A HISTORY AND OVERVIEW OF THE COLORADO CIVIL ACCESS PILOT PROJECT APPLICABLE TO BUSINESS ACTIONS IN DISTRICT COURT

Increasingly difficult economic times test the limits of individuals, businesses, and governments, as budgets are stretched often to a breaking point. More and more litigants are priced out of the civil justice system for dispute resolution, while judges have fewer and fewer resources to handle the claims that do make it to court. Meanwhile, as cases increasingly do not make it to trial, the prospect of dark courtrooms has critical implications for the clear and open development of the law. In this climate, "business as usual" in the courts is not sustainable. The legal profession must search for ways to decrease the burden of civil litigation on both litigants and courts, increase access to judicial dispute resolution, and protect the civil trial as a valuable institution. This was the impetus behind the creation of the Colorado Civil Access Pilot Project (CAPP) for certain business actions in district court.

Efforts Leading Up to CAPP

The genesis of CAPP can be traced to mid-2007, when the American College of Trial Lawyers (ACTL) formed a Task Force—consisting of experienced legal professionals from around the United States and Canada, including a balance of plaintiff and defense attorneys as well as judges—to partner with the University of Denver's Institute for the Advancement of the American Legal System (IAALS). The partnership was designed to address the growing concern that the civil pretrial process is unnecessarily complex, lengthy, and expensive. The effort began with extensive research on the current federal rules, and continued with a survey of ACTL Fellows nationwide. Those surveyed indicated that the costs of discovery and expert witnesses are important factors in driving cases to settle, and reported that cases involving less than $100,000 (at the median) are not cost-effective to litigate.[1]

Accordingly, the ACTL Task Force sought to identify ways to improve the civil pretrial process and ultimately produced a document containing specific proposals for fulfilling the goal of Rule One: "to secure the just, speedy, and inexpensive determination of every action."[2] In developing these proposals, the Task Force used an inclusive, collaborative, and creative process. Members were challenged to rethink every aspect of the rules of civil procedure, and they struggled to work through tough issues and reach acceptable compromises.

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[1] *Interim Report & 2008 Litigation Survey of Fellows of the American College of Trial Lawyers on the Joint Project of the American College of Trial Lawyers Task for on Discovery and the Institute for the Advancement of the American Legal System* (September 9, 2008) (available at http://iaals.du.edu).

[2] *Final Report on the Joint Project of the American College of Trial Lawyers Task for on Discovery and the Institute for the Advancement of the American Legal System* (March 11, 2009, revised April 15, 2009) (available at http://iaals.du.edu). The quoted language is contained in Rule 1 of both the Federal Rules of Civil Procedure and the Colorado Rules of Civil Procedure.

In the spring of 2009, IAALS held a Civil Rules Summit attended by lawyers, judges, empiricists, and academics nationwide.[3] Along with the work of the ACTL Task Force, the Summit sparked an important national dialogue. The Summit focused on the importance of empirical data collection and dissemination, making clear that emerging ideas for improving the civil justice process would need to be tested on the ground to ensure real and positive change.

During the last two years, an increasing number of jurisdictions around the country, both state and federal, have started experimenting with a variety of innovative civil rules and procedures.[4] Although the parameters of the various projects differ, they share the common goal of making the civil pretrial process more efficient and making courts more accessible, from the commencement of a lawsuit all the way through trial.

CAPP Development

Two Colorado practitioners, Ann B. Frick (now Denver District Court judge) and Gordon "Skip" Netzorg (Sherman and Howard), serve on the ACTL Task Force. These individuals, and others in the Colorado legal community, were enthusiastic about bringing the spirit of innovation into Colorado courts, where the district court civil trial rate stands at approximately 1%.[5]

In August of 2009, a balanced committee met to discuss possibilities for improving the state civil justice system. This committee included: local members of the American Board of Trial Advocates and the American College of Trial Lawyers; leadership from the Colorado Bar Association, the Colorado Trial Lawyers Association, and the Colorado Defense Lawyers Association; and other experienced members of the Colorado trial bar and judiciary. During its deliberations, the committee employed the same collaborative process utilized by the ACTL Task Force.

Over the course of the next year, a subcommittee focusing on business litigation, co-chaired by Judge Frick and Mr. Netzorg, developed a proposed set of pilot project rules for business cases. Upon completion of the draft rules, the committee offered them to the Colorado Supreme Court for consideration. The Court published the proposal, invited public feedback and comment, and made appropriate revisions. In July 2011, the Court authorized a two-year pilot project to begin January 1, 2012.[6] The chief and civil judges in several judicial districts expressed support for the project and volunteered to participate; these are the designated pilot project jurisdictions. In June 2013, the Court extended the project by one year, to cases filed through December 31, 2014. The purpose of the

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[3] *2009 Civil Rules Summit: From Anecdotes to Action* (March 3-4, 2009) (information available at http://iaals.du.edu).

[4] Information on current projects is available at http://iaals.du.edu.

[5] Colorado Judicial Branch, *Annual Statistical Report Fiscal Year 2009*, 26, 29 (available at http://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Annual_Statistical_Reports/2009/FY09ARFINALREVkvpdf.pdf). The "civil" category does not include domestic relations, juvenile, mental health, or probate actions.

[6] The Court declined to authorize a pilot project for medical malpractice cases.

extension is to "provide the court with more data and a detailed evaluation" prior to making any decisions on possible changes to the Colorado Rules of Civil Procedure.[7] In July 2014, the project was extended by an additional six months to apply to cases filed in the pilot districts up to June 30, 2015. The purpose of this extension is to "eliminate confusion, give the court time to determine whether the rules as piloted achieved the state goals, and consider what, if any, changes to the Colorado Rules of Civil Procedure should be proposed or adopted prior to the end of the original pilot project." [8]

The CAPP Rules

The CAPP rules are the product of rigorous debate and compromise. Ultimately, committee members on both sides felt confident that the proposed procedures would address issues of cost and delay in an even-handed way. The spirit of the rules is to streamline the civil litigation process and minimize opportunities for gamesmanship, thus better serving the needs of litigants in Colorado's courts.

The basic idea is that through new pleading and disclosure procedures, all known information comes to light at the earliest possible point. With the disputed facts and issues thus narrowed and framed, the parties and the court work together to determine the extent of additional discovery necessary and to shape a proportionate discovery process focused on enabling a fair resolution. To reduce expert witness costs, each side is permitted one expert per issue or specialty, and all aspects of the expert's testimony are contained in the disclosed report and files. A single judge provides close case management on an expedited time frame, leading up to a firm trial date.

Many of the CAPP provisions are based on rules of civil procedure in other states. For example, the Oregon Rules of Civil Procedure require the pleadings to state the facts constituting the claim for relief. The Arizona Rules of Civil Procedure require expansive automatic disclosures. Studies in both of these states indicate that these rules help reveal the pertinent facts and narrow the issues early in a case.[9]

CAPP Implementation and Evaluation

The success of CAPP depends on consistent implementation and rigorous evaluation. Numerous judicial and attorney education programs will be held through the fall of 2011, to ensure a smooth and consistent transition to using the CAPP rules in applicable business cases. All practitioners are encouraged to attend these programs, as their success is dependent upon maximum participation.

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[7] Chief Justice Directive 11-02 (June 26, 2013) (available at http://www.courts.state.co.us/Courts/Supreme_Court/Directives/CJD%2011-02amended%206-26-13.pdf).
[8] Chief Justice Directive 11-02 (July 11, 2014) (available at: http://www.courts.state.co.us/Courts/Supreme_Court/Directives/11-02amended%207-11-14.pdf).
[9] Institute for the Advancement of the American Legal System, *Survey of the Oregon Bench and Bar on the Oregon Rules of Civil Procedure*, 15-16 (2010) (available at http://iaals.du.edu); Institute for the Advancement of the American Legal System, *Survey of the Arizona Bench and Bar on the Arizona Rules of Civil Procedure*, 19 (2010) (available at http://iaals.du.edu).

On the evaluation side, the Court has designated IAALS to collect and analyze data to determine whether the rules achieve their goals and deserve consideration by the Colorado Civil Rules Committee. Meaningful data collection requires adequate numbers of pilot project cases, so participation in CAPP is mandatory for all cases to which it applies. Measurement also requires a basis for comparison, so data must be collected from non-participating districts. This type of evaluation will require the assistance of everyone involved in the litigation process, from court clerks to judges to attorneys to litigants.

The importance of this cause ought to garner the legal community's full support and ready participation. An improved pretrial process will benefit citizens, who will be able to come to court with their claims and defenses, and see their cases through to trial if they wish. Cases will hopefully not be subject to the same gamesmanship and cost over-runs that erode trust and respect. Attorneys will benefit by taking cases that would have been economically infeasible without new rules, and will have greater opportunities to take cases to trial, increasing their trial experience. Judges will benefit by being able to move cases through the process in a more effective and expeditious manner, relaxing the strain on judicial resources. Finally, we will all benefit by restoring public confidence in the civil justice system and preserving the institution of trial by jury.