example, if the Court thinks something is going to be a big or important issue, the Court should go *en banc* from the outset. Some cases are scheduled on the briefs, and after the briefs are all filed, the Court decides to go *en banc*. (This mechanism can be used to restart the clock for statistical purposes.) Other times, the parties fully brief the issue, and, the day after briefing is concluded, the Court issues a decision affirming for the reasons stated in the trial court’s opinion. Both are frustrating to the litigants.

Another Justice agreed that “in important cases, the appeal should go directly to an *en banc* hearing” because “[i]t avoids the two-step appeal process” that results when a matter is first heard by a panel of three Justices, and only then deemed appropriate for submission to the Court *en banc*. Thus, some respondents believe that the Court should more frequently exercise the power conferred on the Court by Rule 4(g) to set matters of obvious significance for an *en banc* hearing “*ab initio* upon the affirmative vote of 2 or more of the qualified and available members of the Court.”

One respondent observed that, while the Court “appears anxious for oral argument” and generally schedules and resolves appeals in a timely fashion, “[i]n the case of capital murder

cases, . . . appeals are not scheduled in a timely fashion due to delays in preparation of the trial transcript.” This respondent stated that “[s]uch delays repeatedly occur in these types of cases which, in turn, cause delays in the scheduling of oral argument.”

### **B. Summer Arguments**

Among respondents who addressed the issue, opinion was divided as to whether the Court should change its apparent practice of generally not scheduling oral arguments in July and August. One interviewed jurist conceded that the policy “slow[s] things down a bit.” Another explained:

Currently, the Supreme Court hears no cases in July and August. That is not a good idea for a few reasons. First, it makes September and October very busy for the Court. Second, it negatively affects the Court’s statistics for timing from filing of the appeal to a decision. (The Court has very good statistics regarding the time between argument and opinion.) Third, some cases simply need to be heard during this time.

Others disagreed. For example, one Justice stated that the July/August hiatus “is not a problem” and that “[t]he Court is always open for issues that need to be heard.” Another explained:

It shows sensitivity to lawyers’ schedules. Everyone is on vacation during those months. In addition, the Court’s clerks turn over during that time, so it makes sense from the Court’s perspective. Otherwise, you would have clerks assisting the Justices with opinions in cases where the prior clerks assisted in preparing for, and attended, the oral argument. Plus, the Court is never “closed.” It is always available to hear argument in expedited cases.

Still another noted that, “[i]f lawyers want to expedite the appeal, they can file a motion to expedite, or file their briefs early.”

### **C. Dismissal of Non-Meritorious Appeals**

Under Rule 29(b), the Court may order an appeal dismissed as nonmeritorious. Respondents generally agree that the Court takes appropriate advantage of this power to dismiss

non-meritorious appeals *sua sponte* or on motion of a party, with more than 80% expressing the view that the Court, as one respondent put it, is “doing a fine job of this.” In response to the question whether more appeals should be dismissed or summarily affirmed, some observed that the Court does a good job of staying on top of these issues and utilizes its ability to dismiss appeals effectively. One respondent stated that the Court appropriately views the motion to affirm as a reasonable mechanism to screen unmeritorious appeals, but still exercises a substantial amount of caution before granting these motions, as “the Court has no desire to summarily dismiss appeals.”

To similar effect, it was observed that non-meritorious appeals do not occur very often. For example, one respondent stated that “[p]arties do not file a great many non-meritorious appeals. The number of appeals currently filed (approximately 761 in 2014) is not unreasonably large.” Some believe that, as a matter of principle, appeals should not be dismissed without providing the appealing party the opportunity to be heard on the briefs.

There was a strident minority, however, who felt that, as one respondent stated, “[t]he Court should be more willing to favorably consider motions to affirm in appropriate cases.” Motions to affirm are not governed by Rule 29(b), but are a method of achieving the same result. Rule 25 permits an appellee in certain circumstances to file a motion to affirm the judgment or order of the trial court in response to an appellant’s opening brief, asserting that the appeal is without merit. If the motion to affirm is granted, the issue is settled without further briefing or a hearing, a process that many dissenters believe should be utilized more often, including one jurist who commented, “[a] ton of time and money is wasted on non-meritorious appeals.” This jurist continued:

Motions to affirm in criminal cases are carefully reviewed on the merits and granted where appropriate. However, on the civil side,

motions to affirm that are filed by attorneys are routinely denied. If the Court has a rule that allows parties to file motions to affirm, the motion should be decided on the merits. Otherwise, the Court should get rid of the rule. That said, if a party thinks an appeal is frivolous, it should say so in its briefs and ask for fees.

Several members of the bar agreed with this sentiment, including one who stated, “[m]y sense is that the Court errs on the side of full briefing too much.” Another practitioner stated, “The Court should make better use of the Motion to Affirm and consider granting more motions to dismiss.” One practitioner expressed the view that “every appeal from a Chancery decision winds up with an oral argument, when they are not all deserving,” while another lawyer noted that “[t]here are a number of criminal defendants who abuse the system.”

## **II. ADMINISTERING APPEALS IN AN EFFICIENT FASHION**

**Theme Two: Appeals are presented in an efficient fashion, but the Court should consider whether oral argument could be improved by increasing the default times established by Rule 16(f), by more frequently departing from such times in complex cases, and/or by dispensing with the Internal Operating Procedure that prevents the Justices from coordinating their questioning of counsel at oral argument.**

There was widespread agreement among those surveyed that existing Supreme Court practice is conducive to the efficient presentation of appeals, though the survey results suggest that the Court may be able to improve the value of oral argument by increasing the default times established by Rule 16(f), by more frequently departing from such times in complex cases, and/or by discarding the Internal Operating Procedure that prevents the Justices from coordinating their questions to make more efficient use of the time allotted.

### **A. Supreme Court Rule 8**

Supreme Court Rule 8 states that “[o]nly questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.” Ninety-three percent of respondents agree that the Court is sufficiently disciplined in its application of Rule 8.

Comments from sitting members of the Court reinforce this conclusion, making it clear that enforcement of the Rule is regarded as important. As one member of the Court stated, the Court is well aware that “we should not reverse a judge for not doing something he wasn’t asked to do.” Another Justice echoed this sentiment, observing that “[m]ost of the justices have been trial judges and do not appreciate the trial judge being sandbagged.”

There are those who are less enamored with the application of this Rule, and who believe that “there is still room for improvement,” but not because it is too stringently applied or too frequently invoked. Rather, as one respondent asserts, “[t]he ‘administration of justice’ exception [loophole] is pretty big;” another suggests that “[t]he Court could be more disciplined in its application of Rule 8.” Several espoused the view that Rule 8 should be a “bright line” or “hard line” rule, at least one noting that the failure to strictly enforce in favor of a liberal application of the “interests of justice” exception “could even rise to the level of a violation of due process,” and that the exception should not be invoked other than in a few select categories of cases, such as child custody disputes.

Those who advocate for Rule 8 being a bright-line rule offer some suggestions on how to implement it. One interviewee states that “[o]ne way to deal with these issues when they come up is to remand the case and let the lower court opine on the issue first,” while another offers the suggestion that “the lawyers should be required to certify that there is nothing in the brief that wasn’t fairly raised below, or, if there is, why the litigant should be alleviated from its Rule 8 burden on appeal.”

## **B. Page Limits**

There is overwhelmingly positive endorsement of the Court’s application of Rule 14(d), which establishes page limits for the different categories of briefs and governs motions to exceed the page limits. There also is a solid consensus that the page limits for appellate briefing

provided for in the Court's rules -- 35 pages for opening and answering briefs and 20 pages for reply briefs -- generally are sufficient for the full and fair presentation of questions on appeal, with nearly 90% of respondents answering this question affirmatively.

This strong support appears to stem in part from the perception that, despite the Rule's express language that such motions are looked upon with disfavor, the Court will grant a requested page extension where it is necessary and appropriate to do so. Respondents state that "[t]he Court is open to considering page extensions in appropriate cases," "[t]hey are typically granted," and "[y]es, the Supreme Court fairly considers requests for increased page limits in appropriate cases as it does not want to 'short-change' a party."

This view was supported by comments from sitting Justices. As one Justice stated:

[A] party can always make application to enlarge the page limits if there is a particularly persuasive need for additional pages. Contrary to popular belief, the Court typically will grant a requested page extension.

Another Justice echoed this sentiment, stating that "[t]he Court will liberally waive the page limits where appropriate." A third stated that such motions are "typically granted."

Another provided this advice to litigants who desire a page extension for their appeal briefing:

Litigants should seek page limit extensions well in advance of the date the brief is due. In addition, before asking the Court for an extension, the parties should confer and attempt to come to an agreement on page limits. If both sides think they need additional pages, they could make a joint request to the Court at the outset (though page limit increases should be proportional). If the parties agree, have a good reason, and the number of additional pages requested is reasonable, the Court will be deferential to the parties' request.

The minority of respondents who do not approve of the Court's page limit rules disagree with certain 2013 amendments to Rule 13, which governs the required format of briefs. There was a distinct undercurrent of dissatisfaction expressed by some practitioners who felt that, as

one respondent stated, “[t]he recent change in font size requirements should have been coupled with a page increase.” Another member of the bar similarly commented: “[T]he increase of font to 14 and maintaining 35 pages cut the length of briefs by more than 30%.” A third stated, to similar effect, that “[t]he enlargement of the font size without a corresponding enlargement of the page numbers has resulted in a shortening of the briefs, without saying so.” Others asserted that the combination of page limits, larger typeface requirements, and the requirement that independent sections of a brief commence on a new page makes it difficult to present appeals effectively in complex cases with lengthy factual histories or multiple legal issues.

Another common complaint among those who disapprove of the page limit requirements is that there should be word limits rather than page limits. As one practitioner noted, “[t]he use of the number of words, such as the Federal Appeals courts use, is preferable.” Those advocating for this change believe that, when coupled with mandatory headings and page breaks, page limits are simply an inefficient barometer of the amount of material that is included in a brief.

## **C. Oral Argument**

### **1. Allocated Time for Argument**

Rule 16(f) provides that, “[u]nless otherwise ordered by the Court, the parties shall have a total of 20 minutes to argue each side of an appeal or original proceeding before a panel and a total of 25 minutes per side to argue before the Court en Banc. An application for additional time for oral argument shall be presented to a Justice not later than 30 days after the filing of the appellee’s brief.”

While members of the bar largely were of the view that the time for oral argument provided for in the Court’s rules is sufficient, with 77% of survey respondents answering this question in the affirmative, nearly two-thirds (62.5%) of the current and former members of the

Court who were interviewed expressed the view that the default times should be increased. Respondents who felt that the current default times were sufficient generally expressed the sentiment that the purpose of oral argument “is to give the litigants an opportunity to confront what is on the judge’s mind / the harder issues in the case,” and that the default times were sufficient to accomplish this purpose. As one Justice explained, “[t]he time is designed to allow the judges to get their questions answered” and that the default time “[u]sually works for that purpose.” Another Justice commented that “attorneys should try to stick to just the salient points during oral argument.” Others expressed the view that if the allotted time is not sufficient, counsel may ask for additional time. All current and former members of the Court who responded agreed that the Court fairly considers requests for increased argument time, but one Justice noted that “in general [counsel] do not ever ask for extra time.” Another Justice also observed that “[i]t is not unusual for the Court to allow lawyers to continue talking” beyond their allotted time.

Others, from both sides of the bench, disagreed that the default times were sufficient. One Justice observed that “[t]he time is so short that counsel often just summarize their briefs.” Others proposed that argument times be increased to 30 minutes per side for panel arguments and 35-45 minutes per side for *en banc* arguments. Practitioners who were dissatisfied with the default argument times expressed the view that 20-25 minutes was too short for complex cases, when the bench is especially active, or when the appeal involves multiple parties on each side. The proposals for improving the situation ranged from varying the allotted time in keeping with the complexity of the particular case at hand, or increasing the allotted time by 5-10 minutes per side across the board, to encouraging the Court to depart more frequently from the established limits on its own accord.

## 2. Judicial Consultation Pre-Argument

When asked if there are internal operating procedures of the Supreme Court that have an adverse impact on the efficient administration and disposition of appeals, the majority of respondents replied that there are not. Despite this, one of the more controversial topics addressed in the study relates to the Supreme Court Internal Operating Procedure that generally precludes the Justices from discussing an appeal with each other prior to oral argument. A slight majority maintained that this procedure does not create any problems. It is nevertheless the survey topic that evidenced the sharpest disagreement between the bench and the bar.

The Court's Internal Operating Procedures were amended effective June 18, 2015. Current Internal Operating Procedure V (2) provides, in pertinent part:

Before scheduled sittings, each Justice independently reviews the briefs and appendices unless specifically agreed otherwise in a given case. *Neither the Justices nor their law clerks discuss the merits of a matter between chambers before oral argument or the date of submission for cases submitted on briefs.*

Internal Operating Procedure V (2) (emphasis added). The current rule is substantially similar to its antecedent, former Internal Operating Procedure IX (1). As one Justice explained by way of background, “[h]istorically, the rule originated when two Justices were located in Wilmington and the third Justice was located downstate. The downstate Justice did not want the cases to be decided beforehand.”

Of the current and former Justices surveyed, nearly two-thirds (62.5%) expressed the view that the rule should be retained. One Justice stated that “[t]he Internal Operating Procedure that prevents the Justice[s] from coordinating their questions is a very important policy” because “[e]verybody comes to oral argument equally prepared and open minded.” Another Justice stated:

I prefer the current practice of not discussing the matter among the justices before argument. This practice encourages independent thought by the justices. It may be less efficient, but the current practice works very well and should be retained.

A third Justice suggested a middle-ground approach whereby the Internal Operating Procedure is maintained but the default time for oral argument is increased.

A slight majority of practitioners (54%) agreed that the Internal Operating Procedure should be retained. One respondent posited that “th[e] sacrifice in efficiency is likely worthwhile given the gains in objectivity from no pre-coordination.” Another practitioner who favors retention of the rule agreed, stating that the rule “ensures that cases will not be prejudged and that every member of the court walks into the oral argument with an open mind.” These respondents believe that this procedure encourages independent thought by the Justices and that allowing the Justices to confer would narrow the issues before oral argument and deprive the attorneys of their right to present freely their arguments. One respondent asserts that “[l]imiting the exchange of individual justices’ opinions until after oral argument ensures that cases will not be prejudged and that every member of the court walks into the oral argument with an open mind.” Some asserted that any problems that might result from this procedure could be addressed by extending the time allotted for argument.

More than one-third of the current and former Justices surveyed (37.5%) and nearly half of practitioners (46%) prefer that the Internal Operating Procedure be discarded. As one Justice explained:

The rule that precludes consultation among the Justices in advance of the argument contributes to the problem. It precludes identification of common areas of interest and leads to unfocused inquiry that is inconsistent with the time limitations currently in place. Too frequently, [the rule] renders oral argument a largely useless exercise.

Another Justice agreed, stating, in pertinent part:

If the Court is allotting a certain amount of time for oral argument, it should be doing so thoughtfully. The internal operating procedure interferes with the Court's ability to realistically assess the amount of time needed for any given argument.

The Court should work collaboratively for many reasons, not the least of which is efficiency.

A number of practitioners agreed that dispensing with the Internal Operating Procedure would allow for more efficient and focused oral argument. As one bar member stated, “[i]f exchange of ideas occur after briefing and before oral argument it may help develop more pointed questions to get at the heart of the legal issues.” Another declared that “[t]his is a procedure which long ago should have been consigned to the history books.”

Those expressing disapproval of this procedure believe that the Court should work collaboratively, particularly in connection with *en banc* arguments. One respondent said that “there is more to be gained from combining knowledge and understanding than there is risk of bias from discussion before an argument.” Others added that collaborating before oral argument would improve the quality of questions posed. For example, one respondent stated that “[it] seemingly would be more productive for the Court to meet prior to the argument for the purpose of flushing out appropriate questions or areas of concern.” Another noted that oral argument can feel like an ambush and that the Justices should consult before argument and let the attorneys know which issues they would like to have addressed. Suggestions included the circulation by one Justice of a bench memo in advance of oral argument or electing one Justice to take the lead in certain arguments.

### III. THE INTERLOCUTORY APPEAL PROCESS

**Theme Three: The objective criteria for accepting interlocutory appeals established by new Supreme Court Rule 42 likely will address any perceived inconsistencies in the Court's acceptance of such appeals.**

Respondents generally approved of the Supreme Court's administration of its interlocutory appeal jurisdiction. Almost three-quarters of those responding indicated that the Supreme Court's administration of its interlocutory appeal jurisdiction takes appropriate consideration of the practical realities that litigants, practitioners, and trial courts face in addressing particular types of cases. These supporters believe that the Supreme Court is understandably inclined in the typical case to conduct its appellate review on a full record created at the trial level.

There are dissenters, however, who believe that interlocutory appeals are too rarely accepted. One respondent stated that “[l]itigants only seek interlocutory appeal of important rulings for very practical reasons because such appeals are expensive and time consuming.” The most common complaint was that more interlocutory appeals should be granted when the appeal would address an issue that, if resolved separately and before a decision on the merits, is likely to dispose of a case without the need for a trial, thus reducing time and expenses for all concerned.

Others asserted that the standards that govern the acceptance of such appeals are too subjectively applied. One respondent lamented that “[t]he existing rule is so highly subjective in application that it often appears that interlocutory appeals are taken based upon factors that relate more to the ‘interest level’ of the Court in the case than the plain language of the rules.”

In light of the perceived inconsistencies in the Court's acceptance of interlocutory appeals, by order dated April 30, 2015, the Court amended Rule 42, effective May 15, 2015. Rule 42 was rewritten to provide more guidance regarding when the Court will consider an interlocutory appeal. The new rule more precisely identifies the instances in which the Court will be inclined to accept an interlocutory appeal. While the new rule still leaves discretion to the Court to accept an interlocutory appeal where it “may serve considerations of justice,” it is

intended to limit requests for interlocutory appeals to instances that will truly benefit the judicial process. Thus, under the new rule, it will remain the case that the Court's acceptance of an interlocutory appeal will be "exceptional" and "not routine," and even if a request for interlocutory appeal were to satisfy one or more of the criteria set forth in the new rule, the Court still may refuse the appeal.

Specifically, new Rule 42 requires the trial courts and Supreme Court, in deciding whether to certify and/or accept an interlocutory appeal, to consider whether:

- (A) The interlocutory order involves a question of law resolved for the first time in this State;
- (B) The decisions of the trial courts are conflicting upon the question of law;
- (C) The question of law relates to the constitutionality, construction, or application of a statute of this State, which has not been, but should be, settled by this Court in advance of an appeal from a final order;
- (D) The interlocutory order has sustained the controverted jurisdiction of the trial court;
- (E) The interlocutory order has reversed or set aside a prior decision of the trial court, a jury, or an administrative agency from which an appeal was taken to the trial court which had decided a significant issue and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice;
- (F) The interlocutory order has vacated or opened a judgment of the trial court;
- (G) Review of the interlocutory order may terminate the litigation;  
or
- (H) Review of the interlocutory order may serve considerations of justice.

The Supreme Court Rules Committee and the Court will review the operation of new Rule 42 after one year to determine whether further amendment is necessary to discourage meritless applications to the trial courts and the Court.

While the impact of new Rule 42 remains to be seen, there was widespread agreement among the bench and bar (nearly 80%) that, in considering applications for interlocutory appeals, the Court should give consideration to the importance of its role in shaping the body of Delaware corporate law, and in resolving broadly applicable, but unresolved, questions. As one Justice stated, “consideration of the importance of the Court’s role in shaping the body of Delaware corporate law is always on the Justices’ minds in considering applications for interlocutory appeals, particularly in mergers and acquisitions.”

A minority of respondents, however, cautioned that the Supreme Court should not be too quick to “preempt” the authority of the Court of Chancery because broadly applicable questions are best answered “after they have been raised in several different factual contexts” and “on a full record rather than an interlocutory record.” Others expressed the view that the Court should not place a greater focus on corporate law issues than on other areas of the law in deciding applications for interlocutory appeals.

#### **IV. RENDERING CONSISTENT AND SENSIBLE PRECEDENTS**

**Theme Four: The Court articulates consistent and sensible precedent on which practitioners and litigants can rely, but there is a widely held concern that the Court’s perceived preference for securing unanimity among the Justices may adversely affect the clarity and predictability of precedent going forward.**

##### **A. Reliability and Predictability**

An overwhelming majority attested to the Supreme Court’s articulation of consistent and sensible precedents on which litigants and practitioners can rely. The Justices were credited with

respect for consistency with existing precedent without harboring a hidebound reluctance to overrule a prior opinion when warranted.

The few dissenters from this perception offered some specific suggestions in response to identified shortcomings: 1) where the precedent permits two rational approaches to an issue, the Court should choose one so people can adapt, rather than pretending that the existing precedent is consistent; 2) the Court should work toward greater certainty and predictability in criminal matters; 3) when it is overturning one of its precedents, the Court should acknowledge that it is doing so, rather than undermining predictability by claiming that the departure is no departure at all; 4) the Court should strive to confine itself to the case at hand and to avoid addressing issues beyond those required for disposition of the appeal; and 5) the Court should issue fewer “on the basis of” orders affirming a lower court decision in favor of authoring its own opinion, perhaps choosing a narrower basis on which to resolve the case.

Negative votes on this question were accompanied by two quite specific criticisms. One respondent asserted that “[a] good example of inconsistent and insensible precedent is the line of cases that came out a few years ago that have the effect of punishing the victim of civil discovery abuses. The rule ought to be that the party that fails to follow the deadlines bears the consequences.” Another stated as an example “the recent sea change in forum non conveniens law and rulings with regard to arbitration appear to be more legislating from the bench than applying well-established and long-developed precedent.”

## **B. The Supreme Court’s Preference for Unanimity**

One of the more divisive questions in the survey related to the Supreme Court’s perceived preference for unanimity and, more precisely, whether the benefits of such a preference outweigh its costs. On this precise issue, respondents were evenly split. When asked, relatedly, whether the substantive compromises made in order to achieve unanimity have an

adverse impact on the clarity of the Court's precedents, a slight majority responded in the affirmative.

Respondents on both sides of this issue agreed that the purpose of unanimity is to bring greater coherence, certainty, and predictability to the law. They were divided, however, on whether a penchant for unanimity invariably achieves these shared goals. Supporters stated that it is often best to speak in a united voice, especially in corporate cases, due to the fact that "the whole world is watching." Some observed that "[i]nstitutionally, it is the right thing for the court to seek unanimity," with one respondent even imploring the Court "[p]lease let's not become the splintered U.S. Supreme Court where you really don't know what the holding is because it is a plurality with 2 concurring opinions that concur on different parts. Don't make it the bar's responsibility to figure out what the court agreed on." One commentator regarded the complaint of ambiguity in Court opinions as overstated, noting that "[l]awyers build ambiguity into contracts to gain consensus and agreement, one can posit that Justices occasionally must do the same in writing opinions." Another acknowledged the potential negative impact of unanimity-driven compromises, but argued that the alternative is worse, asserting that "it may [have an adverse impact on the clarity of the Court's precedents], but the alternative of multiple opinions in the absence of unanimity would likely have a worse impact on the clarity of the law."

Dissenters were troubled by the prospect that the pursuit of unanimity will prove self-defeating by undermining the clarity and predictability of our precedent. They feared that a price of unanimity is the sacrifice of intellectual rigor for the sake of agreement. These respondents expressed the belief that compromise adversely affects certainty to a greater extent than it contributes to it. One interviewee stated that "[i]f, for instance, the author of the opinion has to water down a holding or include additional language in order to achieve unanimity, then that

would tend to make the rule articulated in the opinion less clear.” Another offered the view that “the headlong effort to secure unanimity when faced with a broad range of viewpoints, can result in precedents that are ambiguous and unclear.... Such an outcome is directly at odds with the stated purpose for unanimity - promoting certainty and predictability.” A third stated that “the language in its opinions is parsed extensively, sometimes beyond recognition. To the extent that language compromises introduce words that ‘soften’ they can blur the edge of what is being decided and what is not being decided.”

Opponents of unanimity advocated for more dissents, believing them to be a sign of intellectual transparency, not weakness. One proponent argued in favor of this view by noting that “[n]ot every point of law is clear, which is why there are legal disputes in the first place. [Dissents] are not wrong, as they can help shape the law in their own right. We should not discourage opposing points of view.” In the view of these respondents, a clear majority and a clear dissent are preferable to a manufactured but muddled compromise. As one put it, “[i]ndependence among all justices is the hallmark of the appellate process.”

## **CONCLUSION**

The Delaware Supreme Court received very positive reviews overall with respect to the efficiency and effectiveness of its administration and disposition of the cases that come before it. While the survey reflects that practitioners are quite pleased with the appellate process in general, practitioners were quick to accept the invitation to identify and comment upon several facets of the process in which respondents believed improvements could be made. Most suggested improvements to the process were relatively minor in nature, but a few issues were raised that were deemed to have substantive effect upon the nature and the quality of the Court’s precedent. As to these issues, however, notable differences of opinion were expressed, and no

consensus emerged. Accordingly, no specific recommendations for changes in the Court's practices and procedures are made in this report.

## **COURT OF CHANCERY**

### **EXECUTIVE SUMMARY**

Approximately 20 experienced Court of Chancery practitioners and jurists were interviewed in person by ACTL Fellows for the study, using a prepared list of questions. In addition, 160 responses were received to the Court of Chancery electronic survey, almost all from active or former practitioners.

Several general themes that emerged from the interviews and survey responses are set forth below, with other specific comments discussed further in the report.

- The advantages of the Court of Chancery's e-filing system outweigh its disadvantages. Some of the advantages include the immediate access to filings and the flexibility to file from anywhere and at any time.
- Cases are fairly and efficiently moved through the Court of Chancery, and the Court and its staff actively manage the dockets and are readily accessible to the parties. Scheduling orders are enforced in a fair and predictable way, but pre-trial orders should be improved to provide more clarity as to what the Court needs from the parties at that stage.
- The Court of Chancery treats motions to expedite in a consistent and reasonable manner but can do better at communicating its procedural expectations, including when and how defendants should respond to such motions.
- The Court of Chancery appropriately does not play an active role in the settlement of cases, but is fair in its consideration of proposed settlements and its fee awards. However, the Court is somewhat unpredictable in terms of the types of settlements it approves and the amount of fees it awards, and there are inconsistencies from judge to judge.

- The Court of Chancery is on the same page as the Supreme Court with respect to most substantive issues, including its interpretation and application of substantive case law, its deference to existing Supreme Court precedent, and its handling of cases procedurally. However, the Court of Chancery’s liberal usage of dictum seems to be inconsistent with the Supreme Court’s view of the role of dictum in court opinions.
- The Court of Chancery rules regarding confidential treatment of filings, while not perfect, strike an appropriate balance between the need for confidentiality and public access.
- The Court of Chancery is flexible and accommodating to parties’ needs with respect to motions, briefs and oral argument. This ensures that parties are fully heard and shows the Court’s commitment to getting the issues right.

This report offers three specific recommendations. First, with respect to the Court's e-filing system, the Court should provide a written codification of all filing requirements and guidelines the failure to comply with which can result in rejection of a filing, and the Court should consider implementing a notice of non-compliance with a limited window for substitution of a compliant pleading, rather than outright rejection of pleadings for non-compliance. Second, the Court should establish a standardized reply procedure for motions for expedited treatment. Third, the Court should re-examine the requirement for stipulated facts in its pretrial orders, based on an assessment of the utility of such stipulations to the parties and the Court.

## **THEMES**

### **I. FILING**

**Theme One: The advantages of the Court of Chancery's e-filing system outweigh its disadvantages.**

**A. The Court of Chancery’s e-filing system is convenient but somewhat inconsistent.**

There was strong consensus among respondents that the Court of Chancery's e-filing system is both convenient and accessible. Specifically, respondents commented that the Court's e-filing system enabled them to gain more immediate access to filings, and commended the immediacy of the notices that are sent when documents are filed by another party. Similarly, respondents noted that the e-filing system makes the record more accessible to litigants, the bar, and the public. The system was also lauded for giving lawyers the flexibility to file at times outside of the Court's business hours, and for eliminating or substantially reducing distance issues for downstate lawyers. One respondent suggested that accessibility could be improved by making the Batch Download processor available before the filing is accepted by the Register, which was the prior practice. Another suggested returning to the process by which filed documents were attached to the notice rather than requiring a party to log into the system to retrieve the document. Others suggested that certain filings could be eliminated, such as requiring an entry of appearance before filings are accepted or the filing of certificates of service in situations where all of those being served are served through File & Serve. Lastly, one respondent suggested that filings that require a response that incorporates the contents of the original filing, such as a complaint, be filed in Word format so that the contents of the original filing may be easily reproduced in the responsive document.

However, numerous respondents reported that filings were not consistently approved or rejected by the Registrar's Office. Two specific problems were identified: (1) some of the requirements applied are unwritten (that is, not contained in any published Court rules or guidelines); and (2) the written and unwritten guidelines are not consistently applied. As one respondent described, the "unpublished, unexplained (and seemingly arbitrary and unfounded) bases for rejecting filings, which are not tied to any requirements in the Court's rules" results in

“learning by rejection.” This perceived inconsistency was noted to be particularly problematic in the areas of technical rejections. For example, filings were reported as being rejected for coding, formatting, or linking errors, as opposed to substantive errors. Another respondent commented that the technical aspects of filing “are daunting and unevenly applied.”

The inconsistency in the way in which the Registrar’s Office approves or rejects filings was seen by respondents as particularly difficult for lawyers who do not regularly file in the Court. Concerns also were raised regarding the “inflexible rules” insofar as they do not appear to “account for special circumstances” and for which there appears to be “no easy recourse, if at all.” Finally, respondents expressed particular concern about the rejection of a Complaint, the effect of which has especially harmful consequences.

Certain respondents made suggestions to ameliorate some of the perceived problems associated with the rejection of filings. One person suggested that corrected filings be required rather than filings being rejected, which sometimes can be very prejudicial. Another asked that rejected filings be made available to the member of the Court assigned to the case, regardless of the rejection of the filing, particularly in expedited cases.

Despite the complaints and concerns about the e-filing system, the overwhelming consensus is that the advantages of the system outweigh the disadvantages. In addition to the convenience and accessibility of the e-filing system, other noted advantages include prompt receipt of notices of filing, the ability to file from any location with electronic access, flexibility to file after hours and the ability to electronically monitor the docket or filings by establishing alerts.

**B. The degree of cost effectiveness of the Court of Chancery’s e-filing system is debatable.**

Respondents were split regarding the cost effectiveness of the Court of Chancery's e-filing system, with only about half of the respondents expressing the view that the e-filing system is very cost effective. Some respondents noted that the costs associated with the Court's e-filing system, while insignificant to some, are problematic for smaller firms and *pro se* litigants. Another respondent wondered "about the monopoly File and Serve has with the State court system, and whether there is any competitive check on rates now and in the future."

## **II. CASE SCHEDULING AND ADMINISTRATION**

### **Theme Two: Cases are moved fairly and efficiently through the Court of Chancery.**

#### **A. Fairness and efficiency are hallmarks of the Court of Chancery's case management.**

The overwhelming majority of respondents were of the view that, as a general matter, cases in the Court of Chancery proceed to conclusion in a fair and efficient manner. Several respondents expressed appreciation for how promptly cases are moved through the Court and how responsive and accommodating the Court is with parties and counsel. Respondents also noted how members of the Court take an "active role" in the management of their dockets.

Additionally, the availability and accessibility of the Court was cited repeatedly as a positive attribute. In particular, respondents were appreciative of the ability to contact chambers directly, especially for scheduling issues. Respondents also expressed appreciation for the judicial assistants, who were described as "easy to communicate with" and cooperative with scheduling tasks. Similarly, chambers staff were noted to maintain attentive oversight of the docket and to make efforts to contact the parties on cases without activity.

Finally, an overwhelming majority of respondents agreed that scheduling orders are enforced in a predictable and fair way. A majority of respondents also perceived the absence of standard scheduling orders for all cases and the individual scheduling and administration

practices of the judges as a benefit. As one respondent commented, while standardization “is good for expectations . . . certain parties and situations require tailoring for their specific needs and circumstances.”

A few respondents had suggestions for improving case scheduling and administration, including the establishment of a case scheduling order early in the case, greater uniformity concerning the procedure for resolving Section 220 actions, and greater clarity as to the matter to be decided when a conference is scheduled with the Court.

#### **B. Pre-Trial Orders can be improved.**

Several respondents expressed frustration with the role of pre-trial orders. Generally, pre-trial orders in the form currently required are seen as having little value. Instead, Respondents sought to have the Court clarify what should actually be provided in the form of a pre-trial order. Respondents also commented that stipulated facts were not useful to the Court and served only to add expense for the parties who had to brief them. There was also significant concern expressed regarding sanctions that are levied for the lack of stipulated facts in pre-trial orders. One commentator described such sanctions as being “grossly out of proportion to the perceived harm.”

### **III. EXPEDITED CASES**

**Theme Three: The Court of Chancery treats motions to expedite in a consistent and reasonable manner, but could do better communicating its procedural expectations with respect to motions to expedite, including when and how defendants should respond to such motions.**

There was strong sentiment among respondents that the Court is consistent in its treatment of motions to expedite. Respondents observed that motions to expedite have recently become key motions and as such “the judges try to handle these motions consistently and treat

them as important.” Another respondent commented that the Court “is giving a more careful look at these motions than it has in the past.”

One commonly noted issue, however, was the lack of clarity regarding the Court’s expectations of when and whether a defendant should respond to a motion to expedite. Respondents expressed concern that, while the procedure for responding to a motion to expedite is “murky,” the Court has at times faulted and called out defendants for not responding in a timely fashion. As such, respondents suggested that the Court issue uniform guidelines for procedures for motions to expedite or at least instruct defendants when to respond to these motions.

A number of respondents noted the change in the past decade concerning the Court’s decisions whether to grant or deny motions to expedite. While such motions were almost routinely granted in the past, during the past decade the Court has undertaken a more critical scrutiny of whether the claim asserted is “colorable” and whether the movant has demonstrated the possibility of suffering irreparable harm. Despite this change, a substantial majority of the respondents expressed the view that the different members of the Court resolved these motions in a consistent manner. One respondent suggested that motions to expedite should be routinely granted because too much time was being spent by the Court and parties determining motions to expedite on the merits. Several respondents noted the use of motions to expedite by certain class plaintiffs seeking to become lead counsel in cases, and these respondents suggested that motions to expedite not be responded to by the defendants or addressed the Court until the Court resolves disputed leadership fights among class plaintiffs and counsel.

#### **IV. SETTLEMENT PRACTICES**

**Theme Four: The Court of Chancery's practices and procedures regarding the settlement of cases is generally appropriate, but could benefit from greater predictability. The Court of Chancery appropriately does not play an active role in the settlement of cases.**

There was strong consensus among respondents that the Court of Chancery generally does not actively encourage settlement. The majority of respondents were of the view that the Court's passive approach is appropriate. Two reasons were highlighted. Some respondents commented that it is not appropriate for the Court, as the trier of fact, to encourage settlement. Others were skeptical of how the Court could actively encourage settlement without expressing its views on the merits of the case, which, according to these respondents, would provide one side with leverage and be counterproductive to settlement. It was noted that comments by the Court may abort a potential settlement because the Court, not being aware of the status of the settlement offers and demands, may motivate a party to reject an offer it was about to accept or not make an offer it was about to make. One suggested alternative approach was for the Court to conduct a pre-trial settlement conference in which the Court lays out to the parties what it understands to be the relevant issues in the case. Such an approach, it was suggested, might help facilitate settlement by focusing the parties on the relevant issues in the case without prejudging the matter.

**B. In representative actions, the Court of Chancery is fair and somewhat predictable in its consideration of proposed settlements and its fee awards.**

The majority of respondents were of the view that the Court of Chancery is fair and somewhat predictable in the way it considers proposed settlements and in the amount of attorneys' fees it awards. Most agreed, however, that the analysis the Court undertakes in deciding whether or not to approve a proposed settlement or the amount of attorneys' fees to award is not an exact science, which necessarily results in discrepancies and some "outlier decisions." One respondent, while agreeing that the Court is somewhat predictable in its fee

awards, even went as far as to say that the judges “seem to be driven by all kinds of considerations that may not be appropriate, including making Delaware a desirable place to bring cases.”

Additionally, some respondents commented that while each individual judge may be somewhat predictable there are inconsistencies from judge to judge. It was suggested that the judges should meet internally to discuss their practices in considering settlements and awarding fees, and agree on a uniform approach. It was also suggested that the Court issue more written opinions regarding settlements and fee awards, which would increase predictability and serve as guidance for judges and practitioners alike.

Many respondents also felt strongly that the Court needs to provide stricter scrutiny of disclosure settlements in class action lawsuits arising from proposed mergers. According to these respondents, such settlements often create pressure to resolve meritorious cases at an early stage and impede inquiry into the merits of the case. One respondent expressed the view that there is “by far too much indulgence, tolerance, and encouragement” of these types of settlements, which are a “judicial creation,” while another similarly commented that there are “too many garbage disclosure settlements.” There was a perception that plaintiffs’ counsel may support the settlement in order to obtain a quick fee with little effort and that defendants support the settlement in order to obtain a complete release; consequently, there was a concern that no disinterested party was in a position to advocate for the interests of the class and determine whether the settlement is in the best interest of the class. There also was a perception that such settlements may encourage non-meritorious suits being filed with respect to every merger transaction.

## **V. PERCEIVED CONSISTENCY WITH THE SUPREME COURT**

**Theme Five: The Court of Chancery is generally on the same page with the Supreme Court, with the possible exception of the role of dictum in its opinions.**

There was strong consensus that the Court of Chancery is on the same page with the Supreme Court in its interpretation and application of substantive case law, in its deference to existing Supreme Court precedent, and in how cases are handled procedurally. Respondents pointed to the low reversal rate as an indication of the Court of Chancery's consistency with the Supreme Court. Some respondents commented, however, that the composition of the Supreme Court has changed almost completely in the past two years, and past differences on doctrinal matters are being resolved and reconciled, as was apparent in certain recent decisions by the Supreme Court. Respondents also noted that some differences between the views of judges on unresolved issues of law are inevitable and not unhealthy.

There was also strong consensus that the Court of Chancery is on the same page with the Supreme Court in coping with the practical realities that litigants, practitioners and judges face in addressing particular types of cases in the Court of Chancery. One respondent noted, however, that the Court of Chancery appears to be "closer to the practical needs of the litigants than the Supreme Court" and that "on occasion, the Supreme Court might not fully understand what the particular implications/realities are of the situation in practice."

However, a number of respondents did not perceive the Court of Chancery to be on the same page as the Supreme Court with respect to the role of dictum in Court of Chancery opinions. While these respondents acknowledged the benefits of dictum, many expressed the opinion that members of the Court of Chancery often write "lengthy law review type opinions" in which they engage in a "scholarly discourse" to explain their views on the law, which, according to these respondents, is inconsistent with the Supreme Court's view on the role of dictum. Other respondents defended the dictum in Court of Chancery opinions, noting its

usefulness to practitioners. Many respondents did express the view that cases should be narrowly decided and only those issues requiring resolution should be decided. However, even those expressing such views acknowledged that broader opinions are sometimes either helpful or necessary, for example, in reconciling areas of law or providing guidance to practitioners on pressing issues of practical consequence.

## **VI. CONFIDENTIAL FILINGS**

**Theme Six: The Court of Chancery’s practice with respect to confidential treatment of filings strikes an appropriate balance between litigants’ need for confidentiality and the public’s general right to have access to such filings.**

There was strong consensus that the Court of Chancery rules regarding confidential treatment of filings, while not perfect, strike an appropriate balance between the need for confidentiality and public access. Some respondents expressed concern, however, about what they perceived to be the over-designation by practitioners of confidential material. In that vein, it was suggested that the Court of Chancery should be “more willing to ‘call balls and strikes’ on confidentiality issues” and be more vigilant in guarding against over-designation.

Other respondents expressed skepticism about the practicality of the three-year expiration date of Rule 5.1(g). One respondent commented that it “seems silly” to have to redo motions two to three years later, and that it might be better to make a general rule that all confidential filings become public after three years. Another respondent lamented the difficulty in complying with the thirty-day notice period of Rule 5.1(g), suggesting that period be extended.

## **VII. MOTIONS, BRIEFS AND ORAL ARGUMENTS**

**Theme Seven: The Court of Chancery's practices and procedures with respect to motions, briefs and oral arguments promote effective presentation of cases.**

- A. The Court of Chancery consistently applies its rules on page limits and is flexible in granting permission to deviate from those limits.**

The overwhelming majority of respondents were of the view that the Court consistently applies its rules on page and word limits and is at the same time flexible in granting permission to deviate from those limits when necessary. However, many respondents expressed concern about the length of briefs. One respondent commented that briefs “are too long, too numerous, and permission for additional space is too readily permitted.” Another respondent suggested that deviation from the page limits is only warranted for “post-trial briefs and situations in which multiple parties combine their submissions into one brief.” Finally, several respondents suggested that the parties be required to alert the Court when the confidentiality stipulation submitted by the parties varies materially from the form attached to the Court’s guidelines.

**B. The Court of Chancery’s practices regarding oral arguments promote judicial efficiency and the disciplined presentation of arguments.**

There was also strong consensus that the Court is “lenient” and “generous” with respect to the amount of time it allots to each party in oral argument. Most respondents viewed this generous time allotment positively, explaining that it allows the parties to be fully heard. One respondent even noted how “lawyers from out of state are very impressed by the amount of time the judges spend and their commitment to getting it right.” Some respondents, however, articulated that oral arguments are often too long and inefficient and suggested that the Court identify prior to oral argument the issues it is interested in hearing about, either by writing a letter to the parties or by convening a pre-trial status conference.

**CONCLUSION**

Overall, respondents expressed an overwhelmingly positive view about the Court of Chancery’s e-filing system, case administration and general trial practices. At the same time, many respondents offered suggestions to further strengthen the Court’s current practices and inform the Court of some of the concerns of members of the Bar in order to help the Court better

face the challenges of the future. Three of those suggestions are incorporated as recommendations of this report. First, with respect to the Court's e-filing system, the Court should provide a written codification of all filing requirements and guidelines. Second, the Court should establish a standardized reply procedure for motions for expedited treatment. Third, the Court should re-examine the requirement for stipulated facts in its pretrial orders, based on an assessment of the utility of such stipulations to the parties and the Court.

## **SUPERIOR COURT OF DELAWARE (CRIMINAL)**

### **EXECUTIVE SUMMARY**

Using a prepared list of questions, ACTL Fellows interviewed numerous experienced Superior Court participants, including Superior Court judges and lawyers who regularly practice civil and criminal law in the Superior Court. In addition, an online survey was electronically circulated to all members of the Delaware State Bar Association, which generated nearly 200 responses.

Among the online survey respondents, 88% reported regularly practicing in Superior Court, with 84% in New Castle County, 48% in Kent, and 45% in Sussex. These numbers demonstrate – importantly, but not surprisingly -- that a significant percentage of Delaware Superior Court practitioners practice regularly in more than one county. The responses also reflected a broad range of legal experience, as 67% of respondents reported practicing 10 or more years (39% for more than 20 years) and 33% reported having practiced fewer than 10 years (17% fewer than 5 years).

Five recurring themes emerged regarding the Superior Court's criminal practices and procedures:

- There is substantial dissatisfaction with the Superior Court's present system for criminal case scheduling and assignment. Assigning criminal cases to individual judges was seen as a beneficial way to manage the heavy caseloads.
- The Superior Court's systems for case management and information sharing need to be upgraded and/or updated. Upgrades must not require additional personnel or time resources, and must take into account various important ethical and statutory

confidentiality requirements. Better integration with, and access to, DELJIS and DACS was often specified by respondents as an important goal. Additionally, 52% (41 of 78) of respondents and interviewees think electronic filing should be required in criminal cases.

- Generally, there is strong support for specialty courts within the Superior Court. Opinions vary according to the specific specialty court, however, with Drug Court and Mental Health Court being most frequently identified as successful. There is little support for adding more specialty courts.
- The Superior Court's present sentencing practices were seen as poor. Judges frequently do not have enough information to craft appropriate sentences. Too many crimes with minimum/mandatory sentences tie judges' hands at sentencing. Approximately 68% of respondents (54 of 79) believe the SENTAC Guidelines are helpful to the sentencing process, though some expressed the sentiment that they often specified too broad a range of sentence. Despite the statistics on racial disparity in sentencing, there was no consensus whether that disparity reflects racial bias. Many respondents expressed the view that it was difficult to determine whether observed disparities were the product of socio-economic or racial factors.
- Most respondents expressed dissatisfaction with the current system of monitoring probation and adjudicating violations of probation. Respondents identified lack of relevant information about the offender and the nature of the violation as a significant problem.

These are the main themes identified in the surveys. Other issues are discussed in the full report below. The Conclusion section specifically recommends assigning criminal cases to individual judges, mandatory electronic filing of criminal cases, and re-establishing Rule

11(e)(1)(C) pleas. This report also more generally recommends reform of the Court's sentencing practices to increase the information available to the Court; similar recommendations are advanced regarding violation of probation hearings. A lack of consensus suggests the need for additional study of separate civil and criminal divisions, mandatory sentences, racial disparity in sentencing, and the efficacy of individual Specialty Courts. Lastly, because many of the issues raised by respondents were directly related to the sheer number of cases in the system, this report recommends that a comprehensive study of the resources needs of each of the component entities in the criminal justice system be conducted.

## **THEMES**

### **I. CRIMINAL CASE SCHEDULING AND ADMINISTRATION**

**Theme One: There is substantial dissatisfaction with the Superior Court's scheduling and assignment of criminal trials.**

#### **A. Scheduling Criminal Trials**

In the individual interviews, respondents were specifically asked to identify the single most important problem in criminal case scheduling. After consistently identifying the Superior Court's heavy caseload as a key cause of scheduling problems, the interviewees listed a number of problems with the current system.

In contrast, the electronic survey did not directly ask respondents to identify problems with the present scheduling system, but instead asked specifically whether criminal cases should be individually assigned.

Responses in the individual interviews included complaints that the scheduling system works only for the convenience of the courts, but not for prosecutors or defense counsel. Among other failures, the current system does not account for different kinds of cases, but rather

represents a one-size-fits-all approach keyed to the age of the case. As a consequence, respondents said, the Court often schedules lawyers for multiple trials on the same day, which is unfair to the lawyers and their clients.

According to the respondents, the Court routinely ignores factors that should be important to case scheduling. Among those factors are the overall trial schedules of both prosecution and defense counsel, the nature and complexity of the particular case, the expected length of the trial, the availability/unavailability of witnesses for both sides and the custody status of the defendant. Moreover, except in murder cases, the Court fails to consult with counsel about these issues and unilaterally sets trial dates without sufficient information or input.

## **B. Criminal Case Assignments**

In the Case Scheduling section of the first survey, ACTL Fellows asked the respondents to identify the single most important problem in criminal case scheduling and then to propose solutions to fix the problem. A consistent theme running through the respondents' answers was that the heavy caseloads are a problem for all concerned. A sampling of respondents' answers highlights the theme that heavy caseloads are a major concern:

"The single most important problem in criminal case scheduling is the master calendar system. It results in attorneys being overburdened with serious cases."

"The scheduling of multiple felonies/complex cases for trial on the same day that are assigned to the same attorney. There is no way to adequately juggle numerous cases scheduled for trial while complying with our ethical obligation to zealously advocate on behalf of the State or defense."

"[O]n criminal trial days, attorneys have multiple cases scheduled that they must . . . prepare."

"The Superior Court has an extremely staggering criminal docket. .

"The single most important problem in criminal case scheduling is the sheer volume of cases given the number of attorneys handling criminal cases. This is true for prosecutors and defense attorneys. There are too many cases and not enough attorneys to handle them. This is a systemic problem."

"[The] volume of cases has increased beyond the capacity of the Public Defender's office."

"Not enough prosecutors and public defenders"

"[Judge] feels that on the day of trial, there are too many criminal cases pending that have not yet been resolved."

"Due to the limited number of defense lawyers, it is often necessary to schedule defense lawyers for multiple defendants on the same day, which results in a lot of continuances."

A substantial number of interviewees proposed some form of individually assigning cases as a way to fix the problems associated with heavy caseloads. Included were the following suggestions:

"(a) Individual case assignment in all Superior Court cases, (b) "Sufficient staff [is needed] for the Attorney General and Public Defender offices so that caseloads can be more in line with national standards and meet the needs of the people these agencies serve."

"Individual case assignment can result in better case management and scheduling in criminal cases."

"Individual assignment to judges."

"Move to case assignment more similar to what is used in civil cases."

"Start having categories of cases that are individually assigned to judges within a system that makes the judges and the prosecutors (more especially) accountable for those cases."

Respondents to the electronic survey were equally split in response to a question whether criminal cases should be individually assigned. Although the electronic survey did not ask specifically about heavy caseloads, a meaningful number of respondents who opposed individual assignment referenced heavy caseloads in their explanations of their answers:

"The volume per judge, particularly downstate, is too heavy for that."

"This would create a virtually impossible management issue, since so many trials, with varied motions, exist."

"It won't work. There are too many cases. Unlike civil cases the only real concern is trial. And they are more generic than civil cases. A Superior Court Judge should be able to pick up a file and preside over a criminal case (except capital murder)."

"There are too many cases to allow this. A lot of what the office judge does is manage the general caseload."

Nearly all those people polled agree that heavy caseloads overburden our Superior Court criminal practice, and its lawyers and judges. However, while there is near consensus about heavy caseloads being a problem, there is no clear consensus on whether individual case assignment is a workable solution. A number of respondents see individual case assignments as a solution to the problems caused by heavy caseloads, but others see heavy caseloads as a reason why individual case assignment will not work. This difference in perspective is reflected in the online survey's roughly 50-50 split on whether criminal cases should be individually assigned.

However, the relatively detailed responses to the in-person surveys shed additional light on this subject. For example, Question 5 in the Case Scheduling section of the individual interview survey asked: "What are the advantages to individually assigning cases like civil cases?" The answers identified several benefits to an individual case assignment system, including judicial accountability, continuity and consistency in judicial decision-making, enhanced procedural justice, predictability, transparency, and facilitating vertical representation. These are specific anticipated improved outcomes from making a change to individually assigning criminal cases in the Superior Court.

The in-person survey also asked, "What are the disadvantages to individually assigning cases like civil cases?" Several interviewees stated that there are no disadvantages, or that if there are disadvantages, the benefits achieved will outweigh them:

"There may be disadvantages to individual assignment for the judges but these are unimportant when compared to the impact that the master calendar system has on people's rights."

"There are no disadvantages."

"There does not appear to be any disadvantages."

Many respondents who expressed opposition to an individual case assignment system did not focus on potential disadvantageous outcomes of a change to such a system, but instead focused on perceived problems in actually implementing individual case assignments. For instance:

"All parties need to competently work their cases and be prepared. Individual assignment could be problematic if one party is ill prepared or incapable of providing the same level of work and professionalism as the other parties . . . ."

"Wreaks havoc on scheduling. What if 2-3 cases are scheduled for the same day? Speedy trial implications. Accommodating case volume. Judge shopping. Judicial logistics of juggling civil and criminal."

"Disadvantages accrue to judges who want to be lazy. . ."

"You might get stuck with a bad judge. . ."

"Potential scheduling issues, but those can be addressed."

"Would require a wholesale change; Judges wouldn't be able to have rotations any longer. Then the judges become split as criminal/civil judges and they become isolated from the bar."

"The Court's already busy docket."

"Unmanageable due to large volume"

On balance, the specific advantages of individual case assignments identified by the survey respondents appear to outweigh the disadvantages, and this report recommends that such a system be implemented.

### **C. Judicial Rotation**

A strong majority of respondents overall asserted that the current three month rotation of judges between the criminal and civil divisions is working, with consistent results across both surveys. However, there was a significant dissenting view.

A prevalent theme among the responses supporting the current rotation system was that judges find it interesting to switch between civil and criminal caseloads, and that the current rotation from civil to criminal prevents burnout. There was, however, no consensus on whether three months is the optimum rotation period. One supporter of the current system wrote that "more than three months in criminal is too much."

But the primary complaint among respondents who said the three month rotation is not working was that three months is not long enough, and that the resulting lack of continuity is disruptive. Judges are "not in the criminal rotation long enough to see the larger trends in criminal justice or individual issues with individual defendants." Others complained that the system does not account for special assignments, resulting in too few judges available to handle criminal trials. Suggested alternatives include changing to individual case assignments and creating separate civil and criminal divisions. Several respondents suggested longer rotation terms, with suggestions ranging from six months to two years.

Thus, although 52 of 70 respondents overall answered that the current three month rotation is working well, there was also significant support for lengthening the term rotation.

#### **D. Creation of Separate Criminal and Civil Divisions**

Neither survey directly asked respondents about the desirability of creating separate criminal and civil divisions in the Superior Court, but a significant number of respondents referenced the possible creation of separate criminal and civil divisions in their responses. However, there was no clear consensus among those respondents as to whether such a step would be desirable.

For example, one respondent stated "if you have civil or criminal specialists [as opposed to the civil/criminal rotation], the judges may be more prone to burn out. It is a question for the

judges." Another said: "The alternative to the three month rotation would be divisions, which would essentially divide the Superior Court into two courts, one dedicated to civil and the other to criminal. I do not think that divisions would be an improvement to the current system and there has not been much interest in going the division route."

But when asked how to replace the rotation system, several respondents suggested creating separate criminal and civil divisions:

"Create a civil and criminal division within the Superior Court with specific judges assigned to each division. This would allow judges to be familiar with criminal issues and trends as well as individual defendants that enter the criminal justice system. This will benefit all parties in the criminal justice system . . . ."

"There should be divisions where some judges are dedicated to civil and others dedicated to criminal. At some point during his/her tenure, the judge would rotate to the other division, but it would not occur at three month intervals."

"Rather than a rotation, we should create a criminal and civil division . . . ."

"People should have far longer tenures as criminal judges or civil judges. They don't have to be designated for life, but have to do that within the system. The system should have judges that principally handle criminal cases and judges that principally handle civil cases."

The failure to ask respondents specifically about the issue precludes reaching a conclusion about creating separate criminal and civil divisions in the Superior Court, though the volunteered rationales for separate divisions were persuasive. However, based on the number of respondents who voluntarily raised the issue (even in the absence of a specific question on the topic), further study of this option should be considered by the Court.

## II. CRIMINAL CASE MANAGEMENT SYSTEM AND FILING

**Theme Two: The Superior Court's systems for case management and information sharing need to be upgraded and/or updated.**

### A. JIC System

Perhaps no other set of questions produced more unanimity among respondents than those intended to assess the Court's case management and information systems. Virtually all respondents agreed that the JIC system was badly in need of an upgrade, and a strong majority answered "no" when asked if the Court is effectively leveraging technology. The deficiencies in the Court's information systems were cited by the respondents as significant constraints upon the Court's ability to improve its case scheduling and management practices. Many respondents identified the lack of information available to the Court and practitioners at sentencing and during the violation of probation process as a significant problem, and it is clear that the Court's antiquated and poorly-integrated information systems are significant contributors to those problems. One respondent summarized the issue well by observing that "the JIC system needs to be completely overhauled so that it can become more modern and robust." Another respondent noted that JIC is a DOS-based system that relies on a user interface that was designed in 1989.

One commonly voiced criticism of the Court's existing information system structure was its Balkanized nature. One respondent lamented:

"There is no way to obtain necessary information across courts that is relevant to a case. For example, during a Superior Court hearing, the court may not be able to access a sentencing order or violation of probation documents from Family Court."

Another noted that the lack of a fully integrated system means that court cases are not easily linked with police complaint numbers, and consequently arrest-level dispositions are difficult to

produce, and "the police want to be able to see dispositions." Because the Justice of the Peace Courts are poorly integrated into JIC as it exists today, arrest and search warrants are still paper documents that must be faxed to and fro, and these are not available electronically as the case moves forward. Respondents noted that nearly every criminal case begins in the Justice of the Peace Courts, and tens of thousands are resolved there, so the lack of connectivity between the Justice of the Peace Courts and JIC is a significant issue.

A lack of information about the back end of each criminal case was also identified as a problem. Respondents expressed a desire that the Department of Corrections' DACS system be made available to judges and practitioners. DACS contains such crucial information as an offender's status sheet, short-time release date, and classification status, yet this information is available to the court and practitioners only with great difficulty, if at all. One respondent observed that LSI-R (Level of Service Inventory – Revised) reports are completed for every sentenced inmate, and then entered into DACS, but they remain unavailable to judges who are handling a Violation of Probation, and to the defense attorneys who represent defendants at violation of probation hearings. The lack of real-time access to DACS data materially and adversely affects the quality of criminal litigation.

Fully 75% of respondents voiced support for a single, integrated case management system that would be shared jointly by the all of the criminal courts, the Supreme Court, Attorney General's Office, Office of the Public Defender and Department of Correction. The value of an integrated case management system is obvious, as are the efficiencies to be gained by making all information necessary to effectively schedule, litigate, adjudicate, sentence and rehabilitate a given case or defendant in a single place. "With greater access to relevant information, the participants [in the criminal justice] system will be able to make better informed

decisions."

However, both supporters of an integrated case management system and those who opposed idea acknowledged the difficulties that would be presented by the need to preserve information that is, and must remain, confidential to a given agency as a consequence of ethical or statutory considerations. Confidentiality concerns led some respondents to favor greater connectivity and information sharing across each agency's systems instead of a single, integrated system.

## **B. Electronic Filing**

There was a significant difference of opinion between the individual interviewees and the electronic survey respondents regarding the question: "Should criminal cases require e-filing?" Among interviewees, 18 of 25 answered "Yes." Yet in the electronic survey, only 23 of 53 respondents answered in the affirmative. Thus, overall, only a very slim majority (41 of 78, 52%) agreed that the Court should require e-filing in criminal cases.

However, many of the written explanations to the "Yes" answers emphasized the inevitability of electronic filing for a modern court system:

"It's inevitable. . ."

"More efficient, LEISS system should be included in online case management system. . ."

"20<sup>th</sup> Century. C'mon . . . ."

"It's inevitable this will happen for reasons of efficiency . . . ."

"It is the way the world does business."

"YES YES YES YES - time to make the criminal bar join the 21<sup>st</sup> century . . . ."

"It's the fifteenth year of the 21<sup>st</sup> Century, way past time . . . ."

"The world is increasingly electronic. The court system needs to catch up. But it

needs to be done correctly and not become a boondoggle like COTS."

The objections and concerns of respondents who opposed electronic filing focused primarily on implementation issues, rather than the concept of electronic filing itself; such issues including the learning curve for staff, the cost to indigent defendants, small firms and sole practitioners, and accessibility for pro se litigants.

"There is a huge learning and training curve involved to require e-filing. If we were to implement e-filing, attorneys should still have the option of paper filing and there would need to be adequate hand-on training."

"To require e-filing would put an additional strain on smaller or solo practitioners."

"Difficulties due to confidentiality and pro se litigants."

"Not every office is on the same technological level."

"This will unnecessarily increase the costs to defendants, and ultimately be uncollectable. Query, how do you charge a defendant who has not been found guilty to e-file?"

"No; e-filing is often very helpful to counsel and the court, but indigent and pro se litigants would be tremendously burdened."

"E-filing - and particularly the retrieval for reference - is terribly expensive for practicing lawyers."

"E-filing has caused some problems for our staff. They prefer mailing or hand delivery."

"E-filing is time consuming and confusing."

Although the surveys revealed no strong consensus on whether to require e-filing, the limited nature of the concerns expressed, which deal primarily with implementation issues rather than substantive disadvantages, lead this report to recommend adoption of e-filing, with care being taken to implement it in a way that will accommodate small firms and make it available to poor and pro se defendants. Obviously, the devil is in the details.

### III. SPECIALTY COURTS

#### **Theme Three: There is strong support for the concept of Specialty Courts.**

By an overwhelming margin, respondents agreed that Specialty Courts are a good idea.

One respondent summed up the general consensus by observing the following:

"Specialty courts... allow the Court, the Treatment Access Center and Probation and Parole to work together as a group to achieve results This collaboration allows the offender to feel that the criminal justice system has a vested interest in his or her success which empowers the offender to succeed....the focus of the program is the offender's issues and not the crime committed.."

Respondents repeatedly emphasized that Specialty Courts are advantageous because they are "able to effectively address the problems which underlie one's entry into the criminal justice system." Specialty Courts were seen as a way of combating recidivism in ways that the adversarial system cannot, in that they are focused on "treatment, rather than recidivism." "It makes sense for people with similar treatment needs to be grouped together and managed consistently." In fact, one major advantage was seen as the development of "continuity" and "uniformity" and the creation of "expertise" in a given issues area "because the same judge handles the case." Consequently, "Defendants are less likely to get lost in the shuffle."

Interestingly, respondents differed on whether the available empirical data supported the assertion that Specialty Courts reduce recidivism. One respondent asserted that "statistics demonstrate specialty courts have a positive impact in reducing recidivism," while another said that the only data that respondent has been able to find does not support that proposition. Others echoed their belief that there is no available data supporting the notion that Specialty Courts reduce recidivism. Several agreed that empirical studies need to be conducted to determine both the efficacy and cost-effectiveness of each of the Specialty Courts, in part because, given the reality of limited funding, "What did we pay to get the benefit, and what other areas did not receive the attention or funding that the [court in question] did . . . that is the only real way to

know whether these courts are not only working, but whether they are worth it." Most respondents recognized the value of empirical studies of the several Specialty Courts, but opinions differed on whether such studies already exist.

While expressing strong support for the concept of Specialty Courts, nearly 75% of respondents opposed the creation of new ones. Resource constraints throughout the criminal justice system were cited by many respondents as an impediment to the expansion of Specialty Courts:

"The only way additional specialty courts could be added is if there additional adequate resources provided to the AG and PD to accommodate the additional work associated with these programs."

"Each specialty court generates additional calendars that agencies, such as the AG and PD, need to staff. This creates additional problems for attorneys."

"Creating more Specialty Courts will require probation to pull more officers off their regular caseloads."

When asked specifically which Specialty Courts were working well, respondents frequently cited the Drug Court and Mental Health Court as examples, although some expressed a desire for empirical studies to test the success of those courts. Both courts were commended because of their "process and structure," and their ability to distinguish between offenders with treatment needs and "criminals." TP/WISH was the Specialty Court most often suggested for elimination. It was seen as not having an "effective process," and lacking a "clear goal or structure." Several respondents opined that TP/WISH consumed "too many resources for too few participants."

Following the comments of a number of respondents, this report recommends that empirical cost/benefit studies be undertaken to determine the efficacy and cost-effectiveness of each of the existing Specialty Courts.

#### **IV. SENTENCING**

##### **Theme Four: Our present sentencing practices are in need of reform.**

###### **A. SENTAC Sentencing Guidelines**

Survey respondents found much to criticize about the Superior Court's current sentencing practices. "There is 'not much' that is right with our current sentencing practices" was a typical comment, although some respondents seemed to agree with the assessment that "we seem to do reasonably well with our half-assed approach to sentencing." Respondents frequently cited the lack of information available at sentencing as a significant problem, and many respondents called for the elimination of all or many of the existing mandatory sentences. At the other end of the spectrum, many respondents called for a tightening of the SENTAC guidelines in ways that would significantly limit, or at least focus, judicial discretion.

When asked what was "right" about current sentencing practices, respondents often cited SENTAC as an example. The SENTAC guidelines were described as "helpful as a guideline for judges" and deviation from them was seen as "rare." Roughly two-thirds of the respondents agreed that the SENTAC guidelines were helpful to the sentencing process. Respondents expressed a level of comfort with the shared understanding between the judiciary and practitioners as to the appropriate sentence in most cases, given the nature of the offense and the characteristics of the offender. "When 80% of the cases are pled and judges follow the recommendation 90% of the time this is an indication that judges are respecting the people who have been involved in the case."

When asked what is wrong with how we sentence defendants, a majority of the respondents were critical of the scarcity of information available to the Court:

"In a majority of the felony cases in Superior Court, judges know nothing about the Defendant."

"There is a lack of information at sentencing in most cases. In the majority of

cases, defendants are sentenced immediately and there is very little information."

"Presentence investigations only occur in 10% of the cases. Too little information is provided to the judge."

"We need more Pre-Sentence Investigations - we need more information upfront before sentencing an individual, especially a repeat offender."

Although a large majority of respondents bemoaned the paucity of information available at the time of sentencing, many were realistic about the real-world constraints on access to such information. Respondents frequently cited the small percentage of cases in which presentence reports were available, and noted that this percentage has decreased markedly over time.

Resource constraints were seen as the reason that presentence reports are infrequently available. Respondents also recognized the constraints upon the Attorney General and Public Defender's ability to provide comprehensive information for sentencing. For scheduling and efficiency reasons, the prosecutor assigned to the case is often not present at sentencing, particularly in cases involving immediate sentencing. "The prosecutor who is 'covering' the matter typically does not have sufficient information about the case." The assigned Public Defender often faces ethical constraints upon the information he or she provides to the Court about the Defendant, because "more information about the Defendant is not always good (and often bad) for the Defendant."

Mandatory sentences -- and specifically, whether they should be eliminated entirely, reduced or preserved -- proved to be a polarizing topic. By a 10-3 margin, respondents who were current or former judicial officers answered "no" when asked if statutory minimum mandatory sentences are "helpful to you as a judge." Approximately 40 percent of total respondents who were individually interviewed argued that all mandatory sentences should be eliminated, with three additional respondents taking the view that there should be "fewer" such sentences. Those who opposed mandatory sentences decried the "one size fits all" nature of

such sentences. In contrast, some respondents specifically cited to the existence of minimum mandatory sentences for violent offenders as one of the things that is "right" about how we currently sentence, especially in light of the recent reform of those sentences in drug cases. Many of the respondents explicitly or impliedly linked increased judicial discretion at sentencing with a need for the availability of more information at time of sentencing.

A number of respondents also proposed that the existing SENTAC guidelines should be reviewed and narrowed.

"The guidelines are too wide and almost anything can serve as an aggravating or mitigating factor."

"The SENTAC ranges should be more specific. The Federal Guidelines are too rigid, but our guidelines are too general."

SENTAC guidelines should be "much narrower" and "become more finite about what a SENTAC guideline sentence should be."

Several respondents proposed a revised and more rigid SENTAC system as an alternative to the current use of minimum mandatory sentences:

"[SENTAC] should be more structured, but allow for variance, but require judge to state his reasons why he went off by citation to specific elements of the arguments of the parties or the records, and give the aggrieved party the right to appeal the sentence if the judge wings it too far in either direction. This would prevent one judge from always going low, or high. A real guideline must have review...this would solve the min/man problem."

A number of respondents also proposed that the Court reinstate the old Rule 11(e)(1)(C), which would allow the parties to agree upon a given sentence as a part of a plea bargain and give either party the right to withdraw from the plea if the Court decided not to impose the agreed-upon sentence.

Overall, it appears that those respondents who favor the elimination or reduction of mandatory sentences believe that increased judicial discretion in sentencing is a desired goal. Conversely, those who favor a more rigid SENTAC system and a reinstatement of Rule

11(e)(1)(C) appear to favor something less than the broad discretion given to judges in sentencing when there are no applicable mandatory sentences.

### **B. Racial Disparity in Sentencing Outcomes**

In this area, there was again a meaningful difference in the responses. Individual interview respondents split equally (13 to 13) when asked if they perceived racial disparity in sentencing outcomes. Some of those who answered "yes" stated the proposition starkly: "Take a walk through Gander Hill. It's obvious." Others took a more nuanced view, acknowledging the disparity in outcomes but rejecting or questioning the notion that the disparity is intentional or a result of racial bias:

"There is racial disparity in sentencing outcomes. This disparity is not deliberate, but rather is the product of complex factors...economic disparity also contributes to racial disparity."

"[R]acial disparity in sentencing outcomes...is a systemic problem as a significant percentage of minorities lack education and a family structure."

Many who did not agree with the proposition that race affected sentencing outcomes focused instead upon the disparate impact of wealth in the criminal justice system.

"There is economic disparity. Wealth, not race, impacts sentencing outcomes. Wealth does not impact the quality of representation a defendant receives. Rather it affects outcomes because wealthier people are more likely to have the means to accomplish and present things at sentencing that impact it."

Others observed that there are racial disparities in arrest statistics, and attributed the overrepresentation of minorities on the Court's docket, and in the prison population, to those statistics. Some respondents suggested that there is an urgent need for in-depth research on the causes of disparate resolution and sentencing outcomes. The 50-50 split of opinions as to whether race is, indeed, a significant factor influencing outcomes is evidence of a lack of reliable data.

In contrast, a large majority (43 of 54, approximately 80 %) of electronic survey

respondents answering "No" to the question, "Do you perceive any racial disparity in our sentencing outcomes?" Several respondents echoed comments from individual interviewees that any racial disparity in outcomes was likely a function of factors other than race.

## V. VIOLATION OF PROBATION SYSTEM

**Theme Five: The current system of adjudicating violations of probation is in need of a fundamental re-design, largely as a function of the excessive number of violations handled.**

Once again, there was a meaningful difference between the individual interviewees and the electronic respondents in this area. By a 22-5 margin, interviewees answered "no" when asked if the current violation of probation system is effective. In contrast, two-thirds of electronic survey respondents answered that question in the affirmative.

The lack of information available to lawyers and judges during Violation of Probation hearings was commonly cited as a significant concern. Judge-to-judge procedural differences were criticized, as were the Court's scheduling practices. Respondents also expressed varying opinions as to the purpose and goals of probation, which suggests a lack of systemic uniformity in the philosophy underlying the use of probation.

Interviewees were clearly dissatisfied with the quality and quantity of information available to the court and counsel before and during violation of probation hearings, which frequently occurs because the judge who handles a Violation of Probation is often not the judge who originally imposed the sentence.

"The judge doesn't know enough to do a good job. The offender's P.O. often doesn't show. [There is] nobody in front of the judge except a piece of paper [that he or she] doesn't trust."

"Violation of Probation reports should be universally available in advance of the hearing."

"I think that it would be helpful to have more information, in the form of pre-sentence investigations, for VOP hearings."

Scheduling problems, including the Court's master calendar system and competing scheduling demands on probation officers, were cited as a critical roadblock preventing judges and probation officers from handling their own Violation of Probation cases.

The quality of advocacy at Violation of Probation hearings was frequently cited as a concern.

"PD's are provided with no meaningful opportunity to represent clients within the standards that any criminal defendant should expect."

"There should be a more measured and robust process to protect Due Process rights."

"The current system should be changed to allow the DOJ to have meaningful input."

"A meeting between the probation officer, prosecutor and defense attorney prior to the hearing would be helpful."

Many respondents seemed to implicitly endorse a refining or rethinking of the basic assumptions underlying our use of probation. Criticism was voiced as to the length of probation sentences and the purposes that such sentences ought to serve.

"Probation should only be used as intensive supervision to protect the public or to ensure compliance with the rehabilitative conditions of a sentence."

"The whole system of probation . . . is inefficient, it doesn't help people and it costs a lot of money. The restrictions are too restrictive - they set people up to fail."

"Minor violations should not be a reason to violate someone."

"The current system needs more probation officers to effectively supervise defendants and provide defendants with resources to help them effectuate and complete their sentences . . . . Many probationers do not have the resources or means to complete all of the conditions of their sentence or probation... Without additional assistance from probation officers, we are setting offenders up to fail."

"Make it so that a defendant's second sentence involves jail and then discharge [from probation] . . . otherwise, you wind up with defendants serving a life sentence on the installment plan."

The broad dissatisfaction with the current system of adjudicating violation of probation

sentences reflects not only a frustration with the insufficient nature of the information available about defendants at the time of a Violation of Probation hearing but also a lack of consensus as to the basic purpose and goals that should underlie a probation sentence.

The Court's sentencing practices are also in need of reform, particularly with respect to the information made available to the Court and parties prior to sentencing, including increased use of pre-sentence investigations and other pre-sentence risk assessment tools. Re-establishment of Rule 11(e)(1)(C) pleas is also recommended. In view of the lack of consensus on mandatory sentencing and the issue of racial disparity in sentencing, no specific recommendation is advanced, but we note the intensity of interest among respondents on those issues, which may merit further study.

### **CONCLUSION**

This report specifically concludes that establishment of a more comprehensive system of assigning criminal cases to individual judges would be desirable. It also finds persuasive the arguments advanced in favor of mandatory electronic filing of criminal cases.

More generally, this report finds that the Court's sentencing practices are also in need of reform, particularly with respect to the information made available to the Court and parties prior to sentencing, including increased use of pre-sentence investigations and other pre-sentence risk assessment tools. Reestablishment of Rule 11(e)(1)(C) pleas is also recommended. In view of the lack of consensus on mandatory sentencing and the issue of racial disparity in sentencing, no specific recommendation is advanced, but we note the intensity of interest among respondents on those issues, which may merit further study.

This report also concludes that the Court's current system for adjudicating Violations of Probation needs reform. Again, respondents identified the lack of information available to the

Court and parties prior to sentencing as the principal deficiency, and recommended in particular that the depth and quality of VOP reports should be improved. The Court is also urged to consider approaches to VOP proceedings that might foster greater involvement (and vetting) from the Department of Justice; and improved due process at VOP hearings (for example, more time for clients to meet with their counsel prior to the hearing, more time for counsel to meet with the probation officers prior to the hearing, improved opportunities for defendants meaningfully to confront the charges, and scheduling reform that would enable attorneys, probation officers and judges who are familiar with a defendant to participate more frequently in the VOP hearing).

With respect to Specialty Courts, there was considerable support for court-specific cost-benefit studies to determine whether the perception of efficacy reflects the reality.

With respect to the other areas addressed by the surveys, no clear recommendations emerged. However, it is clear that many of the issues and concerns raised by survey respondents are, in the end, a direct result of one or more of the component entities within the criminal justice system finding itself overwhelmed by the sheer number of cases it is required to handle. It has been too long since the resource needs of the criminal justice system were studied in a comprehensive and collaborative manner, and this report recommends that such a study be undertaken promptly. The benefits and utility of such a study would be clear and far-reaching.

## SUPERIOR COURT OF DELAWARE (CIVIL)

### EXECUTIVE SUMMARY

On the civil side, several general themes emerged, with specific practices and comments discussed further in the report.

- First, there is a clear consensus among respondents that overall civil case management in Superior Court is generally working well. However, while the current system of individual case management was applauded as effective, there was a strong consensus among civil practitioners that more uniformity among judges is needed in case scheduling, to provide predictability and prevent misunderstandings. It was clear, though, that most respondents felt judges should have maximum discretion to address individual circumstances when it comes to enforcement of case scheduling orders.
- There was little if any criticism of the current procedures for handling civil motions, including page limits and the current practice of liberally granting oral argument of motions.
- The most important issues to practitioners and judges alike in the civil trial process appear to be more and better use of technology in the courtroom, and more and better interaction between lawyers and jurors, in *voir dire* and after trial. The judges and lawyers surveyed were generally satisfied with the job being done by the other group in trial, although many judges would like to see the lawyers who appear before them in trial better prepared, and a significant number of trial lawyers felt the need to caution judges about taking too active a role in trial.

This report specifically recommends that more uniform early case management practices be adopted, and that consideration be given to the adoption of standardized case management

orders, at least for specific categories of cases. Expansion of *voir dire* is also recommended. Finally, this report concludes that the Court's outdated technology resources require a comprehensive upgrade.

## THEMES

### I. CASE SCHEDULING AND ADMINISTRATION

**Theme One: The overall civil case management in Superior Court is working well and, as a result, most cases are moving promptly and efficiently through the court system to resolution.**

#### A. Uniform Scheduling Orders

Although there is a strong consensus that the Superior Court's overall civil case management is working well, a clear majority (70%) of respondents believe that the case management system could be improved by the adoption of more uniform case management procedures among judges statewide, particularly in terms of the content of scheduling orders and when in the life of the litigation case scheduling orders are issued. There was a consistent message in the individual comments of respondents that more uniformity in the content of case scheduling orders, and making sure that such orders are issued early in the litigation, would promote greater consistency and thus more predictability for practitioners and their clients as the case works its way through the system. More uniformity is also seen as limiting the opportunity for misunderstanding between lawyers -- and between lawyers and the court -- about what is expected. The current system, in which individual judges have maximum flexibility in deciding the content and timing of case scheduling orders, is perceived by many lawyers, and some judges, as frequently leading to confusion, inefficiency and, at times, even unfairness.

While the responses reflected strong support for more uniformity in this area, there was less consensus about how to achieve this goal, while also striking an appropriate balance

between the need for consistency in the process and the benefits of judicial discretion in case scheduling. There seemed to be broad recognition among respondents that while uniformity can be very helpful, different types of civil cases have different scheduling needs, so some flexibility in the process is needed. The best way to achieve both these goals, based on a majority of respondent comments, would be to create different statewide uniform scheduling orders for different types of cases. So, for instance, all medical negligence cases would be governed by a particular form of order, while auto negligence, breach of contract disputes and other categories of cases would have their own standardized scheduling orders. There was also significant support for a mechanism of some kind to allow the court to receive input from the parties before a case scheduling order is entered, particularly in more complex cases.

#### **B. Overall Court Uniformity**

Related to this issue is the question of whether the Superior Court should have uniform procedures in all three counties. This question was not specifically asked in the bar-wide electronic survey, but responses in the in-person interviews on this question were almost evenly split (13 yes and 16 no). The arguments for and against closely tracked the arguments for and against uniform case scheduling orders, reflecting the inherent tension between the greater efficiency and predictability uniformity offers and the need for autonomy to address geographical traditions and preferences. The interviews also reflected a large majority (21 to 8) opposing the removal of any distinction among the three county Superior Courts, to make it similar to the statewide structure of the Chancery Court

#### **C. In-Person Scheduling Conferences**

There was no clear consensus reflected in the survey responses about the utility, as a case management tool, of in-person meetings between the court and counsel at the outset of the case. Such conferences were routine among Superior Court judges in the not too distant past but are

becoming less common. While the in-person responses reflected an almost 2 to 1 negative reaction to mandatory early case management conferences, the electronic survey was just about evenly split on the issue (52% yes and 47% no).

Many in favor of this practice lauded it as valuable in promoting collegiality and greater familiarity between the bench and bar, particularly where newer lawyers (and newer judges) are concerned. Many felt that telephone conferences simply do not suffice in this regard. Some also felt that the practice helped to communicate that the Court takes individual case management seriously, and particularly in more complex cases created an opportunity for the Court and counsel to confer regarding less common case-specific issues, particularly those that would affect scheduling.

Many opposed to the practice -- both lawyers and judges -- questioned whether it was an efficient use of lawyer time (which can be significant when traveling between counties) and judicial resources, particularly since the conference usually takes place so early in the process that the lawyers, particularly defense counsel, and judges know so little about the case that substantive discussion is unlikely to occur. Others, tying this issue to the scheduling order question, felt that more uniform case scheduling orders in routine cases would help eliminate the need for an in-person conference.

However, even some respondents who were generally opposed to the idea thought it could be useful in select cases. To that end, it was suggested that a face-to-face conference -- or at minimum a telephone conference -- could occur if requested by a party, and that a place for this request could be added to the CIS form. It seems from judicial respondents that even judges who are opposed to routine face-to-face scheduling conferences would be open to convening such conferences (either in person or by phone) if requested by counsel in more complex cases.

#### **D. Enforcing Case Scheduling Orders**

The issue of enforcement of case scheduling orders was specifically addressed only in the in-person interviews. Here, unlike the issue of the content of scheduling orders, there was a fairly strong preference expressed by lawyers and judges alike for allowing the court maximum flexibility to address scheduling order violations based on the particular circumstances of the case. There also seemed to be a consensus among the Superior Court judges who commented that the lawyers should make every effort to resolve scheduling disputes before involving the court, but keeping in mind that making a proper record is important because informal agreements that deviate from the court's schedule are difficult if not impossible to enforce.

## **II. CIVIL MOTION PROCEDURE AND PRACTICE**

**Theme Two: There is little criticism of the current procedure for handling civil motions, including page limits and the practice of liberally granting oral argument.**

#### **A. Page Limits**

Both the interview and electronic survey responses reflected substantial support for retaining the current page limitation for motions (which was recently changed from 4 to 6 pages based on the now-required use of larger font). Many judges surveyed expressed the thought that page limits force lawyers to be more concise and thoughtful in their arguments -- to more effectively get down to the essence of the argument. A significant number of the practitioner surveys endorsed page limits in part because there is a system in place to request page extensions when necessary, and most judges expressed a willingness to grant page extensions as a matter of course when requested. Experienced practitioners unanimously agreed that the current system to request page extensions "is working," some lawyers and judges in both the in-person and electronic surveys felt that the procedure to obtain a page extension should be less cumbersome and more uniform from judge to judge. As it is, while many judges require a separate motion for

a page extension, others will grant a telephone request. Among the lawyers and judges who favor more generous -- or no -- page limitations, there is a fairly consistent sentiment that summary judgment and *Daubert* motions, in particular, should not be limited to 6 pages.

#### **B. Oral Argument**

The in-person survey reflected that oral argument is almost always scheduled by almost all Superior Court judges, at least in dispositive motions, and that the overwhelming majority of judges do not place time constraints on counsel making oral argument. There seemed to be general satisfaction with this among the practitioners who commented regarding these issues.

#### **C. Civil Appeals**

There was near unanimous agreement in both the in-person and electronic surveys that no changes were necessary to the jurisdictional limits for Superior Court or the procedures for appeals to -- or from -- Superior Court.

### **III. CIVIL TRIAL PRACTICE**

**Theme Three: The Bench and Bar need to improve their communication and interaction before, during and after trial.**

#### **A. Courtroom Technology**

The most frequently suggested improvements to the Superior Court trial process revolved around the use of technology. Judges would like to see more use of available technology to present evidence in the courtroom, and likewise want more trial lawyers to be familiar with and able to operate the available courtroom technology. However, both lawyer and judge respondents recognized that the court's technology resources need updating to make them more compatible with the technological resources being commonly used by many members of the bar. Concern was also expressed that the Court's existing technology needs to be better maintained and that court personnel need to be better trained to use it.

## **B. Juror Interaction with Lawyers**

Many survey responses also suggested more expansive *voir dire* of prospective jurors and more attorney involvement in the process. The consensus seemed to be that more extensive *voir dire* would better help to eliminate biased jurors and thereby make the trial process fairer for all. There were also several calls to allow lawyers to speak to jurors after trial. This would allow lawyers to learn what evidence and what approaches to advocacy were and were not effective, and in that way help them to improve the quality of their trial presentations.

## **C. Constructive Criticism for Judges**

Lawyers were asked if there were “things that judges regularly do that are counterproductive to a fair trial.” By a more than a two-thirds margin in both surveys, the answer was “no”, a testament to the high level of skill and even temperament of our Superior Court judges. Where concerns were raised, they most often focused on occasions where judges were thought by the lawyers appearing before them to have been too proactive at trial, or where a lapse in judicial demeanor was thought to have suggested to jurors, or the lawyers themselves, that the court had taken sides. Specific criticisms included excessive questioning of witnesses before the jury; commenting on factual issues, especially where the issue had not been raised by the other side; criticizing lawyers, particularly with regard to strategy decisions; or otherwise suggesting bias through tone of voice, body language or facial expressions.

## **D. Constructive Criticism for Lawyers**

The same question was asked about lawyers: “Are there things that lawyers regularly do that are counterproductive to a fair trial.” Again, the majority response was “no.” In both surveys, the most often cited criticisms of trial lawyers were either lack of preparation and lack of jury trial experience, both of which can lead to trial delays or error. Also mentioned were

ineffective use of trial time, including overlong arguments or witness examinations, and the presentation of needlessly cumulative evidence. Unnecessary or even frivolous motions and late production of expert reports or other discovery were cited as injurious to the fairness of the trial process.

## **CONCLUSION**

Overall, respondents reported broad satisfaction with Superior Court's handling of its civil docket. There were numerous resource-based suggestions, including calls for more courtrooms, better technology in the courtrooms, and more and better-trained court personnel.

This report specifically recommends that more uniform early case management practices be adopted, and that consideration be given to the adoption of standardized case management orders, at least for specific categories of cases. Expansion of *voir dire* is also recommended. Finally, this report concludes that the Court's outdated technology resources require a comprehensive upgrade.

## **FAMILY COURT OF DELAWARE (CIVIL)**

### **EXECUTIVE SUMMARY**

Twenty-one Delaware Family Court judicial officers and attorneys identified as experienced Delaware Family Court practitioners were interviewed as part of the ACTL/DSBA courts study, using a prepared list of questions. A condensed online version of the survey utilized in the interviews was sent to members of the Delaware Bar Association, and 122 responses were received, approximately 80% from lawyers who have practiced in Family Court, and 20% from judicial officers.

The following general themes related to the Family Court's civil jurisdiction emerged from the interviews and surveys:

- There was a strong consensus that case management efficiency and effectiveness is improved when the Court involves counsel in a conference call or an in-person call of the calendar. While uniformity in scheduling practices was generally favored, there was also significant tolerance for flexibility expressed.
- There was substantial support for an adjustment to the jurisdiction of the Family Court to include adult guardianships, truancy, and name changes for minor children.
- Many respondents expressed the view that electronic filing may increase efficiency in Family Court, but concern was expressed that cost and hardship issues should be addressed as e-filing procedures are adopted.
- There was a strong feeling expressed that Family Court procedures do not adequately address the “gap period” that occurs in custody cases.
- Respondents expressed general satisfaction with the effectiveness of mediation in child support proceedings, but a general dissatisfaction with the mediation process in custody

proceedings. Recommended improvements in custody mediation and pre-trial practice included additional time for mediation and training for mediators, an opportunity for a hearing in the event of an unsuccessful mediation, and mandatory pre-trial forms for all custody proceedings.

- Survey participants find the forms associated with Family Court Civil Procedure Rules 16(c) and 52(d) difficult to use, and recommended revisions, particularly elimination of the disposition request from the Rule 16(c) Financial Report.
- Respondents recommended improved procedures in guardianship proceedings, including reducing inconsistencies between different types of proceedings, more timely relief in non-emergency guardianship proceedings, eliminating or waiving filing fees for guardians, and reconsideration of publication requirements for service and notice.
- There was agreement that the protection from abuse statute is abused by litigants seeking a quick method to get a spouse out of the marital residence, obtain a custody order, or obtain financial support. Proposed solutions included the elimination of custody and financial support as possible forms of relief from the process.
- A consensus among survey participants supports the establishment of guidelines for self-represented litigants that are consistent with those of the Supreme Court.
- Finally, there was a general consensus in favor of more uniformity in practice and procedures across the counties, although numerous respondents acknowledged the benefits of judicial independence.

These general themes and other issues are discussed in more depth in the full report below.

## **THEMES**

### **I. CASE MANAGEMENT**

#### **Theme One: Convening a case management conference between the court and counsel creates efficiency.**

There is a strong consensus among survey participants that case management efficiency and effectiveness is improved when the Court involves counsel representing parties in a case management conference call or an in-person call of the calendar. The focus was not on the timing of the communication, but rather on the general desirability of the practice. Those surveyed indicated the case scheduling call allows attorneys to have input into the timing of the scheduling and the amount of time needed for a hearing, resulting in fewer continuances and bifurcated proceedings. The opportunity for interaction between the judge hearing the case and counsel preparing it also provides an opportunity to address case complexities and early discovery issues.

Although the majority of the survey participants responded in favor of “uniformity in case scheduling,” there appeared to be some question about what the concept means. Further, some statements also reflect the perceived desirability of case scheduling flexibility. Responses included the following:

- There should be “uniformity with flexibility.”
- Cases should continue to be scheduled by the judge assigned to the case, and the judge should have the ability to manage and schedule based upon the facts and circumstances of the case.
- “. . . Would be helpful for someone coming into the court system to know what to expect.”
- Not desirable to schedule for an allotted amount of time based upon the type of case. For example, every custody case should not be scheduled for an allotted two-hour hearing without consultation with counsel.

- "Would like all judges to issue pre-trial scheduling orders. It is helpful to the litigation process to nail down dates for discovery and required settlement conferences."

On balance, a “hands-on” approach by judges which includes lawyers and considers their input on timing and scheduling of cases is perceived as valuable to the efficiency and overall handling of cases in the Court. Scheduling without counsel input creates inefficiency and increases costs for continuance requests, often resulting in delays. While uniformity in scheduling is favored, there is also significant tolerance for flexibility with a balancing of too little case management and too much detailed and unnecessary case management.

## **II. JURISDICTION**

**Theme Two: The jurisdiction of the Family Court should be adjusted to include adult guardianships, truancy and name changes for minor children.**

A substantial majority of survey participants favor an adjustment to the jurisdiction of the Family Court with many respondents suggesting the addition of truancy proceedings; name changes for minor children; and adult guardianship proceedings. Logically, these types of proceedings are more appropriately addressed in Family Court given the expertise of the Family Court judges in addressing the issues. There is a concern, however, that truancy proceedings would put a significant strain on the resources of the Court. Adjustments to jurisdiction should occur in connection with an analysis of necessary additional resources.

## **III. FILING**

**Theme Three: Electronic filing may increase efficiency in Family Court, but the cost and hardship should be addressed as procedures are adopted.**

Survey respondents (both individual interviewees and electronic survey respondents) are evenly split on the question of whether Family Court should require e-filing in all civil cases. Those in favor of e-filing perceive an increase in efficiency, including record-keeping and

organization. Those opposed are primarily concerned about the efficacy of e-filing with the significant *pro se* population that does not have access to technology and lacks the sophistication necessary to use it. Others worry about increased costs to practitioners which ultimately are passed on to the client. Cost and hardship issues should be closely monitored if electronic filing becomes a universal requirement.

#### **IV. CUSTODY CASE DELAYS**

**Theme Four: The procedures of the Family Court do not adequately address the “custody gap” period that occurs in custody cases.**

Parents are joint natural custodians of their children with equal powers, duties and rights to them. Initially, when parents separate from one another physically by living in separate residences, there is no order or statute in place governing the residential custodial arrangements for the children.

The period of time between the physical separation of parents and the entry of a custody order is often referred to as the “custody gap.” It is of significant concern because of the impact on children who may be caught in a parental “tug of war” and denied contact with a parent.

Existing Family Court procedures can unduly prolong the custody gap. Currently, custody petitions are first scheduled for mediation, but weeks and sometimes months can pass between the filing of a custody petition and mediation. Moreover, unless an agreement is reached at mediation, parents must wait an additional few weeks for an interim custody order based upon the recommendations of the mediator.

Although it is possible to file a motion seeking a temporary order, which is supposed to result in a quickly-scheduled hearing before a Family Court Commissioner, the procedure is little-used.

There is consensus that Family Court procedures should address the custody gap period more effectively. The survey, however, did not result in any specific recommended solutions. As one survey participant commented, “After clients separate and are living apart, there is no procedure to quickly get a custody order in place. It takes too much time to get an interim custody order and this creates issues with clients. There needs to be a way to get into Court more quickly to address custody even for a temporary custody order.”

## **V. PRE-TRIAL PROCEDURES**

### **Theme Five: Family Court should implement improved mediation and pre-trial procedures for custody proceedings.**

Family Court Civil Procedure Rule 16(b) sets forth the pre-trial practices for custody proceedings. The focus of pre-trial practice is on mediation.

Across the interviews, there was a fairly close division between those who find the Court’s mediation practices effective and those who do not. A review of the comments indicates there is general satisfaction in the effectiveness of mediation in child support proceedings based on the high rate of resolution of child support issues at mediation, but a general dissatisfaction with the mediation process in custody proceedings.

Recommendations for improvement of mediation and pre-trial practice for custody proceedings in general include the following:

Additional time for mediation and training for mediators. The hour allotted for mediation in custody proceedings is generally insufficient in contested custody proceedings. In addition, there is a perception that mediators would benefit from additional training to be more effective in helping litigants reach agreement on child custody matters. Because mediators too often lack adequate time and training to facilitate agreements between litigants, the mediator too often becomes an arbitrator who effectively decides the interim custody arrangement by making a

recommendation for a contact schedule which is typically approved by a judicial officer and implemented for a significant length of time before a scheduled hearing can occur. These roles are inconsistent with one another.

Pre-trial procedures should include an opportunity for a hearing in the event of an unsuccessful mediation: Concern was expressed that litigants are denied due process when a mediator makes a recommendation for a contact order pursuant to Family Court Civil Procedure Rule 16(b) (4). As one survey participant commented: “Recommendations from mediation are implemented without much review. If there is review, there is little or no information upon which to review the recommendation. These interim orders can be highly prejudicial. There should be a pre-trial analysis early on to have judicial determinations of temporary arrangements.” Contact schedules recommended by mediators are typically entered as interim orders by judicial officers with no opportunity for the parties to be heard, resulting in a process that many feel is unconstitutional. Survey participants recommended a procedure which results in a brief hearing when an agreement on a contact schedule is not reached at mediation.

The completion of a pre-trial form should be mandatory in custody proceedings. Family Court Civil Rule 16(b) provides for the completion of a written court-provided report for custody proceedings, if required by the Court. However, at present there is no such requirement. Survey participants believe the implementation of a requirement to submit such a pre-trial form or forms, much like the Rule 52(d) form, is desirable. Specifically recommended is a form that requires the parties to identify witnesses and address the 13 *Del. C.* §722 factors regarding the “best interest of the child,” the standard upon which custody determinations are made.

## **VI. FAMILY COURT FORMS AND REPORTS**

**Theme Six: Family Court Civil Rule Forms 16(C) and Rule 52(D) should be amended.**

Survey participants find the forms associated with Family Court Civil Procedure Rules 16(c) and 52(d) difficult to use, and recommend revisions to them. In particular, elimination of the disposition request from the Rule 16(c) Financial Report was suggested. At the present time, Family Court practitioners often avoid completing this portion of the document with an indication that the request will be provided once discovery is complete. There is also a perception that the completion of the disposition request at the early stage in the proceedings when it is currently required can have a negative impact on settlement negotiations.

Further, the Family Court Civil Procedure Rules do not adequately track the use of the forms, creating difficulties in implementation. Family Court judges send letters detailing the use of the pre-trial form used pursuant to Family Court Civil Procedure Rule 52(d), but the instructions are impractical to implement because one party is required to complete the form, then send it to the other for completion and filing. If the second party to receive the form, however, adds an issue in dispute, there is no opportunity for the other party to respond if the form is completed as contemplated by the letter, and Family Court Civil Rule 52(d) does not provide guidance on this topic.

## **VII. GUARDIANSHIP PROCEDURES**

**Theme Seven: Better procedures are needed in guardianship proceedings, including: reducing the inconsistencies between different types of proceedings; providing more timely relief in guardianship proceedings that do not present facts warranting emergency relief; eliminating and/or waiving filing fees for guardians; and reconsideration of publication requirements for service and notice.**

Online survey participants expressed a more favorable view of the Family Court's guardianship procedures, while the in-person interviewees were evenly split, with eight indicating the procedures are working, and eight indicating they are not. Those critical of the process focus on a few key points:

Inconsistencies between private guardianship proceedings and guardianship proceedings involving the Division of Family Services: Participants indicated that these proceedings should be identical, but in practice they are not handled in the same manner. Private guardianship proceedings are treated more like regular custody proceedings despite the requirements of the Family Court Civil Procedure Rules and the guardianship statute. Further, the standards for obtaining guardianship in private guardianship proceedings were perceived to be more difficult than for guardians in cases in which DFS is involved. Opinions differed about whether the standards and procedures should be different. There was recognition that in both cases there are similar constitutional implications because children are being taken from parents. Overall, there was a sense that the guardianship procedures should be reviewed and revised where appropriate.

Filing Fees in Guardianship Proceedings: There were conflicting comments on this topic. A few survey participants noted the significant number of *in forma pauperis* requests in guardianship proceedings, and suggested such requests are “incongruous” given the obligation of the guardian to provide for the minor child, at least some portion of which requires the financial ability to do so. Others suggested a fee waiver for guardians, noting the significant financial burden placed upon them to pay the filing fees, costs associated with the publication requirements for service and hearing notice, and attorney’s fees. In contrast, the child’s parents often have attorneys appointed for them at no cost.

Emergency Filings: There is a perception that Family Court denies requested *ex parte* emergency relief in too many guardianship filings seeking an order necessary for the guardian to enroll a child in school. Some survey participants (perhaps from within the court system) expressed concern over the glut of filings in August and the perceived abuse of process when an emergency order is granted for purposes of enrolling a child in school and the parties do not

follow through with the process. Family Court practitioners, in contrast, expressed frustration about the inability to provide solutions to their guardianship clients to obtain the relief they need for the child for whom they are caring. A suggestion for improvement to the process was the creation of a “school guardianship calendar” at the beginning of the school year.

Publication Requirements for Service and Notice: The requirement that litigants pay the cost of publication requirements for service (and for subsequent notice of hearings, required in some cases where a parent’s location is not known) is overly burdensome for guardians who are assuming the responsibility to care for a child, including the financial burden. In addition to the financial burdens, survey participants point to the fallacy that publication for multiple hearings is meaningful in providing due process. In reality, the published notices are not seen by the intended parties. Family Court rules also continue to require that publication occur in print when publication in digital media would likely be more effective.

## **VIII. PROTECTION FROM ABUSE PROCEEDINGS**

**Theme Eight: The protection from abuse statute is often abused by litigants seeking a quick method to get a spouse out of the marital residence, obtain a quick custody order, and/or obtain financial support.**

The interviewed survey participants were split seven to five in favor of the effectiveness of the protection from abuse procedures. A far greater majority (43 of 47 respondents) of the online survey participants responded that the protection from abuse procedures are effective. Nearly all of the comments about the process, however, focused on misuse of the statute, which is possible due to the broad definition of abuse within the statute. There are several possible reasons for the perceived abuse, including the absence of any other mechanism for getting an unwanted spouse out of the marital residence during divorce proceedings, the “gap period” in custody proceedings, and the need for financial support.

As summarized by a few interview participants and survey respondents:

- “Expedited scheduling of PFAs and the broad relief available results in the PFA process being used to obtain custody, support, property, exclusion from household, and other relief which often appears to be a more important consideration than protection or separation from alleged abuser.”
- “This interviewee very much dislikes the PFA process and feels it is too abused by Petitioners. Litigants abuse the process. The current process incentivizes people who are really just looking to get another person out of the house or to get custody or other such issues—not abuse. And this happens too often.”
- “This has become a vehicle to fight over custody, support, the house, etc. There are far too many PFAs filed with little or no domestic violence even alleged and no proof. There needs to be a better vetting process before these claims are brought to Court.”
- “The PFA is probably the most misused process in Family Court.”

Proposed solutions to perceived problems with the protection from abuse process included the elimination of custody and financial support as possible forms of relief from the process. Another suggestion was to develop solutions for people who need to be living separately while going through divorce. Finally, better procedures addressing the “gap period” in custody proceedings will resolve some frivolous protection from abuse proceedings.

## **IX. PRO SE GUIDELINES**

### **Theme Nine: Family Court would benefit from guidelines for dealing with *pro se* litigants.**

Consistent with other areas in the Family Court study, the in-person interviewees were generally more critical of the *pro se* services offered by the Court than the online survey respondents, with an even split of seven interviewees believing they are adequate and seven believing they are not. The online survey participants responded more favorably, with 60 agreeing the resources for civil litigants in *pro se* cases are adequate and 28 reporting they are not.

Participants noted favorably the amount of helpful information available on the Family Court website; the Family Court Resource Center, for which forms and videos have been and will be created; and the skill of the Family Court judges in dealing with the *pro se* population. It should, however, be noted that some respondents were critical of the Family Court judges to the extent they exceed their judicial authority and neutrality to assist *pro se* litigants.

One interviewer reported:

Yes; the resources for *pro se* litigants are working, but they are just adequate. Interviewee would like to see guidelines for self-represented people. For example, *pro se* litigants often call judges' chambers without the other party on the line. Later that same litigant will claim that the Court's office has permitted them to file a certain form or granted them certain leave. This does not lead to productive litigation. The Court could require all parties to be on the line and discourage *ex parte* communications from *pro se* and from lawyers.

A consensus among survey participants is the need for guidelines for self-represented litigants that are consistent with those of the Supreme Court. Respondents strongly supported the view that self-represented litigants need to be held more accountable by the Court, and that failure to do so can result in the represented litigant incurring unnecessary and excessive fees for responses to filings by *pro se* litigants that are not in compliance with the Court's procedures..

## **X. UNIFORMITY OF PRACTICE AND PROCEDURES**

**Theme Ten: There is a general consensus in favor of uniformity in practice and procedures across the counties, tempered by the perceived desirability of judicial independence.**

Differences in the practices and procedures between the counties in the Family Court were widely reported. Survey participants also identified some significant differences in the substantive application of the law. While there was recognition that there can be a legitimate basis for differences in practices and procedures (due, for example, to differences in each county's Family Court's number of judicial officers, other resources, and litigant populations),

there was a general sense reflected in the responses overall that more uniformity in processes would be preferable.

### **CONCLUSION**

Consistent throughout the responses was essentially a call for more information, communication and organization, all of which would lead to greater predictability and better control over case, client and time management. This is particularly desirable in a family court setting where the volume of cases is so high. Many of the suggestions could be quickly implemented whereas some may require considerable time and thought to address.

## **FAMILY COURT OF DELAWARE (CRIMINAL)**

### **EXECUTIVE SUMMARY**

The major theme concerning the Family Court's criminal jurisdiction that emerged during the Family Court practitioner interviews was concern over whether or not the Court was appropriately handling the most potentially dangerous juveniles, especially juveniles involved in gun crime. Respondents also expressed concerns about Drug Court, the way criminal calendars are being run, the Court's handling of sentencings, and the current setup of Court facilities. Respondents noted that in many other key areas, the Court is functioning well.

#### **I. HANDLING OF DANGEROUS JUVENILES: RISK ASSESSMENT, PLACEMENT, TRUANCY**

**Theme One: The Court is not adequately utilizing the tools at its disposal to effectively filter the most dangerous juveniles into the necessary programs.**

Family Court practitioners and stakeholders expressed concerns regarding the Court's handling of potentially dangerous juveniles. The Court is not adequately utilizing the tools at its disposal to effectively filter the most dangerous juveniles into the necessary programs. That calendar was described by one practitioner as "a joke" where "very serious crimes are being ignored and there is little regard for victims." The words of another respondent summed up the tenor of the responses: "we are not treating the really dangerous kids with enough caution."

##### **A. Risk Assessments**

Respondents indicated the Court often sentenced juvenile offenders before YRS completed its PAAC risk assessments. Allowing sufficient time for risk assessments would help the Court fashion appropriate sentences for the most at-risk youth and bring the Court in line with the national consensus of evaluating risk assessments pre-sentencing.

## **B. Placement Issues**

Respondents stated that there appears to be an unwarranted preference for sending juveniles to Glenn Mills over Ferris. The surveys noted multiple concerns with Glenn Mills: it is an unsecure facility that had six escapes in one year; recidivism rates from Glen Mills and Ferris appear to be equal; and Glen Mills lacks an evidence-based program focusing on guns and gang violence comparable to the SNAP program at Ferris. Further, Ferris has the Youth Advocacy Program, “a re-entry team” tasked with creating and implementing a comprehensive plan for re-entry when a juvenile is about to be released. Stakeholders more broadly expressed concern over whether or not Glenn Mills was an appropriate option for violent juvenile offenders.

Multiple respondents criticized the placement of juveniles, especially female juveniles, in out-of-state facilities. The practice was noted to be expensive, and contradictory to the rehabilitative intent of the juvenile justice system. The practice places unnecessary strain on family ties, with many incarcerated juveniles’ families unable to visit them.

## **C. Truancy Court**

Respondents also felt that Truancy Court was unintentionally harming the key mission of appropriate handling of the most dangerous juveniles. Many serious juvenile offenders’ first contact with the juvenile justice system is Truancy Court where they “got violated, put on gps, and then the juveniles feel that the Court is like a parent and don’t take things seriously.” One practitioner suggested moving Truancy Court from JP Court to the Family Court to aid with early identification of the highest need juveniles.

## II. DRUG COURT

**Theme Two: Drug Court is not working as an adjudicative court; it should be converted to a diversion court.**

Respondents felt that Drug Court in its current format, as an adjudicative court, was not working, and that it “should be a diversion court.” The current system was viewed as unduly onerous, to the point that practitioners came up with workarounds such as nolle prosequis being used in conjunction with promises for outpatient drug treatment instead of entering juveniles and their families into Drug Court.

## III. CRIMINAL CALENDARS

**Theme Three: The criminal calendar is being handled effectively overall, but specific improvements could be made.**

A majority of respondents felt that the Court was running criminal calendars well. There were, however, concerns related to delays and victims.

Delays seem to spring from three causes: (1) inadequate opportunity to engage in pretrial motion practice; (2) inadequate opportunity to engage in plea negotiations before trial; and (3) inadequate Court staffing.

Some respondents felt there is inadequate opportunity to engage in pretrial motions practice. Specifically, the short time between arraignment and trial provides “little [opportunity for] pretrial motion practice, with cases moving so quickly that pretrial motions are generally heard the day of trial, and those raising substantive issues often result in a continuance.”

A significant minority of respondents felt that there was not adequate opportunity to engage in plea negotiations before trial, with “nearly everything” happening the day of trial “during the trial calendar.”

Regarding Court staffing, the surveys revealed concerns that trial calendars were “overscheduled,” leading to a situation where these calendars have effectively become case

review calendars, where multiple cases are called for trial and “frequently continued because the Court has insufficient resources to have more than one trial heard” on a given day.

Regarding victims and witnesses, one respondent bemoaned a situation where victims and witnesses were “having to show up... may or may not be called...” often “wait[ing] hours” before trials began late in the day, and in many instances hearing that a case has been continued. This wait often occurs in close proximity to the accused, leading to situations where “victims are revictimized.” In some instances, co-defendants have been scheduled for different days, forcing “victims to appear multiple times.” Overall, there was a feeling that victims are “left out, ignored” throughout the process and there is insufficient “emphasis [placed] on the effect the crime has [had] on the victim.”

### **1. Sentencing**

As emphasized in the Handling of Dangerous Juveniles section, there is a feeling among respondents that the risk assessment tools available to the Court are underutilized, with judges proceeding to sentencing without adequate information. There is also a feeling that insufficient emphasis is placed on restorative justice.

### **2. Facilities**

Respondents are concerned about the Family Court’s facilities. Specifically, the current setup in which victims, defendants, witnesses and families are all asked to wait in a small space with no segregation prior to court hearings is not ideal. This “face-to-face contact before hearings is a problem.” This setup has led to volatile situations that the respondents felt could have been avoided, perhaps with a “separate room for victims and witnesses, like there is for PFA victims and witnesses.”

## **CONCLUSION**

With the exception of the above themes, respondents felt that the Family Court was handling many important duties well in the criminal area. It is generally felt that the agencies involved in juvenile justice – the Attorney General, Public Defender, Youth Rehabilitation Services, Office of the Child Advocate, and DFS – have been working well together; that the master calendar is being handled effectively; and that VOP proceedings are being handled expeditiously. The mission of the Family Court to provide restorative juvenile justice is an ongoing and difficult one, and overall the responses reflected the view that due attention was being paid to most aspects of the Court's important mission.

## DELAWARE COURT OF COMMON PLEAS

### EXECUTIVE SUMMARY

The Court of Common Pleas study is based on personal interviews of experienced Court of Common Pleas participants, using a prepared list of questions, and an electronic survey provided to all DSBA members, which generated 55 additional responses. The results of the Delaware Court of Common Pleas study may be grouped into eight themes, summarized below.

- **The continued ability of the Court of Common Pleas to resolve cases quickly should be a key factor in analyzing any reforms.** The overall level of satisfaction among practitioners and judicial officers with the functioning of the Court of Common Pleas is high. A key factor in that satisfaction is the court's continued success in handling a high-volume caseload in a timely fashion. Respondents expressed great respect for the court's judges, and many of the constructive comments focused on the need for more resources, suggesting that, as a general rule, the court is using effectively the resources available to it.

The quality of the judges and the court's success in resolving cases quickly promotes a perception that two competing structural changes to the jurisdictional divisions among courts would improve overall functioning of the court system. First, with respect to jurisdiction, respondents suggested that the jurisdictional threshold for cases in the Court of Common Pleas should be increased to enable more cases to be before the court, and that a greater range of criminal cases should be within the jurisdiction of the Court of Common Pleas as well. Alternatively, respondents suggested that the Court of Common Pleas and the Superior Court

should be combined, with a division for misdemeanors and a division for felonies.

- **The court’s flexibility provides benefits, but increased uniformity among counties might be desirable.** Certain practices and procedures in the Court of Common Pleas vary from county to county, allowing each county to adapt to local facilities, staffing, and other nuances and to adopt procedures and practices that work best for the types and volume of cases that are heard by the court in that county. While permitting a certain level of variability benefits the court’s operations, uniformity of procedures and practices has benefits as well, including promoting administrative efficiencies statewide and allowing litigants and counsel to have consistent expectations regardless of the county in which a particular case may be pending. The court has been striving toward increased uniformity, a goal that the court should continue to pursue to the extent possible given the varying caseloads of the court in various counties.
- **The court mediation process is an asset.** Early resolution of cases is beneficial to the effective functioning of this high-volume court, and the participation of a “top notch” court mediator has greatly enhanced the court’s ability to resolve many cases early.
- **Views of commissioners were mixed.** Some respondents expressed the opinion that the commissioners are effective and that increased resources to support additional commissioners would therefore improve the court’s operation, while others expressed concern about the effectiveness and efficiency of the commissioners, as well as the consistency of their decision-making. This may be an area where additional study could be useful. Such additional study could objectively

(rather than anecdotally) evaluate the commissioners' performance and determine whether the level of commissioner staffing is appropriate, whether additional commissioners would benefit the court's functioning, or whether the commissioner positions should be eliminated (with or without the addition of new judicial positions).

- **Technology improves the functioning of the system but could be modernized.**

E-filing and other technological tools are beneficial to the system and should be widely available, so long as sufficient accommodations are made for pro se litigants.

The eFlex e-filing system used in the Court of Common Pleas received mixed reviews, which diverged on issues of functionality versus cost effectiveness.

Overall, the eFlex system may appropriately balance these two competing features.

Other technology used in the Court of Common Pleas, such as the case management system and courtroom technology, are unwieldy, outdated, in insufficient supply and/or lack technical support.

- **The court handles its criminal calendar effectively given the available**

**resources, but enhanced resources would enable improvements.** Overall, it appears that the Court of Common Pleas handles its criminal calendar effectively with the resources that are available to it. As noted above, the court's ability to resolve cases quickly is a key driver of perceptions of the effectiveness of the court. This holds true for assessments of the court's handling of its criminal calendar, for which the primary gauge is whether the court meets its speed trial deadlines despite handling a very large volume of criminal cases. The report summarizes respondents' suggestions for improved functioning of the court's criminal calendar;

implementation of many of these suggestions would require deployment of additional resources, including expanded facilities and additional judges, staff, prosecutors, public defenders, social workers to make victim contacts, and law clerks.

- **The problem-solving courts are generally effective but resource-intensive.** The drug diversion and mental health courts are perceived as effective, as evaluated by reduced recidivism rates. Support for the human trafficking court has waned among constituents such as law enforcement, probation and parole officers, and the community, in part because of a perception that the human trafficking court will be eliminated. Participation and referrals have therefore decreased. The veterans' court may be underutilized because of prosecutorial discretion not to divert cases.

Despite the general view that the problem-solving courts are effective overall, there is a perception that they are resource-intensive, consuming judicial time that is disproportionate to the number of participants. If it is desirable for the problem-solving courts to continue, additional resources, such as assignment of a full-time commissioner in each county to assist with the court's overall caseload, would help to preserve judicial time for the diversion courts. Moreover, efficiency of the diversion courts system-wide might be enhanced if all diversion programs (in the Court of Common Pleas and the Superior Court) were consolidated within one court or cross-appointments were made.

- **The civil appeals and transfer processes need improvement.** Respondents did not have specific complaints about the court's handling of appeals, but they noted a number of areas for improvement of the appeals process more broadly. The report

summarizes respondents' suggestions for changing the appellate rules and streamlining the appellate lines and the appellate and transfer processes.

## THEMES

### I. THE COURT OF COMMON PLEAS RESOLVES CASES QUICKLY.

**Theme One: One of the greatest strengths of the Court of Common Pleas is its ability to resolve cases quickly. Potential changes to policies and procedures, jurisdiction, and staffing should be considered in light of their impact on the Court's actual and perceived ability to administer justice relatively promptly.**

#### A. Jurisdiction

While this position was not unanimous among survey respondents, many expressed the view that the Court of Common Pleas jurisdictional limit of \$50,000 for civil cases should be increased to somewhere in the \$75,000 to \$100,000 range. Respondents suggested that a jurisdictional limit in that range would provide greater access to the prompt resolution of cases offered by the Court of Common Pleas, so long as the Court has or receives sufficient resources to handle the increased volume of cases.

Many respondents expressed the view that the jurisdiction of the Court of Common Pleas over criminal matters should also be adjusted, if resources are correspondingly adjusted and distributed to handle the various courts' respective caseloads. The suggestions for precisely what jurisdictional adjustments should be made varied widely, but two overarching themes emerged. First, because of the ability of the Court of Common Pleas to resolve cases quickly, the justice system overall would benefit if the court were given jurisdiction over a wider array of lower-level offenses, and perhaps even the ability to accept guilty pleas on at least lower-level felony offenses. Second, the jurisdictional lines between the various courts should be "cleaned up." Specifically, respondents suggested that

the Court of Common Pleas should have jurisdiction over “all misdemeanors” or at least “all misdemeanor drug charges,” rather than placing jurisdiction of certain misdemeanors in the Court of Common Pleas and others in Superior Court. Similarly, respondents suggested that the division of traffic-related offenses among the courts should be reviewed.

Others suggested that the Court of Common Pleas and the Superior Court should be merged to increase efficiencies, reduce administrative costs, reduce public confusion, and provide flexibility in judicial assignments to respond to shortages or absences for illness or disability. The merged court could have divisions, such as a separate division to handle misdemeanors, which would provide a good training ground for new judges. The merger of these courts would also be a significant step in eliminating what appears to be a widespread perception that the Superior Court judges do not understand the challenges that the Court of Common Pleas faces due to the high volume of cases in the court, and that many Superior Court judges are dismissive of the work that the Court of Common Pleas does.

Relatedly, respondents suggested a variety of offenses that are currently classified as crimes but should be reclassified as offenses that should incur only a monetary penalty and/or community service, but not incarceration. The suggestions included many motor vehicle offenses, drug possession, environmental infractions, disorderly conduct, refusing to aid a police officer, second-degree advancing gambling, and carrying a concealed dangerous instrument. In addition to promoting court organization and efficiency, these suggestions were aimed at reducing the over-criminalization of relatively minor infractions, and the attendant consequences to perpetrators of having a criminal record.

## **B. Civil Jury Trials**

Survey respondents were concerned that the addition of civil jury trials in the Court of Common Pleas would delay trial calendars and interfere with the court’s ability to

resolve cases quickly, particularly because many litigants in the court are self-represented. Others pointed out, however, that the unavailability of civil jury trials in the Court of Common Pleas enables some litigants to engage in tactics designed to “drastically delay trial” by demanding a jury trial, thus requiring that the case transfer to Superior Court, even in cases involving only nominal damages.

### **C. Assignment of Cases to Individual Judges**

Two camps of respondents also emerged with respect to the issue of whether cases should be assigned to individual judges at the time of filing or whether the Court of Common Pleas should continue the current practice, in which most cases are handled by calendar assignment. The prevailing view seemed to favor individual assignment, which would give parties greater access to judicial officers for resolution of pre-trial disputes and management of pre-trial and trial-related issues, develop “settled expectations” among litigants and attorneys, and foster earlier resolution of cases. Some respondents noted that individual assignment is particularly important in higher-value personal injury cases and certain other types of cases.

With respect to criminal cases before the court, it was noted that motions to suppress should be heard by individually-assigned judges, who would then hear the case at trial. This procedure could lend itself to presenting stipulated facts at trial before a judge who is already familiar with the facts of the case. Opponents of individual case assignment opined that the high volume of cases in the Court of Common Pleas makes individual assignment unworkable, and noted that sufficient flexibility is already built into the system. In particular, the speed docket allows parties to elect individual assignment. Moreover, more complicated cases, including those involving motions that require a judicial officer to perform substantial work on a case and issue an opinion, typically are assigned to the judge

performing that work, rather than remaining in the calendar-assignment system.

#### **D. Trial Calendars**

Some respondents observed that certain adjustments to the trial calendar process could improve efficiency, without moving to a system in which all cases are individually assigned to judges. The Court of Common Pleas currently uses a three-calendar system, which includes calendars for traffic court, jury trials, and non-jury trials. The jury trial calendar typically includes 60 cases and one judge per calendar. With this number of cases on a calendar, the calendar review absorbs most of the morning, leaving insufficient time to complete trials in the afternoon. Yet trials cannot be completed the next day, as there is usually another calendar scheduled for that day. Thus, full trial calendars can result in rescheduling cases to a date that may be two or three months in the future. One respondent opined that the “One Day One Trial” rule “is detrimental to the administration of justice and many times results in non-speedy trials.”

Respondents proposed making the calendars smaller, which presents a resource issue, as additional judges, court personnel, prosecutors, and defenders would be required to cover the resulting increase in the number of calendars. Another proposal was to limit the scheduling of DUI trials to one per day, because such trials tend to take longer than others (at least half a day) and can disrupt the rest of the calendar. Similarly, it was suggested that preliminary hearings in salacious cases (murder, infant death, correctional officer crimes) should be separately and specially scheduled because they take more time and have priority over other matters. Finally, respondents suggested that the system would benefit from clear start times, both for when court begins in the morning and for when trials begin in the afternoon, which would clearly define for defendants and witnesses when they should arrive. In fact, a significant and correctable problem was reported by some respondents,

who said that judges and commissioners often appear in the courtroom too late in the morning, when attorneys, defendants, and witnesses have been waiting.

#### **E. Speed Docket**

The speed docket appears to be a valuable tool when it is used, but it is not often elected by litigants. That may be because the average time from commencement to disposition of a civil matter in the Court of Common Pleas is 116 days, while the stated goal of the speed docket is to resolve cases within eight months. Thus, the average time to resolution is less than the target time to resolution under the speed docket framework. The speed docket rules do ensure assignment of an individual judge, however, which adds flexibility to the system overall, even putting aside the speediness issue.

#### **F. Discovery**

Respondents reported that the discovery process is often subject to delays from the attorney general's office. The public defender's office files a substantial number of motions to compel, consuming court time and resources that are in short supply. There is a perception that prosecutors need to do a better job of responding to discovery requests in a timely fashion, and that defense counsel should proactively follow up on such requests before filing motions to compel. Implementing a procedure for automatic discovery at the time of arraignment, similar to the process for automatic discovery at the time of indictment that is used in Superior Court, might improve the adequacy and effectiveness of discovery in the Court of Common Pleas.

## **II. UNIFORMITY AMONG COUNTIES**

**Theme Two: Variability in processes and procedures from county to county provides benefits, but increased uniformity among counties might be desirable.**

Certain practices and procedures in the Court of Common Pleas vary from county to

county. This variability allows the court in each county to adapt to local facilities, staffing, and other nuances and to adopt procedures and practices that work best for the types and volume of cases that are heard by the court in that county. For example, in New Castle County one judge is assigned as the office judge each week; among other duties, that judge serves as the civil motion judge on Fridays, while a second judge handles the debt collection motions and trials on Fridays. In Sussex County, in contrast, a commissioner handles the entire civil motion calendar and all pre-trial conferences.

While some level of variability can be beneficial to the efficient operation of the judicial system, uniformity of procedures and practices has benefits as well. Uniformity promotes administrative efficiencies statewide and allows litigants and counsel to have consistent expectations regardless of the county in which a particular case may be pending. For example, one survey respondent noted that the Court of Common Pleas has not been able to agree on a single scheduling order for all counties, and that the maintenance of separate scheduling orders for each county creates unnecessary complexity. Another noted that the pre-trial process could use some reform to enhance consistency statewide. Several respondents observed that forms differ among counties and even among individual judges.

The Court of Common Pleas downstate employs certain pre-trial practices that drew compliments from observers. In particular, observers noted that procedures in the Court of Common Pleas in Sussex County offer more pre-trial resolution opportunities and a more effective arraignment process than in the other counties. And in both Kent and Sussex Counties, defendants who are the subject of a *capias* because they fail to appear for a preliminary hearing get placed on a *capias* calendar, during which a plea can be achieved. This process offers another opportunity for early case resolution.

The court has been making strides to increase uniformity, including by creating uniform case management processes and a system that allows the court to extract data from all counties in a centralized way. Judicial rotation among counties could facilitate increased uniformity, but judges on the court have been resistant to a rotation system.

### **III. THE MEDIATION PROCESS.**

**Theme Three: The mediation process in the Court of Common Pleas received high marks.**

The effectiveness of the Court of Common Pleas pre-trial process is augmented by the participation of an effective court mediator, whom one respondent (among several who complimented the in-court mediator) described as “top notch” and another described as “better than most professional mediators used at the Superior Court level. Excellent.” One court observer noted that approximately 90% of cases get resolved at the pretrial conference stage. The pretrial process allows the court to become familiar with the case and evaluate whether mediation might work, particularly since the Court of Common Pleas employs a court mediator who is very effective at resolving cases. In Kent County, mediation is recommended in approximately 10-20% of cases. Of those, approximately 90% go through the mediation process, and approximately 75% of those get resolved. The biggest complaint regarding mediation is that not enough litigants use it. In contrast, one respondent stated that “[f]or attorneys billing by the hour, the amount in controversy of most cases filed in CCP does not justify the hours spent on mandatory ADR.”

### **IV. THE COMMISSIONERS**

**Theme Four: Views of the effectiveness of Court of Common Pleas commissioners were mixed.**

Some respondents expressed the opinion that the commissioners are effective, and

that increased resources to support additional commissioners would therefore improve the court's operation. In particular, it was noted that additional commissioners could help with the workload of pre-trial conferences, which, as noted above, are an effective process for identifying cases that should be mediated. One respondent noted that court efficiency would be improved if commissioners could hear violation of probation cases without consent to a guilty plea. Commissioners could also enhance the efficient operation of the court if they were permitted to decide uncontested name changes, uncontested license restorations, and uncontested pre-trial civil motions without requiring review by a judge. According to one respondent, "commissioners are most effectively used when they do things wholly within their power, so there is no need for the added time of writing a recommendation and then having it accepted, rejected, or appealed, [which] adds months to the pretrial process."

Other respondents expressed some concerns about the work done by commissioners, opining that they "take too much time on routine matters" and could "operate more efficiently" and "take their job more seriously." Some respondents also noted that the consistency in decision-making among judges and commissioners could be improved. One respondent specifically observed that the Court of Common Pleas judges are more consistent with their bail decisions and decisions on preliminary hearings than commissioners, and opined that there is a large disparity between bail decisions made by judges and bail decisions made by commissioners. Several respondents questioned the use of commissioners, suggesting that the commissioner role should be eliminated and an additional judicial position added, while others opined that the addition of commissioners would allow an expanded role for commissioners, such as the handling of pre-trial matters,

which would improve the overall effectiveness and efficiency of the court.

## V. TECHNOLOGY

**Theme Five: Technology improves the functioning of the system but could be further improved.**

### A. E-filing

Survey respondents were overwhelmingly of the opinion that e-filing should be available and required in all cases, so long as sufficient accommodations are made for pro se litigants. E-filing is efficient, saves resources, and allows filings outside of court hours. The e-filing system is coordinated with the Justice of the Peace Court e-filing system, which is helpful when the Court of Common Pleas hears appeals from that court.

The eFlex e-filing system currently used in the Court of Common Pleas received mixed reviews. Some respondents stated that they prefer the eFlex system to the systems used in other Delaware state courts. One reason given is that the eFlex system is more cost effective and increases access to court documents because it allows a user to view docket items without charge, even if the viewer was not the filer or a service recipient of the document.

But a number of respondents stated that the File & Serve Xpress system used in some of the other Delaware state courts and the e-filing systems used in the federal courts are preferable because they are more intuitive, more cost-efficient, and/or more reliable than eFlex. General comments included that eFlex is “archaic” and “too complex, but at the same time lacks function.” The eFlex system was similarly criticized for prompting a “push to file things to suit the computer systems” when “the computer systems should bend to the criminal justice system rather than the other way around.” Some respondents also stated that e-filings are rejected for insignificant reasons (such as not having two zeros before the

attorney's bar identification number or not including counsel's middle name), while others said that court staff processes e-filings quickly and provides specific explanations if a filing needs to be reworked and resubmitted. Finally, a respondent noted that a different e-filing system is used for motor vehicle administrative appeals than for civil cases in the Court of Common Pleas and opined that all cases in the court should use the same system.

### **B. Case management system**

The current electronic case management is labor-intensive, with many screens to click through and duplicate entries that are required to be made. The system could be improved and streamlined, particularly by causing later sections (financial information) to auto-populate from information drawn from sections completed earlier (docketing on disposition).

With respect to case scheduling, the court automatically schedules cases without checking availability; if counsel is unavailable, counsel must seek a continuance. Use of a system like Matrix, which is used in Superior Court, could enhance efficiency.

### **C. Courtroom technology**

Survey respondents lamented the dearth of technology available for trials in the Court of Common Pleas courtrooms. They noted that the equipment that is available is outdated, there does not seem to be any training for court staff regarding the use of the technology, and "the amount of time and effort that goes into playing a simple DVD is astonishing."

## **VI. THE CRIMINAL DOCKET**

**Theme Six: The Court of Common Pleas criminal calendar is handled effectively given the available resources, but enhanced resources would enable improvements.**

The overall view was that the Court of Common Pleas handles its criminal calendar

effectively with the resources that are available to it. The primary gauge for this conclusion was that the court meets its speedy trial deadlines despite the very large volume of criminal cases before the court. The case review process is key in the court's management of the volume: approximately 50% of cases are resolved by the prosecutor and public defender or defense counsel at case review, without trial. The case review process also provides an opportunity for the court to recommend that a defendant obtain counsel, particularly in DUI cases, which frequently present complex evidence issues.

Much of the constructive feedback centered on changes that would require deployment of additional resources, including additional judges, staff, prosecutors, public defenders, social workers to make victim contacts, and law clerks to alleviate the research and writing burden that judges face. Some respondents also noted that the courtroom sizes are inadequate to handle the volume of cases scheduled for the criminal calendars.

A shortage of prosecutors at arraignment calendars impedes the early resolution of cases. One specific example of this relates to the court's use of the video calendar for detainees. For the video calendar, the public defender is at the prison site with the defendant, but no prosecutor is in the court room or otherwise participating. If a prosecutor were present, however, the court could accept pleas over the video, reducing time in custody. Thus, changes to the resources available to, or staffing decisions made by, the Department of Justice could allow early resolution of more cases.

Another respondent suggested that electronic communication between prosecutors and defense counsel could be used to streamline the pretrial process. Specifically, if prosecutors and defenders communicated electronically to determine which cases could be resolved by plea deals, then the case review calendar could include only those defendants

that accepted a plea deal, thereby reducing the size of the case review calendar and the number of people who need to appear for that calendar.

The jury trial calendars are overloaded due to the high volume of cases, sometimes leading to a cascade of issues. A typical jury trial calendar includes 60-65 cases, which results in the calendar running into the afternoon. As noted above, this leaves insufficient time to select juries and conduct trials in the afternoon of the same day, and no additional time is reserved for such trials, as the court has another calendar scheduled the following day. One respondent noted that this issue is particularly problematic on days when the Court of Common Pleas is sharing a jury pool with the Superior Court. Moreover, when the calendar is not completed in the day scheduled, a case may be rescheduled to another date two or three months later.

Respondents made various suggestions to address the trial calendars. Calendars could be made smaller, which would require additional court, prosecutorial, and defense resources. A maximum of one DUI case could be scheduled per day, in recognition of the fact that such trials typically take at least 1/2 day, which is significantly longer than other trials in the court. Or the court could find a way to move the calendar more quickly in the morning, leaving more time for trials in the afternoon.

It was also suggested that the court could provide more certainty to litigants, counsel, and court staff by adjusting the schedule for the calendars to establish a set time (such as immediately following the lunch break) for trials to start. While achieving this goal would likely need to be coupled with the other adjustments discussed above, such as reducing the size of the trial calendars, this would reduce the time that people spend idly waiting. Similarly, the court could call cases involving defendants with private

representation first to reduce cumulative wait times. It was also noted that the precedence assigned to cases when scheduling (as between Superior Court and the Court of Common Pleas) should take into account the individual circumstances of a particular case. For example, it should account for whether a misdemeanor defendant is imprisoned, while a felony defendant is not, before automatically giving the felony case precedence.

Other feedback included a recommendation for adjustments to the criminal motions calendar. This respondent reported that six or seven motions, such as motions to suppress evidence, are scheduled at a time, but the court usually has time to resolve only one of those. The other five or six motions get rescheduled to a later date, creating inefficiencies that could have been avoided if the calendar had not been overscheduled in the first place.

The scheduling and handling of bail hearings were also addressed. Comments included a suggestion that bail hearings be scheduled sooner, since delays in this process impact people who are waiting in prison.

Finally, a respondent noted that resources would be saved if a single law enforcement officer could handle all cases in a given day, instead of having multiple officers wait for multiple cases to be called (often only to be continued until a later date anyway).

## **VII. PROBLEM-SOLVING COURTS**

**Theme Seven: Problem-solving courts are generally considered effective but resource-intensive.**

The drug diversion court is perceived as very effective, with many positive success stories and reduced recidivism rates. The mental health court is also seen as generally effective. It has an increasing number of participants and enhanced effectiveness after a recent reorganization, although some observers doubt the legal system's qualification to

treat mental health issues and opine that if a mental health issue means that a person lacks mens rea, the court system should not remain involved. Reviews of the human trafficking court were more mixed, and focused on the magnitude of resources being expended on a very small number of participants. Although the human trafficking court initially had the support of law enforcement and other stakeholders, such as probation and parole and the community, support has become less consistent and there is a perception that the human trafficking court will be eliminated, which has led to a drop in the level of referrals and participation. One respondent noted that the veterans' court is not being handled well, because the manner in which cases are accepted is too unpredictable. In that respondent's view, prosecutors have too much discretion not to accept a case in the veterans' diversion court program, even when all other parties, including the court, believe the diversion court would be appropriate.

The diversion courts are resource-intensive, consuming judicial time that is disproportionate to the number of participants. Assignment of a full-time commissioner in each county to assist with the overall caseload would help to preserve judicial time for the diversion courts. Efficiency of the diversion courts might be enhanced if all diversion programs (in the Court of Common Pleas and the Superior Court) were consolidated within one court or cross-appointments were made.

## **VIII. APPEALS AND TRANSFERS**

### **Theme Eight: The civil appeals and transfer processes need improvement.**

#### **A. Appeals**

While respondents were generally of the view that the Court of Common Pleas handles civil appeals effectively, they noted a number of areas for improvement of the appeals process more broadly. Noting that the rules can be confusing for litigants, some

opined that the “current system sets litigants up to make mistakes, which does no justice,” that the “rules/law on appeal should be rewritten” and “streamlined,” and that the system might be improved if all appeals from the Justice of the Peace Court went to the Court of Common Pleas. Similarly, another respondent suggested that perhaps some of the existing courts could be eliminated entirely, but that if all the courts are maintained, appeals should flow in a single, direct line from one court to another, rather than having different types of cases or issues from a single court flow to different courts for review.

Several respondents cited a particular rule -- the “mirror image rule” -- as being hyper-technical and causing problems, including “many unnecessary motions attempting to dispose of cases for mirror image violations.” As an example, one respondent observed that if the Justice of the Peace Court issues a judgment in a landlord-tenant proceeding and the tenant moves out, such that the issue in the case is only about money and not possession, an appeal would go to the Court of Common Pleas. But if the landlord wants money *and* possession, an appeal would go to a three-judge panel of the Justice of the Peace Court, with no right of review except an appeal to Superior Court. The issue arises because in the Justice of the Peace Court a business may be represented by an executive of the business, while in the Court of Common Pleas a business must be represented by counsel. Thus, once counsel is retained for an appeal in a money-only case, counsel identifies additional issues, files a complaint raising those issues, and defeats appellate jurisdiction in the Court of Common Pleas, based on the mirror image rule. This issue does not arise in the money-and-possession cases, for which review is before a three-judge panel, yet there is no sensible reason for the distinction.

Additional suggestions regarding potential improvements to the appellate process

included that trials de novo should be eliminated, especially for Title 21 driving offenses, because they inefficiently give litigants “two bites at the apple,” and that the appeals process from the administrative hearing on DUIs is “effectively broken,” particularly because “getting the record from the DMV takes many months.” One respondent noted that the process by which the Court of Common Pleas gets notice of a reversal and remand by the Superior Court is inconsistent.

### **B. Transfers**

Respondents expressed concerns about the process for transferring cases from the Justice of the Peace and Alderman’s Courts to the Court of Common Pleas, citing delays in the processing of cases, clerical errors, and confusion among litigants about the transfer process. It was noted that cases too often “sit in limbo,” and that prosecutors cannot dispose of or resolve cases that are pending the Justice of Peace Court but have not yet been transferred to the Court of Common Pleas.

## **CONCLUSION**

Participants in the interviews and survey have an overall favorable perception of the functioning of the Court of Common Pleas. Many of the suggestions for improvement could only (or best) be achieved if additional resources were made available. Specifically, the high volume of cases leads to oversized and backlogged criminal calendars. But many of the more targeted suggestions for improving the handling of the court’s criminal calendars would involve having more judges, prosecutors, and defenders available to handle the caseload. Moreover, courtroom, case management, and e-filing technology could be improved with an appropriate budget and focus on these issues.



# **JUSTICE OF THE PEACE COURT**

**Prepared by the Administrative Office of the Courts  
in conjunction with the ACTL and DSBA review of the Delaware Court system**

## **SURVEY BACKGROUND**

The Administrative Office of the Courts expresses its gratitude to Chief Magistrate Alan G. Davis and the Justice of the Peace Court (“JP Court”) for their assistance in creating the electronic survey that serves as the basis for this report, in conjunction with the American College of Trial Lawyers (ACTL) and the Delaware State Bar Association’s (DSBA) review of the Delaware Court system.<sup>1</sup> In addition to the personal interview that the ACTL conducted related to the JP Court, an online survey was electronically circulated to all members of the DSBA and others in the spring of 2015. The JP Court survey was reopened in January 2016 and distributed to the Office of the Attorney General and the Office of Defense Services. A total of 186 responses to the JP Court electronic survey were received, with 74 responses being submitted in the spring of 2015 and another 112 responses when the survey was reopened in January 2016. Similar to the interviews conducted by the ACTL and DSBA, online survey respondents were assured anonymity. Answers to the questions were optional and respondents were permitted to skip questions if they chose to do so. Therefore, the response sample for many questions was less than the total number of survey responses received (186). Additionally, respondents were given the option to provide additional written comments. On average, 26 additional comments were received for each question, although the number of comments ranged from 10 to 63, depending upon the question. The questions receiving the most comments related to recommendations for changes in the criminal jurisdiction for JP Court.

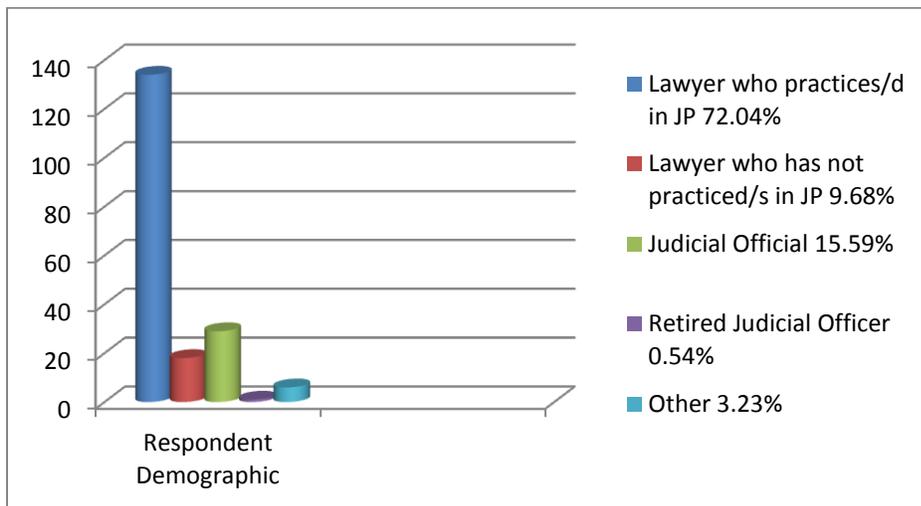
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<sup>1</sup> Information about the JP Court was collected through electronic survey only.

This report synthesizes the survey responses and recommendations made by respondents.

### Who Are the Respondents?

The response group to the electronic survey was comprised of the following: (1) 72.04% lawyers who practice or have practiced in JP Court; (2) Judicial Officers - 15.59%; (3) lawyers who do not practice in JP Court - 9.68 %; (4) other - 3.23 %; and (5) retired Judicial Officers - 0.54%. The majority of respondents (76%) practice in New Castle County with an even distribution of respondents from the lower two counties (Kent County - 34%; Sussex County - 31%). Forty-one percent of respondents indicated that they practice in more than one county.



Additionally, the responses reflect a broad range of legal experience as 44% of respondents reported having fewer than 10 years of experience and roughly 56% reported having more than 10 years of experience.

## **JP COURT'S CIVIL CASELOAD THEMES**

Exactly half of those who responded to survey questions relating to JP Court's civil caseload indicated that they have experience with civil matters in JP Court. A few recurring themes emerged regarding JP Court's civil practices and procedures:

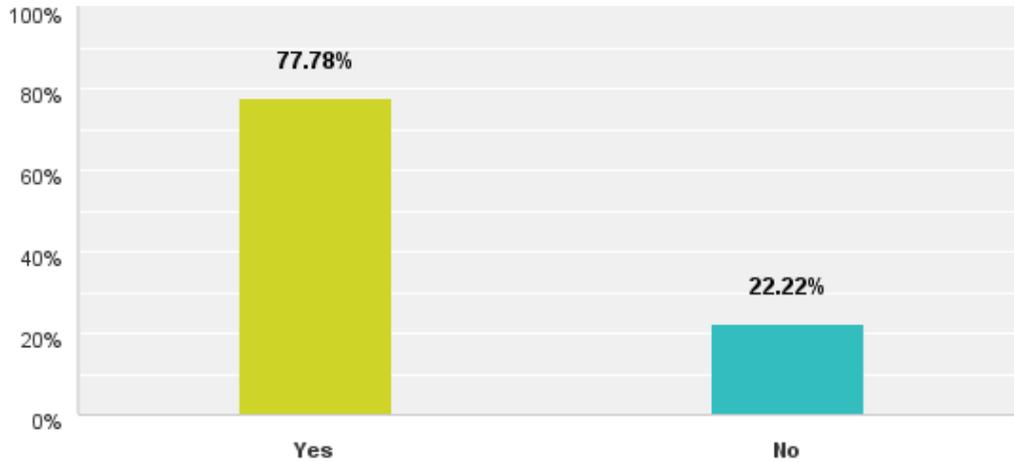
- JP Court's civil docket, while not perfect, is handled efficiently by the court. Cases are disposed of quickly and at low cost to the litigants. When concerns were raised they tended to focus on the lack of law trained judges and a perception that cases are handled inconsistently between the different courts and across the counties.
- The majority of respondents do not think that changes to JP Court's civil jurisdiction are needed. Respondents were hesitant to change anything that might slow case dispositions. However, a significant number of responses suggested increasing the jurisdictional threshold to at least \$20,000 to account for inflation.

### **1. JP COURT HANDLES CIVIL CASES EFFECTIVELY**

The vast majority of respondents agreed that the JP Court handles its civil caseload effectively.

## A. Non Landlord/Tenant Cases

*Are civil cases (non landlord/tenant) in JP Court being handled effectively?*

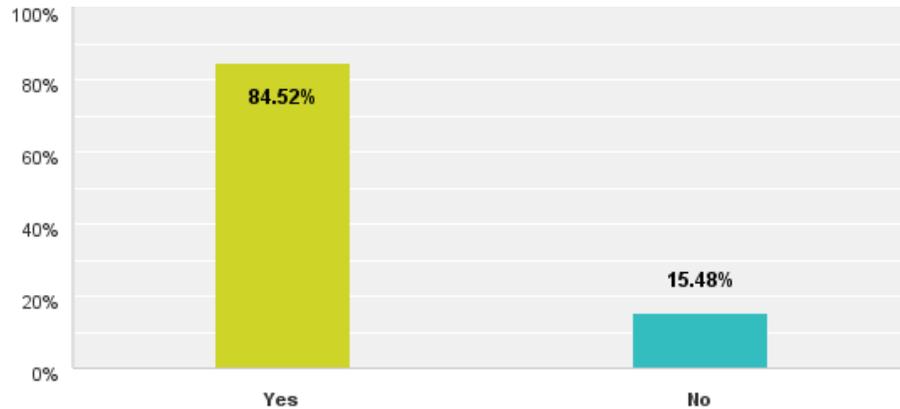


*Answered: 81 Skipped: 105*

Close to 78% of respondents were of the view that that non landlord/tenant cases are effectively handled by the court noting that the system works well and that these cases are disposed of quickly. About 22% of respondents disagreed and raised concerns about the perceived lack of consistency among judges. One respondent suggested that there is an “inconsistent understanding of evidentiary rules among judges.” Another respondent suggested that “the pressure to quickly resolve cases causes some judges to spend an inadequate amount of time with more complex matters.” The lack of legally trained judges was cited repeatedly as a concern in comments to this question as well as throughout the survey.

## B. Landlord/tenant Cases

*Are landlord/tenant cases in JP Court being handled effectively?*



*Answered: 84 Skipped: 102*

An overwhelming majority of respondents (84.9%) believed that landlord/tenant cases are handled effectively by the JP Court. As with the non landlord/tenant cases, respondents expressed a perception that cases are not consistently handled and were critical of the lack of legally trained judges.

## 2. ORGANIZATIONAL CHANGES TO THE CIVIL DOCKET

Several survey questions solicited input on specific aspects of JP Court's organization and operations.

### A. Should JP Court continue to conduct jury trials in landlord/tenant possession cases?

Approximately 72% of respondents agreed that JP Court should continue to conduct jury trials in landlord/tenant possession cases. Some respondents questioned whether JP Court judges

are qualified to preside over trials as they are not legally trained and have a limited understanding of the evidentiary issues.

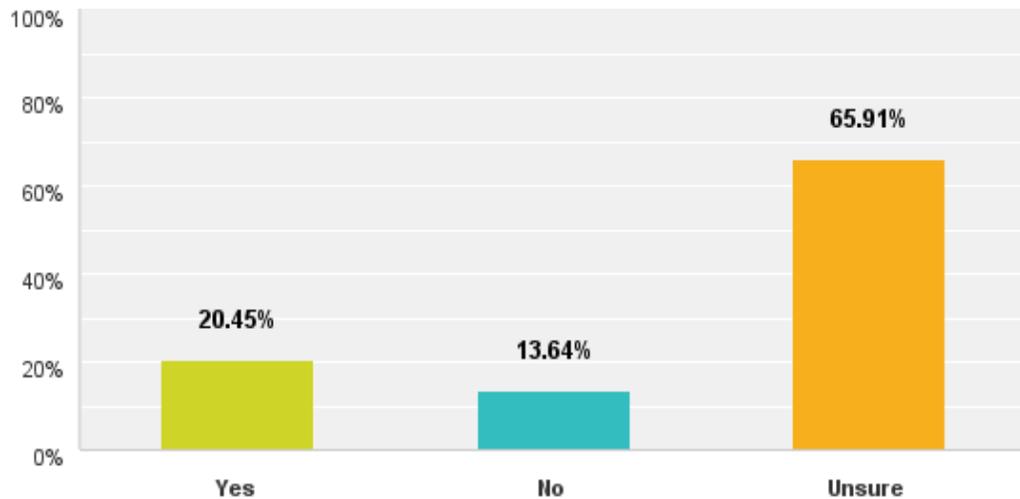
### **B. Case Assignments**

About 58% of respondents do not support individual civil case assignments in JP Court. These respondents argued that the current procedure is working and individual assignments might slow the process. About 42% of respondents agreed that individual case assignments might be beneficial to ensure consistent handling and allow for more thoughtful review particularly in complex cases.

### **C. Appeals**

Recommendations regarding the appeals process were inconsistent. Approximately two-thirds of respondents (65.9%) were unsure whether or not changes were needed. About 20% of respondents thought that the process might be improved, although specific recommendations varied. Suggestions for change included the following: eliminate the mirror image rule; create a written record for appeals; and clarify the rules related to appeals. Slightly less than 14% of respondents felt that no change was necessary.

*Are there better ways to handle civil appeals to the Court of Common Pleas?*



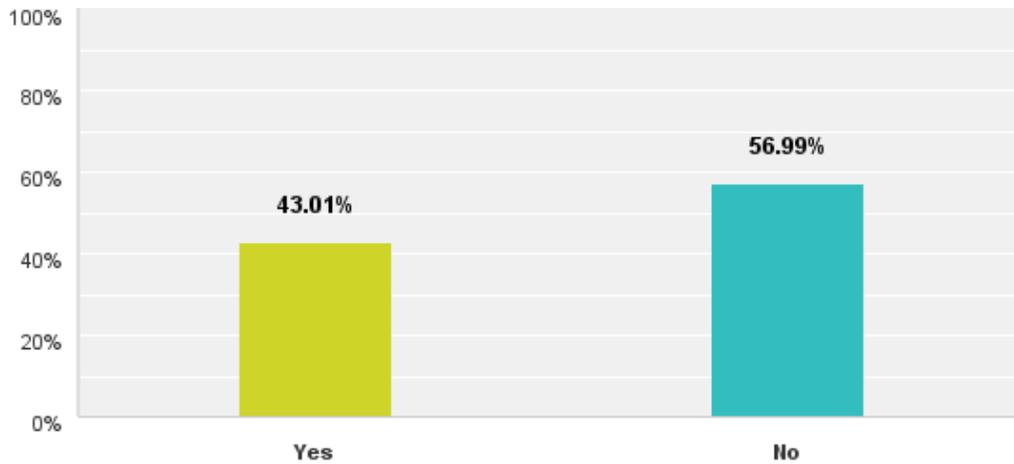
*Answered: 88 Skipped: 98*

### **3. CHANGING THE JURISDICTIONAL THRESHOLD**

A number of survey questions focused on whether changes to JP Court’s civil jurisdiction are warranted. There was a solid consensus among respondents (63%) that civil jurisdiction should stay the same. Those respondents that advocated for the *status quo* viewed JP Court’s ability to quickly dispose of cases as an advantage and worried that an expanded case load might slow disposition rates. A quarter of respondents (25%) recommended expanding civil jurisdictional limits, while 12% of respondents suggested restricting jurisdiction. When asked specifically about expanding the jurisdictional amount, 57% of respondents against raising the threshold as compared to 43% in favor of increasing the limit. Those in support of expansion recommended increasing the jurisdiction limit anywhere from \$20,000 to as high as \$50,000. Adjusting the limit to account for inflation was cited most often as the reason for the increase.

One respondent noted that the current cap is particularly problematic in landlord/tenant possession cases with past due rent disputes when the past due rent exceeds the monetary cap – “the case ends up being split between the JP Court and the Court of Common Pleas (CCP), causing confusion among the litigants and the JP Court personnel.” Supporters of an increased threshold noted that increasing the monetary threshold would allow JP Court to adjudicate the entire case, rather than having the case flow to CCP where the litigation is more expensive for litigants. Those respondents who do not approve of expansion mentioned the lack of law trained judges and absence of a written record as the bases for their opinion.

***Should the jurisdictional threshold of \$15,000 be adjusted?***



*Answered: 93 Skipped: 93*

**JP COURT’S CRIMINAL AND TRAFFIC CASELOAD THEMES**

Approximately 75% of the responses received from those answering the survey questions related to criminal and traffic cases in JP Court were active or former practitioners in JP Court. Given the overall demographics of survey respondents, it is likely that a significant number of these respondents reside in New Castle County and have over 10 years of experience.

Three general themes that emerged from the survey responses on criminal and traffic cases in JP Court are set forth below, with other specific comments discussed further in the report.

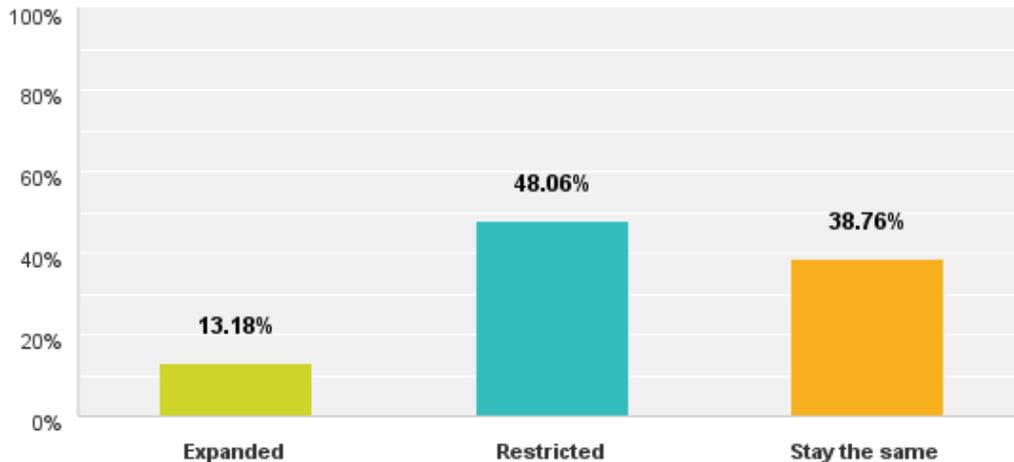
- Generally, JP Court handles its criminal docket efficiently. However, DUI jurisdiction should be moved to the Court of Common Pleas.

- The lack of legal training among JP Court judges may create issues in more complex cases.
- Citizen warrants should be eliminated.

## 1. CHANGING CRIMINAL JURISDICTION IN JP COURT

A majority of respondents (62%) agreed that JP Court manages its criminal docket effectively. However, there was a strong sentiment among respondents that DUI cases would be better handled in the Court of Common Pleas (“CCP”). Several survey questions were directed at changes to criminal jurisdiction. Despite the generally favorable rating of JP Court’s handling of criminal cases, about 48% of respondents expressed the view that criminal jurisdiction should be restricted; about 39% suggested it should remain the same with only 13% indicating that jurisdiction should expand.

*Should the court's criminal and/or traffic jurisdiction be expanded or restricted?*



*Answered: 129 Skipped: 57*

In another question, respondents were asked whether jurisdictional or organizational adjustments should be made to enhance the court system's effectiveness. Approximately 61% of respondents agreed that adjustments are warranted, while approximately 39% do not agree. For those seeking to change or limit jurisdiction, the handling of DUI cases was cited repeatedly as an issue. Two specific problems were identified throughout the survey in response to questions about criminal jurisdiction: (1) the dual process for DUI cases with many being transferred to CCP renders the process inefficient, and (2) DUI cases should not be handled by judges who are not legally trained.

Sample comments follow:

- “[T]here is no reason for JP courts to hear DUI cases. DUI's hinge on the suppression law (more than other cases). DUI cases are won and lost at suppression, and many of the DUI-related suppression issues are legally nuanced. Having a non-law trained Judge handling those doesn't make sense.”
- “All DUI cases should be handled in the higher courts in light of the collateral consequences and the severe consequences for subsequent offenses unless the law is expressly amended to provide that prior DUI convictions in JP Courts do not constitute a subsequent offense.”
- “Justice of the Peace Court should be divested of jurisdiction over DUI cases, or in the alternative, appeals from DUI cases from JP Court to CCP should be heard on the record, not de novo.”

Although a few respondents commented negatively on JP Court’s handling of truancy cases in general questions related to jurisdiction, this criticism did not feature predominantly in the specific question targeting truancy. This is probably due to the small response sample. Sixty-five of the 186 surveys chose to skip this question. Of those who did answer, the vast majority of respondents indicated that they had no experience with truancy in JP Court (82%). Only 22 responses gave a definitive answer to the question whether truancy cases are handled effectively by JP Court: 15 responded yes, while 7 answered no. The few comments received suggested that truancy matters be moved to Family Court and that Family Court services were best equipped to handle the issue. One comment noted that truancy court works well for some kids and not as well for others. Additionally a few respondents commented on the JP Court’s handling of citizen warrants and suggested that they should be eliminated altogether. Those responses in favor of expanding jurisdiction focused on the reclassification of certain criminal offenses as violations, including low level drug offenses and Title 21 offenses (not DUI).

## **2. ORGANIZATIONAL CHANGES TO THE CRIMINAL DOCKET**

Several survey questions solicited input on specific aspects of JP Court’s organization and operations.

### **A. Warrants**

The majority (58%) of respondents agreed that warrants are handled effectively in JP Court. Several respondents expressed frustration with citizen warrants, articulating the view that they should be eliminated. Respondents were split with some stating that warrants “should be reviewed more carefully and are granted at will”; others suggested that judges are “refusing to sign arrest warrants despite the presence of probable cause.” It is likely that the discrepancy falls

along the lines of prosecution vs. defense counsel. However, the survey did not ask respondents to identify practice area.

### **B. Bail**

Similarly, the majority of respondents (63%) indicated that the bail process in JP Court is working well. One respondent noted that the new risk assessment tool provides good guidance to judges making bail decisions. However, about one-third of respondents (37%) expressed concern on the following issues: (1) money bail should be eliminated; and (2) felony bail should not be set at the JP Court level because judges are not formally trained.

### **C. Trial Calendars**

Respondents were overwhelming of the view (73%) that trials are handled well by the JP Court. The accessibility of the court and the quick handling of cases were cited repeatedly as a positive attribute. Concerns focused again on the lack of legal training of judges and the trial *de novo* to CCP.

### **D. Transfers to Court of Common Pleas**

There was a strong consensus (79%) that transfers to CCP are effectively managed. However, a few respondents expressed concern about whether it was an efficient use of resources. One respondent noted that “[m]ost transfers are handled effectively. There is an ongoing issue with J.P. Courts splitting charges in a single case and sending the felonies to CCP for preliminary hearing and sending associated traffic offenses for arraignment. I have seen countless examples of this over the years.” Another commented that “[i]t is not efficient to have cases tried in JP Court and then heard on *de novo* appeal in the Court of Common Pleas. This system wastes everyone's time in JP Court.”

## **E. Appeals**

Sixty-four percent of respondents were unsure whether the criminal appeals process needs modification. Of the 13% who noted that changes were needed, most suggested that appeals be made automatically and on the record. A few responses noted that the JP Court decisions were “unpredictable” and that cases “typically end up being appealed to CCP.” A handful of respondents pointed out that “the speed in which cases are resolved lead to less than quality outcomes which result in procedural violations.” Another commented that *pro se* parties do not necessarily appeal because they “do not understand the process.” Some respondents recommended waiving the requirement of filing a Notice of Appeal in both CCP and JP Court for *pro se* litigants.

### **3. PRO SE LITIGANTS**

There was strong consensus among respondents (79%) that the JP Court handles *pro se* litigants effectively. However, a number of respondents perceived that *pro se* litigants are given too much deference by the Court.

A few respondents had suggestions for improvement:

- More readily available information to guide litigant through the process.
- Court should provide coin-operated copiers, and a dress code.
- Summons should explain deadline for filing motion to vacate default judgment.
- List more restrictive deadlines first on appeal page.

#### **4. ADMINISTRATIVE SUPPORT SERVICES**

Respondents were asked a series of questions regarding the administration of JP Court. Respondents had no clear view on whether JP Court administrative support services need improvement; 53.5% were unsure; 27% responded that improvements were needed while 19.1% said no improvement is necessary. A few respondents commented on the lack of full staffing in all JP Courts, but especially in the 24 hour courts. Others noted the following concerns:

- Clerks have too much leeway to accept or reject pleadings.
- Clerks do not provide clear information or consistent answers to questions regarding filings or procedure in JP Court.
- Staff attorney should provide more assistance to non-lawyer judges.
- Disconnect between administration and front-line staffing should be resolved.
- Deny insufficient security to handle continuous court proceedings.
- Low salaries and no pay raise for JP Court staff that leads to high attrition rates after considerable time is spent training staff.
- Administration needs more support from overall judiciary.

##### **A. JP Court Staffing**

Fifty-eight percent of respondents were not sure about the staffing needs in JP Court. Seventeen percent responded that additional staffing is needed while 25% argue that it is not. Additional responses offered comment on the following:

- Innovative incentives are needed to reduce turnover.
- More pay to attract more qualified employees.

- Attracting qualified employees for shift work is difficult because of “uncompromising scheduling and supervisors.”
- More judges in Kent County are needed – it “has the same amount of judges as it was originally assigned in 1965.”
- JP Court does “not have enough staff statewide to support the caseloads they are processing each day.”

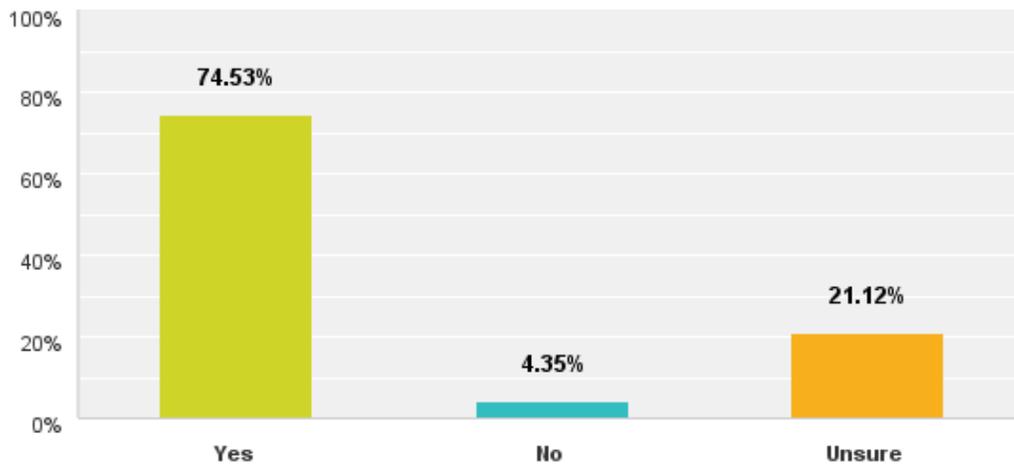
### **B. Parking, space, facility improvements**

When asked if the Court has adequate facilities and equipment to perform its work 30% of respondents answered yes, 24% answered no, and 45% were unsure. Some respondents were of the view that more security is needed in the JP Courts. Another respondent recommended moving the JP courts into the same spaces as the rest of the Courts so they have “similar security and similar respect.” Another respondent raised concerns with Court 13, including space issues, bad access, and other renovation needs.

### **C. Consistent operations within the JP Court**

Respondents were asked whether JP Court operates consistently within each of the three counties and across all JP Court locations. The majority of respondents (60%) were unsure how to answer the question. Thirty percent of responses indicated that the courts are not consistent, while 9% believe that there is consistency between the courts. However, when asked whether procedures should be uniform across the courts, an overwhelming majority (75%) of respondents agree that uniformity is desirable.

*Should JP Court have uniform procedures across all three counties and in every JP Court location?*



Answered: 161 Skipped: 25

#### **D. Modify fee structure**

A slight majority of respondents (56%) think that the courts should review their current fee structures to determine whether modifications are needed; 37% were unsure and 6% said no. Several respondents noted that the fees are “extremely out of date and not consistent across courts.” Another comment argued that if the courts were to modify the fee structure, a cost impact to litigants study should be conducted. Other respondents questioned whether *pro se*

litigants can afford access to JP courts now given the amount of fees and suggested a different fee schedule for “self-represented filers.”

### **E. Technology**

Answers to questions related to the use of technology in JP Court suggest that this is an area for improvement – some of which is already underway. Almost one-third of respondents (28%) do not think that JP Court uses technology effectively. Questions targeting specific technologies reveal a strong consensus that advancements are needed. For example, a clear majority of respondents (64.7%) agree that there should be a single case management system and 72% of respondents think that one consistent electronic filing system for all courts is a good idea. Other suggestions for enhanced technology include automating check writing, and credit card scanners for payments. This would seem to align with efforts to expanded payment kiosks across the state.

## **CONCLUSION**

Overall, respondents expressed a positive view about JP Court’s handling of both its civil and criminal caseloads. Respondents noted an appreciation of the JP Court’s quick and efficient disposition of cases at a low cost to the litigants. Similarly, respondents generally approved of the way the court handles *pro se* litigants. Respondents also made suggestions to enhance the court’s current practices, including a review of the court’s current fee structure, moving to one statewide case management system and e-filing, and clarifying rules and procedures to more effectively guide *pro se* litigants. Respondents also expressed the view that the JP Court’s

procedures should be consistent across all courts and counties. As for JP Court jurisdictional limits, while there was solid support on the civil side to maintain the *status quo* on jurisdiction, a significant number of respondents suggest raising the threshold limit to at least \$20,000 to account for inflationary increases. Despite respondents' generally positive view of the court's handling of its criminal docket, a significant majority of respondents recommended moving DUI cases to CCP. Finally, respondents were critical of the use of citizen warrants and recommended that they be eliminated.

## ADMINISTRATIVE LAW

### EXECUTIVE SUMMARY

This report is based on in-person interviews with selected members of the Delaware Bar who regularly practice administrative law and appear before administrative agencies, using a prepared list of questions, and an on-line survey distributed to all members of the Delaware Bar covering many of the same questions and issues as the in-person interviews, which elicited approximately 75 responses. Respondents included practitioners, judicial officers, and administrative law hearing examiners spanning all three Delaware counties. Most respondents were very experienced Delaware lawyers having practiced twenty or more years, although more junior practitioners were also included. The great majority of respondents had practiced before hearing examiners as part of an administrative tribunal process, before a wide range of agencies and boards, and in a plethora of practice areas. Respondents captured a broad array of administrative law practice in Delaware and have provided valuable insight.

Respondents provided a number of suggestions to improve upon the current system of administrative law in Delaware. Specifically, eight themes emerged from the interviews regarding issues with and improvements to the substantive and procedural aspects of administrative law. These eight themes are summarized below.

- ***Administrative law practitioners agreed that most hearing examiners render fair, objective and thoughtful decisions, but also shared concerns regarding hearing examiner competence, bias, and the hearing examiner selection process.*** Most practitioners believe hearing examiners are fair, objective, and thoughtful. However, many provided examples of inconsistency and instances where hearing examiners lacked sufficient learning and knowledge to perform their duties adequately. To remedy these

problems, many practitioners suggested the State adopt an administrative law judge system. Practitioners would also like to see the State address the perceived bias of hearing examiners to rule in favor of the examiner's assigned agency, and issues with the political appointment of hearing examiners.

- ***A clear majority of administrative law practitioners have significant concerns regarding the “substantial evidence” standard utilized in Superior Court administrative appeals.*** Practitioners believe the current appellate standard of review is far too limiting to allow for meaningful appellate review. Although practitioners understand this deference is premised upon the assumed expertise of underlying administrative bodies, many practitioners view this rationale as misguided, because too often tribunals and board members are not sufficiently trained or provided with requisite support to perform their roles properly. Furthermore, practitioners do not believe the standard is sufficiently clear to be applied consistently.
- ***In most administrative appeals, timeliness is not typically problematic. However, practitioners favor limited opportunities for expedited review.*** Timeliness of appeals was not viewed as a problem for most administrative appeals, but practitioners suggested that expedited review should be available for certain cases, such as those impacting public health and safety, or that present significant financial implications. Practitioners suggested an injunctive process with an irreparable harm standard, or establishing clear guidelines for when a case will receive expedited review by the courts.
- ***Practitioners strongly agree that Supreme Court review of administrative decisions is necessary and that eliminating Supreme Court appellate review would be ill-advised.*** The majority of practitioners believe the availability of Supreme Court review is

necessary because it provides finality, uniformity and predictability in administrative law. Practitioners recognize this review is resource-consuming, but it is viewed as greatly enhancing the substantive quality of outcomes. A minority of practitioners support eliminating Supreme Court review and offered various alternatives to Supreme Court oversight, such as limiting review to issues of first impression, or requiring the appellant's attorney to certify that the appeal involves a legal, as opposed to factual, issue.

- ***Most administrative law practitioners interviewed agreed that administrative tribunals in Delaware should be uniformly subject to the Delaware Administrative Procedures Act (“APA”), but believe that the APA should be updated.*** Practitioners often cited inconsistency as a significant issue with the practice of administrative law in Delaware and believe all administrative tribunals should be subject to the APA or uniform judicial review to prevent arbitrary or capricious action. Additionally, practitioners encouraged a comprehensive review and revision of the APA and suggested a number of improvements, such as increased use of independent administrative law judges and less deference to agency tribunals on appeal.
- ***A majority of administrative law practitioners believe all administrative appeals should go to a single court.*** Most practitioners agree that administrative appeals should go to a single court -- even suggesting a special administrative law court within the Superior Court -- and some practitioners who do not support a single-court appellate system would still suggest that a single court handle appeals in certain administrative practice areas.
- ***Practitioners expressed the view that administrative agencies, trial courts handling appeals, and the Supreme Court are not on the same page regarding administrative***

*law*. Practitioners consistently voiced dissatisfaction with what they perceive as a disconnect between the procedural rules used by the courts and those used at the agency level. Many practitioners believe agencies should employ more robust rules of evidence, and provide an opportunity for discovery, to give litigants a fair opportunity to present and defend their case, and those rules, whatever they may be, should be uniformly applied to all agencies. Practitioners also suggested greater training for members of agency tribunals, and recommended that board counsel should take a more active role in offering substantive guidance or correcting obvious errors arising in proceedings, particularly to avoid erroneously accepting incredible evidence or succumbing to public pressure.

- ***Practitioners suggested a number of changes to the current administrative law system to engender more fairness, predictability and efficiency.*** Some examples of suggested improvements are (i) using independent administrative law judges, (ii) creating a specialized court to hear administrative law matters, (iii) greater consistency of procedural rules across agencies, (iv) publication of agency decisions, (v) limiting remand, and (vi) modifying the current standard of review.

## THEMES

### I. HEARING EXAMINERS

**Theme One: Administrative law practitioners agree most hearing examiners render fair, objective and thoughtful decisions, but also share concerns regarding hearing examiner competence, bias, and the hearing examiner selection process.**

**A. There is variance in hearing examiner quality.**

There was strong consensus among respondent practitioners that hearing examiners generally render fair, objective, and thoughtful decisions. Respondents agreed most hearing officers are well-intentioned professionals attempting to address often complicated issues with limited resources. Hearing officers were described as “diligent and thoughtful” professionals who typically write “thoughtful decisions.” Some respondents noted hearing examiners are not used by all agencies and suggested that universal use of hearing examiners would be an improvement. However, many respondents who believed hearing examiners typically are fair, objective, and thoughtful also recalled instances when hearing examiners did not perform appropriately.

Practitioners noted issues with hearing examiner ability, stating that “the quality of examiners varies greatly” and that as a best practice hearing examiners should be lawyers and not necessarily state employees. Practitioners noted issues with non-lawyer hearing examiners, including increased vulnerability to “incredible unscientific claims.” Practitioners reported instances when hearing examiners acted unprofessionally and unfairly by “misrepresenting undisputed facts,” “relying upon facts outside the record,” “making decisions not based upon the law,” “participating in ex parte communications” and “ignoring agency procedures.” Practitioners suggested that hearing examiners should have some degree of learning and

knowledge in the field; however, they noted, that is not always the case in practice. A common suggestion was for Delaware to adopt a more modern administrative law judge system.

**B. There is concern about hearing examiner selection bias.**

A large number of respondents reported significant concerns regarding the selection of hearing examiners. The concerns were largely focused on two aspects of the hearing examiner selection process: (i) hearing examiner agency bias; and (ii) the political appointment process.

Practitioners' most pervasive complaint was that hearing examiners are biased in favor of the assigned agency. Nearly all practitioners who identified such a bias attributed it to the hearing examiners' employment by the agencies for which they render decisions. Whether real or simply perceived, practitioners view this relationship as creating inherent bias. Respondents note "the appearance of impartiality matters" and it is "unsettling" when a hearing officer is the ultimate finder of fact yet also is a contractor of the agency under review. This perceived "lack of independence" from the agency is troubling to practitioners and, more importantly, to "private sector litigants seeking a decision, who perceive the process as not objective."

Many practitioners identified specific agencies where this is particularly problematic. An example often cited addressed hearing examiners serving under the Public Service Commission. Multiple respondents reflected on an "unduly close relationship between hearing officers regularly located in the same office as Public Service Commission staff" and the "outsized influence" this appears to create. Respondents described Public Service Commission tribunals as "not appropriately insulated from influence by Public Service Commission members, Commission Staff, or the Public Advocate." For example, respondents explained the Public Service Commission Staff essentially selects the hearing examiner, although the full Commission approves the appointment. One practitioner noted that in this process "significant deference is afforded Commission Staff resulting in Staff having *de facto* appointment authority."

Respondents explained the Commission Staff also serves a dual role, thus making this perception issue more acute. Staff not only provides support and advice to the Commission Members as neutral deciders, but also serves as influential advocates in the litigation. While this particular example was repeatedly cited by practitioners, many other agencies were noted as suffering from similar issues.

**C. There was also concern expressed about hearing examiners selected by political appointment.**

Practitioners also expressed concern regarding hearing examiners and administrative board members selected by political appointment. Some agency boards feature lay people appointed by the Governor without any consultation with the relevant administrative agency or the judiciary. Respondents noted that in some agencies, hearing officers are required to be admitted to the Delaware Bar and selected by the relevant agency, but in other agencies hearing officer lay person appointments were perceived as “purely political appointments,” often resulting in “unqualified appointments” and appointees “lacking diversity.” Several practitioners suggested modifying the appointment process such that “practitioners could weigh in on prospective candidates,” or establishing a nominating commission like that used for judicial appointments.

## **II. STANDARD OF REVIEW**

**Theme Two: A clear majority of administrative law practitioners have significant concerns regarding the “substantial evidence” standard utilized in superior court administrative appeals.**

A majority of administrative law practitioners reported concerns regarding the standard of review typically employed in the Delaware Superior Court for administrative appeals, commonly known as the “substantial evidence” standard. Practitioners reported that the standard

of review is far too limiting to allow for meaningful appellate review, “inhibiting the correction of underlying bad judgments” and described the amount of review as “not much . . . even when the judge believes the decision is incorrect.”

This limited review was described as making “meaningful oversight difficult.” Practitioners noted that the deference reflected in this standard of review is conceptually based upon the assumed subject matter expertise of underlying administrative bodies, but many question that rationale. Respondents explained that in many tribunals, members are “not law-trained, often serve as volunteers, or are paid a minimal stipend.” While “well-meaning,” tribunal members typically serve in this role on top of otherwise busy lives and full-time jobs. There is “little professional support” and “while some have expertise in a particular subject, many do not.” Respondents cautioned that substantial experience in the related field “does not necessarily mean the member has the capacity to adjudicate complicated matters in a thoughtful way, yet our system affords great deference to these decisions.” One practitioner specifically questioned such deference in light of the “very skewed initial process . . . often imbalanced and biased toward the administrative agency.”

Other practitioners expressed the view that despite significant case law, there is a lack of clarity regarding the precise amount of review being conducted by the Superior Court. One respondent explained, “Despite the fact that I’ve been doing administrative law and administrative appeals for more than 20 years, I have no idea regarding the level of review being conducted, except to say reviewing courts will bend over backwards to find something, anything, in the record to support a board’s decision, even when that ‘evidence’ may be shaky and contrary to the overwhelming evidence the other side may have presented.” Another commented that “the substantial evidence test allows for the affirmance of an otherwise bad decision if it can be

supported by, really, any evidence of record.” Another respondent explained that in practice, “the lack of substantive review creates a perception that Superior Court judges do not see a sufficient number of these cases to develop sufficient expertise, and when they do hear such a case, they want to handle them expeditiously, not always with the depth they deserve.”

Respondents explained that “the system of heightened deference seems to give short shrift to the value of full-time professional adjudicators in favor of boards with members of the public and subject matter experts.” While a “trial judge may not have particular experience in the subject area, he or she is a full-time adjudicator that has the support of law clerks and staff. Yet, the standard of review applied on appeals from administrative bodies seems to provide deference that goes beyond even an appellate court reviewing a trial court.”

Practitioners expressed concern that the substantial evidence standard gives “great deference to the factfinders when findings of fact may not have been completely or accurately incorporated in the written opinion.” Respondents suggested that this results, in part, from the fact that

hearings are not governed by the rules of evidence, and “testimony” and “evidence” is often submitted that would never be admitted in court. Cross-examination may or may not be available, and false (or inaccurate) statements are made without the opportunity for correction or clarification. Due to time constraints and the late nights involved with some boards, material submitted may not be reviewed by the board. Watching the board deliberate after a hearing and before making its decision often reveals misunderstandings about evidence or the law.

A smaller number of respondents addressed appellate practice before the Court of Chancery. Practitioners described this appellate review process as fairly robust, explaining that the Court of Chancery seems to have adopted a more flexible standard of review compared to the standard of review in Superior Court, as well as in federal courts. Practitioners asserted “there is a fair opportunity to have matters reviewed in Chancery.” According to one practitioner, this is

because the Court of Chancery does not use the federal standard that has evolved from *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>1</sup> and its progeny. As such, a respondent explained, “the Court of Chancery does not defer as much as other courts do in other agency appeals. The flexibility provided with this standard is helpful.”

### III. TIMELINESS AND EXPEDITION

**Theme Three: In most administrative appeals, timeliness is not problematic, but practitioners suggest the need for limited opportunities for expedited review.**

Most practitioners responded that the appeal process for administrative appeals was typically sufficiently timely. Most reviewing courts review and respond to appeals in an “appropriate” amount of time, although some lawyers expressed a sentiment that “no lawyer is ever satisfied with court timeliness.” Some practitioners noted administrative appeals do not seem to be priorities for reviewing courts, who seemingly would rather work on other matters.

While timeliness was generally not described as a problem, the vast majority of respondents believed certain administrative appeals require expedited review. One practitioner explained administrative “matters often become a war of attrition with significant cost borne by the regulated entity, cost ultimately passed through to customers. The process can be costly, onerous and acrimonious . . . expedited review might help.” Two particular groupings of administrative appeals were repeatedly referenced as being good candidates for expedited review: (i) those impacting public health and safety; and (ii) those with significant financial implications.

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<sup>1</sup> 467 U.S. 837 (1984).

**A. Appeals involving public health and safety.**

Practitioners cited various examples of administrative matters requiring expedited review to promote public health and safety, including agency action related to nursing homes, medical practices, controlled substance registrations, and liquor licensing. Practitioners explained that delays in these cases not only impact the business, but potentially the general welfare, and therefore, an expedited review should be available.

One practitioner noted, “When a board suspends or revokes a doctor’s medical license, the immediate impact of the decision is a death sentence for the medical practice. Once patients have been cut off from their doctors, even for a matter of weeks, patients find new doctors and many never return. The impact on health care providers is significant. But the impact on patients is even more important. We have regions of this State where there may be only one or two specialists of a certain type within a reasonable geographic area. Disconnecting patients from their specialist can leave few to no viable alternatives for care.”

Respondents explained that “decisions to suspend a license or close a medical practice must be weighed when appropriate, using balanced reasoning and where supported by the law, but all of this by necessity must be conducted as efficiently as possible.” Respondents suggested such an approach should balance the need for patient protection against the practical impact of such a revocation. One attorney noted “for many board and agency decisions, the right to appeal . . . is so impractical that it is rarely exercised. The time it takes to resolve an appeal, coupled with the cost, results in infrequent appeals. If we represent a nurse whose license is suspended for 90 days, there is no use appealing because by the time the appeal is resolved she will be back to work.”

**B. Appeals with significant financial implications.**

Separately, numerous practitioners recommended expedited proceedings where an administrative action carries significant financial implications. One practitioner explained that “the passage of significant time can work against certain business transactions and when there is no mechanism for expedited review, outsized leverage is available for those seeking to oppose the transaction or those seeking to secure concessions from the transaction.” Another respondent noted that “time is money in the business world, and opponents of new businesses know that a dragged out judicial appeal can be devastating to businesses and cause some projects to be abandoned (or relocated to other locations).”

Numerous examples of the types of administrative actions carrying significant financial implications were noted by practitioners, including rezoning decisions, tax board decisions, major utility restructurings, and business mergers and acquisitions in a regulated industry. One respondent noted an instance involving the review of a rezoning decision when,

appellate review took some nine months . . . after briefing and oral argument. As a result, the developer lost certain crucial tenants and, ultimately, lost a large portion of its project to the banks because the extended delay ran into the 2008 recession. Had the court issued its decision in 90 days, construction could have commenced and tenants would have been open before the recession. Time is money and in the world of economic development, any delay can be deadly.

Additionally, in such cases, practitioners observed “when parties and decision makers do not believe their positions/decisions will be subject to timely appellate review, the positions/decisions tend to be less balanced and reasonable.”

**C. Proposed approaches to expedited review.**

Respondents generally agreed that while expedited review should be available, it should be limited because “all cases are not of equal import and just as our courts have recognized the

need for expedited processes in particular circumstances, the same should be true for administrative tribunal review.” Some practitioners suggested an injunctive process with an irreparable harm standard. One practitioner noted his understanding that “parties remain free to ask courts for expedited review; although it might be helpful if courts made clear they would consider expedition in appropriate circumstances.” Additionally, in an expedited review, a practitioner asserted “remand should be strictly limited and a reviewing court should be willing to hear the matter fully and issue a final decision. Time and resources could be saved by removing any remand power from the reviewing court on appeal — only permitting the court to reject, affirm, or modify the board’s decision.”

#### **IV. SUPREME COURT REVIEW**

**Theme Four: Practitioners strongly agree that Supreme Court review of administrative decisions is necessary, and that eliminating Supreme Court appellate review would be ill-advised.**

##### **A. Supreme Court review is necessary.**

The majority of respondents indicated that the current appellate structure, which provides for Supreme Court review of administrative appeals, is necessary, and the additional layer of review should not be eliminated. Practitioners indicated that the current system is already “self-screening” such that cases not worthy of appeal are far less likely to be appealed. Practitioners observed that higher quality, better-reasoned lower court decisions “often discourage another round of appellate review, unless a fairly important issue of law is at stake.”

Practitioners view the additional appellate review as “helpful and indeed, often necessary.” Supreme Court administrative review is viewed by practitioners as providing an opportunity to establish “uniform rules,” “stability,” “predictability,” and “consistency” in an

area with “broad impact” that would struggle without the “meaningful oversight” of the Supreme Court. As evidence of the important role of the Supreme Court, practitioners pointed to various instances where the Court has reversed and remanded administrative decisions. Some practitioners tied the need for additional review to the current deferential standard of review in the Delaware Superior Court. Specifically, according to one practitioner, if the standard of review in Superior Court were altered to require a more substantive analysis, only then would it be possible to eliminate Supreme Court oversight.

The strongest sentiment among practitioners for why Supreme Court review is necessary was the finality provided by the State’s highest appellate court. This finality was viewed as necessary to “resolve inconsistent and competing decisions of the lower court.” The Supreme Court’s review was also described as “providing additional protection for the parties.” Practitioners perceive the lower courts as having “many judges with different opinions,” and because lower court appellate review is heard by a single judge rather than a panel, a lower court’s review may reflect “much less collective experience and knowledge of the substantive law than a panel of three or more Supreme Court justices.” Practitioners also noted that “many times the lower court judges don’t have oral argument on administrative appeals, therefore the only chance to argue the parties’ positions is at the Supreme Court.” With administrative appeals often addressing “esoteric” areas of law, practitioners perceive an increased risk of legal error.

While respondents acknowledged that the additional review can be time-consuming, it was viewed as greatly enhancing the substantive quality of outcomes. To illustrate this, practitioners highlighted what one respondent described as “frequent instances of reversal, remand, and correction by the Supreme Court.” Many practitioners asserted that “limiting the Supreme Court’s review would only be appropriate if it is coupled with a more robust review

process by the trial courts.” Importantly, one practitioner noted that “Supreme Court review is especially crucial where due process rights are implicated as is the case in appeals addressing the revocation of medical licenses, for example.”

**B. Alternative approaches to current Supreme Court review practices.**

The minority of practitioners who support eliminating Delaware Supreme Court review of administrative appeals assert that this approach would save time and money for both parties and the courts, and contend that the additional layer of review offers little benefit to litigants. These practitioners expressed their “confidence in lower court review” and belief that the lower courts have a “greater familiarity with and knowledge of the particular bodies of law related to administrative appeals.”

While most practitioners generally disfavor abolishing Supreme Court administrative review, some offered various alternatives or possible limitations for Supreme Court oversight. Some respondents agreed that limiting Supreme Court review would promote judicial economy, as long as “certain defined situations could receive a second level of appellate review.” Some respondents suggested limiting Supreme Court appeals to “issues of first impression,” or alternatively to instances where an appellant’s attorney certifies the appeal involves “a rule of law and not a factual determination.” Finally, some practitioners suggested that the Supreme Court adopt a *writ of certiorari* standard, although a larger group of practitioners specifically stated objections to this proposal. Lastly, one respondent explained that forgoing Supreme Court review of Superior Court decisions might be appropriate if the State had an intermediate appellate court like neighboring states.

## V. UNIFORM APPLICATION OF ADMINISTRATIVE PROCEDURES ACT

**Theme Five: Most respondents agreed that administrative tribunals in Delaware should be uniformly subject to the Delaware Administrative Procedures Act (“APA”), and that the APA should be updated.**

Most respondents practice before tribunals subject to the APA, although there is some uncertainty as to which administrative agencies are subject to the APA. Regardless, most practitioners surveyed believe that all administrative tribunals in Delaware should be uniformly subject to the APA, or at least subject to uniform judicial review to prevent arbitrary or capricious action. There was also overwhelming support to update the APA, which has not been updated since 1976.

Practitioners suggested a number of changes to improve the APA. Most consistently, practitioners recommended increased use of independent administrative law judges, less deference to agency or board “expertise,” limits on remands back to the agencies, and greater uniformity across agencies. As one interviewee stated, “Uniformity with respect to appellate review and process is important in some respects but just as there is great diversity in the types of matters before our trial courts, the same is true here. As such, updating the APA, coupled with a more uniform application thereof, is a worthy and welcomed effort but would require a careful review to guard against unintended consequences with respect to the many tribunals and their corresponding enabling legislation.”

In addition to the generally supported changes noted above, below are specific changes recommended by some respondents:

- Provide for an injunctive process.
- The APA should clarify when decisions and regulations are final, as this is a consistent area of confusion.
- Codify process for expedited appellate review.

- The revised APA should separate the role of hearing evidence from decision-making authority (e.g., the hearing examiner should not be selected by advocates in the proceeding).
- The APA should establish a minimum threshold for procedures, with agencies free to add further steps, such as workshops, additional notice to “stakeholders,” and internal reviews.
- Clarify whether agencies are partially or fully exempted from APA.
- Permit parties to supplement the record upon appeal, and limit remand because it creates a costly, slow, ping-pong process: “APA does not allow the Superior Court to hear new or additional evidence if the lower tribunal has produced an insufficient record – instead remand is ordered. Cases should not be remanded to administrative boards, or at least such remands should be limited to instances where no appeal was heard and no record created. Remand drags out the process further—costing time and money—and does not necessarily solve the original problem, leading to yet another administrative appeal to the courts.”
- Possibly model the entire administrative system on the federal system.
- Consider revising the fifteen-day written comment period, which slows down rule-making and does not seem to provide much benefit.
- Reconsider the procedures for licensing because proposals to deny are confusing and time-consuming.
- Exempt more routine changes and amendments from the rulemaking process, as well as supporting materials that are not regulations used for compliance.
- Standardize and routinize hearing notice provisions across all administrative tribunals.
- Establish the requisite quantum of proof by statute.

## VI. CENTRALIZATION OF ADMINISTRATIVE APPEALS

**Theme Six: A majority of administrative law practitioners believe all administrative appeals should go to a single court.**

A large majority of practitioners believe it would be an improvement if all administrative appeals went to a single court, and many respondents noted that most appeals already go to the Superior Court. For instance, one practitioner stated, “Appeals should go to a single court—

which is essentially the rule now (to Superior Court) with very few exceptions; only rezoning, which are quasi-legislative go to the Court of Chancery and landlord-tenant cases go to Justice of the Peace Court.” Some practitioners even suggested creating a specialty court within the Superior Court to address administrative law appeals, so judges could develop expertise in what are often complicated and recurring administrative matters. It was posited that such a court might alleviate the need for Supreme Court review in certain circumstances, as there would be improved credibility and consistency of agency review.

Some practitioners who do not believe administrative appeals should go to a single court still suggested that a single court handle appeals from certain administrative agencies, such as the Merit Employee Relations Board, the Public Employment Relations Board, landlord/tenant and land use. There was continuing support for having some appeals go to the Court of Chancery -- for example, in cases where equitable relief is sought, rather than compensatory or punitive relief. As one practitioner stated, “Knowledge and consistency is the key consideration in any appeal. Provided all appeals from the same administrative body proceed before the same court, this need is met as well as it can be absent a court established to hear administrative appeals only.”

A small majority of practitioners agree it would be an improvement to vest a single court with the authority to address any application for judicial review or enforcement under a state statute. Such a system would create stability and predictability in the application of administrative law. The minority who opposed such a system pointed to specific areas or reasons why a single court may not be an improvement to the current system. For example, there are different areas of expertise, such as workers’ compensation and tax, and as one practitioner

noted, there are “too many statutes for one body to do such review justice; there is a need of various courts with expertise in their statutory areas.”

## VII. CONSISTENCY

### **Theme Seven: Practitioners expressed concern that administrative agencies, trial courts handling appeals and the Supreme Court are not on the same page regarding administrative law.**

Although a slim majority of practitioners agreed that administrative agencies, trial courts handling immediate administrative appeals, and the Supreme Court are generally on the same page regarding the substantive laws governing cases within an administrative agency’s jurisdiction and the realities the administrative agency and its constituents face in addressing the matters within agency jurisdiction, there was a strong dissenting view. The dissenters viewed the disconnect between the courts and the agencies as likely the result of the small volume of cases that actually reach the courts, with the judges therefore dealing relatively rarely in the particular substantive area of the law. “While I think the Court usually gets it right, there is a significant effort required to get the judges up to speed on administrative matters.”

#### **A. There is a disconnect regarding substantive and procedural rules.**

One of the most consistent issues raised by practitioners was that administrative tribunals do not follow the same substantive or procedural rules used by the courts, or even other agencies, raising due process concerns. Several practitioners noted that although administrative hearings are rarely bound by the rules of evidence (most importantly with respect to discovery), a process should exist to ensure that action is not taken by agencies on the basis of information no court would find reliable or trustworthy. Practitioners were frustrated with the resulting lack of due process, and inconsistency across agencies. Without a process allowing for a meaningful

informational exchange between parties prior to the hearing, comparable to discovery, parties have no opportunity to respond to evidence presented by the other side other than the day or night of the hearing, leaving parties unprepared to defend against all evidence used against them. As one practitioner noted, “At least one agency refuses to provide any information prior to a hearing and, to date, no court, despite the issue having been raised many times, has required it to do so.” Another general issue identified is that many board hearings are heard in very compressed time frames, and may run late into the night, with board members often expected to make decisions without the opportunity to review and reflect. “Making their decision in public, late at night, often in front of a large group of the public who oppose the particular request, does not help ensure quality decisions.”

Practitioners also cite a lack of knowledge by administrative boards with respect to fundamental legal concepts like burden of proof, standing, and the relevant legal standards before them:

For example, the Department of Justice may file a formal complaint against a doctor alleging that the doctor failed to do x or y. The Board, comprised partly of doctors, may identify different concerns during their questioning of witnesses at the hearing. These are concerns that were never alleged in a formal complaint against the licensee. Yet boards often issue discipline based entirely on purported deficiencies that were never alleged in a formal complaint, and where the licensee had no opportunity to present a defense, simply because one or more of the board members identified a concern during the hearing.

To remedy this disconnect, practitioners suggested board legal counsel take a more active role in offering substantive guidance or correcting obvious errors occurring during the course of a proceeding. As one practitioner put it, “Good attorneys make the process better, timid attorneys allow issues to be created for appeal.”

## **B. Courts appear unaware of the realities of administrative law.**

Practitioners generally do not believe the Supreme Court understands the realities of what is occurring at the agency level. One practitioner commented, “It seems like the Supreme Court only gives attention to appeals holding the public interest and the Court has limited understanding of the realities of the agencies and what is really happening at the agency level.” Another stated, “It is important to recognize that some of these administrative tribunals are deciding incredibly important matters, where millions of dollars and the employment of hundreds are at stake. Whether it is a necessary approval for a multi-billion dollar merger or a permit that will decide whether a major employer can continue to operate or perhaps create additional jobs in Delaware, these matters are often of critical importance.”

Finally, there is a belief among practitioners that boards are not sufficiently familiar with many of the “specialized” issues on which they are supposed to opine, and too often bend to the will of the public. One respondent stated:

More often than should be the case, the outcome of a matter can be predicted by either (i) the level of public opposition or (ii) the fact that many boards are predisposed to uphold the agency whose decision is being contested. . . In one memorable instance, a board member famously said, on the record, that whatever she might think about the pending application, if the public did not want it, that was good enough for her and she would honor the neighborhood’s wishes.

## **VIII. SUGGESTED CHANGES**

**Theme Eight: Practitioners suggested a number of changes to the current administrative law system to engender more fairness, predictability and efficiency.**

Generally, comments provided by practitioners were directed at creating an impartial and fair administrative hearing process. These comments fall into the categories of “Substantive,”

“Procedural” and “Miscellaneous.” In many cases, readers will benefit most by reviewing the practitioners’ direct quotes included below, rather than a summary.

**A. Procedural Improvements.**

There were a number of suggested procedural improvements for administrative agencies. Most prominently, practitioners urged the increased use of independent administrative law judges and independent hearing examiners, noting this would add legitimacy and expertise to the system. This would eliminate the inherent conflict of interest of having agency-related boards hearing matters regarding those very same agencies, and may result in better and timelier decisions, which would in turn reduce the need for appellate review. One respondent stated, “[I]t is difficult to explain to clients that the process is objective and fair when the lawyers bringing the enforcement action are colleagues with the decision maker and work in the same office.” At the very least, practitioners would like to see more consistent training of non-attorney board members or require that all board members and hearing officers be Delaware lawyers to improve the way boards address substantive and procedural issues before them.

Several practitioners believe the State would benefit from creating a specialized court within the Superior Court to hear administrative law matters or the State should become a “central panel state” where all administrative hearings are conducted by an administrative hearing department, so no individual agency would hear a dispute and the tribunal would have no conflicts or appearance of conflicts of interest. One practitioner suggested Maryland and California are good models of this system and have been using the central panel model for many years with great success.

Additionally, practitioners frequently expressed concerns that administrative tribunal decisions were not timely (or at least noted timing inconsistency across agencies), and that requesting records of hearings caused delays. Practitioners suggested that there should be firm

deadlines on making a decision on cases, and that decisions should be published. Having published decisions would facilitate researching precedent and improve consistency across similar cases. For example, one practitioner indicated the Public Service Commission publishes decisions, orders, and rule-making, which are accessible on its website. The process is transparent and there are clear rules of practice.

A few practitioners raised issues with specific agency practices. One stated:

Boards are required to deliberate in public, and state the reasons for their vote, which makes sense, but the written decision (written by the board's attorney after the fact) often goes well beyond the stated public reasons, making judicial review difficult. Often the attorney is trying to make the decision more defensible on appeal, but the attorney combs the record to include things not cited by board members, creating further difficulties and confusion on appeal.

Another practitioner said, with respect to the Board of Medical Practice, "the investigation process needs complete overhaul because of lack of due process and qualified investigators. In regard to the Board of Medical Examiners, there needs to be more scrutiny of complaints before they get to the Board so as to eliminate frivolous complaints."

#### **B. Substantive Improvements.**

While there were fewer substantive issues noted with the administrative process, several practitioners would like to limit or remove any remand and would modify the applicable standard of review. Specifically, one practitioner had the following comment:

The Superior Court's meaningless "scintilla" standard [should be] eliminated. A board decision should be upheld only where, on balance, the overall weight of the evidence supports the board's decision. In close cases, this means deferring to the board, but most cases are not that close. Judicial review should not consist of the side defending the board's decision combing the record to find one or two or three "facts" which support the board's decision when the overwhelming weight of evidence demonstrates the board should have granted a permit or reversed an agency decision. A party appealing a decision should not have to "disprove" every

single “fact” in the record that might support a board’s decision. Reviewing courts should not be afraid to review the record and say “this is not really that close board, and you based your decision on emotion or some other impermissible reason. I am going to reverse and the appellant gets their relief.” Note that some appeal statutes specifically allow the court to hear additional evidence. In close cases, the court should exercise this power, conduct a one or two day hearing (I suspect most hearings would not be long because most administrative hearings are not that long and folks know what the issues are), and then decide the matter. In fact, I would not allow remand at all, or I would strictly limit when it could be done (for example, when the board refuses to hear an appeal at all, so there is no record to review). Some statutes do not provide for remand, but the Superior Court dodges this by “reversing” a board’s decision and then requiring that a new application be filed with a new hearing before the board.”

In addition to this specific comment, many practitioners believe reviewing courts understand the law far better than agencies, but the courts fail to appreciate the lax process utilized by boards, and wrongly assume a level of sophistication and analysis not there. For example, courts do not appreciate the lack of process, lack of discovery, and lack of attention to detail that often occurs at the board level.

### **C. Miscellaneous Comments.**

Below are some poignant comments that resist categorization, but may help to clarify the “realities on the ground,” so to speak.

One responded lamented that “the Bar does not seem to respect administrative law practitioners. These practitioners need more support and more recognition that the work they do is valuable legal practice. Any change that takes away from this and enforces the idea that these practitioners are ‘less than’ should be avoided.”

Another practitioner had the following comment:

Be more respectful of the administrative law judges or whatever the positions are called. They are frequently thought of and treated as individuals without any special training, education, or experience. They are looked down upon and not respected. Many

people, including attorneys do not realize the persons holding the hearings have JD degrees, more education, particularly legal education, than the members of the Boards who review their decisions.

Currently, the lay members of the Industrial Accident Board are selected by the governor's office and there must be some parity between the two major parties. While the General Assembly must approve those selections, to date there are certain board members who have potential conflicts with other State positions they hold simultaneously. Currently, two sitting Board members act as the jury, but often rule on legal evidentiary motions for which they are not trained. The primary role of the hearing officers is to draft their written decision and to advise the Board of any error of law or abuse of discretion in their ruling, which sometimes makes for a difficult, balance with respect to the appropriate roles of those involved in differentiating between findings of fact and legal conclusions. Perhaps the State should consider changing from the current system we now have to one administered by Administrative Law Judges or Commissioners under the control of the judicial branch which would put us in line with the majority of other jurisdictions in the country.

Ultimately, such a change in procedural process may result in more consistency in decisions from the original trier of fact which would reduce both the number of cases requiring a hearing on the merits and reduce the number of appeals to a higher legal authority. Such a change may also potentially reduce the overall financial costs for the State in the long run. Currently, board members are paid the same salary regardless of the numbers of times he or she sits at a hearing.

In addition, there are presently nine hearing officers (all admitted to the Delaware bar) who must sit with the two panel members of the Board for any hearing on the merits and who also receive a full salary. It should be noted that according to 19 *Del. C.* § 2301B, the parties may stipulate to having a contested workers' compensation matter decided by a "solo" law trained hearing officer, but the statistics in the annual report from the Department of Labor may not accurately reflect the rather small percentage of those solo hearing officer cases, i.e., hearings on the merits, actually conducted. (Only the litigators can advise as to why they might prefer a lay board rather than a law trained hearing officer.)

The figures in the annual report for individual hearing officer caseloads reflect a combination of decisions following a hearing on the merits in addition to orders and re-arguments following

decisions. While the number of appeals was only 41 out of 386 cases in 2014, if the system were changed by the legislature to another format, this statistic may even become lower. Of course, given the litigation process, there would still be a sizable amount of other case motions to be adjudicated. Delaware should have administrative law judges. The board appointment system is outdated.

## CONCLUSION

The interviews and survey responses provided valuable insight into the practice of administrative law in Delaware. Respondents provided candid assessment of what is working and what areas could use improvement, and offered informed insight into the realities of practicing administrative law in the First State. Practitioners seek to improve hearing examiner selection and appellate review, make available expedited review, and increase the professionalism and communication between agencies and the courts. While numerous areas for improvement and modification were noted, practitioners seek to maintain many of the aspects of administrative law that are working, such as Supreme Court oversight.

Three proposed improvements that were both supported by a strong contingent of respondents and based on particularly thoughtful analysis are offered as specific recommendations of this report.

First, all administrative tribunals should be uniformly subject to the Delaware Administrative Procedures Act, and a comprehensive review and update of that act should be undertaken.

Second, serious consideration should be given to clarifying and tightening the overly deferential “substantial evidence” standard of review currently applied in Superior Court administrative appeals.

Third, clarification of the availability of expedited appellate review of certain types of administrative decisions – for example, those involving public health or safety – using an injunction-style irreparable harm standard is recommended.