Proposed New Pretrial Rules for Civil Cases—Part I: A New Paradigm

by Richard P. Holme

With the looming termination of the Civil Action Pilot Project (CAPP) on July 1, 2015, the Colorado Civil Rules Committee has submitted to the Colorado Supreme Court a series of proposed amendments designed to take advantage of the lessons learned from CAPP and other pilot projects and ideas from around the country.[1] The Supreme Court has established a deadline of April 17, 2015 for submitting written comments about the proposed amendments, and has set a public hearing for 1:30 p.m. on April 30, 2015.

The proposed amendments, referred to as the Improving Access to Justice Rules (IAJ Rules), are aimed at improving access to justice for many users and prospective users of the Colorado state district courts. However, the IAJ Rules are designed to accomplish more than simply updating or tweaking the existing pretrial rules, or polishing rough edges and making minor revisions to make it easier and more affordable for prospective litigants to access and use our civil courts. To effectuate a real improvement in access to and operations of the civil trial system, lawyers and judges nationwide agree that a fundamental change in the culture of litigation is necessary. A change in the existing culture—a new paradigm for pretrial case management—is one of the goals of the IAJ Rules.

The need for a change in culture and paradigm is significant. First, an increasing use of "bottomless discovery"—allegedly to seek greater justice or truth—is made somewhat illusory by the protection of attorney/client, doctor/patient, and husband/wife privileges and the work-product doctrine, all of which may block access to the most revealing truths. Second, bottomless discovery is extremely counterproductive to concepts of "speedy" and "inexpensive" as goals of the legal system.[2] Finally, bottomless discovery does not honor the important need of bolstering community support for the judicial system, which is a central pillar of democracy.[3]

This article, written before the IAJ Rules have had a public hearing or have been approved and adopted by the Colorado Supreme Court, attempts to briefly explain the back story of the proposed rules changes—their justifications, purposes, and sources. Assuming that all or even some of the IAJ Rules are adopted, a follow-up article in *The Colorado Lawyer* will provide a more detailed explanation of the revisions and how litigators can comply with the new provisions concerning pretrial motion practice, case management, disclosures, and discovery.

In recent decades, the culture of litigation has morphed from trying cases as a means of resolving legal disputes to expanding motion practice and discovery, often with a goal of evading trials. The expense and time involved in this current form of practice has forced many parties to avoid or abandon trials, or to entirely forego the judicial system as a means of dispute resolution.[4]

The IAJ Rules attempt to facilitate the development of a new culture (or perhaps a return to an older culture) that (1) moves pretrial practice more expeditiously; (2) involves significantly more personal pretrial involvement and control by the judge; (3) requires more frequent and substantive communication and cooperation among lead trial counsel; and (4) limits discovery to what lawyers and parties *need* to know to try their stated claims and defenses, not what they *want* to know. In short, one major object of the IAJ Rules is to provide genuine meaning (and "teeth") to Rule 1's longstanding but often ignored requirement and goal that litigation be "just, speedy, and inexpensive." A related result sought by the IAJ Rules is to enhance true accessibility to the judicial system for all persons, not just those with massive financial resources or claims.[5]

Current Cultural Problems With Litigation

Articles and treatises aplenty detail the evolution of trial practice under the Rules of Civil Procedure, whether federal or state, and need not be summarized here.[6] A brief perusal of the Advisory Committee Comments to the Federal Rules of Civil Procedure (Federal Rules) reflects the numerous efforts to improve and polish those rules, recently almost on an annual basis. Revisions of rules initially adopted in 1938 have undergone valiant efforts to catch up with new statutes, case law, and innovations in technology that continue to drive costs upward and expand delays in preparing cases for trial. For example, the rules in 1938 did not anticipate causes of action for civil rights, disabilities, exquisitely complex patents, and environmental violations. They were not prepared for handling mass torts and product liabilities. Certainly, the

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initial rules did not anticipate the advent of the photocopiers, personal computers, e-mails, social media, electronically stored information, or even the explosion of experts on subjects then unimagined. With the advent of many of these new factors, litigants have demanded ever more knowledge about the litigation they become enmeshed in and, therefore, seek vastly increased discovery. Later amendments to procedural rules attempted to catch up with and rein in some of the myriad changes that impacted the courts and judicial system. A glance at the Advisory Committee Comments to the Federal Rules for most of the rules being proposed for amendment by the IAJ Rules[7] shows that these efforts have proven incapable of genuinely stemming the tide.

The current approach of using an overabundance of motions and discovery often appears to the outside world to be merely an excuse for lawyers to charge larger fees. Although that may occasionally be the case, there appear to be several other factors at play in the systemic inability to reduce the time and expense of litigation.

Fear of Malpractice Claims and Lawsuits

Excessive motions and discovery are often used to head off feared claims or lawsuits for legal malpractice. Lawyers can feel that they must exhaust all available pretrial tools—the maximum allowable depositions, prolonged document requests and requests for admissions, and the use of as many experts as possible. These actions, of course, create the legal analog to defensive medicine. In the absence of demonstrable scorched earth, lawyers fear they will be sued for not being sufficiently zealous, for overlooking subsequently uncovered allegations, or for not telling their clients about every possible perceived weakness in their case.

One significant antidote for these fears is judicial involvement, oversight, and application of the mandate that discovery must be proportional to the claims and defenses in the current litigation. If a judge limits discovery, it can hardly be alleged that the lawyer committed malpractice by refusing to disobey the court's orders limiting discovery.

The Irving Younger Fallacy

During this expansion of litigation, some cultural traits have developed and become embedded in litigation. One of the major traits has been the desire and perceived need to know everything there is to know about each case, each claim, each party, each judge, and each document, before being willing to go to trial.

Perhaps one identifiable cause of this desire or sense of necessity to know everything can be attributed to the late Professor Irving Younger. Professor Younger was one of this country's most insightful and entertaining teachers of trial practice over the last fifty years. Starting forty to fifty years ago, many would-be trial lawyers, who subsequently became the mentors of today's most active litigators, heard Professor Younger state forcefully and often, "When examining a witness at trial, never ask a question to which you do not know the answer."[8] It follows that the only means of complying with this "commandment" is to take depositions of everyone remotely involved with the subject of the case and to seek documents that exhaust any conceivable aspect of the case, claims, and parties. At least two generations of lawyers seem to have developed their litigation styles and strategies based at least in part on Professor Younger's dictum. I call this, for lack of a better term, "the Irving Younger Fallacy" (Fallacy).

The Fallacy helps explain, for example, a lawyer's decision to (1) seek excruciating detail from virtually every deponent about every job the deponent held following high school (dates, titles, duties, reason for changing jobs); (2) read document passages and ask if the excerpt was read correctly; and (3) go over financial statements, medical reports, or other documents line-by-line, repeating what is already printed on the page, whether or not those details are significant or material to the lawsuit. The Fallacy may also explain interrogatories with exhaustive instructions and definitions, and requests to opposing parties to provide "every fact" that supports or refutes every statement in pleadings, documents, and prior testimony and every contention ever made or considered. It explains seeking "every document" in the universe arguably relevant to anything possibly related to the case (with "document" defined in almost every request by a half-page long list of every form of preserving information either technology or the imagination of creative lawyers can conceive—the significant majority of which are normally unrelated to the case in which the definition is being applied).

But the Younger dictum *is* a fallacy. Ask prosecutors and criminal defense counsel who try cases every day for victims who suffered severe injury or loss and that involve imprisonment and loss of liberty for lengthy terms. The lawyers try these cases under rules that do not allow depositions, interrogatories, or requests to admit. Ask lawyers who must try cases seeking temporary and preliminary restraining orders on a moment's notice. Ask trial lawyers who understand the value of merely posing penetrating questions at trial to cause the fact finders to think about them, regardless of what

the answer may be. What the Fallacy has accomplished is to exacerbate a culture that greatly increased the expense and time needed to prepare to try even the most mundane lawsuits.

Years ago, the late Dan Hoffman, one of this state's best complex case trial lawyers and former Dean of the University of Denver College of Law, told attendees at a CLE program that he could not remember taking a deposition that took longer than three hours (the three other experienced trial lawyers on the panel agreed). Recently, a well-regarded Denver trial judge, facing a courtroom of approximately ten lawyers, including the author, asked, only somewhat rhetorically, whether any of us had ever obtained so much as one useful piece of information from a response to an interrogatory or request for admission. No one said they had nor did any of us volunteer that we could easily evade virtually any interrogatory request we had ever received.

E-Mails In Lieu of Personal Discussions

A third and more recent cultural phenomenon has been the advent of e-mails. This is not to be confused with electronic discovery (which, itself, often exponentially multiplies the impact of the Fallacy). Rather, I observe that e-mails have caused most litigators to stop talking with each other—in person or even by telephone. This seems to be particularly the case in fulfilling the requirement that counsel "meet and confer" before filing motions.[9] In many cases, the ease of typing a few remarks, sometimes caustic, and hitting the "send" button, creates communication without conferral or even any real thought. Not only do such e-mails lack meaningful communication, but they also tend to create the fuel for the epidemic of incivility bemoaned by most lawyers and judges.

The e-mail communication problem becomes compounded when opposing associates or lawyers without the ultimate responsibility for the case exchange the e-mails as a surrogate for requirements to meet and confer about pretrial matters. Less experienced lawyers routinely have difficulty compromising on anything, apparently concerned that any concession will be considered by their supervising lawyers as showing weakness.[10]

Within the last couple decades, however, the pendulum has begun to swing back. Attention has started to refocus on efforts to rein in discovery, tackle increasing delays, encourage genuine communication, and breathe new life and meaning to the central guiding principle of civil procedure. This principle, etched in Rule 1 since its inception, is "to secure the just, speedy, and inexpensive determination of every action."

The Explosion of Reform and Cultural Change

Approximately eight years ago, a process began that touched a wick to the fuse of a virtual powder keg of efforts to reform the legal system and, perhaps more important, to reform the fundamental culture of litigation. The resulting explosion has definitely impacted Colorado and has led directly to the development of the IAJ Rules.

The ACTL/IAALS Final Report

In 2007, a serendipitous collaboration began between a specially formed task force of the highly regarded and selective American College of Trial Lawyers (ACTL) and a new legal think tank, IAALS, the Institute for the Advancement of the American Legal System at the University of Denver, headed by former Colorado Supreme Court Justice Rebecca Kourlis. The effort coupled the diverse experiences of a group of seasoned trial lawyers and outstanding trial court judges (all of whom were formerly excellent trial lawyers themselves) with the research skills of IAALS. This group undertook a joint project to study the perceived problems of the civil justice system.

The group first decided to measure the magnitude and nature of the problems. It hired an independent polling company to survey the Fellows of the ACTL to determine whether there was a general perception of problems with civil litigation and trial practice. There was. With a remarkable response rate of 42%, the survey of ACTL Fellows revealed that 81% agreed that the civil justice system was too expensive; 69% said it took too long to resolve cases; 68% said potential litigation costs inhibit the filing of civil cases; and 65% said the Federal Rules are not conducive to meeting the goal of a "just, speedy, and inexpensive determination of every action."[11]

The results of this survey were sufficiently unsettling that the Litigation Section of the American Bar Association undertook a similar survey of its own broader membership.[12] More than two-thirds of the respondents agreed that litigation, and discovery in particular, are too expensive; more than 78% believed that litigation costs are not proportional to the value of smaller cases; and well over one-third believed that litigation costs are not proportional and are too high even for large cases.[13]

With this information, the ACTL/IAALS joint project turned its attention to possible methods of addressing those problems.

Following an exhaustive series of meetings, discussions, drafts, revisions and organizational approvals, the joint project issued its "Final Report"[14] in 2009.[15] The Final Report contains twenty-nine "Principles" for improvements that could be applied to both state and federal civil justice systems. Among its recommendations were:

1. The "one size fits all" form of current rules needs flexibility.[16]
2. Notice pleading should be replaced by fact-based pleading.[17]
3. Proportionality should be the most important principle applied to all discovery.[18]
4. Early, automatic disclosure of supportive documents should occur.[19]
5. Discovery should be limited to information enabling a party to prove or disprove a claim or defense or impeach a witness.[20]
6. After initial disclosures, only limited discovery should be permitted.[21]
7. Promptly after litigation is commenced, parties should discuss and, if needed, courts should resolve, issues related to the preservation of electronic documents.[22]
8. Experts should provide written reports and their testimony would be limited to those reports, with a limit of one expert per side on any given issue.[23]
9. A single judge should handle the case from start to finish.[24]
10. Early case management conferences should be held with active judicial involvement.[25]
11. Early, firm trial dates should be set.[26]
12. Parties should be required to confer early and often about discovery.[27]
13. Parties and courts should give greater priority to motions that will move the case more quickly to trial.[28]

In short, this was a clarion call for significant change in both the operation and culture of civil litigation. Nonetheless, the remarkable aspect of this Final Report is not the length and breadth of the list of recommended solutions itself, but what the Final Report triggered.

The Spread of Pilot Projects

Although amending the various civil rules is normally a long and detailed process involving judges, academics, and lawyers, the reality is that few practicing trial lawyers ever learn of proposed amendments before their adoption. Moreover, there have rarely been any empirical studies of whether those proposed amendments will actually bring about the desired reforms or whether they may create adverse, unintended consequences.[29]

The ACTL/IAALS joint project recognized that some of its twenty-nine Principles should work well, but some might not. Thus, the joint project encouraged states and federal courts to establish pilot projects of their own, with follow-up analysis, to determine which Principles worked, which didn't, and which needed adjustments to allow them to succeed.[30]

The result of this encouragement has been the adoption of a substantial number of pilot projects ranging from those adopting most of the Principles (for example, New Hampshire and Minnesota) to those adopting relatively small portions of them (for example, proportionality applied to electronic discovery—Seventh Circuit Electronic Discovery Pilot Program).[31] Several states developed pilot projects for business or commercial courts (for example, Colorado, Massachusetts, Iowa, and Ohio), and some pilots were created for complex cases (for example, the Southern District of New York).[32] Several of the pilots have now progressed into permanent rule changes, and Utah completely revamped its civil rules to incorporate many of the Final Report's Principles without even first using a pilot project.[33]

Proposed Amendments to the Federal Rules

Amending the Federal Rules involves publication of proposed amendments in the *Federal Register* and on the judiciary's rulemaking website, as well as holding two or three public hearings where interested parties can comment, normally in large, geographically spread-out cities. Consideration and study is undertaken by the federal Advisory Committee on Civil Rules, the Judicial Conference Committee on Rules of Practice and Procedure, the U.S. Supreme Court, and finally the U.S. Congress.[34] The preparation time for approval of amendments is normally three to four years from proposal of an amendment to its adoption and its effective date. With only one or two exceptions, however, neither the Supreme Court nor Congress has changed proposed rule amendments submitted after review and approval by the Judicial Conference.

As relevant here, following the release of the 2009 Final Report, and without awaiting the results of any pilot projects, the Advisory Committee on the Federal Rules of Civil Procedure arranged for a Civil Litigation Conference to be held in 2010 at the Duke University School of Law (Duke Conference) to discuss whether and how the civil justice system should be reformed.[35] Two hundred participants were invited to attend; all but one accepted.[36] They included federal and state trial and appellate judges, law professors, and lawyers representing all types of clients.[37] Although the Advisory Committee did not cite the Final Report in calling this meeting, the attendees did. Many of the papers presented at the Duke Conference cited and discussed the Final Report, often with approval.

Following the Duke Conference and as the result of a large and intensive effort overseen by the Advisory Committee, the Committee "developed, published, and refined a set of proposed amendments that [would] implement conclusions reached" at the Duke Conference.[38] The Advisory Committee summarized its conclusion as follows: "What is needed can be described in two words—cooperation and proportionality—and one phrase—sustained, active, hands-on judicial case management."[39] Successful application of the two words and one phrase, however, must ultimately be

accompanied by a fundamental change in the culture of the litigation and pretrial process.

The genesis of the proposed federal amendments is clear: the Duke Conference lead to the creation of the Duke Subcommittee, which developed the Duke Proposals, which, having gone through virtually all of the approval process, will probably be incorporated into the Federal Rules, effective December 1, 2015. The vast majority of the most important amendments were foreshadowed by the Principles in the Final Report.

In addition to the Final Report, various pilot projects, and the Duke Proposals, numerous other empirical studies were undertaken during the following five years, covering litigation issues and practices and ranging from pleadings, case management conferences, disclosures, discovery, and motions to trial settings, costs, and litigation culture.[40] Additionally, extensive interviews were undertaken with highly regarded state and federal trial court judges across the country to learn what steps most effectively advance the goal of making civil cases just, speedy, and inexpensive. The lessons from these interviews are contained in "Working Smarter, Not Harder: How Excellent Judges Manage Cases."[41] All of these efforts underlined the massive, nationwide awakening to the crucial importance of changing the existing culture of trial preparation and the management of the civil litigation process.

Colorado's Civil Access Pilot Project

In the midst of this activity, CAPP was one of the most complete pilot projects in the country to test many of the twenty-nine Principles. CAPP was a direct outgrowth of the Final Report: two of the prime movers most responsible for developing CAPP and urging its adoption are original members of the ACTL task force.[42] CAPP was implemented as a pilot project in five Denver metropolitan area counties on January 1, 2012. A significant feature of CAPP was that the Supreme Court requested that IAALS gather information and compare the results of the CAPP cases with similar cases in non-CAPP counties.[43]

CAPP was originally scheduled to run for two years, but was then extended for a third year, to December 31, 2014, to allow for more cases to be concluded so the IAALS study could be more complete. Finally, CAPP was extended to June 30, 2015, to allow the Civil Rules Committee to recommend what changes, if any, should be made to the Civil Rules as a result of lessons learned from lawyers' and judges' actual experience with and reactions to CAPP.

CAPP experimented with a number of the twenty-nine Principles. CAPP applied only to "business actions" in five of the metropolitan Denver area counties.[44] A key CAPP rule was that the court and parties were to assure that the process and costs of CAPP cases, specifically including discovery, must be proportionate to the needs of the case.[45] Moreover, continuances were "strongly disfavored," and absent "extraordinary circumstances," such motions were to be denied.[46]

Parties were required to plead all material facts supporting claims, defenses, and damages.[47] Disclosures were to be filed within twenty-one days of filing pleadings and had to include all reasonably available documents related to claims and defenses, whether supportive or harmful.[48] Filing Rule 12 motions did not delay the time for filing answers or for making disclosures.[49] CAPP cases were assigned to one judge for all purposes, including pretrial and trial proceedings.[50] Parties were to meet and confer concerning preservation of documents and electronically stored information (ESI).[51]

Case management conferences were attended in person by lead counsel.[52] They were preceded by a fairly extensive report of pertinent matters and followed by a Case Management Order from the judge.[53] Thereafter, courts were instructed to provide "active case management," including "prompt conferences" concerning court orders, or to resolve disputes on any pretrial matter by telephone if permitted by the court.[54] Firm trial dates were to be set at the Case Management Conference and not changed absent extraordinary circumstances.[55]

Discovery was limited to matters enabling parties to prove their claims or defenses or to impeach a witness, as long as it was proportional to the needs of the case.[56] Experts were to prepare written reports (not summaries) stating, among a number of other things, specific opinions and their factual basis. Significantly, the experts' direct testimony at trial was limited to that which had been disclosed in reasonable detail in their reports.[57] Only one expert per subject per side was authorized.[58]

The most controversial provision of CAPP was that no depositions of experts were allowed.[59] Indeed, the original proposal for CAPP was that it be applied to all business actions and all medical malpractice (med-mal) actions. However, after the outcry at the Supreme Court's public hearing on the proposed CAPP rules by med-mal lawyers (primarily defense-oriented) over not being able to depose expert witnesses, med-mal cases were stripped from CAPP by the Court.

After more than two years of experience with CAPP, IAALS published the CAPP Final Report based on its review of the case data and surveys and interviews with lawyers and judges who had experience with CAPP cases.[60] The findings of the CAPP Final Report found strengths in particular aspects of the CAPP Rules, as well as some areas that presented issues needing further consideration.[61] The strengths included: reduced time to resolution; that litigation costs were proportionate to the subject of the case; that the cases were more likely to be handled by one judge; and that motion practice and discovery were both reduced.[62] Significantly, "CAPP's focus on early, active and ongoing judicial management of cases received more positive feedback from lawyers than any other aspect of the project."[63] Even judges reported that the initial Case Management Conference was "the most useful tool for determining a proportionate pretrial process."[64]

Conversely, the issues needing further consideration were: the very definition of "business actions" for purposes of determining whether a case was subject to CAPP; the rolling deadlines for pleadings and initial disclosures, especially in multiple-party cases, which caused considerable confusion and uncertainty; inconsistent compliance with and enforcement of expanded pleading and disclosure requirements; and the stringent limitations for obtaining extensions of deadlines.[65] Unfortunately, the CAPP Final Report found insufficient data to determine the impact of the effects of CAPP's limitations on expert witness discovery.[66]

The Improving Access to Justice Proposed Amendments

In January 2014, the Supreme Court requested that the Civil Rules Committee review CAPP and recommend what should be done upon its expiration. A subcommittee of the Civil Rules Committee was appointed, which comprised members of the Rules Committee and four nonmembers who had fairly extensive personal experience with CAPP (IAJ Subcommittee).[67] The details of the ultimate proposals submitted to the Supreme Court by the Civil Rules Committee and adopted by the Court will be discussed in a future article in *The Colorado Lawyer*, following the Court's actions on the proposed amendments. (A general description of the proposed IAJ Rules was previously published in *The Colorado Lawyer.*[68]) However, even now it is useful to describe the aspects of CAPP that were *not* incorporated in the proposed amendments.

At the outset, it was clear that the IAJ Subcommittee was not being asked either to rubber stamp adoption of all of the CAPP rules or to remove all vestiges of those rules. Even general knowledge of the bar's reaction to CAPP made it clear that not all aspects of CAPP were either universally applauded or abhorred. The IAJ Subcommittee understood that CAPP had, indeed, been a pilot project—a vehicle for testing certain theories and practices to find out in real-world experience what appeared to work and what did not.

The IAJ Subcommittee first decided that it would not attempt to preserve the CAPP rules in the form of either a separate set of rules for business actions or as rules applicable to only a subset of Colorado counties. The CAPP experience had shown that it was more difficult than originally imagined to separate business actions from other matters, either in practice or in theory. Although it might be easy to conclude that a fight for corporate control among competing minority shareholders was a business action, it wasn't clear whether an automobile accident between a private car and a business vehicle was or was not included. It was not clear that an individual's claim against another individual for collection of a $50,000 promissory note was substantively different from or needed different rules and procedures than the individual's action to collect an identical $50,000 promissory note from a small business (or vice versa). Furthermore, a different set of rules in the five counties in and around Denver was hard to explain to parties in Grand Junction, and was likely to encourage forum shopping either to access or to escape CAPP. Thus, it was determined that the goal of any proposed amendments should be rules applicable statewide and to all types of civil actions that were subject to the Civil Rules.

Second, the IAJ Subcommittee concluded that the CAPP method of individual "at issue" dates and "rolling disclosures" was problematic and should be abandoned. The disclosure timing rules, in simple two-party cases, did not create a major problem and had the desired result of expediting the case. The disclosure timing became more of a problem when plaintiffs discovered that by serving their disclosures along with the summons and complaint, they could attempt to force a defendant to provide its disclosures within only twenty-one days of being served. Even that situation became more difficult when an out-of-state defendant's designated agent for service of process was The Corporation Company, which would forward the process to the defendant's home office, which then had to locate and retain local counsel to represent it. When a case contained several defendants being served at different times, however, keeping track of disclosures and when the at-issue date was reached could become a Gordian knot. The IAJ Subcommittee quickly decided that simplicity and certainty worked strongly in favor of keeping a standard at-issue date, as currently defined in Rule 16(b)(1)—that is, the date when all pleadings permitted by Rule 7 have been filed or defaults and dismissals have been entered.

Another CAPP rule that was not pursued was the requirement that pleadings should plead "all material facts that are known to the party and that support the claim or affirmative defense. . . ." This provision was designed to "identify and narrow the disputed issues at the earliest stages of litigation and to focus [limit] the discovery."[69] However, this requirement was clearly deemed to be radical by many trial lawyers, and even went beyond the U.S. Supreme Court's mandates in *Twombly*[70] and *Iqbal.*[71] Even though those cases were decided in 2007, the Colorado Supreme Court has not

adopted them. This left the IAJ Subcommittee uncertain as to whether it should try to do so by changing the Civil Rules. (As the IAJ Rules were being submitted to the Supreme Court, the Court granted *certiorari* to decide whether it would adopt, reject, or modify the pleading positions articulated in those two cases.[72] Thus, this pleading issue may be resolved by the Court in deciding that case.)

Finally, the IAJ Subcommittee was persuaded that the inflexibility of the CAPP rule refusing to grant extensions of time absent extraordinary circumstances[73] was inappropriately strict, and was inconsistent with the concept of abandoning the one size fits all approach, even if that restriction on extensions of time was, on some occasions, more speedy.

Conclusion

There is a rapidly growing national realization that a lack of attention to increasing costs and delays in litigation is foreclosing the judicial system to a growing number of persons who need the courts to resolve their legal problems. To deal with these serious impediments to real access to justice, the Supreme Court is being urged to adopt a number of significant changes designed to increase access and to change a culture of expensive and frequently unnecessary discovery costs and motion practices. Providing for early and personal judicial oversight of pretrial activities, streamlining pretrial motion practice, expanding initial disclosures while limiting expansive discovery, and placing limits on the multiplicity of experts and expert discovery are all designed to make courthouse doors more open and accessible to those seeking relief from the courts. In short, the IAJ Rules, like the Duke Conference, are suggesting adoption and implementation of pretrial rules whose goals "can be described in two words—cooperation and proportionality—and one phrase—sustained, active, hands-on judicial case management."[74]

Notes

1. The proposed rules can be found on the Court's website, www.courts.state.co.us/Courts/Supreme_Court/Rule_Changes.cfm, and on the CBA website, www.cobar.org/index.cfm/ID/20001/iNewsID/528. *See also* Holme, "Colorado Supreme Court to Consider Significant Amendments to Pretrial Civil Rule, 44 *The Colorado Lawyer* 71 (Feb. 2015), www.cobar.org/tcl/tcl_articles.cfm?articleid=8805.

2. In *DCP Midstream, LP v. Anadarko Petrol. Corp.*, 2013 CO 36 at ¶ 27, 303 P.3d 1187, 1194 (2013), the Court states:

> Delay devalues judgments, creates anxiety in litigants and uncertainty for lawyers, results in loss or deterioration of evidence, [and] wastes court resources. Delay also increases costs. The increased costs associated with protracted litigation may force a party into an unwarranted settlement or may deter a party from bringing a viable claim.

(Citation and internal quotation marks omitted.)

3. *See* Prince, "A New Model for Civil Case Management: Efficacy Through Intrinsic Engagement," 50 *Court Review: The Journal of the American Judges Association* 174, 193 (Issue 4, 2014) ("The courts provide a safety valve to a community by providing a credible method of resolving individual disputes fairly and peacefully. A community that does not have a credible institution for resolving disputes fairly and peacefully is not sustainable.") *But cf.* Egypt, Russia, and Iran.

4. For example, virtually all lawyers have recognized that even with our frequently elevated salaries, we could not personally afford to litigate cases involving claims by or against us under the current system. Furthermore, the growth of arbitration and mediation services has been fueled by the undesirability of using the judicial system, even at the cost of clarification of applicable legal standards or of foregoing appellate review.

5. This is especially necessary where, as in Colorado, experience shows that well over 50% of all civil cases involve claims below $100,000.

6. *See, e.g.*, IAALS, "America's Ailing Civil Justice System: The Diagnosis and Treatment of the Federal Rules of Civil Procedure" (2009), iaals.du.edu/library/publications/americas-ailing-civil-justice-system.

7. *See* Committee Comments to CRCP 16, 26, 30, 34, and 37.

8. *See, e.g.*, Younger, "The Ten Commandments of Cross-Examination," No. 4, en.wikipedia.org/wiki/Irving_Younger.

9. *E.g.*, CRCP 121 § 1-15(8). *But, cf., Hoelzel v. First Select Corp.*, 214 FRD 634 (D.Colo. 2003) ("That [rule] generally requires counsel to 'converse, confer, compare views, consult and deliberate.'"); *Auguste v. Alderden*, 2008 WL 3211283 (D.Colo. 2008).

10. The fact that supervising lawyers or lead counsel frequently resolve these disputes suggests that their less-experienced colleagues may not be talking to their supervisors, either.

11. The 42% response to the survey is even more remarkable considering that a significant number of the Fellows exclusively or primarily practice criminal law. *See* ACTL Task Force on Discovery and IAALS, "Interim Report (including 2008 Litigation Survey of the Fellows of the American College of Trial Lawyers) 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" A-2 (ACTL/IAALS, 2008), www.actl.com and iaals.du.edu/images/wygwam/documents/publications/Interim_Report_Final_for_web.pdf.

12. ABA Section of Litigation, "Member Survey on Civil Practice: Final Report" (2009), www.americanbar.org/content/dam/aba/migrated/litigation/survey/docs/report_aba_report.authcheckdam.pdf; ABA Section of Litigation, "Member Survey on Civil Practice: Summary" (2009), apps.americanbar.org/litigation/mo/premium-lt/articles/pretrial/1105_wachen.pdf-123k.

13. *Id. See* Gerety, "Excess & Access: Consensus on the American Civil Justice Landscape" (providing a more in-depth description of a number of the surveys undertaken concerning the problems with the civil justice systems and the need to reform them) (IAALS, 2011), iaals.du.edu/images/wygwam/documents/publications/Excess_Access2011-2.pdf. *See also* Kourlis and Kauffman, "The American Civil Justice System: From Recommendations to Reform in the 21st Century," 61 *U. Kansas L.Rev.* 877, 879-80 (2013).

14. The ACTL/IAALS Final Report appears to have been prematurely named. Now that results have been gathered from a number of the pilot projects, the ACTL/IAALS joint project has completed reviewing the "29 Principles" in light of the real-world experience of those pilot projects, and has published an extensive update of the Final Report entitled "Reforming Our Civil Justice System: A Report of Progress and Promise" (Feb. 2015), iaals.du.edu and ww. actl.com.

15. ACTL/IAALS Final Report, www.actl.com and iaals.du.edu/images/wygwam/documents/publications/ACTL-IAALS_Final_Report_rev_8-4-10.pdf.

16. *Id.* at 4.

17. *Id.* at 5-6.

18. *Id.* at 7.

19. *Id.*

20. *Id.* at 8.

21. *Id.* at 9-11.

22. *Id.* at 12-16.

23. *Id.* at 17.

24. *Id.* at 18.

25. *Id.* at 19.

26. *Id.* at 19-20.

27. *Id.* at 21.

28. *Id.* at 22-23.

29. Independent of the ACTL/IAALS Joint Project but concurrent with it, in 2006 Colorado's Fourth Judicial District in El Paso County started its own pilot project using many of the same policies or principles. This pilot project, still in effect today, originated as the "Commercial Docket" and is now known as the "Public Impact Docket." It has shown

that judges devoting time early to collaborative case management yielded a significant reduction in judicial time spent addressing later disputes. The operation of this pilot project is described in Prince, *supra* note 3.

30. ACTL/IAALS, "21st Century Civil Justice System—A Roadmap for Reform: Pilot Project Rules" (2009), iaals.du.edu/images/wygwam/documents/publications/Pilot_Project_Rules2009.pdf.

31. *See generally* Kourlis and Kauffman, *supra* note 13. For descriptions of the pilot projects and copies of the rules, *see* IAALS, "Rule One Initiative," iaals.du.edu/initiatives/rule-one-initiative.

32. *Id.*

33. *Id.*

34. 28 USC § 2071-74. *See* "United States Courts, About the Rulemaking Process," www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking.aspx.

35. Even before the Duke Conference, a number of other reform efforts had begun. *See* Kourlis, "Keynote Address: Civil Justice at a Crossroads," XI *Pepperdine Dispute Resolution L.J.* 3 (2010), iaals.du.edu/initiatives/rule-one-initiative/research/civil-justice-at-the-crossroads.

36. Memorandum from Judge David Campbell to Judge Jeffrey Sutton re Proposed Amendments to the Federal Rules of Civil Procedure (Campbell Memorandum) B-2 (June 14, 2014), www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014-add.pdf.

37. *Id.*

38. *Id.* at B-2 to B-3.

39. *Id.*

40. Gerety and Kauffman, "Summary of Empirical Research on the Civil Justice Process: 2008–2013" (IAALS, 2014), iaals.du.edu/images/wygwam/documents/publications/Summary_of_Empirical_Research_on_the_Civil_Justice_Process_2008-2013.pdf.

41. ACTL/IAALS, "Working Smarter Not Harder: How Excellent Judges Manage Cases" (2014) (Working Smarter), www.actl.com and iaals.du.edu/images/wygwam/documents/publications/Working_Smarter_Not_Harder.pdf.

42. Judge Ann B. Frick, vice chair, ACTL Task Force, and Gordon (Skip) W. Netzorg.

43. *See* Gerety and Cornett, "Momentum for Change: The Impact of the Colorado Civil Access Pilot Project" (CAPP Final Report) (IAALS, Oct. 2014), iaals.du.edu/images/wygwam/documents/publications/Momentum_for_Change_CAPP_Final_Report.pdf. *See also* Gerety and Cornett, "Preliminary Findings on the Colorado Civil Access Pilot Project" (IAALS, April 2014), iaals.du.edu/images/wygwam/documents/publications/Preliminary_Findings_on_CAPP.pdf.

44. Pilot Project Rule (PPR) 1.1.

45. PPR 1.3.

46. PPR 1.4.

47. PPR 2.2.

48. PPR 3.1.

49. PPR 4.1.

50. PPR 5.1.

51. PPR 6.1.

52. PPR 7.1.

53. PPR 7.1 to 7.2.

54. PPR 8.1 to 8.4.

55. PPR 8.5.

56. PPR 9.1

57. PPR 10.1(a) and (b).

58. PPR 10.2.

59. PPR 10.1(d).

60. *See* Gerety and Cornett, *supra* note 43.

61. *Id.* at 1.

62. *Id.*

63. *Id.* at 23.

64. *Id.* at 24.

65. *Id.* at 1.

66. *Id.*

67. The Civil Rules Committee members of the IAJ Subcommittee were: Court of Appeals Judge Michael H. Berger (committee chair); Richard P. Holme (subcommittee chair); David R. DeMuro; Lisa Hamilton-Fieldman; Judge Ann B. Frick; Judge Thomas K. Kane; Richard W. Laugesen; David C. Little; Professor Christopher B. Mueller; Teresa T. Tate; Judge John R. Webb; and Judge Christopher C. Zenisek. Outside members of the IAJ Subcommittee were Judge Herbert L. Stern III; Judge E. Eric Elliff; Gordon (Skip) W. Netzorg; and John R. Rodman.

The IAJ Subcommittee met ten times, held extensive discussions on possible amendments to the Civil Rules, and reported its proposals to the entire Civil Rules Committee in four meetings, where the rules were further discussed and voted on. The IAJ Rules were then submitted to the Colorado Supreme Court in mid-December 2014.

68. *See* Holme, *supra* note 1.

69. PPR 2.1.

70. *Bell Atlantic Corp v. Twombly*, 550 U.S. 544 (2007) ("factual allegations must be enough to raise a right to relief above the speculative level").

71. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (complaint must state sufficient factual matter "to state a claim to relief that is plausible on its face").

72. *Warne v. Hall,* No. 12CA719, *cert. granted*, No. 14SC176 (Nov. 3, 2014).

73. PPR 1.4.

74. Campbell Memorandum, *supra* note 36 at B-2 to B-3. ■