

# LAW WEEK

## COLORADO

## Civil Changes: A Need To Wait And Hope

By **James Carlson**  
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DENVER — Last year, an elderly preacher by the name of Harold Camping boldly predicted the earth would perish on Oct. 21. He turned out to be wrong.

Talking at a panel discussion last week, Utah lawyer Francis Wikstrom said that state's lawyers have a little Camping in them.

"They predicted the end of the world when the new rules of civil procedure took effect," he said. "Ten months later, we continue to limp along, and their prediction has proven to be equally inaccurate."

Wikstrom and lawyers involved in four other states' pilot projects on civil procedure discussed the issues with the current system and changes their states are implementing to address the problems. The panel was part of IAALS' Civil Justice Reform Summit.

The problem is well known to even the occasional participant in the civil justice system. A process that is supposed to be "just, speedy and inexpensive" has become bogged down in expensive discovery processes and continuances that can drag out for years. Because of these factors, national surveys show that litigation costs are disproportionate to small claims often sought in these cases.

In a paper co-authored last year by Sherman & Howard attorney Skip Netzorg, co-chair of Colorado's committee to reform civil procedure, he wrote that for many firms the threshold is \$100,000, "suggesting the problem extends beyond the smaller cases." As he told the panel audience last week, "Up and down the system people were really fed up."

This has all resulted in a steep decline in civil jury trials. Nationally, state



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court jury trials dropped by 32 percent between 1976 and 2002, according to a survey of 22 states. In Colorado, jury trials haven't accounted for more than 1.7 percent of outcomes in any year in the last decade.

As Judge Louise Dovre Bjorkman, of the Minnesota Court of Appeals, recalled one of her state's supreme court justices telling her once, "Civil justice is no longer relevant to our public."

The problems, panelists said, are actually quite easy to identify. The process is too long because of a culture of continuances and delay tactics. And the expenses are exorbitant due to a standard discovery practice of asking for everything and giving nothing.

In Colorado, the Civil Access Pilot Project, or CAPP, seeks to limit the gamesmanship through pretrial conferences to make the expectations clear by decreasing discovery disputes and by

increasing worthwhile trials.

Discovery seemed the biggest issue for many. Netzorg said Colorado attorneys, despite rules that require disclosure of every pertinent document, had developed a "don't give it up" concept. "So we were expending vast resources to get what we already had a right to get."

He said the new rules hope to change that culture by refocusing on proportionality, which CAPP defined as "discovery needed to prove or disprove a claim or defense or to impeach a witness."

A few components are involved. There is early substantial disclosure of witnesses and documents — whether supportive or harmful. Failure to disclose on time now results in mandatory sanctions. Likewise in Utah where Wikstrom said there are "draconian consequences for not meeting the disclosure deadlines."

"If you don't disclose it, you can't use it," he said.

Colorado also changed the rules on motions to dismiss, which now don't stay a case. So attempts to delay or push other deadlines can't be accomplished through such motions. Because of that, Netzorg said one Denver judge told him that motions to dismiss are now more substantive.

Many states have also constricted the use of expert witnesses. In Colorado, they're limited to one per side per issue, except in extraordinary circumstances.

States have also pushed for a one case, one judge standard. "Cases that bounce from judge to judge take longer, cost more and are harder to narrow the issues on," Bjorkman said. "You're less likely to get to trial on time."

Which is why judges in the pilot projects are also setting firm trial dates and scrutinizing attempts to continue. "I think the result will be more trials," she said. "We know a lot settle not because of merits but because people give up. We'll see more trials and that's a good thing."

Retired Judge Margaret Hinkle from Massachusetts, one of the early adopters of such programs, told the audience that the state has seen the effects. Motions to compel are nearly nonexistent, she said as one sign of progress, and cases are moving faster.

Meanwhile, in most states the jury is still out on the impact of these projects. Hopes for the changes are high.

"We hope they cut down on cost of discovery," Wikstrom said. "We hope they'll result in more trials. We hope more people with small claims will have access to civil justice. We're waiting to see." •

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