

# MOMENTUM FOR CHANGE

## THE IMPACT OF THE COLORADO CIVIL ACCESS PILOT PROJECT

tailored discovery  
single judge  
meet and confer

early case management  
robust disclosures  
proportional process





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INSTITUTE *for the* ADVANCEMENT  
*of the* AMERICAN LEGAL SYSTEM



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IAALS, the Institute for the Advancement of the American Legal System, is a national, independent research center at the University of Denver dedicated to facilitating continuous improvement and advancing excellence in the American legal system. We are a “think tank” that goes one step further—we are practical and solution-oriented. Our mission is to forge innovative solutions to problems in our system in collaboration with the best minds in the country. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications, and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models, and will to advance a more accessible, efficient, and accountable American legal system.

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*Rule One* is an initiative of IAALS dedicated to advancing empirically informed models to promote greater accessibility, efficiency, and accountability in the civil justice system. Through comprehensive analysis of existing practices and the collaborative development of recommended models, the *Rule One Initiative* empowers, encourages, and enables continuous improvement in the civil justice process.

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# EXECUTIVE SUMMARY

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Beginning in 2012, Colorado instituted a pilot project in five state district courts to test a new set of pretrial procedures for civil business cases. These procedures relate to pleadings, disclosures, discovery, and case management. They were designed to increase access to civil justice, by reducing cost and delay while maintaining a fair process.

This is the final report on IAALS' evaluation of the project. As a whole, the Colorado Civil Access Pilot Project (CAPP) has succeeded in achieving many of its intended effects:

- ▶ The docket study shows that CAPP reduces the time to resolution over both existing procedures (standard and simplified). Moreover, four out of five surveyed attorneys indicated that the time was proportionate to the subject CAPP case and the same proportion of surveyed judges indicated that the process allowed sufficient time to fairly resolve the CAPP cases on their dockets.
- ▶ Three out of four surveyed attorneys indicated that litigation costs were proportionate to the subject case.
- ▶ The docket study and survey data indicate that the CAPP process is not tilted in favor of either plaintiffs or defendants.
- ▶ The docket study shows that CAPP cases are more likely to have a single judge. In addition, the parties are 4.6 times more

likely to see that judge earlier and will see him or her twice as often. CAPP's early, active, and ongoing judicial management of cases received more positive feedback in the surveys than any other aspect of the project, with many calling for it to become a permanent feature of the rules.

- ▶ The docket study and survey data suggest that CAPP reduces motions practice (although the project has not had a measurable effect on the number of motions to dismiss filed during the pleadings stage).
- ▶ Surveyed judges consider the initial case management conference to be the most useful tool in shaping the pretrial process, including discovery and timelines, proportionately to the dispute. A majority of surveyed attorneys with discovery in their subject CAPP case indicated that the discovery actually conducted was either less than or equal to the amount set forth in the initial case management order, was proportionate to the needs of the case, and resulted in effective information exchange.

Specific parts of the rules have presented issues that ought to be considered in any future rulemaking process:

- ▶ The rolling and staggered deadlines for the initial stages of the CAPP process (pleadings, initial disclosures, and the initial case management conference) raise



logistical issues. In addition, the plaintiff's responsibility to file initial disclosures before the defendant appears may increase the resources expended to obtain a default judgment.

- ▶ There must be consistent compliance with and enforcement of the expanded pleading and disclosure requirements for them to have the intended effect of providing more information prior to discovery.
- ▶ While CAPP has resulted in a decrease in the number of motions for extension of time filed and granted, and that has a beneficial effect on time to disposition, surveyed attorneys and judges find that the “extraordinary circumstances” standard is challenging to apply.
- ▶ The CAPP definition of a “business action” has resulted in confusion and inconsistency in application.

Finally, there are aspects of the pilot project about which conclusions cannot be drawn from the data. These include the effects of the expert witness limitations and the impact of the CAPP rules on the trial rate.

Overall, this project provides a rich source of information to inform more permanent rules changes aimed at achieving a just, speedy, and inexpensive civil justice process in Colorado—and around the nation.

# INTRODUCTION

In 2011, the Colorado Supreme Court authorized the Civil Access Pilot Project Applicable to Business Actions in District Court (CAPP) and designated IAALS—the Institute for the Advancement of the American Legal System—to study its effects.<sup>1</sup>

This report contains the final results of IAALS' systematic data collection, which took place over the course of more than two years. It is intended to provide feedback on CAPP's new set of rules for pleading, disclosure, discovery, and case management in civil cases. IAALS hopes that information about this particular innovation will be helpful to decision-makers, in Colorado and elsewhere, who are committed to improving the legal process.

This report follows a preliminary report released in April of 2014.<sup>2</sup> Since that time, more cases within the study sample have resolved, and the results in this Final Report have been adjusted to reflect the inclusion of these new data, as well as additional analyses conducted. The overall conclusions remain substantially unchanged.

All referenced appendices are available online at [iaals.du.edu/ResearchAppendices](http://iaals.du.edu/ResearchAppendices) for readers seeking more detail.

## BACKGROUND

In recent years, there has been growing concern that the American civil justice process is not living up to its promise of a just, speedy, and inexpensive determination of every action. Majorities of surveyed attorneys and judges nationwide have identified the following challenges: 1) cost is a concern that affects court access, 2) delay increases cost, and 3) discovery is responsible for unnecessary cost and delay.<sup>3</sup>

Following the 2009 Final Report on the joint project of IAALS and the American College of Trial Lawyers Task Force on Discovery and Civil Justice,<sup>4</sup> and the ensuing 2010 Conference on Civil Litigation at the Duke University School of Law (sponsored by the federal Advisory Committee on Rules of Civil Procedure),<sup>5</sup> a flurry of federal and state rules projects began to take shape around the country.<sup>6</sup>

- 1 CHIEF JUSTICE DIRECTIVE 11-02: ADOPTING PILOT RULES FOR CERTAIN DISTRICT COURT CIVIL CASES (Colo. amend. June 2013), available at [http://www.courts.state.co.us/Courts/Supreme\\_Court/Directives/11-02amended%207-11-14.pdf](http://www.courts.state.co.us/Courts/Supreme_Court/Directives/11-02amended%207-11-14.pdf) [hereinafter CHIEF JUSTICE DIRECTIVE 11-02].
- 2 CORINA GERETY & LOGAN CORNETT, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., PRELIMINARY FINDINGS ON THE COLORADO CIVIL ACCESS PILOT PROJECT (2014), available at [http://iaals.du.edu/images/wygwam/documents/publications/Preliminary\\_Findings\\_on\\_CAPP.pdf](http://iaals.du.edu/images/wygwam/documents/publications/Preliminary_Findings_on_CAPP.pdf).
- 3 CORINA GERETY, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., EXCESS & ACCESS: CONSENSUS ON THE AMERICAN CIVIL JUSTICE LANDSCAPE 8 (2011), available at [http://iaals.du.edu/images/wygwam/documents/publications/Excess\\_Access2011-2.pdf](http://iaals.du.edu/images/wygwam/documents/publications/Excess_Access2011-2.pdf).
- 4 AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., 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 (rev. ed. 2009), available at [http://iaals.du.edu/images/wygwam/documents/publications/ACTL-IAALS\\_Final\\_Report\\_rev\\_8-4-10.pdf](http://iaals.du.edu/images/wygwam/documents/publications/ACTL-IAALS_Final_Report_rev_8-4-10.pdf).
- 5 See Memorandum from the Honorable Mark R. Kravitz, Chair, Standing Committee on Rules of Practice and Procedure, to the Honorable Lee H. Rosenthal, Chair, Standing Committee on Federal Rules of Civil Procedure (May 17, 2010) (on file with authors).
- 6 See IAALS' *Action on the Ground* interactive map at <http://iaals.du.edu/initiatives/rule-one-initiative/action-on-the-ground>.

Colorado is familiar with the spirit of innovation, and a committee formed to develop and propose a pilot project for state district court. This committee was comprised of “local members of the American Board of Trial Advocates and the American College of Trial Lawyers; leadership from the Colorado Bar Association, the Colorado Trial Lawyers Association, and the Colorado Defense Lawyers Association; and other experienced members of the Colorado trial bar

and judiciary.”<sup>7</sup> The Colorado Civil Access Pilot Project arose out of that effort.

This report on CAPP complements a range of information and literature on rules projects around the country, available on the IAALS website at <http://iaals.du.edu/initiatives/rule-one-initiative/implementation/P0>.

## THE COLORADO CIVIL ACCESS PILOT PROJECT (CAPP)

CAPP seeks to increase access to civil justice through a new set of pretrial rules designed to bring the disputed issues to light at the earliest possible point, tailor the process proportionally to the needs of the case, provide active case management by a single judge, and move the case quickly toward trial or other appropriate resolution.

The CAPP rules were created for state district (general jurisdiction) courts, and apply to “business actions” as specifically defined based on the claims set forth in the initial complaint. They are not a complete set of rules; rather, the Colorado Rules of Civil Procedure govern any aspect not addressed. The CAPP rules include the following components:

- ▶ Proportionality principles guide the application and interpretation of the rules.
- ▶ To help identify and narrow the disputed issues, complaints and responsive pleadings should include all material facts; general denials are deemed admissions.
- ▶ Initial disclosures are more robust, accompanied by a privilege log, filed with the court, and on a staggered schedule (the

plaintiff must make disclosures before the defendant answers). Mandatory sanctions accompany the failure to properly disclose unless deemed “justified under the circumstances or harmless.”

- ▶ Motions to dismiss do not stay the obligation to file an answer—or any of the pleading, disclosure, or case management conference requirements.
- ▶ The parties meet and confer on preservation shortly after the answer. They also prepare a joint case management report containing a statement of the issues, a proportionality assessment, proposed timelines, and proposed levels of discovery.
- ▶ The judge holds an initial case management conference with lead counsel to shape the pretrial process to the needs of the case. Permitted discovery (including expert discovery) and all timelines (including the trial date) are then set forth in the case management order. This order can be modified only upon a showing of “good cause.”

<sup>7</sup> STATE OF COLORADO JUDICIAL BRANCH, A HISTORY AND OVERVIEW OF THE COLORADO CIVIL ACCESS PILOT PROJECT APPLICABLE TO BUSINESS ACTIONS IN DISTRICT COURT, [http://www.courts.state.co.us/userfiles/file/Court\\_Probation/Educational\\_Resources/CAPP%20Overview%207-11-13.pdf](http://www.courts.state.co.us/userfiles/file/Court_Probation/Educational_Resources/CAPP%20Overview%207-11-13.pdf) (last visited Aug. 25, 2014).

- ▶ The scope of discovery is limited to matters that would “enable a party to prove or disprove a claim or defense or to impeach a witness,” and is subject to proportionality considerations.
- ▶ Only one expert witness per side per issue or specialty is permitted, and expert discovery and testimony is limited to the expert’s report. No depositions of expert witnesses are permitted.
- ▶ The judge assigned to the case is to handle all pretrial matters and try the case. This judge actively manages the case, and the parties may contact the court to arrange “prompt conferences” to address any pretrial issue.
- ▶ Continuances and extensions are strongly disfavored and are to be denied absent “extraordinary circumstances,” even if stipulated.

Chief Justice Directive (CJD) 11-02 implemented the pilot project to test the new rules and provided the following project dimensions:

- ▶ The rules were adopted for use in the First (Jefferson and Gilpin Counties), Second (Denver County), Seventeenth (Adams County only) and Eighteenth (Arapahoe County only) Judicial Districts, to be applied to “business actions” as further delineated in the rules.
- ▶ The CJD initially made the rules effective from January 1, 2012, through December 31, 2013. The project was later extended through June 30, 2015, to allow the Court more time to “consider what, if any, changes to the Colorado Rules of Civil Procedure should be proposed or adopted.”

Appendix 1 contains the CJD, the CAPP rules, the special definition of a “business action” (Amended Appendix A to the rules), the form for the joint case management report of the parties (Appendix B to the rules), and the form for disclosure of expert witnesses (Appendix C to the rules). More information on the pilot project is also currently available on the Colorado Judicial Branch website at [http://www.courts.state.co.us/Courts/Civil\\_Rules.cfm](http://www.courts.state.co.us/Courts/Civil_Rules.cfm) (including a History and Overview of the Colorado Civil Access Pilot Project, as well as a CAPP Frequently Asked Questions document).



# EVALUATION APPROACH

## GOALS AND HYPOTHESES

At the outset of the pilot project, IAALS established ten hypotheses to test, based on the project's goals:

*It is hypothesized that the CAPP rules will be associated with...*

- ▶ A reduction in time to case resolution;
- ▶ A decrease in the cost of case resolution;
- ▶ The maintenance of a fair process;
- ▶ An increase in the level of judicial case management;
- ▶ A decrease in the number of judges per case;
- ▶ A decrease in motions practice;
- ▶ A decrease in discovery practice;
- ▶ An increase in trials;
- ▶ A decrease in trial time; and
- ▶ An increase in the proportionality of the process to the needs of the case.

While some of these hypotheses—such as the level of judicial case management—are not readily susceptible to direct measurement, IAALS made every effort to obtain useful data in one way or another, even if those data are necessarily limited or qualified.

Moreover, given the nature of this research as a program evaluation, there was no attempt to limit information gathering or analysis to the hypotheses set forth in advance. Rather, the approach was to gain a full understanding of CAPP—both in theory and practice.

## STUDY METHODS

This research utilizes multiple methods, combining quantitative and qualitative research, to view CAPP from different perspectives and to help overcome some of the methodological shortcomings associated with any single approach.

### DOCKET STUDY

#### Method

The docket study consisted of electronic court case file review and analysis. To help isolate the impact of the CAPP rules from other factors (i.e., reduce the effects of selection bias and maturation), the study included four sets of cases:

|                          | <i>Pre-Implementation</i> | <i>Post-Implementation</i> |
|--------------------------|---------------------------|----------------------------|
| <i>CAPP Courts</i>       | Baseline Pilot Set        | Pilot Set                  |
| <i>Comparison Courts</i> | Baseline Comparison Set   | Comparison Set             |

**Comparison Courts:** To select a set of comparison courts that would be as similar as possible to the set of pilot courts (in the aggregate), a number of demographic and court composition factors were analyzed. The factor that ultimately carried the most weight was caseload. The comparison courts are: Boulder, Douglas, El Paso, Larimer, and Weld Counties.

**Time Period:** The pre-implementation and post-implementation groups each encompass one year of cases, but form a mirror image. The pre-implementation cases *closed* between January and December of 2010, regardless of when they were filed.<sup>8</sup> The post-implementation cases were *filed* between July 2012 and June 2013, regardless of when they closed.<sup>9</sup> This design

<sup>8</sup> Note that “closed” refers to cases that had an administrative closing event in the stated timeframe. Closing does not necessarily correspond with case resolution for the purpose of this study.

<sup>9</sup> The time period for evaluation was selected so as to exclude the cases filed during the first six months of the project, recognizing that there is a learning curve that naturally accompanies any new process.

ensured that time to disposition (a dependent variable) did not influence inclusion in or exclusion from the study, while allowing the evaluation to conclude within a reasonable period of time.

**Included Cases:** One challenge of this study, particularly with respect to the baseline and comparison sets, was the identification of subject cases. The CAPP rules apply to a specially-defined set of “business actions” based on the claims set forth in the initial complaint. This definition is unrelated to any existing category of cases and is subject to differing interpretations. To ensure the likeness of cases in each of the four data sets given that the pilot courts would be designating CAPP cases, it was necessary to adopt the strictest interpretation for study purposes. Accordingly, only those cases *clearly* included under the plain language of Amended Appendix A were selected for the docket study—although the judges actually applied the CAPP rules to a broader range of cases.

**Excluded Cases:** The docket study aimed to evaluate the effects of the CAPP rules on standard litigation when put into practice. Thus, certain cases were excluded even if they met the definition of a “business action”:

- ▶ Due to the substantial proportion of cases that end at an early point and the need to understand the operation of the rules throughout the pretrial process, cases without any defense appearance were excluded. The docket study thus examines the impact on cases that were at least minimally contested, defined as at least one pre-resolution filing by any defendant.

The attorney and judge surveys nonetheless provide insight into application of the CAPP rules to cases resolved by early voluntary dismissal or by default judgment for failure to answer.

- ▶ Cases that were transferred between courts or consolidated with other cases were excluded to prevent double counting, to ensure accurate case analysis, and to reduce the risk that different procedures were applied at different times in the same case.
- ▶ Cases with distinct procedures that could be easily identified from the record, including class actions, were excluded to allow for direct comparison between the CAPP and standard processes.
- ▶ Recognizing limits on the time to conduct the evaluation, cases in both pre-implementation baseline sets that did not fall within the 90th percentile for time to disposition were excluded.

**Sampling:** The docket study analyzed a simple random sample from each of the four sets of cases.<sup>10</sup> First, a random sample was pulled from those existing court case types that could include “business actions” as defined for CAPP purposes (see Appendix 2 for a list of these case types) or, for the pilot set, those cases that were coded as having proceeded under CAPP. Second, the initial complaint in each sampled case was reviewed in the same order as randomly selected, and cases clearly falling within Amended Appendix A (and the other study criteria) were designated for inclusion in the study and underwent thorough review based on court documents and records.<sup>11</sup>

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10 A stratified sampling approach was not feasible due to the lack of information on the distribution of CAPP “business actions” across courts.

11 In general, about 10 complaints had to be reviewed for each CAPP-eligible case in the study. Importantly, even those cases that the pilot courts designated as CAPP cases underwent this sampling process to ensure consistency in designation across all four datasets. Anywhere from about 20 to 40 data points (depending on data set and other case particulars) were collected from the records and documents for each included case via the state’s online case management systems, Eclipse and ICCES.

In the final count, there were 859 cases in the docket study sample. However, the specific procedure applied was not clear from the court record in 19 of those cases. Accordingly, the analysis includes 840 total cases. This number proved sufficient to draw reliable conclusions.<sup>12</sup>

**Modeling Approach:** This evaluation used a three-pronged approach to analyzing the docket data: 1) difference-in-differences, 2) dependent variable-appropriate models, and 3) matching. The difference-in-differences approach is widely used to evaluate the impact of policy changes across many disciplines, as it is a pragmatic and readily-understood design capable of isolating effects. However, because this approach can exaggerate the impact of a program when the outcome variables are discrete or categorical rather than continuous, an appropriate alternative model (hazard, count, logit, or fractional logit) was also employed. Finally, to verify the results, each of the models was applied to a sub-sample of matched cases (groups of cases having the same characteristics except that some utilized the CAPP rules and some did not).<sup>13</sup>

The combination of the three approaches helps to ensure that conclusions drawn are meaningful and not simply a function of a particular statistical method. Where indicated, the docket study results control for the following: case type, court, number of plaintiffs, plaintiff type, plaintiff representation type, number of defendants, defendant type, defendant representation type, and resolution type.<sup>14</sup>

An additional 48 cases have resolved since the preliminary analysis, leaving only 25 of 840 cases still pending at the time of final analysis. The unresolved cases did not have the opportunity to fully experience many of the outcomes of interest.<sup>15</sup> To prevent those cases from biasing the results, they were removed from the analyses where possible and appropriate for the outcome of interest. Please refer to Appendix 3 for more information on the docket study methodology and the data tables for each model.

**Procedures Examined:** Generally, civil cases filed in Colorado district court are subject to either the standard procedure (i.e., following CRCP 16 and 26) or the voluntary simplified procedure (i.e., following CRCP 16.1, for cases under \$100,000 in monetary damages). The procedure used in each baseline or comparison case was identified so that any differences potentially attributable to the two distinct procedures used in non-CAPP cases could be parsed out.

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12 Prior to data collection, it was roughly estimated that 860 cases (215 from each set) would be needed for 95% confidence and power, with a 0.15 effect size (using Cohen's algorithm to calculate sample size in a multivariate regression framework). Upon analyzing the collected data, it was determined that an 840-case sample was large enough to detect the effects of the CAPP rules.

13 Matching provides a pseudo-experimental framework when an experimental framework is not possible in the real world (i.e., the assignment of the CAPP rules to cases was not random) by reducing imbalance between the treatment (pilot) and control (baseline pilot, baseline comparison, and comparison) groups.

14 Plaintiff and defendant types included "all individuals" (all plaintiffs or defendants were individuals), "all entities" (all plaintiffs or defendants were businesses or other entities), and "mixed" (indicating that the plaintiffs or defendants consisted of a mixture of individuals and entities). Plaintiff and defendant representation types included "all represented" (indicating that all plaintiffs or defendants were represented by an attorney), "all self-represented" (indicating that all plaintiffs or defendants were self-represented), and "mixed" (indicating that the plaintiffs or defendants consisted of a mixture of represented and self-represented litigants).

15 This concept is known as "right-censoring." Censoring happens when a variable's value is not fully known. With right-censoring, it is known that a data point is above a certain value but it is not clear by how much.

## Sample Description

Appendix 4 contains tables and graphs with more information on the cases included in the sample. The following is simply a brief summary:

**Districts:** The following table shows the representation of each court in the sample, all data sets combined.

| <i>Pilot Courts</i> | <i>% of Total</i> | <i>Comparison Courts</i> | <i>% of Total</i> |
|---------------------|-------------------|--------------------------|-------------------|
| <i>Adams</i>        | 5.4%              | Boulder                  | 11.2%             |
| <i>Arapahoe</i>     | 9.5%              | Douglas                  | 9.6%              |
| <i>Denver</i>       | 26.4%             | El Paso                  | 16.9%             |
| <i>Gilpin*</i>      | 0.0%              | Larimer                  | 6.4%              |
| <i>Jefferson</i>    | 8.6%              | Weld                     | 6.0%              |

\* Because Gilpin County is so small, and the number of CAPP cases in that court have been few, it has almost no presence in the research.

**Case Types:** At least 50% of the cases in each data set were contract cases, as determined by IAALS researchers based on the initial complaint. The next most common case types were business tort and insurance cases, but each of those types made up less than 15% of each data set.

**Number of Parties:** It was most common for cases to have a total of two parties, regardless of data set. The average total number of parties was 3.5. The lowest number of parties was 2; the highest was 24.

**Resolution:** Settlement was the most common resolution for the cases in all data sets, with between approximately 62% and 69% being resolved in this way. None of the other methods of resolution rose above 15% for any data set. About 9% of comparison cases and about 3% of pilot cases had not reached resolution

as of the time of writing. However, all baseline cases had resolved. The average time from filing to resolution across all data sets was 270 days. The shortest time was 16 days; the longest was 1,367 days.

## CASE-SPECIFIC ATTORNEY SURVEYS

The second aspect of the evaluation involved surveying the lead attorneys in closed cases. Most of the attorney survey questions were case-specific, but there was also an opportunity for the attorneys to provide more general feedback on the pilot project.

### Method

Upon filing and initial review of the complaint, pilot courts assigned a CAPP code to each case in the project. The attorney survey instrument (see Appendix 5) was sent to the lead attorney for each party (i.e., the attorney listed first in the online case management system) in coded cases that had a closing event from May 2012 through December 2013.<sup>16</sup> The attorney survey includes a different and broader range of cases than the docket study, due to a more generous judicial application of the “business action” standard and the inclusion of *all* coded cases upon closure rather than a more limited sample of cases.

With respect to the CAPP case survey, the overall response rate was 17.3%.<sup>17</sup> Because surveys were sent out for each designated case, some attorneys received multiple surveys. As most of the survey questions were case-specific, this was not generally a problem. However, for the open-ended opinion questions, only the final response for each attorney (identified by a code) has been analyzed. In addition, all reported percentages exclude respondents who left the question blank.

16 It should be noted that the court’s administrative closing, upon which the survey case list was generated, does not always correspond with resolution of the case (all pretrial proceedings concluded). Therefore, a threshold question at the beginning of the survey asked whether the case had in fact resolved. If the case was unresolved, the survey ended and the respondent was informed that a new survey would be sent after the next administrative closing event in the case. In addition, the survey was administered electronically, although paper versions were sent to those who did not have an email address listed in the Colorado Legal Directory.

17 A total of 4,005 surveys were sent out, and there were 693 valid responses.



## **Sample Description**

Appendix 6 contains tables and graphs with more information on survey demographics. The following is simply a brief summary:

**Districts:** More than half (54%) of the attorney survey responses related to CAPP cases in Denver. The portions attributable to the three other large counties were: Arapahoe, 20%; Jefferson, 17%; and Adams, 10%. Only a single response was received from Gilpin County.

**Case Types:** Consistent with the docket data, over 50% of respondents indicated that the subject case was a contract dispute. However, it should be noted that several case types not intended to be included in CAPP appeared in the population of attorney survey CAPP cases (e.g., construction defect, employment, medical malpractice, personal injury, etc.), indicating some confusion with regard to designation of CAPP cases.

**Number of Parties:** A plurality of responses indicated a total of two parties in the subject case, as is true with the docket data. The average total number of parties was 3.3, which is, again, consistent with the docket data. The minimum total number of parties was one; the maximum total number of parties was 40.

**Party Represented:** Approximately two out of three surveys (62%) were completed by an attorney who represented a plaintiff in the subject case, while about one-third (36%) were completed by a defendant's attorney. The remaining 2% of respondents selected "other."

**Billing Structure:** A majority (68%) of respondents indicated their firm follows an hourly billing structure. Another 22% indicated working on a contingency fee basis.

**Amount in Controversy:** About 60% of respondents indicated that the subject case had between \$0 and \$100,000 in controversy. About 6% of respondents indicated the amount in controversy exceeded \$1,000,000. The median amount was \$54,100, the mean amount was \$741,353, and the highest amount was \$200,000,000. One in five respondents reported important aspects of the case aside from amount in controversy (non-monetary relief, issues of importance beyond the particular case, or recoverable attorney fees)

**Alternative Dispute Resolution:** Exactly 30% of respondents indicated participating in some form of ADR in the subject case.

**Discovery:** About 40% of respondents indicated that discovery took place in the subject case. Of those who indicated that discovery was conducted, about 37% stated that e-discovery was conducted.

**Resolution:** As was true with the docket data, settlement was the most common mode of resolution, with about 59% of respondents reporting that the subject case resolved in this way. The second most common mode of resolution was default judgment (17%).

## JUDGE SURVEYS

The third aspect of the evaluation involved surveying participating judges in the pilot courts concerning management of CAPP cases and views of the pilot project.

### Method

The judge survey instrument (see Appendix 7) was administered electronically to all pilot judges on a quarterly basis, beginning the second quarter of 2012 and finishing the fourth quarter of 2013. The survey sought information about the CAPP cases on the judge's docket, as a whole, during the relevant quarter. A number of questions also solicited the judges' opinions about the project more generally.

With respect to the judge surveys, the overall response rate was 43%.<sup>18</sup> Because surveys were sent out each quarter, the judges could complete multiple surveys over the course of the project. For the open-ended opinion questions (i.e., not quarter-specific), only the final response for each judge (identified by a code) has been analyzed.

### Sample Description

Appendix 8 contains tables and graphs with more information on judge survey demographics. The following is simply a brief summary:

**Districts:** Considering the total pool of survey responses received, the proportion coming from each participating court was: Adams, 13%; Arapahoe, 13%; Denver, 41%; and Jefferson, 34%. (Gilpin County shares Jefferson County judges.)

**Docket Composition:** Exactly 59% of responses indicated that the responding judge had a dedicated civil docket, while the other 41% indicated the judge had a mixed docket.<sup>19</sup>

**CAPP Case Types:** As is consistent with the docket data and attorney survey responses, respondent judges reported contract disputes as the most common type of CAPP case in their court. As with the attorney surveys, however, there is some indication of confusion in designating CAPP cases (e.g., inclusion of personal injury).

## DISCUSSION GROUPS, QUESTIONS, AND UNSOLICITED FEEDBACK

In an effort to gain as much insight as possible into the pilot project, IAALS also obtained information through less formal mechanisms. While this information cannot be considered representative of the overall CAPP experience and will not be systematically reported, it nevertheless serves to inform the docket and survey data.

### Methods

**Discussion Groups:** The IAALS evaluation team attended a number of discussion sessions with various groups of participating judges. IAALS was also invited to a discussion with members of the Rocky Mountain Paralegal Association, which was helpful in illuminating the perspective of litigation support staff. These events allowed for a more free-flowing discussion, and the participants were able to react to each other's perspectives.

**Questions:** The IAALS evaluation team maintained a running list of the questions posed to the court liaison by attorneys, litigation support staff, self-represented litigants, and others throughout the project. These questions are useful for understanding points of confusion or ambiguity in the CAPP process.

**Unsolicited Feedback:** A number of individuals contacted IAALS directly to provide feedback.

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<sup>18</sup> Overall, 202 surveys were distributed to pilot court judges, with 86 valid responses submitted.

<sup>19</sup> For research purposes, those dockets consisting of 95% or more civil cases were considered dedicated civil dockets.

# EVALUATION RESULTS

As a whole, the CAPP process succeeded in achieving many of its intended effects, including a reduced time to disposition, early and appropriate case management, proportional discovery and costs, and a lower level of

motions practice. Certain aspects of the rules have presented challenges that ought to be considered in any future rulemaking process.

## TIME

### CAPP CASES RESOLVE SOONER AND THE TIME TO RESOLUTION IS CONSIDERED PROPORTIONATE AND SUFFICIENT.

One of CAPP's main goals is to bring cases to a resolution more quickly. For this evaluation, a case was considered resolved when the last outstanding claim was disposed with respect to the last remaining party.

**The docket study found that CAPP is associated with a statistically significant reduction in the time it takes to resolve a case.**

All else equal,<sup>20</sup> applying the CAPP rules increases the probability of an earlier resolution by 69% over the standard procedure. This is even greater than the impact of Rule 16.1, which applies only to cases of \$100,000 or less, and increases the probability of an earlier resolution by 38% over the standard procedure.<sup>21</sup> In terms of time, application of the CAPP rules reduces the median case duration by about 59 days over the standard procedure (i.e., looking at a snapshot in time

when 50% of the cases have resolved).<sup>22</sup> Even when none of the variable controls are applied, it is clear that cases proceeding under CAPP resolve more quickly overall. See Figure 1.

**The association between CAPP and a reduced time to disposition is even stronger for cases that end in settlement.**

The docket study found that for settled cases, application of the CAPP rules increases the overall probability of an earlier resolution by 89% over the standard procedure, all else equal. Again, this is even greater than the impact of Rule 16.1, which increases the probability of earlier resolution over the standard procedure by 46% in settled cases. In terms of time, the CAPP rules reduce the median case time by 71 days for settled cases. See Figure 2, which shows the effect of CAPP even when none of the variable controls are applied. It should be noted that the CAPP rules were not shown to affect the settlement rate.

20 The phrase "all else equal" is used to indicate that the analysis controls for the known variables described in the docket study method section: case type, court, number of plaintiffs, plaintiff type, plaintiff representation type, number of defendants, defendant type, defendant representation type, and resolution type.

21 Here, it is important to keep in mind that the docket study excluded cases without an appearance by any defendant, as it was designed to evaluate the procedures in cases that are at least minimally contested. Because over half of the cases proceeding under Rule 16.1 end in default judgment (see CORINA GERETY, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., MEASURING RULE 16.1: COLORADO'S SIMPLIFIED CIVIL PROCEDURE EXPERIMENT 23 (2012), available at [http://iaals.du.edu/images/wygwam/documents/publications/Measuring\\_Rule\\_16-1.pdf](http://iaals.du.edu/images/wygwam/documents/publications/Measuring_Rule_16-1.pdf)), the CAPP docket study cannot speak to a large portion of those cases. The attorney survey comments, discussed on pages 19-21, contain insight into the CAPP process at the earliest stage of litigation and how this compares to the 16.1 and standard procedures.

22 At the median resolution time, the CAPP rules and Rule 16.1 have the same effect. However, it is important to note that the effect of the CAPP rules on case duration is stronger than Rule 16.1 in the 75th percentile of cases.

Figure 1

Business cases (as specifically defined) are more likely to resolve at an earlier point in time under the CAPP procedure.

TIME TO RESOLUTION SURVIVAL ANALYSIS BY PROCEDURE TYPE  
ALL QUALIFYING CASES, NO ADDITIONAL VARIABLE CONTROLS

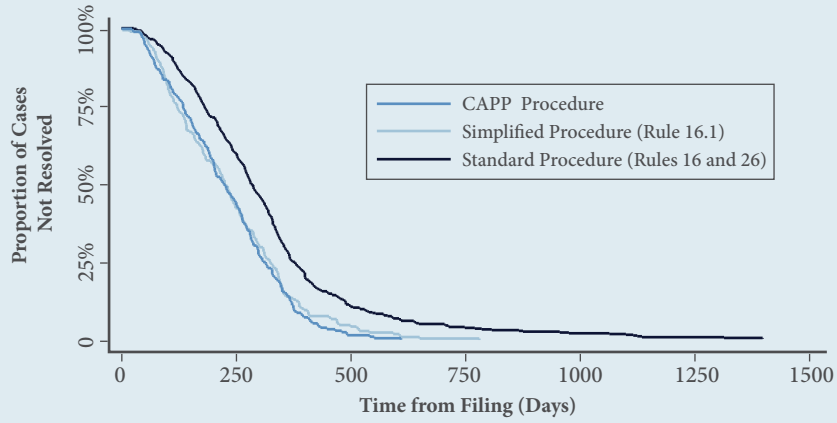
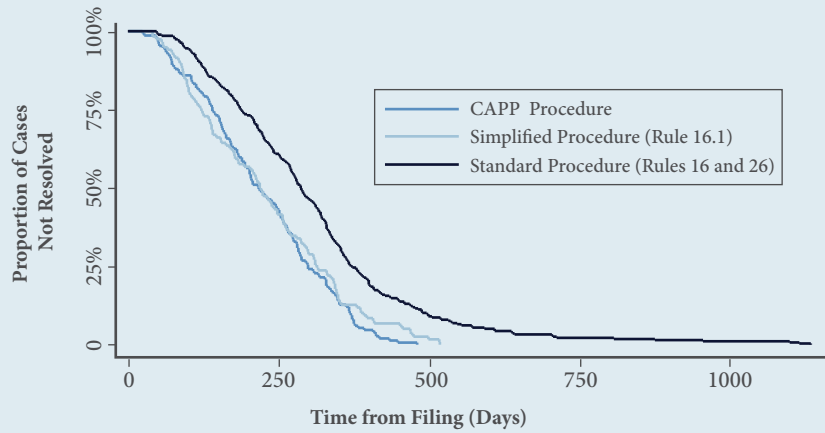


Figure 2

Cases ending in settlement are more likely to resolve sooner under the CAPP procedure.

TIME TO RESOLUTION SURVIVAL ANALYSIS BY PROCEDURE TYPE  
CASES ENDING IN SETTLEMENT, NO ADDITIONAL VARIABLE CONTROLS





**The effect of the CAPP process on time to resolution does not vary by case type.**

Examining the five most prevalent case types in the sample (contract, insurance, business tort, business structure, and professional malpractice), the effect of the CAPP rules on disposition time was not shown to be stronger or weaker depending on the case type.<sup>23</sup> This is particularly notable with respect to professional malpractice cases (not including medical negligence cases, which do not fall within the pilot project), as these cases are considered among the more complex. In fact, none of the procedures showed different effects based on case type.

**Considering the time data outside of the statistical models, the average time to resolution decreased between the baseline and pilot project time periods in every CAPP court.**

The decrease was most pronounced in Adams and Arapahoe Counties and least pronounced in Jefferson County. By contrast, in every comparison court except for Weld County, the average time to resolution increased between the baseline and pilot project time periods.

**It is also telling that, of the 25 cases in the sample that have not yet resolved, 72% are comparison cases while 28% are CAPP cases.**

There does not appear to be higher rates of complexity within this set of cases, as most are contract and business tort cases, and most have three or fewer parties.

**With respect to the appropriateness of the time to resolution in CAPP cases, a strong majority (80%) of surveyed attorneys indicated that the length of time to resolution at the trial level was proportionate to the subject case (considering the amount in controversy, the complexity of the litigation, and the importance of the issues).**

It should be noted that even when the subject case resolved early in the proceedings or ended in default judgment, a strong majority of attorneys indicated that the time was proportional to the case notwithstanding the early disclosure requirement. With respect to all subject cases, those attorneys who indicated that the time was not proportional were pretty evenly split between opinions that the time was “too long” (11%) and “too short” (9%). In general, those who reported an unfavorable result were more likely to show dissatisfaction with the length of the process than those reporting a favorable result.

- ▶ Of those who indicated that the time was *too long* and provided an explanation, nearly two-thirds gave a reason disconnected from the CAPP rules, such as the litigation tactics of the opposing party, the presence of a self-represented litigant, or delayed rulings on pending motions. CAPP-related reasons included the extended time for obtaining a default judgment, the additional case management requirements, and discovery disputes over the proportionality standard.

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<sup>23</sup> Here, the hazard models were used to run interactions between each case type and the different processes under review.

- ▶ Of those who indicated the time was *too short* and provided an explanation, over half gave a reason disconnected from the CAPP rules, such as an early settlement, bankruptcy, or consolidation. Many of those who gave a CAPP-related reason discussed needing more time to serve the defendant(s) or conduct discovery, resulting in dismissal or a rushed process.

**Finally, the judge survey responses showed strong support for the proposition that the CAPP process “allows for sufficient time to fairly resolve cases on their merits.”**

Each quarterly survey asked the judges to consider their CAPP cases over the previous quarter. Taking all of the surveys administered over the course of the project together, not a single judge at any time disagreed that the time was sufficient for a fair process. Exactly 81% agreed, and 19% took a neutral position.

## COST

### LITIGATION COSTS ARE GENERALLY CONSIDERED TO BE PROPORTIONATE IN CAPP CASES.

According to the case-specific attorney survey data, the resources expended in CAPP cases span a broad range.

Although it is unclear whether these numbers would be higher or lower in a similar set of standard procedure cases, this does serve as a point of reference.

#### MONETARY COST TO BRING OR DEFEND THE CLAIM(S) UNDER CAPP<sup>24</sup>

|               | Minimum | Median     | Mean        | Maximum      |
|---------------|---------|------------|-------------|--------------|
| Attorney Fees | \$0.00  | \$5,589.00 | \$24,968.68 | \$800,000.00 |
| Other Costs   | \$0.00  | \$500.00   | \$3,381.74  | \$225,000.00 |

#### BILLABLE HOURS<sup>25</sup>

|                  | Minimum | Median | Mean   | Maximum   |
|------------------|---------|--------|--------|-----------|
| Senior Attorney* | 0.00    | 16.00  | 117.51 | 11,000.00 |
| Junior Attorney  | 0.00    | 0.00   | 86.35  | 11,000.00 |
| Paralegal        | 0.00    | 0.00   | 33.55  | 4,375.00  |

\* The pool of responses for senior attorney billable hours contained two outliers, which were excluded from the analysis: 150,000.00 and 33,850.00. If those responses are included, the minimum is 0.00, the median is 16.00, the mean is 449.55, and the maximum is 150,000.00.

Exactly three out of four attorney survey respondents (75%) indicated that the total cost incurred for resolution at the trial level was proportionate to the subject CAPP case (considering the amount in controversy, the complexity of the litigation, and the importance of the issues).

Another portion of respondents (19%) indicated that the amount was “too high,” while some (5%) indicated that the amount was “too low.” This response pattern holds true for cases eligible for Rule 16.1 (involving monetary damages of \$100,000 or less), and holds true for cases resolved on both ends of the spectrum (by default judgment and by trial). It should be noted that those who received an unfavorable result were more likely to report that costs were either too high or too low than those attorneys reporting a favorable result.

- Of those who indicated that the amount was *too high* and provided an explanation, half gave a reason somewhat disconnected from the CAPP rules, relating mainly to the unreasonable litigation tactics and positions of the opposing party and, less prevalently, to the failure of the judge to provide timely rulings on key substantive issues or enforce the rules. With respect to the half that were more directly related to CAPP, the following themes emerged: 1) the strict deadlines and procedural requirements can elevate form over substance and inhibit taking cost-saving measures in both simple and complex cases; 2) when service is difficult, the costs are higher in CAPP cases due to the need to obtain extensions or refile; 3) unnecessary costs are incurred in preparing disclosures when the defendant does not ultimately

24 Respondents were instructed to include “amounts even if they are recoverable from another party or will not be collected from your client(s),” and to exclude “the value of the claim(s), post-judgment or post-settlement activity, appeal costs, or expenses after remand.”

25 This information relates only to those respondents indicating that their firm tracks billable hours (85% of all respondents).

appear or when settlement is likely simply based on the filing of the case; and 4) unnecessary costs are incurred litigating a case when a motion to dismiss is ultimately granted. Despite the comments concerning the initial stage procedures, sentiment that costs were too high was more prevalent in cases resolved later in the process—by summary judgment (44%), court dismissal (30%), and jury trial (25%). In addition, attorneys tended to report disproportionate costs at a higher rate for cases involving

discovery than for cases without discovery. It is unclear how these numbers might differ from perceptions of cost under the standard procedure.

- ▶ Of those who indicated that the amount was *too low* and provided an explanation, four out of five provided a reason unrelated to CAPP, such as the provision of services at a reduced rate or an unexpected early settlement. The remaining responses related to terminating the case early to avoid CAPP requirements.

## FAIRNESS

### THE CAPP PROCESS APPEARS TO BE FAIR TO BOTH PLAINTIFFS AND DEFENDANTS.

One important issue is whether the CAPP rules are fair to both plaintiffs and defendants. There are multiple ways to view and measure the issue of fairness.

**The docket study found no difference between the pilot and the comparison sets as to which party prevailed more often.**

Studied cases were placed into four categories based on outcome: plaintiff(s) won on all claims; defendant(s) won on all claims; plaintiff(s) won some and defendant(s) won some; and liability not determined in court (including settlement). The proportion of cases distributed among these categories does not vary significantly as a result of application of the CAPP rules,<sup>26</sup> which means there is no evidence to suggest a relationship between CAPP and the likelihood of a favorable or unfavorable outcome on either side. It

should be noted that these data do not speak to the relative favorability of the results for a particular party within the mixed outcome category, nor do they speak to the relative favorability of settlements and other outcomes determined outside of court.

**From the perspective of the attorneys litigating the subject CAPP cases, a plurality (48%) agreed with the statement that “the pretrial process was fair to my client.”**

Another 27% expressed a neutral position on the issue. However, one in four disagreed that the process was fair. Some of this sentiment may be explained by the issues concerning the initial-stage deadlines, discussed beginning on page 19. The responses to this question appear to be independent of the party represented (plaintiff or defendant), but there are differences based on the reported outcome. About half of those who reported a favorable or mixed result agreed that the process was fair, while only one-third of those who reported an unfavorable result agreed.

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<sup>26</sup> Due to the structure of the data for this variable (aggregate outcome as the proportion of cases), two alternative modeling approaches were used here: the Pearson chi-square test and Fisher's exact test.



**Attorney survey respondents gave even better marks to the judge, as nearly 60% agreed with the statement that the court “handled my client’s case in a fair manner.”**

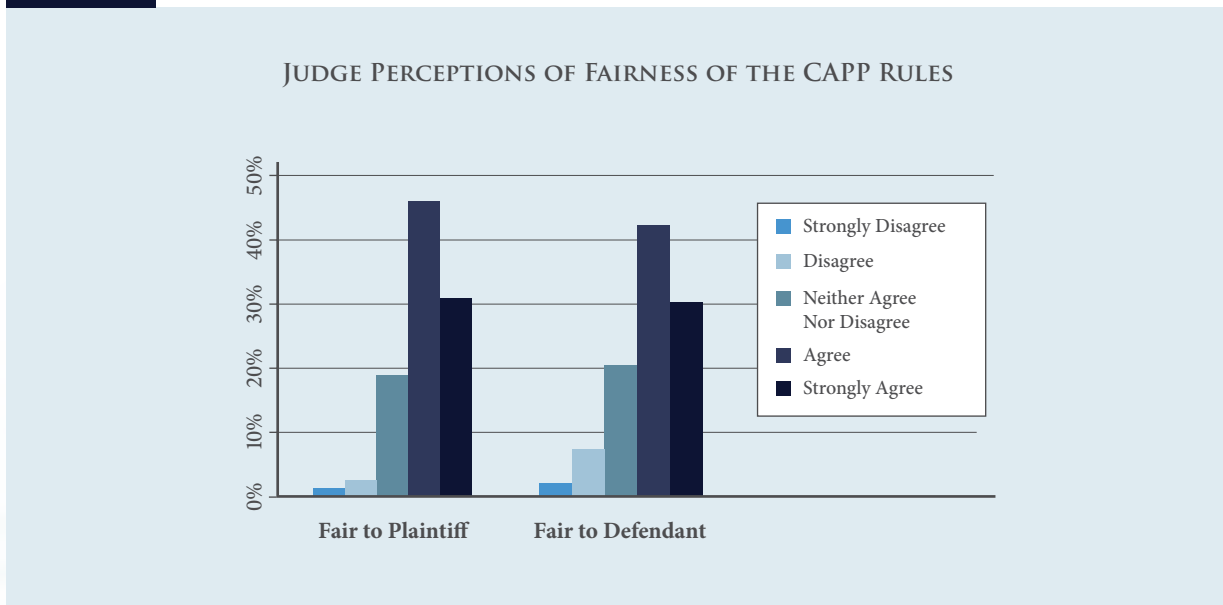
About one in three respondents were neutral and about one in ten respondents disagreed that the court was fair. As above, the responses appear to be independent of the party represented, but there are differences based on reported outcome. Majorities of those who reported a favorable or mixed result agreed that the judge was fair, while just over one-third of those who reported an unfavorable result agreed. In addition, the level of agreement tended to be higher in cases where a higher

level of contact with the judge would be expected (i.e., cases with discovery, cases over \$100,000 with a significant consideration other than monetary damages, and cases resolved by summary judgment).

**The judge surveys likewise found CAPP to be fair to both plaintiffs and defendants overall.**

The judges were asked to assess the fairness of the rules in CAPP cases pending during each quarter. Considering all of the responses, more than 70% expressed agreement that the process is fair with respect to plaintiffs and defendants, while about 20% expressed a neutral position. See Figure 3.

Figure 3





## THE EARLY STAGE

**THERE HAS BEEN GENERAL ADHERENCE TO THE INITIAL-STAGE TIMELINES, EVEN IF THEY HAVE PROVED CHALLENGING IN CERTAIN RESPECTS.**

Because CAPP applies only to those cases that meet the definition of a “business action” under the CAPP rules, the following procedure has been used for case designation. The plaintiff filing the case makes an initial determination on the case cover sheet, and the judge then reviews the complaint and makes a final determination. If the original classification was correct, the case proceeds; if it was incorrect, the plaintiff has generally been given additional time to serve the correct summons and amend the complaint. The substantive issues related to case designation are discussed beginning on page 35.

The plaintiff has 21 days from service of the complaint (“any pleading making any claim for relief”) to file an initial disclosure statement with the court. From that filing, the defendant has 21 days to file an answer (“any pleading defending against a claim for relief”). Exactly 21 days after service of the answer, the defendant’s initial disclosure statement is due to be filed with the court. The initial case management conference must be held within 49 days of the filing of the answer, with the joint case management report due 7 days before the conference.

**The docket study found that where the plaintiff originally designated the case as non-CAPP on the cover sheet, and the judge changed the designation, there was some built-in delay.** In this group (16% of CAPP cases), the average time from the filing of the complaint to the judge’s order changing the designation was 15 days (minimum 1 day, maximum 64 days). Please refer to the discussion on page 35 concerning case differentiation.

**The docket study found that the average time between the filing of the initial complaint and the plaintiff’s first initial disclosures in CAPP cases was 28 days (median 23, minimum 0, maximum 274).**

The plaintiff’s disclosures were filed within the 21-day time limit contained in the rule in 46% of cases, with 17% filed on the same day as the complaint. The remaining 54% were not filed according to the CAPP timeframe. Not surprisingly, cases in which all parties were represented tended to adhere more closely to the rule than cases involving a self-represented party.

**The docket study found that the average time between the filing of the plaintiff’s initial disclosures and the filing of the first answer was 18 days (median 21, minimum -230, maximum 165).**

In 64% of cases in which an answer was filed, the first answer was filed within 21 days of the plaintiff’s first initial disclosures, as required by the rule. Interestingly, in 15% of cases, the first answer was filed prior to the plaintiff’s first initial disclosures (which were late), accounting for the negative minimum time. Although this time period did not tend to increase as the number of defendants increased, the data speak only to how long it takes for the first answer to be filed, not how long it takes to conclude all pleadings and the initial phase of the litigation.

**The docket study found that the average time between the filing of the first answer and the filing of the first initial disclosures by a defendant was 33 days (median 21, minimum 0, maximum 405).**

It is important to note that 58% of the first initial disclosures by a defendant were filed within 21 days of the first answer (the average is a bit skewed by an outlier), with a plurality of 41% taking the full amount of time without being late.

The docket study found that the average time from filing to the initial case management conference was 103 days (median 91, minimum 47, maximum 260). The rule requires the conference to be held within 49 days of the answer, which translates to within 70 days of the date of filing if there is only one defendant, if service of the complaint occurs at the time of filing, and if the pleadings and disclosures occur exactly on time.

The joint case management report, which is to be filed with the court “at least seven days before the conference,” was filed exactly on time in 41% of cases.

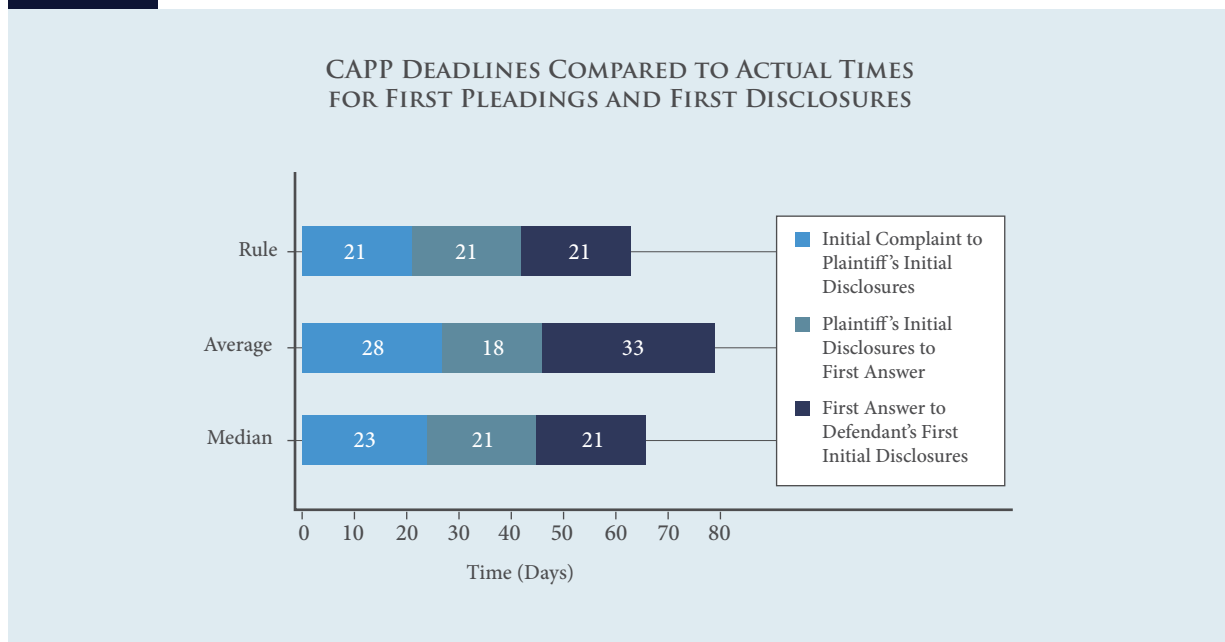
However, it was filed late in 43% and early in 16% of cases.

Most of the negative commentary contained in the attorney and judge survey responses relates to the initial-stage timelines.

Both attorneys and judges identified the following issues:

- ▶ Service of the plaintiff’s initial disclosures has been a point of confusion, as the deadline to answer is counted from the filing of initial disclosures (and thus is not specified in the summons), but the defendant has not yet appeared in the action to receive notice of the deadline. It is not clear from the rules how this notice is to be accomplished.

Figure 4



- ▶ For plaintiffs, the need to prepare detailed initial disclosures prior to the defendant's obligation to answer may increase the resources expended in cases that end in default judgment (note that those cases were excluded from the docket study but included in the surveys). This appears to be a particular issue with respect to collections actions, which are often brought under Rule 16.1 absent the CAPP rules.<sup>27</sup>
- ▶ From the defendant's perspective, the plaintiff can compress the time available to prepare initial disclosures by filing initial disclosures with the complaint or very soon thereafter, which is problematic in complex cases where the initial disclosures are more difficult to prepare. In addition, for cases that ultimately resolve via a granted motion to dismiss, the need to prepare an answer and initial disclosures can increase the time and money expended.
- ▶ The "rolling" deadlines at the initial stage, i.e., counting a deadline from the date of a previous event, can make it difficult to plan ahead in an environment where extensions are disfavored. The counting scheme has also resulted in a substantial administrative burden for both law firms and courts, as it requires entering new deadlines with each occurrence. This burden is often borne by support staff and law clerks, who must track deadlines for standard procedure and Rule 16.1 cases, as well.
- ▶ The initial-stage timelines were designed for a straightforward two-party case, and it is not clear how the CAPP deadlines for pleadings, disclosures, and the initial case management conference ought to be calculated for cases with multiple parties served at different times (sometimes even after the plaintiff's initial disclosure statement), cross-claims, third-party practice, amended pleadings, etc. Without vigilance on the part of the judge, such cases can easily veer off track and succumb to delay.<sup>28</sup> It should be noted that, in terms of the time from filing to the initial case management conference, the docket data do not reveal an apparent pattern when the number of parties rises from two to four, nor is there a pattern when comparing cases with four or fewer parties and cases with five or more parties.

**Here, there is also some tension concerning the role of the court process early in the life of a case.**

While some attorneys responded positively to early and staggered initial disclosures, others expressed that the timelines give insufficient breathing room to pursue settlement after filing but before undertaking the full disclosure and discovery process.

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27 Although debt collection actions brought by commercial banks or financial institutions are excluded from CAPP, such actions are included when brought by other types of creditors. With respect to a similar pilot project in New Hampshire, providing defendants with more information prior to the answer deadline (via fact-based pleading) may have reduced the default rate. See PAULA HANNAFORD-AGOR, ET AL., NAT'L CTR. FOR STATE COURTS, CIVIL JUSTICE INITIATIVE, NEW HAMPSHIRE: IMPACT OF THE PROPORTIONAL DISCOVERY/AUTOMATIC DISCLOSURE (PAD) PILOT RULES 17 (Aug. 19, 2013). However, default rates were not measured as part of this evaluation.

28 It is important to note that the times discussed on pages 19-20 relate to the *first* pleadings and disclosures, not for the close of *all* pleadings and disclosures by all parties.

## JUDICIAL CASE MANAGEMENT

The CAPP rules expect early and ongoing case management by a single judge. This includes an early initial case management conference designed to shape the process proportionally to the needs of the case, court availability to address outstanding pretrial issues without the need for briefing, and additional status conferences as required.

**CAPP CASES ARE MORE LIKELY TO HAVE A COURT APPEARANCE, AND WILL SEE THE JUDGE EARLIER AND MORE OFTEN.**

A court appearance includes, for docket study purposes, both in-person conferences and teleconferences in which the judge and at least one party were present.

**The docket study found that CAPP is associated with a statistically significant increase in the likelihood of a court appearance (i.e., whether either party sees a judge).**

All else equal, CAPP increases the likelihood of a court appearance during the course of a case by 49%.

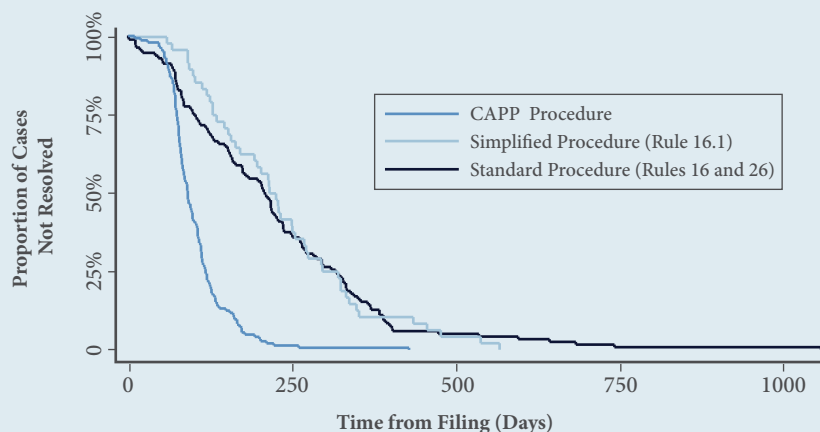
**The docket study found that CAPP is associated with a statistically significant decrease in the time between the initial complaint and the first court appearance (i.e., how long it takes to see a judge).**

All else equal, application of the CAPP rules increases the probability of an earlier court appearance by 360% over both Rule 16.1 and the standard procedure (in other words, CAPP cases are 4.6 times more likely to have an earlier first court appearance).<sup>29</sup> This effect is apparent even when none of the variable controls are applied. See Figure 5.

Figure 5

*CAPP cases are much more likely to see a judge at an earlier point. This graph shows that when half of CAPP cases had already had a court appearance, nearly all simplified and standard procedure cases had not yet been before the court. In fact, for most of those cases, the first court appearance occurred more than 200 days after the case was filed.*

TIME TO FIRST COURT APPEARANCE SURVIVAL ANALYSIS BY PROCEDURE TYPE  
ALL QUALIFYING CASES, NO ADDITIONAL VARIABLE CONTROLS



<sup>29</sup> Only cases with at least one court appearance are included in this analysis.

For every CAPP case in the docket study that had a court appearance, the first court appearance was the initial case management conference.

There is not a statistically significant association between the CAPP rules and the time from the first court appearance to resolution, perhaps because the court appearance occurs much earlier in CAPP cases. The result is the same considering only cases that end in settlement.

**The docket study found that CAPP is associated with a statistically significant increase in the number of court appearances.**

All else equal, CAPP more than doubles the number of court appearances from an expected 0.5 under the standard procedure to 1.3 under the CAPP rules. See Figure 6.

## CAPP CASES BENEFIT FROM CASE MANAGEMENT BY A SINGLE JUDGE.

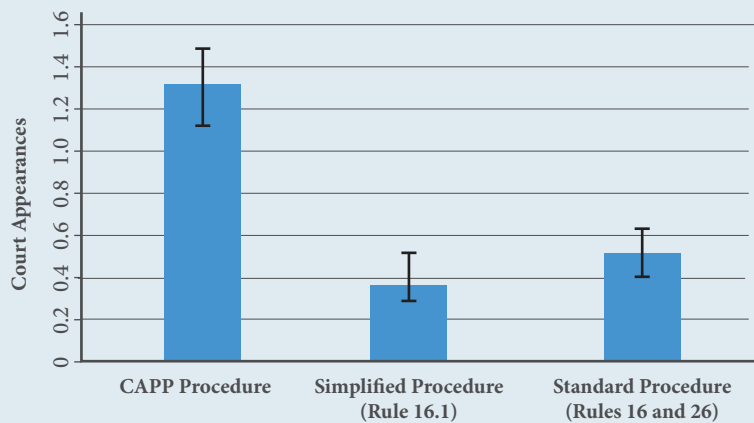
**The docket study found that the CAPP rules are associated with a statistically significant increase in the probability that only one judge will be involved during the pretrial phase of a case.**

All else equal, the likelihood of having a single judge hear the case prior to trial (rather than having different judges throughout the pretrial process) is about 25% higher in CAPP cases than in standard procedure cases. Although the CAPP rules call for the same judge to be involved in both the pretrial and trial stages, the CAPP judges determined that in the event of a conflict (docket or otherwise), it is better to have another judge hear the fully-prepared trial than to continue the case. Accordingly, only the pretrial phase is examined above. A full 90% of CAPP cases had a single judge through the pretrial *and* trial phases.

Figure 6

The number of court appearances is higher under CAPP.

NUMBER OF COURT APPEARANCES PER CASE BY PROCEDURE TYPE





**In 96% of survey responses, the attorney indicated that all portions of the subject CAPP case were heard by the same judge.**

This is consistent with the docket data.

### CAPP JUDGES TAILOR THE PRETRIAL PROCESS TO THE DISPUTE, PROVIDING ACTIVE CASE MANAGEMENT WHERE APPROPRIATE.

Once the CAPP initial-stage timelines (discussed beginning on page 19) have passed, the judge tailors the remainder of the pretrial process (timelines, discovery, etc.) proportionally to the needs of the case, as set forth in the initial case management order. In doing so, the judge has the benefit of the pleadings, the initial disclosures filed with the court, the parties' joint case management report, and the initial case management conference.

**According to the attorney survey data, CAPP judges applied active case management selectively in those cases demonstrating the greatest need.**

Only 16% of attorneys indicated "active" or "very active" judicial management in the subject case, with another 20% indicating a "moderate" level of case management. Examining these responses in the context of other reported factors, the following trends came to light:

- ▶ Attorneys tended to report higher levels of judicial management in cases with discovery than in cases without any discovery.
- ▶ Attorneys tended to report higher levels of judicial management in cases involving more than \$100,000, particularly when non-monetary relief, issues of importance beyond the particular case, and/or recoverable attorney fees were also involved.

- ▶ Attorneys reported very low levels of judicial management when the subject case ended immediately after filing or during the pleading phase. For cases resolving by default judgment or voluntary dismissal, a majority reported "almost no" case management.

**A strong majority (84%) of surveyed attorneys indicated that the level of judicial management employed was appropriate for the subject CAPP case.**

The remainder were split between opinions that judicial management was "too much" (10%) and "not enough" (6%) for the subject case.

- ▶ Those who indicated that there was *too much* judicial management most commonly cited the imposition of layers of procedure considered to be unnecessary or arbitrary within the context of the particular case. The issue of the case needing breathing room to allow for settlement was also raised, as was the desire for more flexibility to allow the attorney to handle the case in the most appropriate manner for the client. Interestingly, however, one-third of those who indicated that the level of judicial management was too high also stated that there was "almost no" or "low" judicial management employed in the case. This could be an indication that some respondents simply provided general opinion rather than case-specific information.
- ▶ Those who indicated that there was *not enough* judicial management also identified three main issues: 1) *pro forma* or strict adherence to the rules without providing more substantive management directed at what the parties really needed; 2) failure to enforce or refusal to follow the rules on the part of the judge; and 3) delayed rulings on pending motions.

In the attorney survey comments, CAPP’s focus on early, active, and ongoing judicial management of cases received more positive feedback than any other aspect of the project, with many calling to make it a permanent feature of the rules.

Overall, the case management aspects of the CAPP rules are perceived as beneficial to getting everyone engaged on the substance of the case and focused on its resolution, while preventing “drift” and decreasing motions practice. In particular, the initial case management conference received enthusiastic reviews, as it can set the standard of conduct, frame the issues, and provide the parties with a valuable opportunity for judicial input on the case prior to commencing discovery. Survey respondents also expressed appreciation for the accessibility of the judge to address pretrial issues and disputes promptly as they arise. However, it should be noted that when the management becomes more a matter of form than of substance, or when the case does not really need oversight, this aspect may be more of a hindrance than a help.

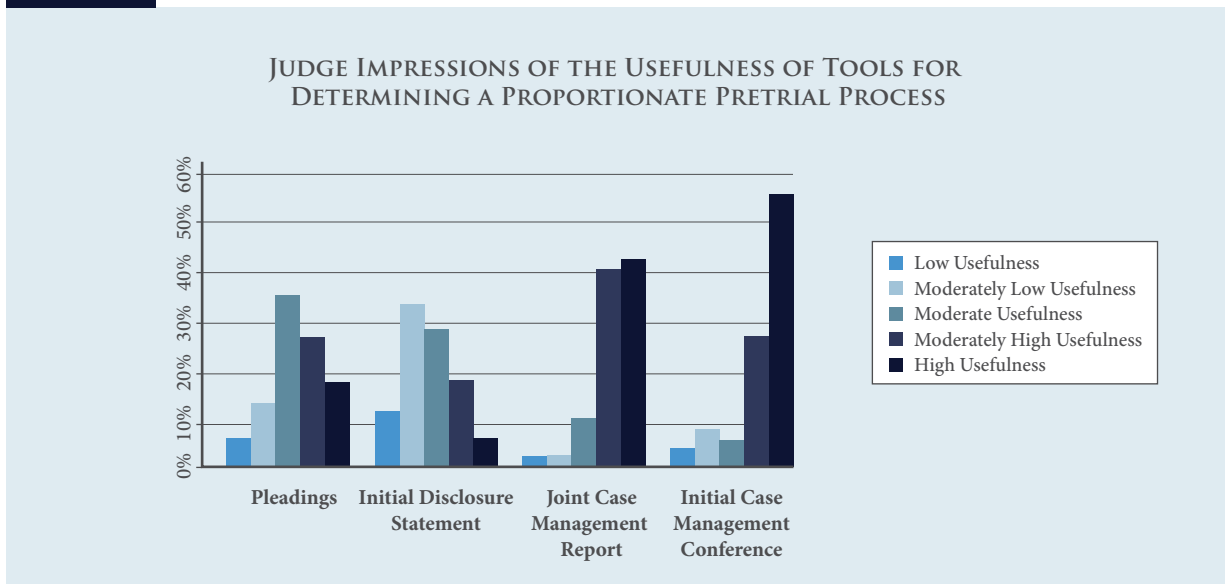
Considering all judge surveys completed over the course of the project, the initial case management conference was reported to be the most useful tool for determining a proportionate pretrial process, while initial disclosures were reported to be the least useful tool.

On a five-point scale ranging from low (1) to high (5) usefulness, the average scores were: 4.22 for the initial case management conference; 4.19 for the joint case management report; 3.36 for the pleadings; and 2.72 for initial disclosures. See Figure 7.

**With respect to the qualitative data, most CAPP judges view shaping the pretrial process in the context of the particular dispute as important to ensuring proportionality.**

However, at least one judge expressed concern that imposing strict time or discovery limits early in the case will inadvertently prejudice or favor a party, preferring to adhere to the joint case management report recommendations if all parties are in agreement.

Figure 7



## THERE IS GENERAL ADHERENCE TO AND ENFORCEMENT OF THE RULES AS WRITTEN.

**In general, attorney survey respondents reported that the parties adhered to, and the judge enforced, the CAPP rules in the subject case.**

A total of 82% indicated that the parties followed the rules of procedure “almost always” (51%) or “often” (31%). The remaining 18% stated that the parties followed the rules “about half the time,” “occasionally,” or “almost never.” Similarly, a total of 87% indicated that the judge enforced the rules “almost always” (56%) or “often” (31%). The remaining 13% reported less frequent enforcement.

**The judge survey data are mostly consistent with the attorney data on this issue, with party adherence to and judicial enforcement of the CAPP rules reported across dockets.**

Considering all of the judge surveys completed during

the course of the pilot project, 71% indicated that the parties followed the CAPP rules as written “almost always” (23%) or “often” (49%). The remaining 31% stated that the parties followed the rules “about half the time,” “occasionally,” or “almost never.” Similarly, in 93% of surveys, the judge reported taking “action” to ensure compliance when the CAPP rules were not followed as written “almost always” (74%) or “often” (19%). It should be noted here, however, that judges with less enthusiasm about enforcing CAPP may also have been less likely to complete the surveys.

**Nearly 90% of attorney survey respondents also indicated that sanctions were not warranted in the subject CAPP cases.**

Of the responses indicating that sanctions were warranted, about one in three reported that sanctions were actually imposed. About 15% of the responses indicating that sanctions were imposed in the subject case also indicate that sanctions were, in fact, not warranted.

## MOTIONS PRACTICE

With the parties conferring on substantive issues earlier in the case and the judge being available to informally address pretrial issues, it was expected that motions practice would decrease.

### CAPP APPEARS TO REDUCE MOTIONS PRACTICE IN GENERAL.

**The docket data suggest that the CAPP rules may be associated with a decrease in the total number of motions filed in a case.**

When applied to both the whole sample and the matched sets, the count model found that the CAPP

rules significantly decrease the number of motions filed in a case from an approximate expected 4.9 motions under the standard procedure to 3.8 motions under CAPP, all else equal.<sup>30</sup> The expected number is even lower for Rule 16.1 (2.1 motions). See Figure 8. While the difference-in-differences model showed a decrease, a statistically significant effect was not detected. Due to the distribution of the data for this particular variable, more confidence can be placed on the count models, with the difference-in-differences model serving as more of a robustness check. However, it is important to note the variances across the different approaches in reaching any conclusions.

<sup>30</sup> It should be noted that these data *include* continuance and extension motions, analyzed separately beginning on page 27, and discovery motions, addressed beginning on page 29.

**The judge survey data also suggest that fewer motions are filed in CAPP cases.**

Each quarter, the judges were asked to compare the number of motions in their CAPP cases during that quarter to their experience with similar non-CAPP cases (excluding discovery and dispositive motions, which are addressed below). Considering all of the judge survey responses, 51% indicated that there were “many fewer” (24%) or “moderately fewer” (27%) motions filed in their CAPP cases. Another 43% of responding judges reported that the number of motions was about the same.

**The qualitative attorney survey data contain some comments about delay caused by the failure of judges to promptly rule on pending motions.**

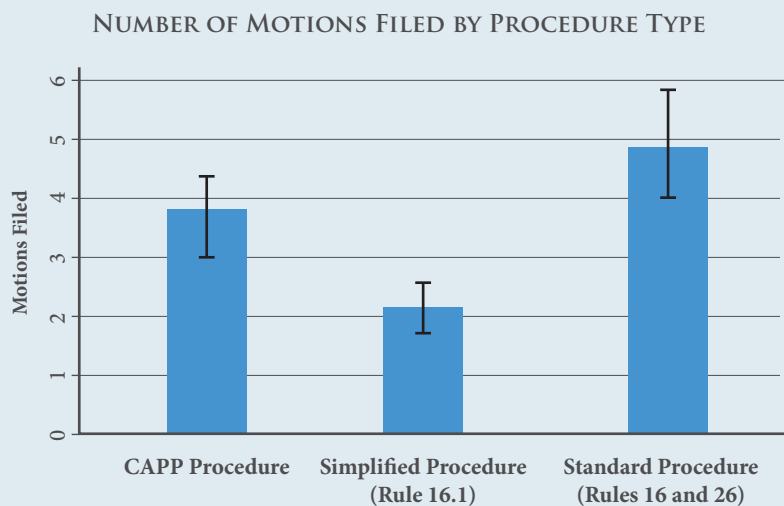
A handful of respondents suggested that ruling deadlines should be imposed on the court, in keeping with the strict deadlines to which the parties must adhere.

**THERE ARE FEWER EXTENSION MOTIONS FILED AND GRANTED IN CAPP CASES, ALTHOUGH THE “EXTRAORDINARY CIRCUMSTANCES” STANDARD CAN BE A CHALLENGE.**

Under the CAPP rules, continuances and extensions are “strongly disfavored,” and are to be denied without awaiting a response absent “extraordinary circumstances.” Further, there is no exception for stipulated motions for extension or continuance. This rule was designed to keep the case moving forward and to counteract the tendency for extensions and continuances to become par-for-the-course. It was anticipated that this rule would affect both the number of motions filed and the proportion of motions granted.

Figure 8

Both the CAPP and Rule 16.1 procedures reduce the number of motions filed over the standard rules.



**The docket study did not find any difference in motions to continue appearance dates (conferences, hearings, trials) under the CAPP rules.**

All else equal, the CAPP rules are not associated with a statistically significant decrease in the likelihood that a motion for continuance will be filed during a case, nor are they associated with a statistically significant change in the proportion of such motions granted.

**The docket study did find that the CAPP rules are associated with a statistically significant decrease in the number of motions for extension of time filed during the course of a case.**

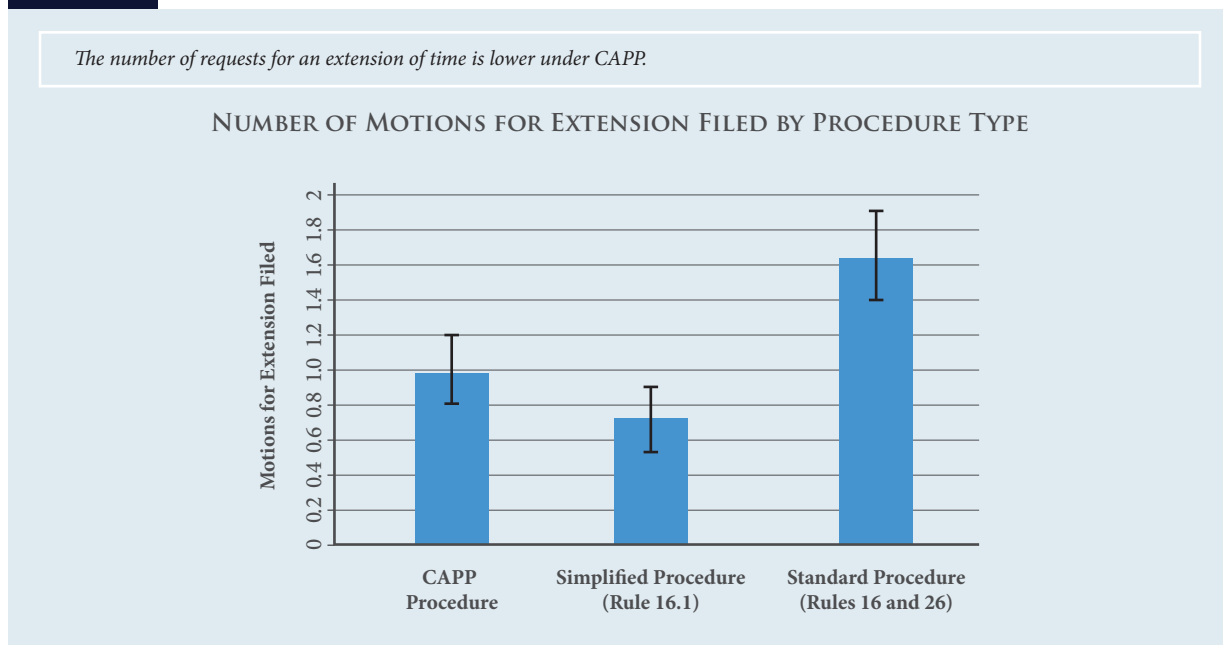
All else equal, CAPP decreases the number of requests for an extension from an approximate expected 1.7 per case under the standard procedure to an expected 1.0 per case under the CAPP rules. See Figure 9. It should

be noted that there were no extensions requested in at least a plurality of cases in each data set.<sup>31</sup>

**The judge survey data are consistent with the docket data. According to a majority of the survey responses, the parties in CAPP cases infrequently requested continuances or extensions.**

Considering all of the judge surveys completed during the course of the pilot project, which asked each judge to refer to their experience over the past quarter, nearly 70% of respondents indicated that the parties requested to continue CAPP conferences, hearings, or trials “almost never” (46%) or “occasionally” (38%). Similarly, in 85% of responses, the judge indicated that the parties requested to extend CAPP deadlines “almost never” (23%) or “occasionally” (46%).

Figure 9



31 Accordingly, the matched count models did not produce results, as the sample was too small.



**The docket study found that the CAPP rules are associated with a statistically significant decrease in the proportion of motions for extension of time that are granted.**

Motions for extension of time are less likely to be granted in CAPP cases. The CAPP rules decrease the proportion of motions granted by 11% as compared to the standard procedure.

**Likewise, the judges reported infrequently finding “extraordinary circumstances” warranting relief.**

In 89% of survey responses, the judges indicated that extraordinary circumstances were present to warrant granting a continuance or extension “almost never” (54%) or “occasionally” (35%). However, these data do not speak to how often the judges decided to grant continuances under circumstances less than “extraordinary.”

**The docket study revealed an inverse relationship between the number of extension motions and time to disposition under all three procedures.**

All else equal, increasing the number of extension motions *filed* decreases the probability of an earlier resolution by 16%. Increasing the number of extension motions *granted* also decreases the probability of an earlier resolution by 16%. The effect is the same under all three procedures.

**While the qualitative data reflected some appreciation of the importance of keeping cases moving and guarding against delay, surveyed attorneys and judges generally provided negative feedback on CAPP’s strict standard for continuances and extensions.**

The continuances and extensions rule caused many attorneys to characterize CAPP as rigid, inflexible, and arbitrary—notwithstanding the fact that the pretrial process is specifically tailored to the case at the initial case management conference.

Attorneys expressed that the strict standard is inconsistent with the realities of modern legal practice, and leads to additional anxiety in an already stressful environment, particularly for those in small firms or with primary family responsibilities. This has led some attorneys to refuse CAPP cases simply to eliminate the risk of missing a hearing or deadline for something unpredictable but less than “extraordinary.” One judge mentioned that the standard can also lead attorneys to seek “cushions” in initial scheduling.

Moreover, commenting attorneys expressed that the standard can be counterproductive to the goal of an efficient and cost-effective process, such as when an extension will result in an earlier resolution or the avoidance of unnecessary or duplicative work. In general, survey respondents expressed support for increased judicial discretion or more built-in flexibility in this area, as long as there is no effect on the trial date or prejudice to another party.

#### **THERE ARE INDICATIONS OF FEWER DISCOVERY MOTIONS IN CAPP CASES.**

**The judge survey data suggest that there are fewer discovery motions filed in CAPP cases.** Each quarter, the judges were asked to compare discovery motions practice in CAPP cases during that quarter to their experience with similar non-CAPP cases. Considering all of the judge survey responses, 61% indicated that there were “many fewer” (35%) or “moderately fewer” (27%) discovery motions filed in their CAPP cases. However, more than one-third of the responses indicated that the number of discovery motions was about the same in both CAPP and similar non-CAPP cases.

**After the project commenced, quite a few CAPP judges instituted a policy of not accepting written discovery motions and promptly holding a conference to resolve disputes in lieu of extended briefing. Qualitative judge and attorney survey comments on this policy were positive.**

While the no-written-discovery-motions policy is not an explicit aspect of the CAPP rules, it is an extension of the rule giving the parties the right to contact the court to arrange for prompt resolution of pretrial disputes. The policy has been implemented differently in different courts, with some judges holding a weekly docket period for the express purpose of resolving discovery disputes and others scheduling conferences as the need arises. There are also some judges who allow, or require, short written statements of the issues in advance of the conference. Those who provided feedback on this policy indicated that it has worked well.

#### **THERE IS NO CLEAR EVIDENCE OF IMPACT ON DISPOSITIVE MOTIONS PRACTICE.**

Because the filing of a motion to dismiss does not stay the obligation to proceed with an answer, initial disclosures, and the case management conference under CAPP, it was expected that the number of such motions would decrease. In addition, it was expected that the proportion of granted motions would increase, as motions would not be filed solely for the purpose of obtaining a stay. For the docket study, only Rule 12 motions to dismiss that were filed within the time for filing an answer were examined.

**The docket study did not find any association between the CAPP rules and a statistically significant decrease in the likelihood that a pleading-stage motion to dismiss will be filed, all else equal.**

However, this finding is contrary to the anecdotal experience of a number of CAPP judges, who believe that the CAPP rules do, in fact, reduce such motions.

**The docket study also failed to find a statistically significant association between the CAPP rules and the likelihood that a pleading-stage motion to dismiss will be granted, all else equal.**

As a result, it cannot be said that a greater proportion of motions to dismiss filed in CAPP cases are meritorious than those filed under Rule 16.1 or the standard procedure. Importantly, however, the small number of cases in the sample in which motions to dismiss were granted (33) impacts the likelihood of finding a significant relationship.

**With respect to all dispositive motions (not just early motions to dismiss), the judge survey data give some indication that there may be fewer filed in CAPP cases.<sup>32</sup>**

Each quarter, the judges were asked to compare the dispositive motions practice in CAPP cases during that quarter to their experience with similar non-CAPP cases. Considering all of the judge survey responses, 46% indicated that there were “many fewer” (23%) or “moderately fewer” (23%) dispositive motions filed in their CAPP cases. However, a plurality (48%) indicated about the same number of dispositive motions filed in CAPP and non-CAPP cases.

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<sup>32</sup> Motions for summary judgment were not examined as part of the docket study.

## DISCOVERY

CAPP seeks to put as much relevant information as possible in front of the parties and the court prior to commencing discovery, through pleadings and initial disclosures. The CAPP rules encourage more detailed pleadings, stating that the party bearing the burden of proof should plead all known material facts and monetary damages, in an effort to “identify and narrow the disputed issues at the earliest stages of litigation and thereby focus discovery.”<sup>33</sup> For the same purpose, the parties are required to disclose and describe information related to the claims, whether supportive or harmful.

Next, the parties confer to identify the disputed issues and make a recommendation to the court regarding the needs of the case, via a joint report. Lead counsel then attend the initial case management conference to finalize the plan for discovery to be conducted. Discovery is limited to “matters that would enable a party to prove or disprove a claim or defense or to impeach a witness.” Moreover, it must comply with proportionality factors.

**SUPPORTED BY EARLY INFORMATION EXCHANGE AND TAILORED TO THE CASE, DISCOVERY UNDER CAPP IS CONSIDERED PROPORTIONATE AND SUFFICIENT.**

**Regarding docket study cases in which the judge changed the plaintiff’s designation from non-CAPP to CAPP, only 21% filed an amended complaint in response, while 79% did not.**

It seems that the majority of plaintiffs in this situation either determined that the original complaint was sufficient or decided to rest on the original complaint regardless of the CAPP language.

**In the attorney survey comments, more respondents expressed support for CAPP’s detailed pleadings and expanded initial disclosures than criticism of the standards.**

Attorneys in favor of the CAPP pleading and disclosure rules stated that the additional information (if known) can be helpful for understanding the case and focusing on the disputed issues at an early point. However, there is also some sentiment that compliance is less than consistent. Although it helps that disclosures are filed with the court, enforcement generally does not occur until the initial case management conference, if at all.

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<sup>33</sup> This standard is permissive rather than mandatory, as there was no intent to affect the dismissal rate.

According to the case-specific attorney survey data, aggregate average discovery in CAPP cases with discovery (60% of subject cases) is lower than the default levels set forth in the standard rules. See the table below for the amount of each type of discovery conducted. While this does not provide a comparison with the levels of discovery actually conducted in similar cases proceeding under the standard rules, it does give a sense of where CAPP cases are falling in relation to presumptive permitted discovery.

CAPP DISCOVERY<sup>34</sup>

|   | <i>Min</i> | <i>Median</i> | <i>Mean</i> | <i>Max</i> |
|---|------------|---------------|-------------|------------|
| <i>Requests for Production</i><br>(CRCP allows 20 for each adverse party)   | 0          | 5             | 8.72        | 70         |
| <i>Requests for Admission</i><br>(CRCP allows 20 for each adverse party plus for the genuineness of 50 documents) | 0          | 0             | 4.36        | 60         |
| <i>Interrogatories</i><br>(CRCP allows 30 for each adverse party)   | 0          | 9             | 10.87       | 90         |
| <i>Non-Expert Depositions</i><br>(CRCP allows one deposition of each adverse party plus two additional)           | 0          | 0             | 0.87        | 11         |

Nearly all attorney survey respondents who conducted discovery in the subject CAPP case indicated that the amount of discovery was either less than (80%) or equal to (18%) the level of discovery authorized in the initial case management order.

Large majorities of respondents representing plaintiffs (81%) and those representing defendants (79%) indicated that the amount of discovery conducted was less than the amount authorized in the initial case management order. These proportions are independent of perceptions of outcome favorability, and show that parties have not had to return to the court to request additional discovery.

Nearly 70% of attorney survey respondents who conducted discovery in the subject CAPP case agreed with the statement that “the amount of discovery allowed was proportional to the needs of my client’s case,” and another 15% expressed a neutral position on the statement.

Breaking the responses down by party represented, 71% of plaintiff attorneys and 68% of defense attorneys agreed that the permitted discovery was proportional. Breaking down the responses by the reported favorability of the outcome to the client (favorable, unfavorable, and mixed), a majority within each group expressed agreement.

In terms of the efficacy of the information exchange, 52% of attorney survey respondents who reported discovery in the subject case agreed that “the pretrial process allowed me to obtain from the other side information necessary to resolve my client’s case” (19% were neutral).

The responses concerning obtaining information did not vary according to whether the respondent represented a plaintiff or a defendant. However, those who perceived the outcome to be unfavorable were more likely to disagree that the process allowed them to obtain the necessary information.

34 CAPP cases in which no discovery was conducted have been removed from this analysis. The sample size for each category (*n*) ranges from 257-259.



Similarly, 55% of attorney survey respondents who reported discovery in the subject case agreed that “the pretrial process allowed me to present the information necessary to resolve my client’s case” (25% were neutral).

With respect to the responses on presenting information, plaintiff attorneys were more likely to agree (61%) than defense attorneys (48%). In addition, those who perceived the outcome to be unfavorable were less likely to agree that the process allowed them to present the necessary information.

**Judges also tend to perceive the information exchange under CAPP in a positive light.**

While the judge’s view of discovery is necessarily more limited than that of attorneys, few expressed disagreement over the course of the project with the proposition that CAPP “allows for the exchange of sufficient information to fairly resolve cases on their merits.” In fact, nearly 70% of the judge surveys showed strong agreement (37%) or agreement (33%) with the statement, and another 25% took a neutral position.

**WHILE NO CONCLUSIONS CAN BE DRAWN WITH RESPECT TO THE EXPERT WITNESS RULES, THERE ARE SUGGESTIONS FOR IMPROVEMENT.**

Expert witnesses are limited to one per side per issue or specialty. Expert discovery is limited to a comprehensive expert report (no depositions are permitted), and testimony is limited to the contents of that report. Hard data on the CAPP expert witness rules is exceedingly limited, particularly because so few cases proceeded all the way to trial. However, a few insights can be gleaned from the evaluation.

The case-specific attorney survey data revealed general—though not complete—compliance with the prohibition on expert witness depositions in CAPP cases with discovery.

The attorney surveys inquired into the number of such depositions in the subject case:

EXPERT DISCOVERY<sup>35</sup>

|   | Min | Median | Mean | Max |
|---|-----|--------|------|-----|
| <i>Expert Depositions (CRCP allows one for each expert who may present opinions at trial)</i> | 0   | 0      | 0.05 | 4   |

**Where surveyed attorneys provided qualitative comments on the expert witness rules, most advocated for the return of depositions.**

Some attorneys noted the tendency for expert depositions to lead to settlement. A few others stated that the lack of depositions leads to “sandbagging,” or at least gives an advantage to the expert who writes an obtuse report. A portion suggested that depositions could be allowed under certain circumstances (e.g., regarding liability experts, in complex cases, when damages exceed a certain level, for professional malpractice, etc.). It is difficult to know whether these comments are based on actual experience with the CAPP expert rule or whether they are simply conceptual opinions, but the pattern of responses held true regardless of the point at which the subject case resolved.

35 This analysis excludes CAPP cases in which no discovery was conducted. The sample size (n) is 252.



**A handful of attorney survey comments provided feedback on the other aspects of the CAPP expert witness rules.**

First, it was noted that the requirement to sign every paragraph in the expert witness report is *pro forma* and wasted time. Second, it was noted that when multiple parties on the same side have divergent positions and interests, additional argument is required to advocate for the right to have separate experts.

**Judges noted that the treatment of non-retained experts needs to be clarified in the rule.**

Some portions of the expert witness provisions refer only to “retained” experts, some portions also contain a reference to parties or party representatives testifying in part as an expert, and some portions refer simply to “experts.” Fact witnesses with expert knowledge, such as the treating physician in a products liability case, are not specifically mentioned. As a result, the rule is subject to differing interpretations for the various types of expert witnesses.

## TRIALS

### THERE IS NO CLEAR EVIDENCE OF IMPACT ON TRIAL RATE OR TRIAL TIME.

**The CAPP rules have no distinguishable effect on the likelihood of going to trial, all else equal.**

With respect to this analysis of the docket study data, there are two issues of note: 1) the small number of cases that proceeded all the way to trial in the sample (57) reduces the likelihood of detecting a statistically significant relationship between CAPP and the trial rate, and 2) the direction of the association was inconsistent across statistical models. Without drawing any conclusions and keeping in mind that the study included only those cases with an appearance by a defendant, the trial rates for each procedure are set forth below.

#### TRIAL RATE

|                             | <i>Court Trial</i> | <i>Jury Trial</i> | <i>Total</i> |
|-----------------------------|--------------------|-------------------|--------------|
| <i>CAPP Procedure</i>       | 7.2%               | 1.4%              | 8.7%         |
| <i>Standard Procedure</i>   | 4.8%               | 1.8%              | 6.5%         |
| <i>Simplified Procedure</i> | 4.8%               | 1.4%              | 6.3%         |

**Likewise, it was not possible to draw any conclusions with respect to trial length (in number of days) from the docket data.**

Without drawing any conclusions, the data on trial length are set forth below.

#### TRIAL LENGTH IN DAYS

|                             | <i>Min</i> | <i>Median</i> | <i>Mean</i> | <i>Max</i> |
|-----------------------------|------------|---------------|-------------|------------|
| <i>CAPP Procedure</i>       | 1          | 2             | 2.28        | 5          |
| <i>Standard Procedure</i>   | 1          | 2             | 2.62        | 7          |
| <i>Simplified Procedure</i> | 1          | 2             | 1.92        | 5          |

## CULTURE AND COOPERATION

**THE LEVEL OF COOPERATION AMONG ATTORNEYS IN CAPP CASES IS GENERALLY CONSIDERED TO BE HIGH.**

**A majority of attorney survey respondents indicated a strong level of cooperation between opposing counsel and parties to efficiently resolve the subject CAPP case.**

Exactly 21% of attorney survey respondents indicated that there was no appearance by an opposing party in the subject case. Of those who did have contact with the opposing counsel/parties, more than half found that the level of pretrial cooperation to efficiently resolve the subject CAPP case was “high” (30%) or

“moderately high” (27%). Another 22% reported moderate cooperation, while only about one in five perceived cooperation to be low or non-existent.

**Attorney survey respondents commented that the effectiveness of the CAPP process is dependent upon adherence by attorneys and enforcement by judges.**

The rules can be elevated or frustrated, depending, as one attorney stated, “on whether counsel (and/or their clients) choose to participate in good faith to achieve a decision on the merits or to engage in ‘hide and seek’ with boilerplate objections, avoidance of questions, etc.”

## CHALLENGES IN DIFFERENTIATION

**THE PROCESS FOR DEFINING AND DESIGNATING CAPP CASES HAS RESULTED IN A CERTAIN LEVEL OF CONFUSION AND INCONSISTENCY.**

For participating courts, a case’s inclusion in CAPP is determined “based on the contents of the complaint at the commencement of the action,” as designated by the plaintiff on the cover sheet and ultimately determined by the judge. The CAPP definition of a “business action” sets forth both a list of included actions and a list of excluded actions, based on the substantive claims rather than party type or relief sought.

**The docket study found that in 96% of pilot cases, the plaintiff filed the correct (new) cover sheet, which contains a check box for designating CAPP cases.**

Fewer than 5% filed the old cover sheet, indicating a high level of awareness of the new cover sheet.

**The plaintiff made the pilot project designation in 84% of the cases, while the judge changed the designation to CAPP in 16%.**

Accordingly, in over 15% of pilot cases, the plaintiff disagreed with the judge’s determination that the case fell within the definition of a “business action” (or was making an attempt to avoid participation in the pilot project). These data do not speak to the proportion of cases in which the plaintiff designated the case to be in CAPP and the judge removed it from the project.

**The attorney and judge surveys, along with the more informal feedback, revealed that the CAPP definition of a “business action” has created confusion and inconsistency in application of the pilot project.**

The following issues have been raised with respect to case classification:

Some case types are not listed in either the included or the excluded categories. A few examples include mechanic's lien cases, quiet title actions, HOA assessment foreclosures, and cases claiming libel, slander, or defamation.

- ▶ Some cases have multiple claims, some of which are included and some of which are excluded. Although the judges have decided to use the "predominant claim" standard, making that call can be difficult when the different claims have the same factual basis.
- ▶ Some cases have one claim that fits within both the included and excluded categories. Is a case claiming personal injuries due to a defective product included as a product liability action or excluded as alleging negligence for physical injuries? Is a wage dispute a contract case or an employment case?
- ▶ Some complaints are factually insufficient to determine the proper categorization, such as those with a claim involving property but without specification of whether it is residential or commercial property.

**In addition, attorneys and judges have questioned several distinctions with respect to case-typing under CAPP.**

There are questions about the lines drawn in the following areas:

- ▶ Debt collection actions brought by commercial banks or financial institutions are excluded, while the same claims brought by any other type of creditor are included.
- ▶ Medical negligence actions are excluded, while other types of professional malpractice actions are included. All professional malpractice actions tend to be complex, and some non-medical malpractice cases involve proof of physical injuries.
- ▶ Some cases have been included because of the existence of a contract, but the contract may be nominal or ancillary to the issues to be litigated (i.e., the claims arose from a breach of duty independent of the contract). The attorney comments cited professional malpractice cases and insurance cases (subrogation, under-insured motorist (UIM), bad faith, and worker's compensation) as examples. There was extensive discussion on how to treat UIM cases among the judges, a good many of whom view those cases as contractual in nature and thus believe they belong in the project. This provides a vivid example of differing opinions on the scope of CAPP.

## OVERALL OPINIONS

**SURVEY OPINIONS ON CAPP OVERALL ARE MIXED, AND REVEAL BOTH BENEFITS AND CHALLENGES ASSOCIATED WITH THE PROJECT.**

**A variety of opinions on CAPP were expressed through the attorney survey, though the suggestion to eliminate the project was more prevalent among attorneys who provided feedback in the comments section than was the suggestion to maintain or expand it.**

In this respect, the qualitative comments are not exactly consistent with the quantitative data, which show compelling benefits to the project. The objective numbers (the docket data and the case- or quarter-specific survey data) provide insight into the project itself, while the subjective comments provide insight into attitudes in relation to the project. Both perspectives are important, which is why a multiple methods approach to research is valuable.

Aside from the comments described more specifically in sections above, the following broad themes emerged from the general feedback:

- ▶ The initial-stage timelines tend to work better for simple cases (with the exception of default judgments), while the subsequent case management provisions tend to work better for complex cases.
- ▶ The ways in which the CAPP rules fit into the larger CRCP scheme (e.g., relationship to Rule 16.1, effecting non-personal service, counting non-CAPP deadlines, etc.) could have used more attention to alleviate confusion arising out of the project. The confusion was especially great for self-represented litigants.
- ▶ Having parallel sets of rules apply to different cases is time-consuming and creates unnecessary difficulty in managing a legal practice, particularly when the standard for inclusion is not clear. Some attorneys expressed the view that the rules should be an all-or-nothing proposition.
- ▶ Certain attorneys are simply more comfortable with the standard procedure.

**The judge survey requested an opinion on the overall impact of the CAPP rules during each quarter. Considering all of the surveys administered over the course of the project, a slight majority (51%) characterized the impact as positive, another 28% characterized it as neutral, and 21% characterized it as negative.**

Taking into account each judge's final response to the survey (as identified by code), the following is a condensed list of the reasons given for the *positive* reactions:

- ▶ Because of the early-action and information-exchange requirements, attorneys reach an informed position—and engage in more meaningful settlement negotiations—sooner than under the standard process, enabling cases to move more quickly toward resolution. This, in turn, makes litigation more affordable.
- ▶ The timing and structure of the initial case management conference is useful.
- ▶ The project has reduced requests for additional time, as well as motions practice in general.
- ▶ From a cultural perspective, the project has made the bench and bar more cognizant of the need to proactively manage cases, while requiring opposing counsel to talk to one another.

The following reasons were provided for the *neutral* responses:

- ▶ The project does not really make a difference for judges who already actively manage their cases and for courts that are already efficient.
- ▶ The project has good points (e.g., early case management and no delay resulting from motions to dismiss) and bad points (e.g., the additional cost of requiring initial disclosures before the case is at-issue and the parties' tendency to rely on status quo discovery in the proportionality determination).
- ▶ The judges do not have sufficient information to assess one of the biggest issues, which is expert discovery in relation to trial.

The following reasons were provided for the *negative* feedback:

- ▶ The project's impact is insufficient to justify new layers of rules and administrative requirements.
- ▶ The project reduces judicial discretion and control over cases.
- ▶ There is now a need to hear motions based on non-compliance with CAPP.



## CONCLUSION

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It appears that the most valuable aspects of the Colorado Civil Access Pilot Project relate to getting the parties and the judge engaged with one another regarding the substance of the case at an early point in the process. It appears that the least valuable aspects of the project relate to case designation and the logistics of the process leading up to the initial case management conference. If the CAPP rules are maintained in one form or another based on the outcomes of this pilot

project, it would be beneficial to coordinate them more fully with—or incorporate them into—the other procedures in place in Colorado.

It is IAALS' hope that this final evaluation report will inform current thinking on rules changes aimed at achieving a just, speedy, and inexpensive civil justice process, in Colorado and around the nation.

tailored discovery  
single judge  
meet and confer





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