

A ROADMAP FOR ACTION

LESSONS FROM THE IMPLEMENTATION OF RECENT CIVIL RULES PROJECTS





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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 continuous improvement of the process and culture of the civil justice system. 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 civil justice 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, *Rule One Initiative* empowers, encourages, and enables continuous improvement in the civil justice process.

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INTRODUCTION

Around the country, momentum for making improvements to the civil justice process is growing in both state and federal courts.¹ Some jurisdictions, such as New Hampshire and Iowa, have implemented pilot projects to test new civil procedures. Other jurisdictions, such as Utah and Texas, have made permanent amendments to their civil rules. Still others have taken initial steps toward procedural reform or are interested in doing so. While every jurisdiction is unique, and every endeavor will be different in purpose, scope, and timing, the experience of change in one place can help to inform the process of change in other places.

For bench and bar leaders seeking to implement a civil rules project, what can be learned from earlier efforts? This report examines some important considerations and decision points, with a particular focus on Colorado's implementation of the Civil Access Pilot Project Applicable to Business Actions in District Court ("CAPP").

With the intent of making civil litigation more accessible,² the CAPP project comprises a set of new rules for pleading, disclosure, discovery, and case management. The rules are not meant to be a complete stand-alone set of rules; rather, the Colorado Rules of Civil Procedure govern except where there is inconsistency, in which case the CAPP rules take precedence. The goals are to "identify and narrow disputed issues at the earliest stage," to "require active ongoing case management by a single judge," and to "keep litigation costs proportionate to the issues being litigated."³ The CAPP rules apply to specifically defined business cases filed in five pilot counties during the pilot project period.

The determination of whether the pilot project has been successful will not be left to chance. The Colorado Supreme Court (the "Court") has designated IAALS, the Institute for the Advancement of the American Legal System at the University of Denver, to evaluate the pilot project.⁴ Because reliable measurement requires—to the extent possible—a smooth transition into and consistent application of the new process, IAALS became involved in the initial implementation phase.

¹ To see the latest activity across the United States, visit the IAALS *Rule One Initiative* "Action on the Ground" interactive map at <http://iaals.du.edu/initiatives/rule-one-initiative/action-on-the-ground>.

² *A History and Overview of The Colorado Civil Access Pilot Project Applicable to Business Actions in District Court*, STATE OF COLORADO JUDICIAL BRANCH WEBSITE (2012), http://www.courts.state.co.us/userfiles/file/Court_Probation/Educational_Resources/Final%20CAPP%20Overview%208-31-11.pdf.

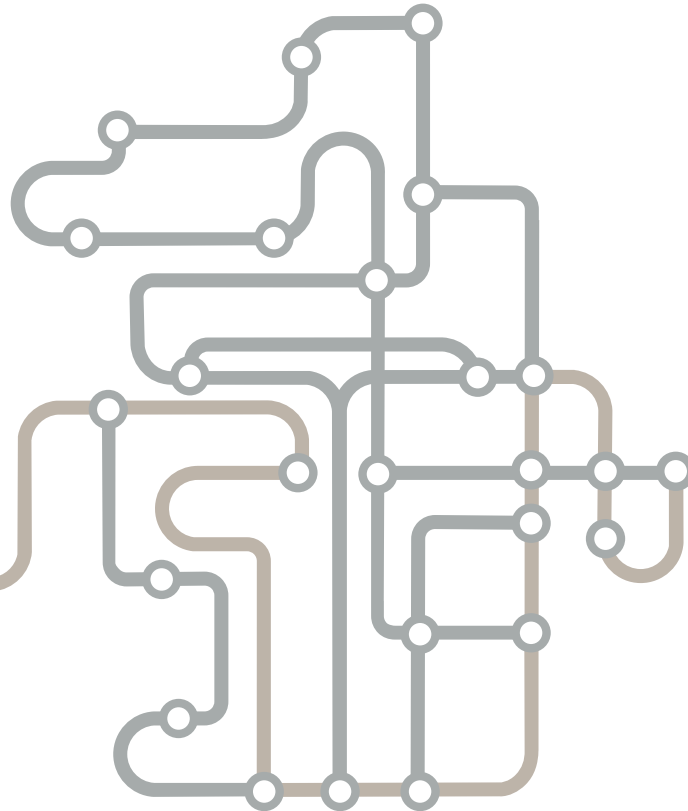
³ SUPREME COURT OF COLORADO OFFICE OF THE CHIEF JUSTICE, CHIEF JUSTICE DIRECTIVE 11-02 (amended June 26, 2013) (hereinafter CJD 11-02). To achieve proportionality, "CAPP seeks to change the culture from an 'all you can eat' model of discovery to a 'get what you need' one." Gordon W. Netzorg & Ann B. Frick, *Significant Changes for Business Cases*, 41 COLO. LAW. 29, 30 (Jan. 2012).

⁴ CJD 11-02, *supra* note 3.



IAALS does not hold itself out as an expert in the complicated science and art of change, but we do hope that sharing our own experience will provide food for thought to those working to improve the civil process in their jurisdictions or considering taking a step in that direction.⁵ The objective, after all, is to achieve successful outcomes—and the first step to that success is a well-designed, implemented, and measured rules project.

When rules changes have been implemented in the past, the success or failure of the rules has generally been gauged on an anecdotal basis, perhaps in law review articles generated some years later. Now, with the benefit of electronic case management systems, and with a clearer understanding of the value of empirical data, it is possible to produce more thoughtful analyses for rulemakers. Hopefully, the ultimate outcome will be that jurisdictions can learn from their own experiences as well as from the experiences of others, and the end product will be more effective.



⁵ It should be noted that this report is based on the author's own experience, as well as discussions with individuals involved in rules projects around the country. Assertions and opinions expressed are personal and do not necessarily represent the official position of any task force, committee, court, or jurisdiction.



THE CAPP STORY

The year 2009 witnessed a renewed national dialogue on the extent to which the civil justice process is effectively meeting the needs of litigants, prompted by concerns that the pretrial process is unnecessarily complex, lengthy, and expensive. IAALS, in partnership with the American College of Trial Lawyers Task Force on Discovery and Civil Justice,⁶ issued a report containing proposed principles for improving the process followed by a set of proposed pilot project rules,⁷ sparking a national conversation. Also in 2009, IAALS hosted a summit of lawyers, judges, empiricists, and academics from around the country, during which it became clear that the rulemaking community was hungry for data on the impact of emerging ideas in order to be more comfortable that any permanent reforms would, in fact, further a more just, speedy, and inexpensive process.⁸

A number of attorneys and judges in Colorado were eager to bring the spirit of innovation to this state's general jurisdiction trial courts and, in late 2009, a committee convened to examine the issues, propose solutions, and develop a pilot project. This committee decided to focus on two case types: business cases and medical negligence cases. The main concern for business cases was the discovery process in general and the burden of e-discovery in particular. The main concern for medical negligence cases was the expert witness process and the associated costs.

Accordingly, the committee formed two sub-committees.⁹ During the first half of 2010, these sub-committees tackled the difficult task of developing new procedures for the respective case types, informed by research in jurisdictions around the country. After each sub-committee had drafted a set of new rules, the broader committee reconvened to discuss the best way to move forward. At that point, the committee decided to merge the two sets of rules into one, due to the extent of overlap and also the desire to avoid over-complicating the approval and implementation process. The committee then proposed one set of new rules for both business and medical negligence actions to the Court.

⁶ Formerly the American College of Trial Lawyers Task Force on Discovery.

⁷ 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), http://iaals.du.edu/images/wygwam/documents/publications/ACTL-IAALS_Final_Report_rev_8-4-10.pdf; INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. & AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & CIVIL JUSTICE, 21ST CENTURY CIVIL JUSTICE SYSTEM: A ROADMAP FOR REFORM: PILOT PROJECT RULES (2009), http://iaals.du.edu/images/wygwam/documents/publications/Pilot_Project_Rules2009.pdf.

⁸ See FED. R. CIV. P. 1.

⁹ Natalie Brown, Gilbert A. Dickinson, Ann B. Frick & Gordon W. Netzorg, *Colorado at the Crossroads: Civil Access Pilot Project*, 40 COLO. LAW. 17, 18 (Jan. 2011).



The Colorado Supreme Court published the proposal, invited public comment, conducted a hearing in January 2011, and accepted follow-up input.¹⁰ Based on the feedback received, the Court made some revisions to the rules. Because the medical malpractice insurance defense bar voiced strong opposition—primarily to the provision eliminating expert witness depositions—the Court also narrowed the scope of the pilot project to business actions alone. The final Chief Justice Directive authorizing the project issued on October 7, 2011, and the new rules went into effect in the pilot jurisdictions three months later, on January 1, 2012, for an initial two-year period. On June 26, 2013, the Court extended the project by one year, to “provide the court with more data” and to “give the court time to determine whether the rules as piloted achieved the stated goals.”¹¹

¹⁰ CJD 11-02, *supra* note 3.

¹¹ *Id.*





LESSONS FOR RULES PROJECT IMPLEMENTATION

The CAPP experience has revealed some important considerations for rules project implementation, applicable to both pilot projects and to rules change processes more broadly. Acknowledging that the right answers will vary by jurisdiction and by project, each section below ends with questions for leadership to consider in the process of achieving reform.

THE RIGHT PEOPLE



In our experience, rules project success rests on a well-considered product and a critical mass of support within the local legal community. Involving the right people at the outset can contribute to both of these elements. As not every member of the bar can work on hammering out the specifics of a project, the process generally requires an official working group, whether titled a “committee” or a “task force.” Certainly, an existing standing committee may take up the cause, as occurred in Utah.¹² CAPP involved the creation of a new working group.

In composing such a working group, the principles of balance, inclusivity, and credibility are key. First, the very *balance* of plaintiff attorneys, defense attorneys, and judges (if not other stakeholder groups) can ensure that, in fact and in appearance, the only agenda is a more effective civil justice system for everyone. Second, an *inclusive* group that welcomes diverse perspectives (even within a particular stakeholder group) can secure contributions from a range of voices and experiences. Third, bringing together *credible* individuals who have the respect of their colleagues (and thus are able to assume a leadership role) can bolster the credibility of the result. The synergy that can be achieved with a committee comprised as suggested is truly one of the most inspirational parts of the process. For IAALS, witnessing attorneys with deeply held opinions engage in the process of stepping back and considering what would truly be best for all litigants—plaintiff or defendant, large or small—is a reaffirmation of the integrity of the profession.

The CAPP committee was comprised of a balance of well-respected Colorado practitioners and judges, with substantial experience in business and medical negligence cases. In retrospect, the lessons learned from the committee process do not relate to its composition as such, but rather to the transparency of the process. In other words, some of the benefits of a well-constituted committee depend upon the broader legal community’s awareness of the effort. The CAPP process as a whole should have been more open from the

¹² This committee was the Utah Supreme Court’s Advisory Committee on the Rules of Civil Procedure. See *generally Civil Procedures Committee*, UTAH COURTS, <http://www.utcourts.gov/committees/civproc/> (last visited July 1, 2013).

outset. In addition, the committee probably should have involved more coordination with the Colorado Supreme Court, rather than acting as an independent group that then proposed a project to the Court.

PEOPLE

When considering a rules project committee process, good questions to ask include:

- Would it be most appropriate to utilize an existing rules committee or form a new working group? Which will have the greatest likelihood of success in achieving a tangible result?
- What will be the process for authorizing, appointing, and charging the working group?
- Who must be at the table in order have a balanced group?
- Who can bring the right practical experience to inform the issues to be addressed?
- Who will be able to credibly promote the final product to those outside the process?
- How will committee formation and composition be made transparent?

THE RIGHT PROCESS

It is also important to consider the environment within which the working group will operate, as this will impact the group's ability to resolve difficult issues and reach a consensus on the final product. We have observed at least three components of a good process: size, tone, and leadership.

MANAGEABLE GROUP SIZE

First, size matters. Certainly, as noted previously, the group ought to be large enough to be inclusive and to avoid the impression that the result is a top-down mandate. On the other hand, a smaller group allows members to establish a good working rapport, build trust among themselves, and feel individually valued and vested in the outcome.

While the right number varies from project to project, the CAPP committee was comprised of about 20 total members. This seemed to function manageably under the circumstances, although not all members were actively engaged and the real work was completed by a smaller subset of committee members. Clearly, active engagement by all involved would be preferable. In this regard, William J. Howe—who has been deeply



LESSONS FOR RULES PROJECT IMPLEMENTATION

involved in Oregon's family law reform efforts for years—has noted that working groups larger than a dozen members can become “unwieldy.”¹³ Even in the federal Seventh Circuit Electronic Discovery Pilot Program, where the guiding principle for committee size is “the more the merrier,” the effort relies on the work of discrete sub-committees.¹⁴

PRODUCTIVE TONE

Second, setting the right tone is essential. In our experience, the most effective working groups are those that embrace collaboration and creativity as guiding principles. While each member will bring the experience of a particular constituency and should openly raise issues based on that experience, the purpose of the process is not to reach a result by compromising various divergent interests. Rather, the aim is to work constructively to improve the system and craft solutions that meet a larger public interest. Accordingly, members should not use the group as a forum to express grievances or to advocate as representatives of a constituency.

The right tone can be established through a pledge that members enter the process with an open mind and acknowledge the possibility of persuasion if compelled by the facts or other viewpoints.¹⁵ This is consistent with the experience of the CAPP committee, where members made an explicit effort to leave their pocketbooks and their assumptions at the door in order to concentrate on the greater good. This allowed for synergy and a consensus on the final product.

EFFECTIVE LEADERSHIP

Finally, effective leadership can contribute significantly to a productive environment and positive results. We have pinpointed three different elements of this leadership, and a different individual may fulfill each role, with energy and enthusiasm being the common denominators.

The process requires a visionary, or someone Howe describes as a “futurist.”¹⁶ This leader (who is not necessarily a working group member) inspires the group to take a high-level view and fundamentally rethink the issues. In Utah, the rules committee framed the guiding vision for its members as follows: “If you were an alien and came to Earth to study civil litigation for the purpose of creating a new system on your own planet, would the current process represent the best possible system for you to replicate?”¹⁷ With respect to CAPP,

¹³ E-mail from William J. Howe, III, Shareholder, Gevurtz Menashe (June 20, 2013, 10:55 MDT) (on file with author).

¹⁴ See generally www.discoverypilot.com.

¹⁵ William J. Howe, III, *Reform Process – Designing for Success*, Presentation Handout distributed at the Association of Family and Conciliation Courts 50th Anniversary Conference, 1 (Los Angeles, May 29-June 1, 2013); Howe, *supra* note 13.

¹⁶ Howe, *Reform Process*, *supra* note 15, at 1.

¹⁷ Telephone Interview with The Honorable Derek P. Pullan, Utah Fourth District Court Judge and Member of the Utah Supreme Court Advisory Committee on the Rules of Civil Procedure (June 28, 2013).

IAALS Executive Director Rebecca Love Kourlis¹⁸ filled the visionary role by attending various meetings, in order to bring the broader perspective and generate excitement for constructive change.

The process requires a facilitator. This leader ensures adherence to an agenda and progress according to an appropriate timeline. Attorneys can wax eloquent on issues they care about, which can cause the process to come to a halt if not carefully managed. The facilitator must have a light touch in assuring that all voices are heard, while keeping the discussion on point and moving along. A judge who has managed a courtroom may be a good choice, as demonstrated by Judge John Koeltl in the process of creating the federal Initial Discovery Protocols for Employment Cases Alleging Adverse Action.¹⁹ With respect to CAPP, the subcommittee co-chairs, who were selected by their peers, filled this role.

The next piece is not one that most people think to include, but it is critical. The process requires a logistics manager. This person staffs the working group by: gathering, organizing, and distributing research and materials; facilitating scheduling and communications; and arranging and documenting meetings. This is important to keep the group on track between meetings and ensure the productive use of meeting time. With respect to CAPP, an IAALS research analyst filled this role.

PROCESS

In setting the stage for the working group process, good questions to ask include:

- What size group can best accomplish the agenda?
- How can the appropriate tone be established?
- Who will best fill each of the leadership roles, and how will those individuals be selected?
- Who will manage and staff the process?
- What is a suitable timeline under the circumstances, allowing the work to be done right while moving forward at the necessary pace?

¹⁸ Kourlis served Colorado's judiciary for nearly two decades, first as a trial court judge and then as a Justice of the Colorado Supreme Court. She resigned from the Supreme Court in January of 2006 to establish IAALS, where she serves as Executive Director.

¹⁹ See generally EMPLOYMENT PROTOCOLS COMMITTEE, PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION (Nov. 2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/DiscEmpl.pdf/\\$file/DiscEmpl.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/DiscEmpl.pdf/$file/DiscEmpl.pdf) (hereinafter EMPLOYMENT PROTOCOLS).



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CLEAR PROJECT SCOPE

The scope of a rules project shapes its substance and impact. Explicitly defining that scope, therefore, is an important part of the process. This involves a number of considerations, as outlined below.

AGREEMENT ON THE PROBLEM TO BE SOLVED

Rules projects are aimed at crafting solutions to problems within the civil justice process. This requires a consensus on the problems and knowledge of the possibilities for addressing them. To inform the effort, a rules project working group should dedicate time to studying the relevant existing research on the civil justice process—both legal and empirical, within the jurisdiction and elsewhere. This can be incredibly informative and inspirational, and helps to avoid re-inventing the wheel.

The group will ultimately need to decide whether to collect any additional data. A pre-project empirical study can serve three important functions: 1) help to pinpoint the nature and extent of the problems to be addressed in the jurisdiction, so the effort can be tailored specifically to those problems; 2) garner support for making changes by demonstrating a need for action and alleviating the concern that the effort is a solution in search of a problem; and 3) provide a baseline against which the results of a project can be measured. Groups in Iowa and Wyoming have conducted such studies.²⁰ Similar to Utah,²¹ while the CAPP committee thoroughly reviewed the current literature, it elected not to conduct additional jurisdiction-specific research. This decision was due to the existence of a consensus concerning the general nature (if not the degree) of the problems based on the collective experience of the group, as well as a lack of resources to dedicate to a study.

Following the information-gathering stage, and after the goals of the effort have been clearly articulated, it may be helpful for the working group to craft a vision statement and agree upon a list of core values, as has been done in Oregon.²² This provides an objective standard against which all proposals can be measured, keeping the focus on the defined problem and ensuring a common aim among all working group members.

DETERMINATION OF PROJECT DURATION

Another issue related to rules project scope is the decision concerning whether to create a pilot project or make permanent changes. There are a number of advantages to the limited scope of a pilot project. Often exempt from the standard rulemaking process, a pilot may be more easily enacted, as has been the case with the recent federal projects (implemented by standing order)²³ and the Boston Business Litigation

²⁰ IOWA CIVIL JUSTICE REFORM TASK FORCE, REFORMING THE IOWA CIVIL JUSTICE SYSTEM: REPORT OF THE IOWA CIVIL JUSTICE REFORM TASK FORCE, 5-12 (Jan. 30, 2012), available at http://www.iowacourtsonline.org/wfdata/files/Committees/CivilJustice-Reform/FINAL03_22_12.pdf; 2010 Civil Justice Survey for Judges (Wyoming, 2010) (on file with author).

²¹ Pullan, *supra* note 17.

²² Howe, *Reform Process*, *supra* note 15, at 2.

²³ In re: Pilot Project Regarding Case Management Techniques for Complex Civil Cases in the Southern District of New York, No. M10-468 (S.D.N.Y., Oct. 31, 2011) (standing order entered by Chief United States District Judge Loretta A. Preska); EMPLOYMENT PROTOCOLS, *supra* note 19, at 10-11; SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM COMMITTEE, SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM FINAL REPORT ON PHASE TWO MAY 2010-MAY 2012, 1 (2012) (model standing order available at <http://www.discoverypilot.com/>)

Session project.²⁴ In addition, it may be more readily accepted by the legal community, as the reach is confined to particular cases until the ideas have been tested. On the other hand, a permanent change also carries advantages, as Utah discovered. It has been described as “ripping off the Band-Aid” all at once,²⁵ allowing necessary reforms to have an immediate widespread impact and removing the need to go through a reauthorization process. It can also eliminate headaches related to delineating pilot project courts or cases, while minimizing concerns about forum shopping.²⁶ Moreover, modifications can still be made at the back end if problems or unintended consequences are discovered.²⁷

Accordingly, this decision must be based upon the balance of considerations relevant to the particular jurisdiction. To facilitate implementation, the CAPP committee elected to propose a two-year pilot project in five Denver-metropolitan courts.

CRITERIA FOR APPLICABILITY

Unless a rules project is applicable to all civil cases, the endeavor will require some level of case differentiation, whether by court, case type, amount in controversy, or some other criteria. Working groups should carefully consider how and when cases will be classified under the project to best meet the substantive goals.

MANDATORY OR VOLUNTARY

A threshold question is whether project participation will be mandatory or voluntary. A mandatory rule ensures participation and protects a procedure from dormancy, while it may also shield attorneys from malpractice concerns related to “opting in” to a voluntary new process. For example, attorneys in contested cases regularly opt out of Colorado’s voluntary “simplified” civil procedure for cases under \$100,000 (Rule 16.1), which was enacted nearly ten years ago.²⁸ Moreover, a mandatory project can be more readily evaluated, as the cases to which the procedures have been applied can be easily identified and are not purely self-selected. Rule 16.1 has taught us that if a procedure is not frequently used and there is no useful data generated concerning which portions are helpful and which are not, the work invested in drafting and implementation will largely be for naught.

On the other hand, a voluntary project may be a better vehicle to build consensus for change. It preserves the right of litigants and their attorneys to select the most appropriate procedure for the particular case and the attorneys do not feel coerced into something that they may not support. There are a number of voluntary short, summary, and expedited jury trial programs around the country that have proved to be

²⁴ Telephone Interview with The Honorable Margaret Hinkle (Ret.), JAMS Neutral and former Massachusetts Superior Court Judge (June 28, 2013).

²⁵ Pullan, *supra* note 17.

²⁶ Telephone Interview with Francis M. Wikstrom, Shareholder at Parsons Behle & Latimer and Chair of the Utah Supreme Court Advisory Committee on the Rules of Civil Procedure (June 28, 2013).

²⁷ Pullan, *supra* note 17.

²⁸ CORINA D. GERETY & LOGAN CORNETT, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., MEASURING RULE 16.1: COLORADO’S SIMPLIFIED CIVIL PROCEDURE EXPERIMENT, 1, 21 (2012).



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quite popular.²⁹ Apart from the substantive merits, we have observed two factors that can affect participation levels with respect to voluntary projects. The first factor is the extent of support from the judiciary and the bar. Not surprisingly, a positive reception will result in higher levels of participation. The second factor relates to the incentives and disincentives affecting the case level cost-benefit analysis as compared to other available procedures—whether intended or unintended, explicit or implicit. For example, realized early trial dates can provide an incentive, while absolute caps on damages can provide a disincentive.³⁰

Recent rules projects have been both mandatory and voluntary. The Southern District of New York pilot project for “complex” cases originally anticipated mandatory provisions, but the judges enacted them as precatory and have the option not to apply them.³¹ With respect to the Business Litigation Session in Boston, a voluntary rule led to stronger support from the bar and quick approval of the project, but it has resulted in the need for consistent prodding by judges to achieve participation.³² Utah decided that a voluntary process would not prompt the necessary cultural change and implemented mandatory rules changes for all cases.³³ The committee conceived CAPP as a mandatory process based on the state’s experience with Rule 16.1 and the desire to conduct a robust project evaluation. As with project duration, this decision should involve careful consideration of the goals of the project and the specifics of the jurisdiction in which it will be implemented.

CLEAR DEFINITION

Whether a project is mandatory or voluntary, it is essential that the cases to which it applies be clearly defined and identified. Otherwise, some of the initial momentum and enthusiasm for the project can be deflected into parsing questions about applicability; and the implementation and evaluation suffer accordingly.

One of the clear downsides of the CAPP project has been uncertainty about the cases to which the project applies. CAPP mandatorily applies to “business actions,” as specifically defined according to claim type in an appendix to the rules. The appendix enumerates 15 categories of claims designated as “included actions,” along with 13 categories of claims designated as “excluded actions.”³⁴ It does not specifically refer to *all* claim types, and some cases fall under *both* the included and excluded lists (particularly those with a variety of claims). In addition, there is a catch-all exclusion for “[a]ctions involving a statute or rule that contains distinct time frames for the proceedings.”³⁵ It is not entirely clear the point at which an existing statute or rule outlining a specific procedure might operate to exclude a case type from the pilot project.

²⁹ INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., AM. BD. OF TRIAL ADVOCATES & NAT’L. CTR. FOR STATE COURTS, A RETURN TO TRIALS: IMPLEMENTING SHORT, SUMMARY, AND EXPEDITED CIVIL ACTION PROGRAMS, 4, 8 (2012) (hereinafter A RETURN TO TRIALS) (specifically, the New York and South Carolina programs).

³⁰ GERETY & CORNETT, *supra* note 28, at 38.

³¹ Telephone Interview with Paul Saunders, Of Counsel at Cravath, Swaine & Moore and Member of the Attorney Advisory Committee for the Southern District of New York Pilot Project (June 26, 2013).

³² Hinkle, *supra* note 24.

³³ Pullan, *supra* note 17.

³⁴ CJD 11-02, *supra* note 3, at Amended Appendix A. Some of the exclusions were the result of compromise, which enabled the project to move forward in the face of special interest lobbying. E-mail from Gordon W. Netzorg, Partner, Sherman & Howard (July 10, 2013, 15:38 MDT) (on file with author).

³⁵ CJD 11-02, *supra* note 3, at Amended Appendix A.

These ambiguities have given rise to uncertainty and disagreement about whether particular cases are “in” or “out.” In fact, from the beginning of pilot project implementation, there has been more debate about applicability than any other aspect of the CAPP rules.³⁶ With respect to cases with multiple issues, the pilot judges have decided to apply a “predominant claim” standard, which provides guidance but does not eliminate inconsistencies in the designation process. Beyond the challenge that reduced consistency poses for the evaluation process, the uncertainty has created practical problems for implementation.³⁷ There is value in making the criteria for applicability as clear as possible, even if it does not result in a perfect application to intended cases.³⁸

SCOPE

During the drafting process, good questions to ask relating to the scope of the project include:

- What is the problem to be solved?
- What is already known about this problem and how has it been addressed in other jurisdictions?
- Should reforms be implemented as part of a pilot project or as permanent rules changes?
- Should participation in the project be mandatory or voluntary?
- What will be the criteria for applicability?
- Are those criteria well-defined irrespective of the idiosyncrasies of particular cases?
- Are they apparent at the point the decision must be made?
- Who will make the decision and is this individual ultimately bound by the criteria?

³⁶ For example, claims against an injured party’s own insurance company for damages caused by an under-insured motorist are not specifically addressed in the appendix. There is an argument that they are included under the breach of contract category, as liability flows from the insurance coverage, but also an argument that they are excluded under the personal injury category, as liability flows from negligence resulting in physical injuries.

³⁷ For example, because the CAPP rules contain a distinct deadline for answering a complaint, determination of pilot project applicability must be made in the first instance by the plaintiff at the time of service. However, as the program is mandatory and interpretation of the CAPP rules ultimately lies with the court, participating judges must quickly review all complaints to ensure a correct determination of the applicable rules and issue an order in the event of an incorrect designation. If the designation is incorrect, the plaintiff may be required to re-serve the defendant(s).

³⁸ The federal Southern District of New York project for “complex” cases made no attempt to define a complex case, but rather chose categories already delineated on the case cover sheet. Saunders, *supra* note 31; *Pilot Project Hopes to Tame Complex Cases*, THE THIRD BRANCH (Dec. 2011), http://www.uscourts.gov/news/TheThirdBranch/11-12-01/Pilot_Project_Hopes_to_Tame_Complex_Civil_Cases.aspx.

BUY-IN FROM THE LEGAL COMMUNITY

Obtaining broad buy-in from the legal community is crucial to the success of any rules project. Accordingly, the effort must involve sharing information about the project, along with opportunities for input from sitting judges and practicing attorneys, at the earliest point possible.³⁹

Howe notes the saying that “those who are with you at take-off will be with you on the landing.”⁴⁰ In this regard, the Utah committee did a remarkable job.⁴¹ It published the rules six months prior to the official notice and comment period, and the committee members spent that time conducting an education campaign, traveling around the state and giving consistent presentations to local bar associations, inns of court, and other groups. Comments received in response were taken seriously, and resulted in some amendments to the new rules. One committee member noted that, as word of the project spread, the support became a “warm blanket” to the committee.⁴² With respect to CAPP, the committee probably should have done more outreach and invited input before proposing the pilot project to the Court. The following sections describe outreach efforts to Colorado judges and attorneys after approval of the project.

JUDGES

The judges applying and enforcing CAPP hold the key to its success. While not every district court judge handling civil cases in a pilot jurisdiction was enthusiastic about CAPP, a number of programs helped to ensure that the judges could connect with one another to discuss issues.

First, multiple in-person sessions were held with the judiciary during the fall and winter of 2011-2012. These “training programs” for the trial judges in pilot courts involved presentations by committee members on the CAPP process and its purpose, open discussion of practical issues and interpretation of the rules, and a mock case management conference. Exceptionally, representatives of the CAPP committee also made a presentation to the Colorado Court of Appeals in order to provide information to appellate judges on the structure and intent of the new rules. Attendance at these programs was very good, and they appear to have made a positive impact on acceptance and implementation of the CAPP rules.

Second, there was an effort to deliver ongoing support to judges. The creation of a private email listserv provided a forum through which the district judges could connect as a group, pose questions, raise concerns, provide input, and stay on top of what was happening in other courtrooms. They could also use the listserv to share resources, including draft orders and deadline tracking techniques.

While none of these steps could guarantee consistent implementation, and certainly more could have been done, the education and support provided to the judges was far better than simply allowing the rules to go into effect.

³⁹ A RETURN TO TRIALS, *supra* note 29.

⁴⁰ Howe, *supra* note 13.

⁴¹ Wikstrom, *supra* note 26; Pullan, *supra* note 17.

⁴² *Id.*

ATTORNEYS AND SUPPORT STAFF

CAPP has demonstrated that the broader legal community can be eager for information and guidance on a pending pilot project. With respect to CAPP, certain committee members—as well as judges where appropriate—have addressed this need by writing articles for legal publications, giving presentations to professional organizations and law firms, and making themselves available to answer questions. The Colorado Bar Association hosted a half-day CLE program, which hundreds of attorneys and paralegals attended (live or via webcast). In addition, to help ensure a smooth transition, IAALS staff volunteered to speak to any individual or group—including legal support staff, who are often charged with keeping the wheels of a case turning. However, most of this effort was subsequent to the Court’s approval of the pilot project. A dedicated effort to provide information and education earlier in the process might have quelled some of the opposition expressed during the notice and comment period.

One educational challenge is ensuring that attorneys who are less connected within the legal community receive sufficient information concerning a project. The Colorado Judicial Branch set up a dedicated page on its website regarding CAPP.⁴³ This page contains resources, such as a history and overview of the project, the rules themselves, the applicable forms, a timetable, and a comparison to the existing rules. The page also contains a frequently asked questions document, based upon the plain language of the CAPP provisions as well as consensus achieved on the judicial listserv.⁴⁴ While it is unclear the extent to which the information reached those who could benefit, all of these efforts were essential to implementing the CAPP rules.

BUY-IN

As part of any rules project, good questions to ask include:

- How can accurate and consistent information be shared with the legal community on an early and ongoing basis?
- How can the legal community have a meaningful opportunity for input?
- What educational programs need to be established and who will provide the education?
- What resources will the judges, attorneys, and support staff need to implement the project effectively?
- How can the judges best connect with one another concerning the project?
- How and from whom can attorneys and support staff seek out additional support if they need it?

⁴³ The web address for the page is: http://www.courts.state.co.us/Courts/Civil_Rules.cfm.

⁴⁴ A frequently asked questions resource has also been created in Utah. Pullan, *supra* note 17.

ADDRESSING THE NUTS AND BOLTS

Those charged with the creation of a rules project tend to view the issues at a high level, and rightly so. However, they may not always consider how each aspect of a new process will work from an applied, “nuts and bolts” perspective.

Because CAPP changes the civil process in significant respects, but is not a comprehensive set of rules, there were some considerable practical issues that had to be resolved before the pilot project went into effect. One issue was the interaction with existing rule sets. For example, the CAPP rules are mandatory for business actions, but Rule 16.1 applies to actions with less than \$100,000 in controversy unless the parties opt out. What would be the option, if any, for business cases under \$100,000? In addition, under what circumstances would provisions of the regular procedural rules apply to CAPP cases? The committee did not originally determine the specifics of this interaction, so the judiciary had to consider and resolve the issues before the pilot project went into effect.

Another issue was the creation—or revision—of standard forms and their related instructions. With respect to CAPP, Colorado had to redraft a civil case cover sheet and summons, as well as format the applicable initial case management and expert witness reports. A number of new standard orders had to be created as well. One simple lesson learned in the process: the form of a standard motion or report to the court and the corresponding standard order should track each other exactly. This did not happen with respect to CAPP and, as a result, judicial staff has spent precious time translating information from one form to the other.

IAALS staff also met with all of the district administrators and court clerks in the pilot jurisdictions to develop a standard protocol for processing CAPP cases, which would promote consistent handling and implementation, while facilitating data collection. For example, because CAPP did not explicitly address how counterclaims, cross-claims, and third party complaints would affect pleading and disclosure deadlines, as well as the timing of the initial case management conference, the discussions addressed deadline and scheduling issues. Other topics included case coding and which events would trigger administrative action. While time-consuming, a successful project depends upon addressing such practical issues.

NUTS AND BOLTS

Good questions to ask in setting a project in motion include:

- What issues must be resolved for consistent case processing to occur?
- What new or different administrative mechanisms, such as standard forms or fields in the case management system, will facilitate implementation?
- How will deadline tracking and scheduling be accomplished?

CONDUCTING AN EVALUATION

One of the purposes of a rules project is to determine whether ideas translate into real improvements when put into practice. However, this requires some level of systematic evaluation to compare the experience under the project with the status quo. Changes can trigger a range of effects (some anticipated, others unanticipated) and evoke a range of reactions (some warranted, others unwarranted). An evaluation can separate useful information from noise, providing a clearer picture of the impact and paving the way for better decision-making. Even more fundamentally, determining the factors to be measured can help to define the outcomes that constitute success for a particular project.

IAALS has been able to dedicate resources, supported by grant funding, to conduct a robust evaluation of CAPP, which includes both an objective docket study and more subjective surveys of attorneys and judges. Unfortunately, the reality is that many jurisdictions do not have the ability to match this effort. The burden can be reduced by considering evaluation needs from the beginning. For example, one of the most resource-intensive aspects of the CAPP evaluation has been related to the issue of case typing—ensuring that the cases in the evaluation for both the “before” and “after” groups are consistent under the special definition of a business case. Consideration of the evaluation process during drafting and the establishment of an easier method for identifying cases would have helped a great deal.

For jurisdictions that are particularly strapped for resources, there are two important points. First, a very limited evaluation is better than no evaluation at all. Accordingly, we encourage project jurisdictions to measure whatever they are able. If this means only capturing data on a handful of the most important variables, this data will still yield useful information. Second, if an evaluation is simply out of the question, project jurisdictions should at the very least establish a process to flag project cases in the system so they can be identified. This will preserve the ability to conduct an evaluation at a later date. If the cases are not tracked, the possibility of a future evaluation will be lost.

EVALUATION

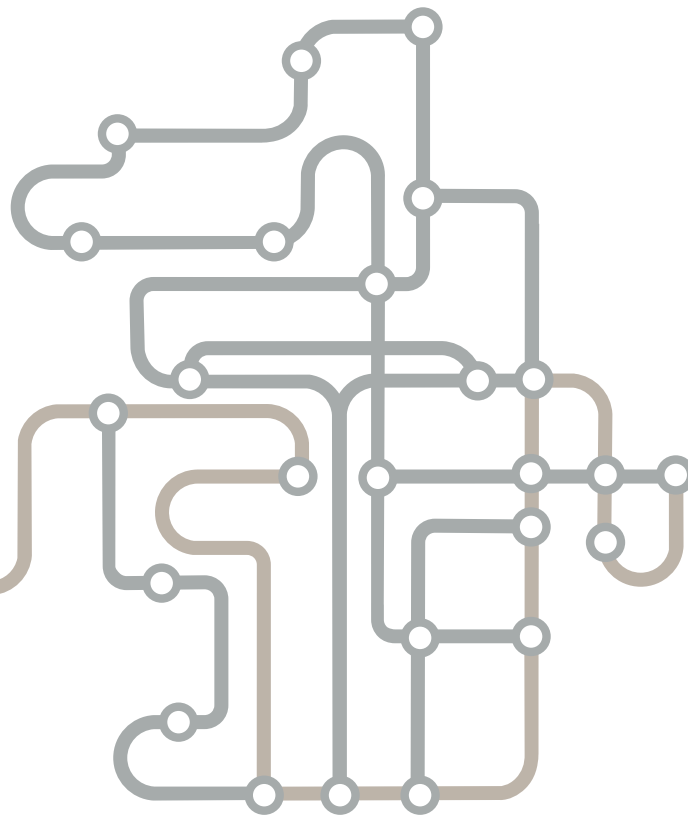
Evaluation is a signification consideration for any rules project. Therefore, at the early stages, good questions to ask include:

- What outcomes would need to be achieved for the project to be considered a “success”?
- How can data on those outcomes be captured most efficiently?
- What processes need to be established to ensure data collection happens?



CONCLUSION

As Colorado awaits the results of the CAPP evaluation, it is useful to look back at the process from which the project arose. CAPP demonstrated the importance of the following factors: the right committee, the right process, a clear project scope, legal community buy-in, attention to the nuts and bolts, and evaluation. Although every rules project will be different, careful consideration of these factors will enhance the implementation process and, hopefully, facilitate the creation of a more accessible, efficient, and accountable civil justice system for everyone.







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