# A Year after Significant Civil Justice Reforms in Colorado: Successes and Challenges

by Nina Y. Wang and Morris B. Hoffman, with contributions by Brittany K.T. Kauffman

It has now been a full year since significant amendments were enacted to the Federal Rules of Civil Procedure.[1] The amendments focused on addressing the issues of cost and delay through increased cooperation, proportionality in discovery, and early case management by judges. The amendments represent the culmination of years of effort by the federal Standing Committee on Rules of Practice and Procedure and the Advisory Committee on Federal Rules of Civil Procedure, as well as many others around the country who worked to amend the rules to achieve a more just, speedy, and inexpensive resolution of civil cases.

These efforts have not been limited to the federal system. There has been an equal focus on improving our civil justice system at the state level, where state courts face larger dockets, higher numbers of self-represented litigants, and a changing landscape of case types. The Conference of Chief Justices recently adopted recommendations for addressing these challenges.[2] Colorado is a leader among the states, with innovations like Colorado's Civil Access Pilot Project (CAPP), which tested new pretrial procedures for pleading, disclosure, discovery, and case management in business cases in five district courts from 2012 to 2015. In July 2015, Colorado adopted amendments that mirrored many of the federal rule amendments and made aspects of CAPP permanent.

Despite these efforts, "organizational change is a process, not an event."[3] Attorneys are watching with interest as the case law and case management practices develop around these reforms. In this article, a federal magistrate and a state court judge share practice advice for attorneys navigating the new rules and discuss challenges and areas for improvement of our system.

## Magistrate Judge Nina Y. Wang, U.S. District Court for the District of Colorado

In his 2015 Year-End Report on the Federal Judiciary, U.S. Supreme Court Chief Justice John G. Roberts stated:

> The amendments may not look like a big deal at first glance, but they are . . . . For example, Rule 1 of the Federal Rules of Civil Procedure has been expanded by a mere eight words, but those are words that judges and practitioners must take to heart. Rule 1 directs that the Federal Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." The underscored words make express the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation—an obligation given effect in the amendments that follow. The new passage highlights the point that lawyers—though representing adverse parties—have an affirmative duty to work together, and with the court, to achieve prompt and efficient resolutions of disputes.[4]

The amendments to the Federal Rules of Civil Procedure, effective December 1, 2015, refocus the court, and the parties, on a practice of active engagement for pretrial discovery. In doing so, the Advisory Committee Notes to the amendments suggest that many, if not all, of the concepts of proportionality in discovery, early and active case management by judges, and reasonable expectations for electronic discovery are not new. Yet attorneys and judges continue to refine their respective approaches to discovery in response to the 2015 amendments, and I reflect on some of those efforts here.

The efforts in our own district to define the expectations for parties and active engagement by the court started before the 2015 amendments went into effect. For example, a year before the amendments, in *Witt v. G.C. Services Ltd Partnership*, Magistrate Judge Craig B. Shaffer explained that "a party does not have an unfettered or absolute right to conduct discovery. The court has considerable discretion to tailor discovery to the circumstances of the case at hand, to adjust the timing of discovery, and apportion the costs and burdens in a way that is fair and reasonable."[5] Because the parties are more familiar with the needs of the case and the particular burdens presented by certain discovery requests, counsel should be ready as


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early as the scheduling conference to discuss with the court particular discovery needs and how such needs correlate to asserted claims and defenses; to understand and be responsive to inquiries about how the client maintains information (electronic or otherwise); to estimate in good faith the amount at issue in the case; and to discuss a realistic discovery plan that can meet the needs of the parties. In some cases, that may mean asking the court to set interim status conferences to facilitate a robust meet and confer process and an efficient resolution of disputes. In others, that may mean being prepared to address why a particular case requires all of the discovery that the Federal Rules contemplate.

In navigating these amendments, the parties and the court should be wary of using shorthand, such as "proportionality," rather than discussing the actual factors that Rule 26(b)(1) asks the court and the parties to weigh in determining a reasonable scope of discovery. Recently, Judge David G. Campbell observed:

> The 2015 amendments thus eliminated the "reasonably calculated" phrase as a definition for the scope of permissible discovery. Despite this clear change, many courts continue to use the phrase. Old habits die hard. . . . The test going forward is whether evidence is "relevant to any party's claim or defense," not whether it is "reasonably calculated to lead to admissible evidence."[6]

Under Rule 26(b)(1), the relevant factors for defining the scope of discovery are: (1) the importance of the issues at stake in the action; (2) the amount in controversy; (3) the parties' relative access to relevant information; (4) the parties' resources; (5) the importance of the discovery in resolving the issues; and (6) whether the burden or expense of the proposed discovery outweighs its likely benefits.[7] These considerations require the parties to understand where a particular discovery request fits into a broader discovery plan (e.g., whether the information or documents sought is cumulative of other discovery in the matter). It also requires parties to be flexible in their evaluation of whether other discovery methods are better-suited and more economical in terms of ascertaining the necessary evidence.

Finally, all attorneys—from the most junior to the most senior—should remain vested throughout the discovery process. Otherwise, pretrial discovery is fraught with potential pitfalls. To that end, be as precise as possible (without giving up client confidences) about what you have done and have not done in terms of searching, and what your client has and does not have. Practice and client demands certainly require attorneys to avoid duplication of effort.

But those pressures should not lead to silos of knowledge where counsel leading the case strategy is unengaged with the information and evidence already collected, and counsel leading the collection effort fails to understand how that information fits into the overall case strategy. Courts rely on attorneys as officers of the court to be forthright and accurate about discovery. For instance, when declaring that you have produced everything responsive, be sure that you and the court understand how you reached that conclusion. Similarly, before contending that opposing counsel has intentionally withheld information, know what is in the production that you already possess. In the end, a short-term win on a discrete discovery battle is simply not worth sacrificing your professional reputation.

## Judge Morris Hoffman, Denver District Court

Our new state amendments to the Rules of Civil Procedure are working pretty much like all previous iterations have over the last 30 years: the drafters love them, the bulk of the lawyers who have to work with them hate them, and they will have no impact on the main problem with civil litigation—soaring costs.

The amendments changed Rule 1 (adding provisions about cooperation), Rule 16 (adding provisions about disclosures), and Rule 26 (adding the requirement that discovery be "proportional"). I don't know how lawyers feel about the cooperation and proportionality provisions, but I have some pretty compelling anecdotal evidence that they are not thrilled with most of the changes to Rule 16. For 15 months, from February 2014 through April 2015, I conducted an informal, off-the-record poll of lawyers after every CAPP conference. I asked counsel to tell me candidly what they thought of CAPP—what they liked, what they didn't like, and how it could be improved. To get something quantifiable, I also asked them to rate the program on a scale of 1 (negative) to 10 (positive). Ninety-seven respondents gave it an average ranking of 3.9, which I thought was surprisingly low, especially given what I assumed would be some in terrorem effect of talking about this in front of the judge who just did their CAPP conference.

For the first few months, all the scores were ones and twos. The scores rose slowly over time, reflecting, I suppose, the fact that lawyers, like all humans, take a while to warm up to new things (or to surrender to them). The distribution nevertheless remained heavily skewed toward the negative. And my guess is that the 3.9 average reflects a default toward the mean ("when in doubt, give it a 5") that hides an even more negative attitude.

But almost all respondents loved two things about the CAPP program: (1) the rule that required an answer and didn't allow the filing of a motion to dismiss in lieu of an answer; and (2) the mandatory early case management conference. When the Colorado Supreme Court revised Rule 16, it didn't adopt either of these two popular provisions. Although Rule 16(d)(1) seems to make early case management conferences mandatory, Rule 16(d)(3) gives counsel the right to ask the court to dispense with them. And the current version still lets defendants stall out a case for months by filing a motion to dismiss instead of an answer. This was not only one of the most popular CAPP provisions, it was also the most effective at getting cases moving. Neither did the Court adopt the one CAPP rule that I think would have had the biggest impact on litigation costs: prohibiting expert depositions.

In October 2014, IAALS—the Institute for the Advancement of the American Legal System—published an empirical study of

the impacts of CAPP (far more statistically sound than my little poll). It found that CAPP cases resolved sooner, on average, than non-CAPP cases, an entirely predictable result of the now-abandoned rule that motions to dismiss could not be filed in lieu of answers. But what the IAALS study could not show is whether this reduction in settlement time corresponded to reduction in litigation costs. All it could say about litigation costs was that costs in like cases were "proportionate" to the complexity of the case.

But the elephant in the living room of civil litigation is that even "proportionate" litigation costs in the average case are so high as to be out of reach for all but the wealthiest of individuals and corporations. We have been tinkering with the civil rules for decades. Anyone notice a drop in litigation costs?

Judges have some responsibility for this situation, because many of us are so resistant to enforcing the existing rules with the bite of sanctions. Now that our appellate courts are generally deferring to our "sanctional" judgment more than had been the case, say, 20 years ago, trial judges have no excuse for constantly complaining about discovery abuses but then never doing anything about them.

With or without engaged trial judges, there are two reasons none of these civil rule reforms will significantly dent or even slow the acceleration of litigation costs. First, the rules of procedure are aimed at strategic actors (both the lawyers and their clients) acting in a marketplace with incentives that these amendments simply don't change. Early disclosure efforts were supposed to reduce discovery disputes, and they may have, but discovery disputes then became disclosure disputes. The rules requiring cooperation and proportional discovery will engender fights over whether people are cooperating and whether discovery is proportional. Every rule imposed in a strategic setting creates more, not fewer, opportunities to fight about rules, and therefore to goose up the game of chicken that is civil litigation.

Second, we all know that the biggest component of civil litigation costs is discovery. As long as we have lawyers who bill clients by the hour, highly paid associates who can't be trusted to do much more than serve as baleen whales in search of a morsel or two in a gigabyte of informational seawater, and clients who will pay them (usually by passing on these costs to us as customers), lawyers will always be incentivized to conduct massive amounts of useless discovery. If we expect that behavior to change, we need to change the incentives that drive it, not tinker at the edges of the rules.

How to do that? Abolishing or severely limiting discovery will immediately and deeply reduce litigation costs, but that will never happen because it will kill the discovery hog from which so many civil lawyers make so much money. Even honorable lawyers who try to keep litigation costs down are understandably skittish about limiting discovery, like doctors afraid not to order every needless test. Criminal law might have something important to teach us all about cooperation, disclosures, and proportionality. Criminal discovery disputes are almost nonexistent, and even the most complex and serious criminal cases manage to get to trial in months rather than years. I've tried complex criminal tax evasion, fraud, and securities cases in less time than simple civil car crash cases. But short of completely overhauling the economics of the civil system to make it look more like the criminal system (state-paid lawyers for the indigent and private lawyers who generally take private cases only with big upfront retainers), I doubt that any change in the civil rules will make any appreciable change in runaway litigation costs.

But the economic realities of the criminal system are not the only thing that has shaped its processes. Criminal lawyers tend to be repeat players; it is a relatively small bar with lawyers who see each other every day, at least locally. They are forced to develop relationships with one another, forced to trust each other. And when trust is broken, they have long memories. All of this repeat playing creates a rich set of norms by which criminal lawyers abide. Let me suggest that in the civil practice we are in desperate need of fewer rules and more norms. That will be hard to accomplish, not just because of the enormous amount of money at stake, but also because of the sheer numbers of civil lawyers. They can screw each other in one case, get handsomely paid for the effort, and then never see each other again.

I applaud the efforts to improve professionalism, which I think of as norm-building. Maybe those continuing efforts, coupled with getting rid of lots of civil rules, will help civil lawyers get along with each other just because that's the right thing to do, and not because there's a rule requiring it. To achieve these goals, we need much more than rule reform, and we have a long way to go.

## Conclusion

Readers can learn more about implementation of the federal rule amendments, as well as efforts to improve our state court system, at iaals.du.edu/rule-one.

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*Judge Hoffman and Judge Wang extend their sincere gratitude to Brittany K.T. Kauffman, director of the Rule One Initiative, Institute for the Advancement of the American Legal System, for her thoughtful insights on this article and her steadfast commitment to the improvement of the judicial system.*

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### Notes

1. For a discussion of the amendments, *see* Groh, "The 2015 Amendments to the Federal Rules of Civil Procedure," 45 *The Colorado Lawyer* 23 (Feb. 2016).

2. Call to Action: Achieving Civil Justice for All, Recommendations to the Conference of Chief Justices by the Civil Justice Improvements Committee (July 2016).

3. *Id.* at 41.

4. 2015 Year-End Report on the Federal Judiciary at 5–6, www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf.

5. *Witt v. G.C. Services Ltd Partnership*, 307 F.R.D. 554, 558 (D.Colo. 2014).

6. *In re Bard IVC Filters Prods. Liability Litigation*, _ F.R.D. _, 2016 WL 4943393 (D.Ariz. 2016).

7. Fed.R.Civ.P. 26(b)(1). ■