

NEW REPORT
ESTABLISHES PRINCIPLES
FOR IMPROVING THE
U.S. CIVIL JUSTICE SYSTEM



New report establishes principles for improving the U.S. civil justice system

by Rebecca Love Kourlis, Jordan M. Singer, and Paul C. Saunders

Last year, we reported on the results of a survey of the American College of Trial Lawyers (ACTL), conducted by the Institute for the Advancement of the American Legal System (IAALS) and the ACTL Task Force on Discovery.¹ The survey collected the opinions of nearly 1500 experienced litigators, representing both plaintiffs and defendants, on a wide range of issues concerning the civil justice system and the pretrial process. The survey found that large—often overwhelming—majorities of those responding were concerned about the cost of litigation, discovery abuse on both sides of a case, and the costs of electronic discovery. Survey respondents also indicated that active judicial management helps to shape and narrow the issues in a case, but that notice pleading does not. Comments to a series of open-ended questions in the survey underscored the respondents' general frustration with inefficiencies in the system.

The survey results provided a starting point for a broader discussion about the need for reform of the civil justice process. In March 2009, IAALS and the Task Force released a final report that proposed a set of principles for future civil justice reform. We report here on the content of the final report and the ongoing work of IAALS and the ACTL to foster positive change to the civil justice system.

The Task Force

The survey and final report are part of a joint project of IAALS and the Task Force that began in mid-2007. The project began by exploring the role of discovery in contributing to cost, delay, and associated problems with the civil justice process. That mandate was later broadened to examine other parts of the civil justice system that relate to and have a potential impact on discovery. The final report reflects the considered judgment of IAALS and the Task Force participants about the need for a new direction for the American civil justice system, one that is more fully in line with the realities of twenty-first century technology, business practice, and the needs of individual litigants.

In developing the final report and the principles contained therein, IAALS and the Task Force took into account nearly five decades of studies on cost and delay in the civil justice system, as well as the survey results, academic and legal commentary on the Federal Rules of Civil Procedure, information on innovative departures by state court systems from the traditional rules structure, and the participants' extensive personal experience.

The principles – A summary

The final report sets out 29 different principles, focusing on all aspects of the civil litigation process. The full

reasoning behind each principle is explained in the final report. Here we summarize the principles by categorizing them in five core areas, and explain their underlying rationale.

Allow flexibility in procedural rules to address the particularized needs of each case. The Federal Rules of Civil Procedure, and many state rules, were originally designed to apply to all civil cases. Over 70 years of experience with the rules, however, suggests that in fact many cases do not fit easily into a "one size fits all" mold. Accordingly, from time to time courts and legislatures have implemented new rules for certain types of cases. The final report recognizes that some case types do indeed require different treatment. For example, the procedures necessary to assure the full and fair adjudication of an employment dispute clearly differ from those necessary for a complex antitrust case. The principles support the establishment of specialized procedural rules where appropriate.

Re-energize pleading. The final report emphasizes that pleadings should set forth the factual and legal basis of the pleader's claims or defenses in order to define the issues of fact and law to be adjudicated. They should give the opposing party and the court sufficient information to determine whether the claim or defense is sufficient in law to merit continued litigation. Pleadings should set the boundaries for discov-

1. See Rebecca Love Kourlis, Jordan M. Singer, and Paul C. Saunders, *Survey of experienced litigators finds serious cracks in U.S. civil justice system*, 92 JUDICATURE 78 (2008).

ery and should give the court adequate information to control and supervise the progress of the case to trial or other resolution.

To this end, one of the key principles in the final report is that notice pleading should be replaced by fact-based pleading, and that the pleadings should set forth with particularity all of the material facts that are known to the pleading party that support the pleading party's claims or affirmative defenses. It is important to note that a proposed return to fact-based pleading does *not* mean a return to a complex nineteenth-century writ system; rather, it is intended to revitalize the role that pleadings play in narrowing and focusing issues at the earliest stage of litigation.

A shift away from the free-form notice pleading in effect since the 1930s is, in the view of the final report's authors, a necessary step in curtailing overbroad discovery. The purpose of discovery has always been to collect information to facilitate understanding and evaluation of a party's claims and defenses; fact-based pleading would provide a significant amount of that information at the forefront of the pretrial process, obviating the need for much expensive and time-consuming discovery.

Keep discovery proportional. The final report prioritizes proportionality as "the most important principle [to be] applied to all discovery,"² noting that "[t]here is simply no justification for the parties to spend more on discovery than a case requires."³ To this end, 16 of the principles relate to methods for controlling discovery costs.

The principles aim to keep discovery proportional by promoting early disclosure of fundamental information, and then limiting additional discovery to that which is narrowly focused on the key facts in dispute. Each party should produce all reasonably available nonprivileged, non-work product documents and things that may be used to support its claims, counterclaims, or defenses. There would be an ongoing duty to

supplement these disclosures. Failure to comply with this obligation, absent cause or excusable neglect, could lead to an order precluding the use of such evidence at trial. Prospective trial witnesses should also be disclosed early in the litigation.

With respect to scope, the principles make clear that all facts are not necessarily subject to discovery,⁴ and that discovery (especially document discovery) should be limited to information "that would enable a party to prove or disprove a claim or defense or enable a party to impeach a witness."⁵ Discovery after initial disclosures would not be permitted except by agreement of the parties or a court order. Even if further discovery is warranted, it should be stayed in whole or part if doing so would be more cost-effective—for example, if a motion to dismiss has been filed or if the proposed discovery pertains only to damages. Finally, electronic discovery should be expressly limited by the principle of proportionality, taking into account the nature and scope of the case, relevance, importance to the court's adjudication, expense, and burdens.⁶

The final report recognizes that electronic discovery poses special challenges for judges and counsel. Some judges may not always appreciate the complex issues surrounding the use and upkeep of emerging technology, and accordingly may issue orders related to electronically stored information that are unworkable or impractical. Similarly, counsel who are unfamiliar with relevant technology may be forced to rely inappropriately on third-party vendors in making litigation decisions concerning requests for and review of electronically stored information. The principles therefore recommend workshops for both judges and trial counsel to familiarize them with the technical knowledge necessary to make informed decisions about electronic discovery.

Limit oral testimony by experts. The final report urges that all courts require expert witnesses to file written reports stating their opinions

and the reasons for those opinions. Such a requirement, coupled with a rule that strictly limits the trial testimony of an expert to the contents of his or her report, would obviate the need for expert depositions in most or all cases. The final report also counsels against the proliferation of competing witnesses on the same topic, recommending that only one expert per party be allowed on any given issue, except in extraordinary circumstances.

Promote active case management by a single judicial officer. Partly in response to the overwhelming sentiment in the ACTL survey that one judicial officer should be involved in managing a case from start to finish, the final report dedicates nine principles to judicial case management. The principles advise the judge to take a hands-on approach to scheduling key deadlines (including a trial date) early in the case. The final report also recommends that the judge require the parties to think about discovery early in the case, and make periodic reports to the judge about discovery conferences in complex cases. Finally, the principles suggest that a judge prioritize activities that will advance the case more quickly to trial or resolution, such as ruling expeditiously on motions to dismiss and raising the possibility of alternative dispute resolution. Because additional judicial involvement is contemplated, the principles also call for increased judicial resources and judicial training programs where appropriate.

These case management principles are fueled by the experience of judges and counsel, as well as emerging empirical research about case-flow management. Seventy-four percent of respondents to the ACTL survey indicated that early intervention by judges helped narrow the issues in a case, and 66 percent said

2. FINAL REPORT OF 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 7 (2009).

3. *Id.*

4. *Id.* at 11.

5. *Id.* at 8.

6. *Id.* at 14.

that such intervention helped limit discovery. Judicial intervention may also help promote a culture of cooperation between opposing counsel to achieve orderly and cost-effective discovery. And while the final report acknowledges that there has been considerable debate about the proper time to schedule a trial date, the authors point to new research on federal caseload management that suggests a strong positive correlation between the time it takes a court to set a trial date after the case has been filed and the overall time to resolution.⁷

Next steps

The final report was adopted by the ACTL Board of Regents at its 2009 winter meeting, signaling the College's dedication to pursuing a better civil justice system consistent with the principles. The principles themselves have been the subject of widespread discussion since their release. In February 2009, representatives of IAALS and the Task Force made a formal presentation on the principles to the United States Judicial Conference Standing Committee on

Rules of Practice and Procedure. And in March, the principles were presented to an esteemed group of leaders of the judiciary, bar, academia, and business at the IAALS 2009 Civil Rules Summit.

Momentum is building, but there is still much to be done. IAALS and the Task Force intend to work with those state and federal judges who have indicated a willingness to develop pilot programs in order to ascertain whether the principles will result in greater efficiency in practice. To this end, both groups have together developed a set of pilot project rules that implement the principles. IAALS has also developed civil caseload management guidelines for judges that correspond to the pilot project rules, and is in the process of establishing proposed metrics to determine the extent to which the pilot project rules are effective in practice.

Pilot projects are set to begin in several courts around the country in the coming months. IAALS and the Task Force are also partnering with other organizations to survey additional groups of attorneys and judges on issues concerning the civil justice system and pretrial process. The new data from additional surveys and the pilot programs will be used to inform a more robust discussion about the

current civil rules regime in the spring of 2010.

The end goal, however, is not—and cannot be—just more reports and more talk about change. Real reform will require a commitment to collaboration, bold thinking, an innovative spirit, and the courage to embrace change. The groundwork has been laid. It is time to give new life to a system that better achieves the promise of an affordable, efficient, and fair resolution of cases in America's courts.

The final report and related materials are available at <http://www.du.edu/legalinstitute>.

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⁷ *Id.* at 20 (citing INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A TWENTY-FIRST CENTURY ANALYSIS (2009)).

Nominations are open for the 28th Annual Edward J. Devitt Distinguished Service to Justice Award

The award recognizes members of the federal judiciary who have dedicated themselves to public service. All federal judges appointed under Article III of the U.S. Constitution are eligible. It is named after the late Edward J. Devitt, longtime chief judge of the U.S. District Court for the District of Minnesota. The honor includes an inscribed crystal obelisk and a \$15,000 honorarium.

Nominations must be submitted by March 31, 2010.

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