

21st Century Civil Justice System A Roadmap for Reform



Pilot Project Rules



INSTITUTE *for the*
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DENVER

21st Century Civil Justice System: A Roadmap for Reform Pilot Project Rules

INSTITUTE *for the*
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LEGAL SYSTEM



Institute for the Advancement of the American Legal System

at the

University of Denver



American College of Trial Lawyers

Task Force on Discovery and Civil Justice

Institute for the Advancement of the American Legal System

The Institute for the Advancement of the American Legal System (IAALS) is a national, non-partisan organization dedicated to improving the process and culture of the civil justice system. Executive Director and former Colorado Supreme Court Justice Rebecca Love Kourlis leads a staff distinguished not only by their expertise but also by their diversity of ideas, backgrounds and beliefs.

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A Message to Our Readers



Rebecca Love Kourlis
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Paul C. Saunders
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21st Century Civil Justice System A Roadmap for Reform

The nation's civil justice system is too expensive, too cumbersome and takes too long. As a result, the price of justice is high and access is being compromised. Small to mid-sized cases that should be filed are not filed because they fail a reasonable cost/benefit analysis; cases that are brought often settle principally because of costs, not merits. Civil jury trials are disappearing.

The American College of Trial Lawyers (ACTL) and the Institute for the Advancement of the American Legal System (IAALS) are both dedicated to protecting and improving our civil justice system. In 2007, IAALS and the ACTL Task Force on Discovery and Civil Justice formed a partnership to study those problems.

We reviewed existing research on the subject, then surveyed the membership of the ACTL. The results of that survey voiced a compelling mandate. Of the Fellows responding, 65% thought that the system fails to meet the guarantee of Rule 1 of the Federal Rules of Civil Procedure of a "just, speedy and inexpensive determination of every action."

The next step was to focus on possible solutions to the problems. In March 2009, we published a joint *Final Report* that contains 29 Principles. Those Principles suggest changes to the civil justice system that would address costs by simplifying and expediting the system. The *Final Report* can be found on both of our websites at www.actl.com and www.du.edu/legalinstitute.

The Principles represent the best thinking of the individuals involved in our project, in collaboration with the broader membership of the ACTL and with experts across the nation. Nonetheless, we understand how important it is to test our proposed solutions before suggesting that they be widely implemented.

Accordingly, it is our intention that the Principles be tested in pilot projects in courts around the country, with the projects monitored and measured to determine what works and what does not. In order to be able to apply the Principles in those pilot projects, we have undertaken the task of reducing them to operational Rules.

We urge jurisdictions to use these Rules as a roadmap for consideration in creating and implementing a pilot project. IAALS has dedicated a portion of its website to these pilot projects (www.du.edu/legalinstitute/tcriz.html), and will be collecting information as we move forward. IAALS will also be developing metrics to gauge the impact of the pilot projects.

The civil justice system is a centerpiece of American democracy. It is in need of improvement. We must refuse to settle for an ailing system that does not adequately meet the needs of litigants. Rather, we must begin to test possible solutions. Our organizations commit to serving as a resource for you in that important work.



Rebecca Love Kourlis



Paul C. Saunders



Pilot Project Rules

Preamble These Pilot Project Rules (PPR) are meant to apply the Principles set forth in the *Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System (ACTL/IAALS Principles)*.^{*} They are not meant to be a complete set of rules. The court's existing rules will govern except to the extent that there is an inconsistency, in which case the PPR will take precedence. In addition, the PPR may need to be tailored to specific requirements in a jurisdiction. Furthermore, there may be certain kinds of cases to which the PPR should not apply because of statutory or constitutional requirements (for example, the requirements contained in the Private Securities Litigation Reform Act of 1995).

^{*} The name of the Task Force was subsequently revised to the Task Force on Discovery and Civil Justice to acknowledge that the problems we identified were not confined to discovery.

Rule One

Scope

- 1.1. These Rules govern the procedure in all actions that are part of the pilot project. They must be construed and administered to secure the just, timely, efficient, and cost-effective determination of such actions.
- 1.2. At all times, the court and the parties must address the action in ways designed to assure that the process and the costs are proportionate to the amount in controversy and the complexity and importance of the issues. The factors to be considered by the court in making a proportionality assessment include, without limitation: needs of the case, amount in controversy, parties' resources, and complexity and importance of the issues at stake in the litigation. This proportionality rule is fully applicable to all discovery, including the discovery of electronically stored information.

Comment to PPR 1.2

The Federal Rules of Civil Procedure and many state rules already contain factors that—where applied—address proportionality in discovery. However, these factors are rarely if ever applied because of the longstanding notion that parties are entitled to discover all facts, without limit, unless and until a court says otherwise. It is the purpose of these PPRs that the default be changed—all facts are not necessarily subject to discovery. Because these rules reverse the default, the proportionality factors that are provided in existing rules and restated in the PPR can be applied more effectively to achieve the goals stated in PPR 1.1.

Rule Two

Pleadings – Form and Content

- 2.1. The party that bears the burden of proof with respect to any claim or affirmative defense must plead with particularity all material facts that are known to that party that support that claim or affirmative defense and each remedy sought, including any known monetary damages. A material fact is one that is essential to the claim or defense and without which it could not be supported. As to facts that are pleaded on information and belief, the pleading party must set forth in detail the basis for the information and belief.
- 2.2. Any statement of fact that is not specifically denied in any responsive pleading is deemed admitted. General denials are not permitted and a denial that is based on the lack of knowledge or information must be so pleaded.

Comment to PPR 2.1

PPR 2.1 expects that the pleading party will plead all material facts known to support a claim or affirmative defense. It is intended to revitalize the role that pleadings play in narrowing issues at the earliest stages of litigation, by bringing salient facts to light in the hope that doing so will reduce the need for discovery. PPR 2.1 is not intended to resuscitate the technicalities associated with common-law pleading or foreclose access to the courts.

The material facts pleaded should provide the “who, what, when, where, and how” of each element of a claim or defense. Several examples follow. In a claim for breach of contract, the pleader should provide a description of the nature of the contract, identify the relevant signatories and date of signature, and for each provision alleged to be breached, state the provision and describe in detail

the manner in which it was allegedly breached. In a claim for negligence arising from an automobile accident, the pleader should state in detail the time, date, and location of the accident, describe in detail the alleged negligent act, provide a precise description of the alleged physical injuries and property damage, and describe known monetary damages. In a claim for patent infringement, the pleader should provide facts identifying the patentee(s) and assignee(s), patent number, dates of application and issue, efforts to mark any products or processes covered by the patent, the specific products or processes that the defendants allegedly made, used or sold in violation of the patent, where and when those products or processes were made, used and sold within the United States, and the claims of the patent that are allegedly infringed.

The pleading requirements apply equally to affirmative defenses. For example, for an affirmative defense alleging the running of the statute of limitations, the pleader should state which claims are time-barred and, for each such claim, the applicable statute of limitations and specific time that has elapsed since the claim accrued.

If a pleading party cannot through due diligence obtain facts necessary to support one or more elements of the claim, the party may plead such facts on information and belief, again with as much detail as possible. However, this provision should not be used in a manner that evades the intent of the rule. Rather, the party should make use of the precomplaint discovery provision in PPR 3 to compile the facts to meet the burden.

The requirement that parties plead each remedy sought is not intended to preclude alternative remedies at the outset, and required damages are only those damages that can be quantified at the time of filing of the action.

Rule Three

Precomplaint Discovery

- 3.1. On motion by a proposed plaintiff with notice to the proposed defendant and opportunity to be heard, a proposed plaintiff may obtain precomplaint discovery upon the court's determination, after hearing, that:
 - a. the moving party cannot prepare a legally sufficient complaint in the absence of the information sought by the discovery;
 - b. the moving party has probable cause to believe that the information sought by the discovery will enable preparation of a legally sufficient complaint;
 - c. the moving party has probable cause to believe that the information sought is in the possession of the person or entity from which it is sought;
 - d. the proposed discovery is narrowly tailored to minimize expense and inconvenience; and
 - e. the moving party's need for the discovery outweighs the burden and expense to other persons and entities.
- 3.2. The court may grant a motion for precomplaint discovery directed to a nonparty pursuant to PPR 3.1. Advance notice to the nonparty is not required, but the nonparty's ability to file a motion to quash shall be preserved.
- 3.3. If the court grants a motion for precomplaint discovery, the court may impose limitations and conditions, including provisions for the allocation of costs and attorneys' fees, on the scope and other terms of the discovery.

Comment to PPR 3

The Federal Rules do not presently permit precomplaint discovery, but it is permitted in some states, either

after an action has been commenced by writ of summons (e.g., PA. R. CIV. P. 4003.8), or by a miscellaneous action brought for the sole purpose of seeking leave to conduct the discovery (e.g., OHIO REV. CODE § 2317.48; N.Y. CPLR LAW § 3102(c)).

Rule Four

Single Judge

- 4.1. As soon as a complaint is filed, a judge will be assigned to the case for all purposes, and, absent unavoidable or extraordinary circumstances, that judge will remain assigned to the case through trial and post-trial proceedings. It is expected that the judge to whom the case is assigned will handle all pretrial matters and will try the case.

Rule Five

Initial Disclosures

- 5.1. No later than (x) days after service of a pleading making a claim for relief, the pleading party must make available for inspection and copying all reasonably available documents and things that may be used to support that party's claims.
- 5.2. The date for each responsive pleading should be fixed to follow the due date of the applicable initial disclosures required by PPR 5.1 by (x) days.
- 5.3. No later than (x) days after service of a pleading defending against a claim for relief, the pleading party must make available for inspection and copying all reasonably available documents and things that may be used to support any defense of that party.

- 5.4. Each party has an ongoing duty to supplement the initial disclosures promptly upon becoming aware of the supplemental information.
- 5.5. A party that fails to comply with PPR 5.1, 5.3 or 5.4 may not use for any purpose the document or thing not produced, unless the court determines that the failure to disclose was substantially justified or was harmless.

Comment to PPR 5

The ACTL/IAALS Principles suggest that the plaintiff should be required to produce such documents very shortly after the complaint is served and that the defendant (who, unlike the plaintiff, may not be presumed to have prepared for the litigation beforehand) be required to produce such documents within a somewhat longer period of time. However, court rules on timing vary so these rules have left the times to be determined by the pilot project court. See FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 8 (Mar. 11, 2009).

Rule Six

Motion to Dismiss/Stay of Discovery

- 6.1. Upon the making of a motion directed to the personal or subject matter jurisdiction of the court or the legal sufficiency of one or more claims for relief, made together with an answer or at the time within which an answer would otherwise be due, the court, at the request of the moving party based on good cause shown, may stay initial disclosures and discovery in appropriate cases for a period of up to 90 days. The motion must be decided within that 90 day period.

Rule Seven

Preservation of Electronically Stored Information

- 7.1. Promptly after litigation is commenced, the parties must meet and confer about preservation of any electronically stored information. In the absence of an agreement, any party may move for an order governing preservation of electronically stored information. Because the parties require a prompt response, the court must make an order governing preservation of electronically stored information as soon as possible.

Rule Eight

Initial Pretrial Conference

- 8.1. Unless requested sooner by any party, the judge to whom the case has been assigned must hold an initial pretrial conference as soon as practicable after appearance of all parties. Each party's lead trial counsel must attend this conference. At least three days before the conference, the parties must submit a joint report setting forth their agreement or their respective positions on the following matters, if applicable:
 - a. an assessment of the application to the case of the proportionality factors in PPR 1.2;
 - b. production, continued preservation, and restoration of electronically stored information, including the form in which electronically stored information is to be produced and other issues relating to electronic information;
 - c. proposed discovery and limitations on discovery, specifically discussing how the proposed discovery and limitations on discovery are consistent with the proportionality factors in PPR 1.2. Limitations on discovery may include:



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- i. limitations on scope of discovery;
 - ii. limitations on persons from whom discovery can be sought;
 - iii. limitations on the types of discovery;
 - iv. limitations on the restoration of electronically stored information;
 - v. numerical limitations;
 - vi. elimination of depositions of experts when their testimony is strictly limited to the contents of their written report;
 - vii. limitations on the time available for discovery;
 - viii. cost shifting/co-pay rules, including the allocation of costs of the production of electronically stored information;
 - ix. financial limitations; and
 - x. discovery budgets that are approved by the clients and the court.
- d. proposed date for the completion of discovery;
 - e. proposed date for disclosure of prospective trial witnesses;
 - f. dispositive motions;
 - g. the amount of time required for the completion of all pretrial activities and the approximate length of trial;
 - h. the issues to be tried;
 - i. the appropriateness of mediation or other alternative dispute resolution;
 - j. sufficiency of pleadings and compliance with PPR 2;
 - k. amendment of pleadings;
 - l. joinder of parties;
 - m. expert witnesses, including dates for the exchange of expert reports;
 - n. computation of damages and the nature and timing of discovery relating to damages; and
 - o. any other appropriate matter.
- 8.2. As soon as possible after that conference, the judge to whom the case is assigned must make an initial pretrial order with respect to each of the matters set forth above and set a trial date. The initial pretrial order must specifically include the court's own assessment of the applicability to the case of the proportionality factors in PPR 1.2. In arriving at that assessment, the court should consider, but is not bound by, the assessments made by the parties. Modifications to the initial pretrial order may be made only upon a showing of good cause. Except as otherwise provided by the PPR, continuances and stays must not be permitted.

Comment to PPR 8.1

PPR 8.1(c)(viii) anticipates that the parties' joint report may include an allocation of the costs of producing electronically stored information. Unless directed otherwise by an order of the court, the cost of preserving, collecting and producing electronically stored information must be borne by the producing party. The court shall consider shifting any or all costs associated with the preservation, collection and production of electronically stored information if the interests of justice and proportionality so require.

Rule Nine

Additional Pretrial Conferences/ Setting the Trial Date

- 9.1. A party may request a special conference with the court to seek guidance on or the modification or supplementation of the court's outstanding pretrial orders.

- 9.2. The court may hold additional status conferences on its own motion.
- 9.3. A conference may be held in person or by telephone or videoconference, at the court's discretion.
- 9.4. If not already set in the initial pretrial order, the court must set a trial date at the earliest practicable time, and that trial date must not be changed absent extraordinary circumstances.

Rule Ten

Discovery

- 10.1. Discovery must be limited in accordance with the initial pretrial order. No other discovery will be permitted absent further court order based on a showing of good cause and proportionality.
- 10.2. Discovery must be limited to matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and must comport with the factors of proportionality in PPR 1.2, including the importance of the proposed discovery in resolving the issues, total costs and burdens of discovery compared to the amount in controversy, and total costs and burdens of discovery compared to the resources of each party.

Rule Eleven

Expert Discovery

- 11.1. Each expert must furnish a written report setting forth his or her opinions, and the reasons for them, and the expert's direct testimony will be strictly limited to the contents of the report. There must be no additional discovery of expert witnesses except as provided by the initial pretrial order.

- 11.2. Except in extraordinary cases, only one expert witness per party may be permitted to submit a report and testify with respect to any given issue.

Comment to PPR 11

This rule is intended to apply to Federal Rule of Evidence 702 experts. It is not meant to address testimony of fact witnesses who, by virtue of their training and experience, would be qualified to express expert opinions but are not retained by any party for that purpose.

Rule Twelve

Costs and Sanctions

- 12.1. The court may impose sanctions in addition to those set forth in PPR 5.5, as appropriate for any failure to provide or for unnecessary delay in providing required disclosures or discovery.
- 12.2. Sanctions may be imposed for destruction or failure to preserve electronically stored information only upon a showing of intent to destroy evidence or recklessness.



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