

# LAW WEEK

## COLORADO

# Civil Rules Revisions Require Culture Change

*IAALS summit focused on remaining tasks for judicial reform*

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The Institute for the Advancement of the American Legal System took a close focus on the new federal rules of civil procedure at its 4th Annual Civil Justice Reform Summit.

The event held Thursday and Friday at the University of Denver's Cable Center brought together judges and attorneys from around the country to discuss the work that went into statewide pilots and rule changes as well as a major revision to the federal rules that went into effect Dec. 1. Although the new rules themselves mark a widespread recognition for a need for less costly and more speedy trials, the reformers behind them are calling for a culture change, as well, in order to make the rules effective.

## STATE CHANGES

IAALS executive director Rebecca Love Kourlis said Thursday that the event was held and the reform was led out of a belief in a system that actually works. With civil litigation often running well past a year and e-discovery making high-value cases even more expensive, reform was needed to make the system work for its participants.

Following the lead of IAALS' own 2009 report on recommendations for discovery reform, several states around the country launched pilot projects to ease the civil judicial process over the past half-decade.

Paula Hannaford-Agor, director of the Center for Jury Studies in Williamsburg, Virginia, referenced the "Landscape of Civil Litigation in State Courts" study that looked at the caseload of courts in 10 urban counties between 2012 and 2013. "High value cases are the tip of the iceberg," she said. "Most of the cases are in single tier courts."

The study found that most cases were lower-value cases — such as

debt collection, mortgage foreclosures and small claims — and most judgments were less than \$25,000. Hannaford-Agor also noted that tort cases "dried up," going from a 1:1 ratio of tort to contract cases in the previous similar study, conducted in 1992, to a 1:7 ratio in the study's sample.

Among those high-volume cases, panelist Linda Sandstrom Simard said she was shocked at the asymmetry of representation in litigation — most defendants are unrepresented individuals facing corporations. Many have limited English proficiency or limited literacy, some have cognitive impairments, and there is a general distrust of the system, she said.

In addition to the states' general goal of limiting the delays and cost of litigation, she said there was also a focus on maintaining integrity and fairness in the legal system.

Panelists discussed several pilot projects to take on those goals in Massachusetts, New Hampshire, Utah, Colorado and Minnesota.

The Colorado Civil Access Pilot Project was launched in January 2012 and was run through July 2015 after two extensions. The project led to final adoption of statewide rules last year. The focus of CAPP was to speed up the litigation process by requiring more robust disclosures, limiting extensions and limiting discovery.

According to Brittany Kauffman, director of IAALS Rule One Initiative, the project succeeded in reducing the time to disposition.

Massachusetts' pilot project was focused specifically on easing the burden and cost of business cases. The idea was to set a tone of cooperation in the courts, and Sandstrom Simard said there was an improvement in the timeliness of discovery case events, case resolutions and the cost effectiveness of discovery.

New Hampshire's project was

started after IAALS' report and implemented five rules to create more open and collaborative courts with meet-and-confer requirements, mandatory disclosure requirements and meet-and-confer for electronic discovery.

"It was kind of disappointing," Hannaford-Agor said. The expectation was that the process would create a faster time to disposition by the virtue of the fact the participants would be communicating more. One of the things left out of case management was that attorneys could pick their own deadlines for when things happened. "They picked their own deadlines for what they used to do," she said. She recommended states set rules with more involvement in the expectations that decrease time to disposition.

## FEDERAL CHANGES

The U.S. Supreme Court last year approved changes to the federal rules of civil procedure, addressing the same concerns of cost and delay that the state courts addressed. The federal courts took that on by promoting active case management by federal judges, encouraging cooperation between attorneys, making changes in preservation and sanctions for loss of electronically stored information.

Judge John Koeltl of the U.S. District Court for the Southern District of New York said the clear effects of the rules are that the expedited case management rules shorten the beginning of the litigation process by two months by shaving 30 days off the initial time to serve summons and 30 days off the time for scheduling orders.

Another key change to expedite the process is involved in Rule 16, which allows parties to communicate through any direct means for scheduling conferences, such as phone or video conferencing. In short, "mail is out, Ouija boards are

out," Koeltl said.

The federal rules also clarify an expectation for proportionality in discovery. Judge Jeffrey Sutton of the 6th Circuit Court of Appeals said limiting discovery was a necessary change from how the rules were originally enacted in 1938. "The assumptions from the '38 rules are 'why wouldn't you turn over every other stone?' In '38, there were a lot fewer stones."

## A CULTURAL MOVEMENT

Although the rules should clarify aspects of litigation that can let cases get away from litigants, those involved in the reform agreed that what is really needed in order to make the courts more effective is widespread culture change.

Jeremy Fogel, director of the Federal Judicial Center in Washington, D.C., said he was impressed by how careful and thoughtful the rulemaking process was. "But we should also look at what the Chief Justice highlighted in his year-end message," he said. "People did not go through the process just so a couple rules could be changed. ... The reason it was undertaken was to change the way we do business."

He said judges often think like lawyers and might only apply the rules differently to the extent they are written. He said the rules are meant to change the way civil litigation is run, though. "They could change the role of judge in fairly significant way."

Among the state rule changes, panelists cited culture as a significant factor as well. Sandstrom Simard said the short-term goal of the project in Massachusetts was to control discovery. The long-term goal is to change the legal culture to accept the concept of reasonableness and proportionality without the heavy involvement of a judge. That however, is a "work in progress," she said. •

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