

# **COURT REFORMS**

## **I. INTRODUCTION**

The overall purpose of this report is to review the court reforms that have occurred or have been proposed among the various states. The goal is to identify those reforms that would be beneficial to the Oregon judicial system.

The goal of any court reform is to provide greater access to the judicial system in a cost-efficient manner. One way to meet this goal is to reduce frivolous claims that burden the court's docket. To reduce frivolous claims, the states have attempted to expand alternative dispute programs. The states have also experimented with "loser pays" systems. Additionally, the states have modified their discovery procedures so as to encourage settlement. Finally, the states have attempted to curb frivolous claims by regulating contingency fees.

This report also analyzes current reforms taking place in our nation's small claims courts. Access to these courts is essential because they provide quick, cost efficient ways to resolve conflicts. Along with increasing access to small claims courts and other state courts, some states have also provided programs that educate and assist pro se claimants with the procedural and substantive aspects of the court process.

Ever since the polygraph test was created, its admissibility has been questioned. Some experts believe that under certain circumstances, these tests are reliable. Other experts have attempted to find a more reliable way to determine the criminal knowledge of a suspect. At the forefront is new technology called Brain Fingerprinting. This report will review the admissibility of these tests among the states.

Lastly, this report will review how some states have authorized juries to become more active within and without the courtroom. These states take the approach that an informed jury is better equipped to make educated decisions if allowed to take notes, review evidence, and question witnesses throughout the trial.

This report will review how the different states have implemented or have attempted to implement such programs.

## II. CONTINGENCY FEES

In general, contingency fee contracts allow an attorney, usually plaintiff's attorney, to receive a fixed percentage of the amount of any settlement or judgment awarded to the plaintiff. Some argue that contingency fees are necessary to allow low-income plaintiffs access to the courts. It is further argued that contingency fees give an attorney direct incentive to work for his client's interest and in doing so, it shifts some of the inherent risks of litigation to the attorney.<sup>1</sup>

Those who oppose contingency fees say that they are unethical. They argue that contingency fees allow attorneys to receive extremely high hourly wages at the expense of their clients. In addition, it is argued, many clients do not understand contingency fee arrangements, and those clients that do understand, use contingency fee agreements to file frivolous lawsuits in the hopes of obtaining early settlement. It is also believed that contingency fees agreements have led to increased hostility and delay in the discovery process.<sup>2</sup>

While contingency fees may negatively impact civil litigation, many jurisdictions believe that the court should not interfere with the client's freedom to contract with their attorney. However, some proposals have been made and some regulations have been put into place to curtail the negative effects of contingency fee agreements.

### A. *State Regulations*

Oregon has one statute on the books that regulates contingency fees agreements.<sup>3</sup> Under ORS 20.340, if a client contracts with an attorney in any civil action arising out of a personal or a property injury, the agreement must be written in plain language and the attorney must explain the terms and conditions of the agreement.<sup>4</sup> The agreement must also contain a provision that allows the client to rescind the contract within 24 hours.<sup>5</sup>

New York's regulations reflect those of Oregon.<sup>6</sup> New York adds that the lawyer must furnish the client with a written statement after the matter is concluded explaining the outcome, recovery, and remittance to the client. Furthermore, the court might declare a contingency fee excessive after reviewing certain factors. New York also forbids contingent fee arrangements for criminal and domestic relations cases.<sup>7</sup>

The supreme court of New Jersey has put restrictions on the amount that can be charged under a contingent fee contract.<sup>8</sup> Under New Jersey's regulations, an attorney cannot contract for or collect a contingent fee in excess of the following amounts:

- 50% on the first \$1,000 recovered;
- 40% on the next \$2,000 recovered;
- 33-1/3% on the next \$47,000 recovered;
- 20% on the next \$50,000 recovered;
- 10% on any amount recovered over \$100,000; and

- Where the amount recovered is for the benefit of an infant or incompetent and the matter is settled without trial the foregoing limits shall apply, except that the fee on any amount recovered up to \$50,000 shall not exceed 25%.

The New Jersey rule has survived attacks in court by the American Trial Lawyers Association.<sup>9</sup>

Oklahoma has limited all contingent fee contracts to 50% or less of the net amount of judgment.<sup>10</sup> The Florida Supreme Court has disagreed with these states and has declared that there is no evidence to demonstrate abuse of contingent fees. In doing so, the court opposed an amendment to enact a schedule of maximum contingent fees.<sup>11</sup> Also, voters in California voted down a proposal that would have limited contingency fee contracts for tort cases to 15% of any early settlement offer.<sup>12</sup>

### *B. Academic Proposals*

Throughout the years, academics have proposed various schemes to regulate contingency fees. Under Lester Brickman's proposal, defendants are allowed a guaranteed opportunity to make settlement offers within 60 days of the suit. If accepted, plaintiff's compensation could be based on an hourly rate of return, or on some modest percentage of the total recovery. If the offer is refused, it then becomes the benchmark against which a contingent fee is calculated. The purpose of this proposal is to encourage defendants to make a good first offer, knowing that a low offer will lead to greater fees to be paid if they lose.<sup>13</sup>

Under the early offer system (a modification of the Brickman proposal), contingency fees cannot be charged against settlement offers made prior to the retention of counsel by a personal injury claimant. Defendants in personal injury cases receive the opportunity to make early settlement offers, but only if made within sixty days after receiving the plaintiff's demand for compensation. If the offer is accepted, plaintiffs' counsel fees are limited to hourly rate charges and are capped at 10% of the first \$100,000 of the offer and 5% of any greater amounts. Demands for settlement by plaintiffs' counsel must include basic discoverable information in order to assist defendants in evaluating plaintiffs' claims. To assist plaintiffs in evaluating defendants' offers, discoverable material must be made available to the plaintiffs for a settlement offer to be effective. If early offers are rejected, contingency fees may only be charged against net recoveries in excess of those offers. If no offer is made within the sixty day period, the contingency fee contract is unaffected by the proposal.<sup>14</sup>

### III. LOSER PAYS

#### A. Alaska's "English Rule"

Unlike traditional loser pay schemes, such as the one found in England, the main purpose of Alaska's Rule 82 is to partially, not completely, compensate a prevailing party for the productive work done by the attorney. The main reason for only awarding partial compensation to the prevailing party is that the Alaska Supreme Court does not want to limit access to the courts.<sup>15</sup>

##### 1. Rule 82

Under Rule 82, Alaska's "English Rule," unless the parties to a litigation agree otherwise, the prevailing party in a civil action is awarded attorney fees.<sup>16</sup> To assist the judge in calculating the attorney fees in a civil action where there is a monetary judgment, the Alaskan legislature has adopted a schedule.<sup>17</sup> This schedule only applies if the prevailing party is the plaintiff. If the prevailing party is a defendant, or if the civil action does not involve a monetary judgment, the prevailing party is awarded 20% of reasonable attorney fees if the case is resolved without trial, and 30% if the case went to trial.<sup>18</sup> If the action ends in a judgment by default, the plaintiff may receive reasonable actual attorney fees or attorney fees according to the schedule, whichever is less.<sup>19</sup> Only judgments by default are determined by the court clerk.<sup>20</sup>

While the rule states that the judge must adhere to the schedule, the rule also allows the judge to vary the attorney fee award. In doing so, the judge must consider eleven factors, which are set out in the statute, and the judge must state the reason(s) for varying the award.<sup>21</sup>

The rule states that attorney fees are not automatically awarded. To receive attorney fees, the prevailing party must file a motion within 10 days, or as the court allows. If the prevailing party fails to file within the deadline, the party waives its right to the award.<sup>22</sup>

If damages are apportioned among the different defendants, the fees awarded the plaintiff are to be apportioned among the defendants according to their respective fault. Plaintiff cannot collect fees from a third party defendant if he did not assert a direct claim against him. If a third party defendant has no fault, attorney fees will be awarded according to the 20/30% calculation. If the fault was apportioned to a third party defendant and a third party plaintiff is involved, the third party plaintiff is awarded under the 20/30% calculation.<sup>23</sup>

Alaskan case law and practice have afforded a couple of exceptions to Rule 82. Attorney fees will not be awarded to the prevailing party if the loser has in good faith raised a question of genuine public interest before the courts.<sup>24</sup> Additionally, a winning plaintiff may recover 100% of his attorney fees when he acts as a private attorney general and pursues litigation of public importance.<sup>25</sup>

## 2. Rule 68

Alaska's Rule 68 works with Rule 82 to deter frivolous claims. Under Rule 68, 10 days before trial, either party may submit a 10 day irrevocable offer to the other party. If the offer is not accepted within 10 days, the offer is withdrawn and it may be used as evidence in determining costs. If the offeree is rendered a judgment that is not more favorable to the offeree than the offer, the offeree pays up to 75% of reasonable actual attorney fees incurred by the offeror from the time the offer was made. However, if the amount awarded the attorney under Rule 82 is greater than under Rule 68, the offeree pays attorney fees under Rule 82.

## 3. Effectiveness of Alaska's "English Rule"

A recent study was done on Rule 82. The study concluded that Rule 82 played an insignificant role in Alaska's civil litigation. Of the attorneys who were interviewed, more than a majority of them stated that the rule was only one of many factors they considered when they decided to file. Furthermore, it was estimated that Rule 82 affected the legal strategy and settlement of cases in about only 35-37% of the cases.<sup>26</sup>

Only 10% of all cases in Alaska contained Rule 82 awards. Of these, only 6% of the attorneys filed motions for fees.<sup>27</sup> Also discouraging is the attorney fee amounts that were awarded. For example, the median award for cases filed in state court was \$2,240 and the median award for cases filed in federal court was \$10,854.<sup>28</sup>

The study found that Rule 82 has some negative impacts on settlements. Most attorneys expressed the concern that while the rule encouraged defendants to settle early if the plaintiff had a good case, the rule also discouraged plaintiffs from accepting the offer if they had a good case, particularly if the attorney was working on a contingency fee basis.<sup>29</sup>

Many personal injury defense attorneys and insurance companies have criticized the rule. They argue that it is difficult to collect awards from losing plaintiffs, especially when they are insolvent. In fact, the study found that Rule 82 at times operated as a one-way fee shifting (as opposed to two-way fee shifting) arrangement in that the plaintiffs were able to collect the awards more often than the defendants.<sup>30</sup>

Most troubling, is the effect that the rule has on middle class plaintiffs. The study determined that most middle class plaintiffs were not willing to "bet the farm" on their cases and risk bankruptcy if they lost. This mentality tended to lead middle class plaintiffs, with the exception of those with extremely strong cases, to settle for less than what they felt they deserved. Many attorneys observed that they felt the rule indirectly limited middle class plaintiffs' access to the courts.<sup>31</sup>

Taking all these factors into consideration, the study found that Rule 82 has three main effects on Alaska's civil justice system: it discourages some middle class parties from filing cases that either wealthy or poor plaintiffs would file; it discourages some suits or defenses of questionable merit; and it encourages litigation in strong cases that might have otherwise settled.<sup>32</sup>

Regardless of what some outsiders see as negative results, 73% of the attorneys interviewed in Alaska recommended that Rule 82 be retained (36% believed that the rule need only to be slightly modified), and 64% of the attorneys believed the rule discouraged frivolous claims from being filed.<sup>33</sup> Furthermore, the rate of tort and contract cases filed in Alaska is lower than other states.<sup>34</sup>

## B. *Proposals in Other States*

Beginning with the Republican Contract with America in 1994<sup>35</sup>, there has been an increased push to implementing loser pays schemes in the American courts. While many of these proposals have been widely opposed, both nationally and at the state level, some states, mainly Oregon and Oklahoma, have made compromises that in reality implement quasi loser pay schemes. Here is a look at recent proposals and statutes.

### 1. Oregon

Oregon moved closer to the English Rule in 1995 by enacting many civil procedure reforms under S.B. 385.<sup>36</sup> Under S.B. 385, a court was authorized to award reasonable attorney fees to a prevailing party if the court dismissed with prejudice a claim, counterclaim, or cross-claim against a party, and that same party later brought the same claim, counterclaim, or cross-claim against the same original party.<sup>37</sup> S.B. 385 further authorized the award of attorney fees as a sanction for false and frivolous pleadings and other misconduct.<sup>38</sup>

Over one hundred statutes were amended under S.B. 385 to authorize the prevailing party to recover reasonable attorney fees in a particular type of civil action.<sup>39</sup> In determining whether to award the prevailing party attorney fees, the trial court considers six factors:<sup>40</sup>

- Conduct of the party that gave rise to the litigation;
- Objective reasonableness of the claims and defenses;
- Extent that award of fees would deter others from asserting a good faith claim or defense;
- Extent that award of fees would deter others from asserting meritless claims and defenses;
- Reasonableness and diligence of parties in the proceedings; and
- Reasonableness and diligence of parties in pursuing a settlement of the dispute.

Unlike Alaska, Oregon does not have a schedule with which to guide the judge when awarding attorney fees. In cases where a statute does not authorize the prevailing party reasonable attorney fees, Oregon does have a fixed dollar amount, albeit quite low, that the judge can award the prevailing party.<sup>41</sup> For example, if a civil action is filed to recover money damages, a prevailing party may recover \$250 (if judgment is given without a trial) or \$500 (if judgment is given with a trial) in a circuit court case.<sup>42</sup> This amount is respectively decreased to \$60 or \$85 in a small claims court.<sup>43</sup> If the court considers it appropriate, the prevailing party fee may be increased to \$5,000.<sup>44</sup>

In cases where the statute does authorize the prevailing party reasonable attorney fees, the trial court may consider the following factors:<sup>45</sup>

- Time and labor required, the novelty and difficulty of questions, and the skill needed to perform legal services;
- The preclusion of the attorney from taking other cases;
- Customary fees charged in the locality;
- Amount involved and the results obtained in a civil action;
- Time limitation imposed by the client;
- Nature and length of attorney's professional relationship with the client;
- Experience, reputation, and ability of attorney; and
- Whether the attorney fee is fixed or a contingency fee.

If a statute authorizes the recovery of attorney fees, an attorney must state the facts, statute or rule that provides a basis for an award in a pleading or a motion.<sup>46</sup> Oregon does not require that the attorney state a specific amount in a pleading or a motion.<sup>47</sup> However, after judgment has been entered, a party has up to 14 days to file with the court a detailed statement of attorney fees, together with proof of service.<sup>48</sup> The losing party may object to the statement of fees within 14 days of service, after which, a hearing on the objection is held, and the court will determine whether to award fees.<sup>49</sup> In doing so, the court is required to make specific findings of fact and state conclusions.<sup>50</sup>

S.B. 385 also modified Oregon's small claims court proceedings<sup>51</sup> and mandatory arbitration<sup>52</sup> statutes. This will be discussed in relevant sections of this report, below.

## 2. Oklahoma

In 1995, Oklahoma enacted a loser pays scheme that mainly applies to large personal injury cases.<sup>53</sup> Under this law, a defendant may invoke the loser pays scheme by making an offer of judgment to the plaintiff. If the plaintiff turns down the offer and is awarded less at trial, he may be liable for attorney fees incurred by the defendant after the offer. After the defendant makes an offer, the plaintiff is free to make a counteroffer of judgment. This starts the loser pay meter running in favor of the plaintiff if the defendant turns down the offer and is subsequently required to pay more at trial. The law is limited to personal injury cases in which either a plaintiff demands more than \$100,000 or a defendant offers more than \$100,000.

## 3. Ohio

Like Oregon, Ohio has about 90 statutes that authorize a prevailing party to collect attorney fees in a lawsuit or as a sanction for frivolous conduct. This past year, the Ohio legislature unsuccessfully attempted to modify their law so as to mirror Alaska's loser pays scheme.<sup>54</sup>

Under Ohio's proposed H.B. 472, the prevailing party in a tort action may receive reasonable attorney fees. To do so, the prevailing party must file an application no later than 10 days after the verdict. The application must itemize the legal service performed and specify whether or not the prevailing party was represented pursuant to a contingency

fee. This application must be served on the losing party. No later than 20 days after the filing of the application, the court must determine the amount of the award.<sup>55</sup>

If the prevailing party was represented pursuant to a contingency fee agreement, the court must award reasonable attorney fees that would have been associated with the legal service rendered had the prevailing party been represented on an hourly fee or another basis other than a contingent fee.<sup>56</sup> Again, this legislation did not pass.

#### 4 . South Carolina

In 1997, South Carolina considered a bill that would authorize the award of attorney fees and costs to the party who wins a case on a dispositive motion, such as failure to state a claim upon which relief can be granted, motion for summary judgment, and motion for directed verdict.<sup>57</sup> The bill did not govern cases that were litigated to a verdict. Much like the Alaskan rule, the bill required the prevailing party to file a motion with the court to receive the award. However, unlike the Alaskan rule, the bill mainly allowed the judge to use his own discretion in determining the award. The South Carolina proposal was not enacted. One concern with the bill was that it did not address whether parties may stay an award without bond requirement while the case was pending on appeal.<sup>58</sup>

#### 5 . Arizona

Currently, Arizona allows the successful party to collect attorney fees when a contest arises out of a contract or upon clear and convincing evidence that a claim or a defense constitutes harassment or is not made in good faith.<sup>59</sup> If a written settlement is rejected, the successful party may only collect an award if he obtains a judgment equal to or greater than the settlement offer.<sup>60</sup> Reasonable attorney fees are awarded from the date of the settlement offer, but they need not be the equal to or relate to the actual attorney fee paid or contracted. However, the award may not exceed the amount of attorney fees paid or agreed upon.<sup>61</sup> In 1999, a bill was introduced, but later rejected, that would have expanded the award of attorney fees to the prevailing party in any contested action. The bill further proposed that the reasonable attorney fees be fixed based upon the fair market value of the attorney's services.<sup>62</sup>

#### 6 . Florida

Florida unsuccessfully experimented with a loser pays system in the early 1980's for medical malpractice claims.<sup>63</sup> Under Florida's law, the losing party paid the prevailing party's fees unless the losing party was poverty stricken. This law was initially sought by doctors and insurance companies. However, the doctors and insurance companies experienced difficulties in collecting their fees when they were the prevailing party. Five years after the law was passed, the legislature, with support from the doctors and insurance companies, repealed the law.<sup>64</sup>

#### IV. DISCOVERY REFORMS

Some of the most innovative reforms concerning discovery came out of Texas in 1999.<sup>65</sup> The main reason for these new rules was to curtail abusive conduct and disputes in oral depositions. A brief summary of the two most relevant rules follows.

##### A. *Rule 190*

Under Texas' Civil Procedure Rule 190, the trial court judge manages every case under one of three control plans.<sup>66</sup> The Level One discovery plan is the most restrictive. All cases that involve monetary relief of \$50,000 or less fall under this plan.<sup>67</sup> Also under this plan, all discovery must be conducted after the suit is filed and it continues until 30 days before the date set for trial.<sup>68</sup> Oral depositions to examine witnesses are limited to six hours for each party. This may be extended to ten hours if all parties agree.<sup>69</sup> Plaintiffs are able to opt out of the control plan if they wish for broader discovery.<sup>70</sup>

The Level Two discovery plan is the default plan and applies to most cases.<sup>71</sup> This level permits the same amount of discovery as in Level One, except that discovery might continue until nine months after the earlier date of the first oral deposition or the due date of the first response to written discovery.<sup>72</sup> Under the oral deposition provision, each side is allotted fifty hours to depose the opposing parties. This may be expanded by six hours for each expert witness if there is more than one. The court may also modify the time if justice so requires.<sup>73</sup>

Level Three is a court-managed discovery plan similar to the process used by federal courts. This may be done on either a party's motion or upon the court's own initiative. This level is generally reserved for the more complex cases.<sup>74</sup>

##### B. *Rule 199*

The purpose of Rule 199 is to make oral depositions become more like a witnesses' testimony in an actual court room. In doing so, the rule mandates that attorneys be courteous to each other and the witness. The rule prohibits private conferences between the attorneys and the witnesses being examined, except for the purpose of determining whether to assert a privilege. The rule further prohibits speaking objections and colloquies by attorneys. Objections are limited to those that are found in the actual courtroom. If an attorney objects, the opposing counsel may request that the attorney give an explanation for the objection. If the explanation is argumentative or suggestive, the deposition may be terminated.<sup>75</sup>

## V. THE EXPANSION OF SMALL CLAIMS COURT

Another method to improving citizen access to the judicial system is to expand the role played by small claims courts. Currently, these courts limit disputes to a certain dollar limit and/or only handle those disputes that involve low transaction costs. The initial goal of the small claims courts was to reduce delay by simplifying the pleadings and procedural steps. This goal is difficult to accomplish if the states do not modify their small claims court limitations as the costs of products and transactions increase.

### A. *State Laws*

Most state small claims courts limit their jurisdiction to \$5,000 or lower (Oregon's limit is \$5,000).<sup>76</sup> Three states have a limit of \$7,500. Two states, Delaware and Tennessee, have a limit of \$15,000. Tennessee increases their limit to \$25,000 if the county in which the court resides has a population of 700,000 or more. Over the last few years, only a hand full of states have proposed bills that would increase their dollar limit to \$10,000.<sup>77</sup>

Many states, including Oregon<sup>78</sup>, do not allow attorneys to be present. About seven states have mandatory or court ordered mediation or arbitration before the court will consider the claim.<sup>79</sup> Oregon exemplifies this by also requiring that the claimant at least make a good faith effort to resolve the matter before trying to collect through the court.<sup>80</sup>

Some states have taken a more adversarial approach to small claims courts. Florida allows discovery if an attorney is present,<sup>81</sup> and the District of Columbia allows limited discovery with court permission<sup>82</sup>. Delaware<sup>83</sup> and South Carolina<sup>84</sup> allow the claimant to request a jury trial, and in Montana,<sup>85</sup> a jury trial is awarded only if counterclaim is filed. Kentucky,<sup>86</sup> Nebraska,<sup>87</sup> and Tennessee<sup>88</sup> have expanded their jurisdiction by allowing equitable relief. Kentucky allows limited equitable relief, and Tennessee only issues restraining orders.

A few jurisdictions have also attempted to make their courts more accessible to the public. Notably, two states, Indiana<sup>89</sup> and Utah,<sup>90</sup> along with the District of Columbia, open their courts to evening and/or Saturday morning sessions. Other states have limited access to their court by restricting the number of claims a claimant can file.

California's small claims court system deserves further attention. There, when a case is filed in a small claims court, a portion of the filing fee goes to the small claims advisor program. This program requires all counties to provide free assistance on how to research the law, prepare evidence, and appear in court. For the smaller counties, phone-in counseling is provided, and for the larger counties, a trained advisor is provided.<sup>91</sup>

## *B. Proposed reforms*

Two national legal reform organizations, HALT and NOLO, have been encouraging the states to make reforms in their small claims court systems. Both of these organizations believe that the dollar limit of the small claims courts needs to be increased to \$20,000.<sup>92</sup> They argue that since consumer prices have increased, so to must the dollar limit of small claims courts. They argue that this will allow more claimants access to a low cost judicial process.<sup>93</sup>

HALT also argues that small claims courts should be authorized to grant not just money damages, but also equitable relief (Oregon does not authorize equitable relief<sup>94</sup>). HALT also believes that small claims courts should expand their dispute resolution programs, protect non-lawyer litigants, and create user-friendly courts.<sup>95</sup>

## VI. ALTERNATIVE DISPUTE RESOLUTIONS

Generally speaking, most states have similar mediation and arbitration statutes. These programs have been beneficial because they allow the courts to refer certain categories of cases (usually cases involving money, damages, or domestic relations below \$50,000)<sup>96</sup> to alternative dispute processes that are cost efficient to all involved. New Jersey will also allow personal injury cases to go to arbitration if the medical expenses do not exceed a certain amount.<sup>97</sup>

Like Oregon, many states have mandatory arbitration under the above-classified categories. Also like Oregon, the arbitration is non-binding. Some states allow parties to stipulate as to who and how many arbitrators they would like. Other states limit the number of arbitrators, and yet other states dictate who the arbitrator will be, or from what pool the arbitrator must be drawn from.<sup>98</sup>

Nevada has one of the most comprehensive programs. Like most states, the parties must choose the arbitrator within a certain amount of time. Nevada gives the parties six months to find an arbitrator and to have the issues resolved. This period may be extended to one year. If the issues are not resolved within one year, the court may issue sanctions.<sup>99</sup>

In Nevada, like Oregon, if a party disagrees with the arbitrator's decision, the party may file within usually 30 days (Oregon is 20 days) for a trial de novo. However, unlike Oregon, if a party does not act in good faith during the arbitration proceedings, that party waives his right to a trial de novo and then must pay the other sides fees and costs (New Jersey allows the arbitrator to award the one party all costs and fees if the arbitrator did not feel like the other party was acting in good faith).<sup>100</sup>

Also, like Oregon, if a party in Nevada is granted a trial de novo, and the judgment is not more favorable to that party, then the opposing party is allowed to have their fees and

costs compensated. In New Jersey, the court will allow the other party fees and costs if the petitioning party did not receive a twenty percent or more favorable judgment.<sup>101</sup>

A Nevada study found that sixty percent of all of its cases went to arbitration. Of these cases, thirty-eight percent were dismissed and about forty-eight percent were settled. Over all, the study found that the system freed up the court docket to allow more complex cases, and that the system was cost-efficient.<sup>102</sup>

## VII. LEGAL ASSISTANCE BY NONLAWYERS

Many people who enter the legal system are pro se litigants. Many of these same litigants lack the funds and resources necessary to adequately represent themselves in front of a court. Many states have tried to find ways to assist these pro se litigants in a cost effective manner. In doing so, many nonlawyers have been recruited. Because this may implicate the unauthorized practice of law, the states are careful to define a nonlawyer's role in assisting pro se litigants.

### A. *Family Facilitator Program*

In Las Vegas, the Family Court staff may assist pro se litigants in their trial. Among the things the staff members are allowed to do is to instruct pro se litigants about court procedures and etiquette, provide access to attorneys who practice family law, and provide information about less costly legal services.<sup>103</sup>

### B. *Domestic Violence Program*

Tennessee has implemented a program that assists those who are victims of domestic violence. The state authorizes a nonlawyer court advocate to assist pro se petitioners in getting a protection order. The advocate may sit with the victim in court, answer docket calls, and communicate information to the judge. The advocate also helps pro se petitioners in preparing the protection order, the final and agreed upon order (only under the supervision of a judge), a petition for contempt, and subpoenas for witness and records.<sup>104</sup>

### C. *Task Force on Housing Court*

In New York, the Task Force on Housing Court sets up information tables in the courthouses. The task force consists of nonlawyers who assist in explaining the procedures of the court, warranty of habitability, and other landlord/tenant aspects of the law. Furthermore, the judge is authorized to call upon the task force volunteers to summarize cases and suggest dispositions.<sup>105</sup>

#### D. Paralegals, “Quick Court”, and Self-Service Center Programs

Arizona has experimented in many different ways to better serve pro se and lower-income litigants. Initially, Arizona authorized its courts to hire paralegals to assist pro se litigants in Family Court.<sup>106</sup> This failed for financial reasons. The state next implemented what is called “Quick Court.” Under this program, courts were able to install multimedia kiosks within the courthouse that gave information on a variety of legal concepts and procedures. The kiosks also had the capability to produce legal documents that could be used in court proceedings. Again, for financial reasons, the kiosk program did not extend past the initial pilot programs<sup>107</sup> (Utah also has this program in place).<sup>108</sup>

Currently, Arizona has Self-Service Center Programs. This is an intake service that identifies the various needs of the different pro se litigants. Through computers and volunteer facilitators, pro se litigants are able to get assistance with court procedures and court approved forms. It also has referral options. Thus far this program has been cost-efficient and generally satisfying to those involved.<sup>109</sup>

### VIII. LIE DETECTORS AND BRAIN FINGERPRINTING

From 1923-1973, no state allowed polygraphs to be admitted into evidence.<sup>110</sup> Since 1973, the states have disparately treated the admissibility of polygraph tests. The United States Supreme Court is also split on the issue.<sup>111</sup> The main concern surrounding polygraph tests is that they will have an undue influence on the jury.<sup>112</sup> On the other hand, many argue that there is a need to closely examine any rule that interferes with a defendant’s right to present his defense.<sup>113</sup>

#### A. Oregon law concerning polygraph tests

The Oregon Supreme Court has held that polygraph tests are not admissible under the Oregon Evidence Code in any civil or criminal trial to prove the truth of a matter asserted.<sup>114</sup> This is true even if both parties have stipulated to the polygraph test results.<sup>115</sup> However, the court does not seem to have a per se inadmissible standard for polygraph tests in all situations.

The Oregon Supreme Court will admit polygraph tests if a statute explicitly authorizes it. In *Snow v. Oregon State Penitentiary, Corrections Div.*, the court held that a polygraph test was admissible in an inmate disciplinary hearing because the statute authorized it and because the prisoner requested it.<sup>116</sup> Polygraph evidence is also admissible in a divorce proceeding to show a mother’s rational basis for her assertions that the father abused a child.<sup>117</sup> The court said that the evidence was not introduced to prove the truth of the matter asserted, the evidence was only offered to show its effect on the mother’s state of mind.<sup>118</sup>

Oregon has also enacted the Polygraph Examiners Act.<sup>119</sup> The purpose of this act is “to regulate all persons who purport to be able to detect deception or to verify the truth of statements through the use of instrumentation or mechanical devices....”<sup>120</sup> The Polygraph Examiners Act regulates the licensing, training, qualifications, and equipment of a polygraph examiner. The Oregon Supreme Court has stated that this act implies “that many reasonable people find polygraph evidence reliable enough to be considered....”<sup>121</sup>

### B. *State and federal law on polygraph tests*

Currently, twenty-seven states (including, to some degree, Oregon) have said that polygraph tests are per se inadmissible,<sup>122</sup> and eighteen states have said that polygraph tests admissible into evidence if the parties stipulate to such.<sup>123</sup> In the other states, polygraph tests are admissible only for limited purposes, such as to impeach a witness or to rebut negative inferences raised by a protesting party.<sup>124</sup> Generally speaking, the admissibility of polygraph tests is not conditioned upon whether the evidence is being used in a civil or a criminal trial; the test is either admissible in both a civil or a criminal trial or it is not.<sup>125</sup>

In determining the admissibility of scientific evidence, the U.S. Supreme Court has stated a four-part test, which is generally the minimum standard for those states that have adopted the Federal Rules of Evidence.<sup>126</sup> The four factors are:

- The theory and technique could be and has been tested;
- The theory and technique has been subjected to peer review and publication;
- The theory and technique has a known or potential rate of error;
- The theory and technique is generally accepted.<sup>127</sup>

The constitutionality of the per se inadmissible statutes and current case law is questionable because of two Supreme Court Cases. In *Rock v. Arkansas*,<sup>128</sup> the court held invalid a per se exclusion of hypnotically refreshed recollection. However, the court later upheld as constitutional a per se inadmissible military rule that banned polygraph tests from all court martial. <sup>129</sup>

To avoid any confusion over whether a polygraph test was admissible into evidence, New Mexico enacted a statute that set forth the minimum qualifications for polygraph examiners and tests.<sup>130</sup> If the standard is met under the statute, the test is admissible.

### C. *Brain Fingerprinting*

Much of the concern surrounding the validity of polygraph tests has caused scientist to search for a more reliable method. One scientist, Dr. Lawrence A. Farwell, has patented the technique of Brain Fingerprinting.<sup>131</sup>

Under the Brain Fingerprinting technique, a headband with sensors is attached to an individual’s head. The individual is then sat down in front of a computer screen where

relevant and non-relevant information concerning the crime scene is flashed onto the computer screen. The sensors then attempt to detect memory and encoding related multifaceted electroencephalographic responses (MERMER) as the information is presented. The sensors only detect electrophysiological manifestations, and not emotional responses (which is one of the advantages over polygraph tests). A MERMER can be detected one second after a stimulus presentation.<sup>132</sup>

There are four stages to the Brain Fingerprinting: crime scene evidence collection, brain evidence collection (the matching of crime scene evidence to actual knowledge), computer evidence analysis (mathematical determinations), and scientific result (information present or information not present).<sup>133</sup>

Brain Fingerprinting has been tested in connection with the FBI, the U.S. Navy, and other U.S. intelligence agencies. Thus far, the tests have been 100% accurate. Furthermore, Brain Fingerprinting has helped determine the guilt and innocence of two individuals.<sup>134</sup> In one case, an individual was released from prison, after having been there for 23 years, when the test determined that he was not at the scene of the crime and that his alibi was valid (and after one of the witnesses admitted to fabricating his story to cover his crime). In another case, a rape and murder suspect was induced to confess after the test revealed that he was at the scene of the crime.<sup>135</sup>

Thus far, Brain Fingerprinting has not been introduced as evidence in a trial. However, given its success rate, wide publication, non-invasive and non-testimonial technique, and its general acceptance, a court may be inclined to admit it into evidence.

## IX. JURY REFORMS

Arizona and Colorado have recently amended their civil rules of procedure to facilitate juror involvement in the trial process. Both jurisdictions now authorize jurors to be provided a notebook. Within these notebooks is a list of the witnesses, exhibits, preliminary jury instructions, a copy of the final jury instructions, item ordered by the court, blank paper on which to take notes, and orientation materials. The notebooks and notes are accessible during trial, recesses, and deliberations. In some jurisdictions, Arizona allows the court to record jury instructions on audiotape to be used during deliberations. Upon the conclusion of the trial, the notes are destroyed.<sup>136</sup>

In Arizona, jurors are also allowed to submit written questions directed to witnesses or to the court. The attorneys are allowed to object and the judge is allowed to modify the questions.<sup>137</sup> Furthermore, Arizona allows jurors to discuss evidence amongst themselves while in the jury room during recess from trial. All jurors must be present and the jurors must reserve judgment about the final outcome until final deliberations begin. The court may limit or prohibit juror discussions during recess.<sup>138</sup>

## X. CONCLUSION

The judicial system in American is constantly being modified to meet the current needs of the citizenry. The prevailing themes behind these changes reflect the need for a faster, simpler, fairer and more efficient judicial process. In making changes, the states have encouraged modifying past judicial procedures to allow greater access to, and participation in, the court system. Throughout our nation the states have had various levels of success in implementing court reforms. Additionally, the while some states are on the cutting edge of judicial progress, other states are not. By reviewing the successes and failures of the other states, and by taking advantage of the new technologies for the judicial process, Oregon will be able to implement those court reforms that are most beneficial to its citizens.

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Date

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Date

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<sup>1</sup> W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the "Odd Man Out" in How it Pays its Lawyers?*, 16 *Ariz. J. Int'l & Comp. L.* 361, 378-79 (1999).

<sup>2</sup> Philip J. Havers, *Take the money and Run: Inherent Ethical Problems of the Contingency Fee and Loser Pays Systems*, 14 *Notre Dame J.L. Ethics & Pub. Pol'y* 621, 625-631 (2000).

<sup>3</sup> Or. Rev. Stat. § 20.340 (1999).

<sup>4</sup> O.R.S. 20.340 (1)(a)(b).

<sup>5</sup> O.R.S. 20.340(1)(c).

<sup>6</sup> Joint Rules of Appellate Divisions § 1200.11 (N.Y. 2000)

<sup>7</sup> *Id.*

<sup>8</sup> New Jersey Court's Rule 1:21-27.

<sup>9</sup> [American Trial Lawyers Ass'n v. New Jersey Supreme Court](#), 66 N.J. 258, 330 A.2d 350 (1974).

<sup>10</sup> Okla. Stat. tit. 5 § 7 (2000).

<sup>11</sup> *In re Florida Bar*, 349 So.2d 630 (Fla. 1977).

<sup>12</sup> *The Wall Street Journal*, March 28, 1996, at A16.

<sup>13</sup> RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 897-902 (6th ed. 1995).

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- <sup>14</sup> Michael Horowitz, *Making Ethics Real, Making Ethics Work: A Proposal For Contingency*, 44 Emory L. J. 173, 174-75 (1995)
- <sup>15</sup> Susanne Di Pietro & Teresa W. Carns, *Alaska's English Rule: Attorney's Fee Shifting in Civil Cases*, 13 Alaska L. Rev. 33, 47-49 (1996).
- <sup>16</sup> AK. R. RCP. Rule 82(a).
- <sup>17</sup> AK. R. RCP. Rule 82(b)(1); *see also* Appendix ?
- <sup>18</sup> AK. R. RCP. Rule 82(b)(2).
- <sup>19</sup> AK. R. RCP. Rule 82(b)(4).
- <sup>20</sup> AK. R. RCP. Rule 82(d).
- <sup>21</sup> AK. R. RCP. Rule 82(b)(3).
- <sup>22</sup> AK. R. RCP. Rule 82(c).
- <sup>23</sup> AK. R. RCP. Rule 82(e).
- <sup>24</sup> *Gilbert v. State*, 526 P.2d 1131, 1136 (Alaska 1974).
- <sup>25</sup> W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the "Odd Man Out" in How it Pays its Lawyers?*, 16 Ariz. J. Int'l & Comp. L. 361, 427-28 (1999).
- <sup>26</sup> Susanne Di Pietro & Teresa W. Carns, *Alaska's English Rule: Attorney's Fee Shifting in Civil Cases*, 13 Alaska L. Rev. 33, 77-86 (1996).
- <sup>27</sup> *Id.* at 49-51.
- <sup>28</sup> *Id.* at 72-77. The study shows that in state courts 39% of the awards were under \$1,000, 34% fell between \$1,000 and \$5,000, and 27% exceeded \$5,000, and in federal courts 60% of the awards exceeded \$5,000, 30% fell between \$1,000 and \$5,000, and only 2% were under \$1,000.
- <sup>29</sup> *Id.* at 77-86.
- <sup>30</sup> *Id.* at 60-61.
- <sup>31</sup> *Id.* at 77-86.
- <sup>32</sup> *Id.*
- <sup>33</sup> *Id.*
- <sup>34</sup> *Id.*
- <sup>35</sup> *See* Common Sense Reform Act of 1995, H.R. 10, 104<sup>th</sup> Cong. § 101. Among other things, the Act proposed that attorney fees may be awarded to the prevailing party, but the award could not exceed the attorney fees of the losing party, and that the court could limit awards under special circumstances. The bill was eventually opposed.
- <sup>36</sup> S.B. 385, 68<sup>th</sup> Leg., 1<sup>st</sup> Reg. Sess., 1995 Or. Laws 618 (enacted).
- <sup>37</sup> *See* O.R.C.P. 54(D)(2) (2000).
- <sup>38</sup> *See* Or. Rev. Stat. §§ 20.105(1), 20.125 (1999); *see also* O.R.C.P. 17(C)(D) (2000).
- <sup>39</sup> *See* Appendix I.
- <sup>40</sup> Or. Rev. Stat. § 20.075 (1999).
- <sup>41</sup> Or. Rev. Stat. § 20.190 (1999).
- <sup>42</sup> O.R.S. 20.190(2).
- <sup>43</sup> *Id.*
- <sup>44</sup> O.R.S. 20.190(3).
- <sup>45</sup> O.R.S. 20.075(2).
- <sup>46</sup> O.R.C.P. 68(C)(2)(a)(b) (1999).
- <sup>47</sup> O.R.C.P. 68(C)(2)(c)(1999).
- <sup>48</sup> O.R.C.P. 68(C)(4)(a)(1999).
- <sup>49</sup> O.R.C.P. 68(C)(4)(b)(c)(1999).
- <sup>50</sup> O.R.C.P. 68(C)(4)(e)(1999).
- <sup>51</sup> *See* Or. Rev. Stat. § 46.465(4) (1999).
- <sup>52</sup> *See* Or. Rev. Stat. § 36.400, *et seq.* (1999).
- <sup>53</sup> S.B. 263, 45<sup>th</sup> Leg., 1<sup>st</sup> Reg. Sess., 1995 Okla. Sess. Law \_\_\_\_ (enacted).
- <sup>54</sup> H.B. 472, 123<sup>rd</sup> Gen. Assembly, Reg. Sess. (Ohio 1999-2000)(not enacted).
- <sup>55</sup> *Id.*
- <sup>56</sup> *Id.*
- <sup>57</sup> S.B. 193, 112<sup>th</sup> Gen. Assembly, 1<sup>st</sup> Sess. (S.C. 1997)(not enacted).
- <sup>58</sup> *See* Charles W. Branham, III, *It Couldn't Happen Here: the English Rule—But Not in South Carolina*, 49 S.C. L. Rev. 97, 979 (1998).

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- <sup>59</sup> Ariz. Rev. Stat. § 12-341.01 (1999).
- <sup>60</sup> Ariz. Rev. Stat. § 12-341.01(A)(C).
- <sup>61</sup> Ariz. Rev. Stat. § 12-341.01(B).
- <sup>62</sup> H.B. 2230-422R-S Ver, 44<sup>th</sup> Leg., 1<sup>st</sup> Sess. (Az. 1999).
- <sup>63</sup> 1980 Fla. Laws ch. 80-67, repealed by 1985 Fla. Laws ch. 85-175; *see also* Edward F. Sherman, *From “Loser Pays” to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice*, 76 Tex. L. Rev. 1863, 1866-69 (1998).
- <sup>64</sup> *Id.*
- <sup>65</sup> *See* T.R.C.P. 190-215 (1999).
- <sup>66</sup> T.R.C.P. 190.1.
- <sup>67</sup> T.R.C.P. 190.2(a).
- <sup>68</sup> T.R.C.P. 190.2(c)(1).
- <sup>69</sup> T.R.C.P. 190.2(c)(2).
- <sup>70</sup> T.R.C.P. 190.2(b).
- <sup>71</sup> T.R.C.P. 190.3(a).
- <sup>72</sup> T.R.C.P. 190.3(b)(1).
- <sup>73</sup> T.R.C.P. 190.3(b)(2).
- <sup>74</sup> T.R.C.P. 190.4.
- <sup>75</sup> T.R.C.P. 199.5
- <sup>76</sup> *See* James C. Turner & Joyce A. McGee, *Small Claims Reform: A Means of Expanding Access to the American Civil Justice System* (2000), <<http://www.halt.org/SmallClaims/UDC.html>>.
- <sup>77</sup> *Id.*
- <sup>78</sup> *See* Or. Rev. Stat. §§46.405, *et seq.*(1999).
- <sup>79</sup> Turner & McGee, *supra* note 72.
- <sup>80</sup> ORS §§46.405, *et seq.*
- <sup>81</sup> Florida Rule of Court: Small Claims Rules 7.010-7.341 (2000).
- <sup>82</sup> D.C. Code Ann. §§1301, *et seq* (1999).
- <sup>83</sup> Del. Code Ann. tit. 10, §§9301, *et seq* (1999).
- <sup>84</sup> S.C Code Ann. §10-320 (Law. Co-op. 1999).
- <sup>85</sup> Mont. Code Ann. §§ 501, *et seq* (1999).
- <sup>86</sup> Ky. Rev. Stat. Ann. §§ 24A.200, *et seq* (1999).
- <sup>87</sup> Neb. Rev. Stat. Ann. §§ 2801, *et seq* (1999).
- <sup>88</sup> Tenn. Code. Ann. §§ 501, *et seq* (1999).
- <sup>89</sup> Ind. Code Ann. §§ 5-1, *et seq* (1999).
- <sup>90</sup> Utah Code Ann. §§ 78.6.1, *et seq* (1999).
- <sup>91</sup> Cal. Civ. Proc. Code §§ 116.110, *et seq* (1999).
- <sup>92</sup> Turner & McGee, *supra* note 72; *see also* Ralph Warner, *Expand Small Claims Court Limits* (2000) <[http://www.nolo.com/democracy\\_corner/sc\\_limits.html](http://www.nolo.com/democracy_corner/sc_limits.html)>.
- <sup>93</sup> *Id.*
- <sup>94</sup> Or. Rev. Stat. § 55.011 (1999).
- <sup>95</sup> Turner & McGee, *supra* note 72.
- <sup>96</sup> Or. Rev. Stat. §§ 36.400, *et seq* (1999).
- <sup>97</sup> L. Christopher Rose, *Nevada’s Court-Annexed Mandatory Arbitration Program: A Solution to Some of the Clauses of Dissatisfaction With the Civil Justice System*, 36 Idaho L. Rev. 171, 175-188 (1999).
- <sup>98</sup> *Id.*
- <sup>99</sup> *Id.*
- <sup>100</sup> *Id.*
- <sup>101</sup> *Id.*
- <sup>102</sup> *Id.*
- <sup>103</sup> Ann Bersi, *Courts Must Take Leadership Role in Educating Public About State Court System: Nevada at the Forefront*, 7 Jul. N.V. Law 4, 5 (2000).
- <sup>104</sup> Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 Fordham L. Rev. 2241, 2241 (1999).
- <sup>105</sup> *Id.*

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<sup>106</sup> Margaret M. Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?* 67 Fordham L. Rev. 1879, 1891-894 (1999).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Michael J. Ligons, *Polygraph Evidence: Where Are We Now?*, 65 Mo. L. Rev. 209, 218 (2000).

<sup>111</sup> In *U.S. v. Scheffer*, 523 U.S. 303, 318, 320 (1998), four of the concurring justices believed that it was unwise to have per se bans on polygraph tests, and one justice believed that per se ban were unconstitutional.

<sup>112</sup> Ligons, *supra* note 89, at 217.

<sup>113</sup> *Id.* at 222.

<sup>114</sup> *State v. Brown*, 297 Or. 404, 445. 687 P.2d 751, \_\_\_ (1984).

<sup>115</sup> *State v. Lyon*, 304 Or. 221, 223, 744 P.2d 231, 231 (1987).

<sup>116</sup> 308 Or. 259, 261, 780 P.2d 215, 215 (1989); *see also* Or. Rev. Stat. § 421.190 (1999) which says, "Evidence may be received at disciplinary hearings *even though inadmissible under rules of evidence applicable to court procedure* and the department shall establish procedures to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to afford the inmate a reasonable opportunity for a fair hearing (emphasis added)."

<sup>117</sup> In *the Matter of the Marriage of Fromdahl*, 314 Or. 496, 507, 840 P.2d 683, 690 (1992).

<sup>118</sup> *Id.*

<sup>119</sup> Or. Rev. Stat. § 703.010, *et seq.* (1999).

<sup>120</sup> O.R.S. § 703.030.

<sup>121</sup> *Snow*, at 267, 780 P.2d at 219.

<sup>122</sup> *Id.* at 218.

<sup>123</sup> *Id.* at 224.

<sup>124</sup> *Id.* at 225.

<sup>125</sup> *Id.*

<sup>126</sup> *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993); *see* Fed. R. Evid. 403, 608, and 702.

<sup>127</sup> *Id.*

<sup>128</sup> 483 U.S. 44, 42 (1987).

<sup>129</sup> *Scheffer*, at 317.

<sup>130</sup> N.M. R. Evid. 11-707B.

<sup>131</sup> Lawrence A. Farwell, Ph.D. & Sharon S. Smith, *Using Brain MERMER Testing to Detect Knowledge Despite Efforts to Conceal*, Journal of Forensic Science, v. 46, n. 1 (2001).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Lawrence A. Farwell, Ph.D., *Executive Summary: Farwell Brain Fingerprinting*,

<<http://www.brainwave-science.com/OnePageSummary0004.htm>>.

<sup>135</sup> *Id.*

<sup>136</sup> Az. R. C. P 39(d)(p), 51(b) (1999); C.R.C.P 16(c)(V), 47(m)(t) (1999).

<sup>137</sup> Az. R. C. P. 39(b)(10).

<sup>138</sup> Az. R. C. P. 39(f).