**REVISED FIRST REPORT OF THE IMPROVING ACCESS TO JUSTICE SUBCOMMITTEE**

**October 17, 2014**

**Background.**

The Improving Access to Justice Subcommittee (“IAJ”) of the Colorado Civil Rules Committee (“CCRC”) is the next step in a wave of reform literally sweeping the nation. This reform movement aims to create a significant change in the existing culture of pretrial discovery with the goal of emphasizing and enforcing Rule 1’s mandate that discovery be administered to make litigation just, speedy and inexpensive. One of the primary movers of this reform effort is a realization that the cost and delays of the existing litigation process is denying meaningful access to the judicial system to obtain justice for many people.

From 2007-2009 several polls of trial lawyers, including significant polls of members of the American College of Trial Lawyers (“ACTL”) and the American Bar Association Litigation Section, showed widespread concerns among lawyers about the expense and delay built into the present administration of pretrial discovery and preparation. The ACTL then established a special Task Force to consider and recommend a series of changes in pretrial case management. The Task Force ended up publishing a set of 29 recommendations for improvement of the judicial system in its handling of civil lawsuits.

The resulting concerns and recommendations were sufficient to cause the Federal Judicial Center to hold a conference at Duke University in 2010 for many of the leading judges, trial lawyers and academicians who specialize in studying and drafting civil rules. Simultaneously, and largely as a result of the ACTL’s report, a series of pilot projects were established to test the pragmatic operations of many of the Task Force’s recommendations. Theses pilot projects included a special Business Court with new pretrial discovery procedures in Boston; completely new civil rules in Utah and New Hampshire; special procedures for handling discovery for large cases in the Southern District of New York; rules for handling electronic discovery in a number of the federal District Courts in the Seventh Circuit; and, not least, the Colorado Civil Access Pilot Project (CAPP).

During this same time the Federal Civil Rules Committee decided to develop a series of what became known as the “Duke Rules” – a series of proposed amendments to the Federal Rules of Civil Procedure designed to implement a significant number of the Duke Conference and ACTL suggestions. These federal rule amendments have gone through several public hearings, reviews by at least three separate federal rules committees including, last month, unanimous approval by the United States Judicial Conference. Now, unless changed by the Supreme Court or Congress (something that has rarely happened), these amendments will become effective for federal courts in December 2015. These proposed amendments to the federal rules also include extensive comments and explanations that have been useful to the IAJ in considering whether to use them as templates for any proposed Colorado amendments.

With the 3-3½ year Civil Access Pilot Project (“CAPP”) coming to an end, our Supreme Court asked the CCRC to consider reviewing the reactions to and results of CAPP to determine whether it should be made permanent, modified, or selectively incorporated in the existing structure of the Civil Rules. A number of members of the CCRC expressed interest in serving on the subcommittee, now known as the IAJ, to examine these issues. The IAJ is composed of CCRC members Judge Michael H. Berger (CCRC Chair); Dick Holme, (Chair of the IAJ); David DeMuro; Lisa Hamilton-Fieldman; Judge https://mail.dgslaw.com/OWA/14.3.195.1/themes/resources/clear1x1.gifhttps://mail.dgslaw.com/OWA/14.3.195.1/themes/resources/clear1x1.gifAnn Frick; Judge Thomas Kane; Dick Laugesen; David Little; Professor Christopher B. Mueller; Judge John Webb; and Judge Christopher Zenisek. Additional members were invited to join the IAJ including Judges Eric Elliff and Herbert Stern who brought additional personal experience with CAPP to the IAJ; John Rodman and Skip Netzorg who had been involved in drafting the CAPP rules and following up on its progress; and Teresa Tate from the State Court Administrator’s office.

The IAJ has had a number of lengthy meetings, all with virtually full attendance, to discuss this project. Among its resources are some of the ACTL materials; a preliminary and the final analysis of CAPP prepared by the Institute for the Advancement of the American Legal System (“IAALS”), which include surveys of a number of the lawyers and judges who handled cases under CAPP; reports of the federal civil rules committees concerning the Duke Rules; and significant experience among IAJ members with cases subject to CAPP.

At the outset, the IAJ members unanimously concluded that it was not desirable to make the CAPP rules permanent as a separate set of rules governing “business actions” statewide. This effort had met considerable resistance and difficulty in application, both from the bar and the bench. Indeed, the very definition of “business action” has proven to be a formidable problem. CAPP rules such as those requiring fact-based pleading, staggered disclosure requirements and severe restrictions on obtaining extensions of time had met significant resistance or were not proven to be effective.

Rather, it was noted that the original concept of CAPP was to serve literally as a “pilot project” – designed to test in the context of real litigation several of the ideas and principles that had come from both the ACTL and from the proposed amendments to the federal rules. Taken in this light, all members agreed that there were a number of the ideas and principles that had been shown to be quite effective, such as a more limited definition of discoverable information including a mandate to make discovery proportional to the case itself; early, active and personal judicial involvement in pretrial case management; controlling the discovery and use of experts; and adopting processes such as in-person case management conferences and discovery motions with the judge to keep cases moving promptly and effectively.

Thus, the IAJ also decided that there were clearly valuable and pragmatic changes that could be incorporated into rules applicable to all civil cases and across the state. It was felt that the subcommittee should endeavor to isolate the positive aspects and recommend appropriate amendments or additions to the civil rules. These changes are focused on efforts to improve access to justice by enhancing the concept of making pretrial case management more efficient in terms of cost effectiveness and decreasing delay, while not sacrificing justice.

**Proposed amendments.**

Reading the clean and redlined versions of the proposed amendments is necessary for a full understanding of the suggested changes in procedures as well as, in some cases, the subtle changes. Nonetheless, what follows is an attempt to describe the fundamental aspects of the proposals and, in most cases, the source or the inspiration for the suggested amendments. (Occasional reference to “the amendment” or “the change” are meant to be read as the “*proposed*” amendment or change.)

*Rule 1.*

The change here is based on identical wording changes proposed for the federal rules. It is designed to place still greater emphasis on the concept that litigation is to be treated at all times, by all parties and the courts, to make it just, speedy and inexpensive and, thereby, noticeably to increase citizens access to justice.

*Rule 12.*

These amendments were designed both to remove delays created by the filing of motions to dismiss under Rules 12(b)(5) and (6), and to avoid some of the problems that were uncovered in CAPP. The existing provisions of C.R.C.P. 12 and 16(b) provide that a case is not “at issue” until all pleadings are complete and that discovery and pretrial preparation are not to commence until after that time. Presently, however, answers do not have to be filed until after Rule 12 motions are decided – a process that frequently takes a significant time for busy judges to accomplish. Thus, the entire case can be stalled for months by simply filing a Rule 12(b)(5) motion. Moreover, both the judges and the lawyers on IAJ agreed that it is rare that granting a 12(b)(5) or (6) motion actually terminates or even expedites the case.

Therefore, the proposal is to declare cases “at issue,” which commences the pretrial activities, once all the pleadings are filed, but to provide that the filing of Rule 12(b)(5) and (6) motions do *not* relieve the party from the requirement to file a timely answer. Given the experience that a number of such motions are filed *because* they cause delay, it is expected that this rule change will also decrease the number of such motions the courts must consider. Because the much less common Rule 12(b)(1)-(4) motions are all jurisdictional in nature, it was felt to be undesirable to require parties over whom the court may not have appropriate jurisdiction to file answers and begin to undertake pretrial preparation and discovery until the jurisdictional motions are decided.

CAPP, on the other hand, caused cases to become “at issue” at different times when multiple parties were served and when initial disclosures were made. This proved to be quite confusing for most parties (and judges). Thus, the proposed amendments require that the pleadings be complete for all parties in the case so that they are all starting pretrial proceedings at the same time and on the same schedule.

(The proposed amendments also include a number of non-substantive textual amendments designed to remove gender identification from the rule.)

*Rule 16.*

The last substantive amendment to C.R.C.P. 16(b) established presumptive discovery limits and procedures so that filing detailed case management orders and appearing before a judge became rare. While this reduced lawyers’ time in preparing detailed orders, it also resulted in judges not being involved in pretrial case management.

Among the key principles articulated by the ACTL Task Force, and adopted by the federal civil rules committees as well as CAPP, is the principle that cases move more efficiently if judges are involved directly and early in the process. (*See* *also, “Working Smarter, Not Harder: How Excellent Judges Manage Cases,”* at 7‑20 (ACTL and IAALS, 2014), *available at* http://www.actl.com).

Particularly in conjunction with the principle that discovery should be in proportion to the genuine needs of the case, it was deemed important for judges, rather than litigants, to be involved in deciding how much discovery was appropriate early in the pretrial processes. Both judges and lawyers have noted that some lawyers have a financial incentive not to limit discovery. Perhaps more significant was the recognition that many lawyers engage in “over discovery” because of the fear (justifiable or not) that failing to engage in every conceivable means of discovery until a judge orders one to “stop!,” could expose a trial lawyer to subsequent expensive malpractice litigation. These problems are greatly alleviated with the intervention of trial judges placing reasonable limitations on discovery and potentially excessive pretrial practices at the earliest meaningful stage of the case.

CAPP required in-person initial case management conferences with the judge. These conferences followed submission of a report from the parties including providing information to the judge relevant to the evaluation of proportionality as well as how the case should be handled. The analysis of CAPP reflects that this practice was widely liked by both lawyers and judges. The members of the IAJ all agreed. It was also felt desirable that there be an official Order arising from the Case Management Conference reflecting the court’s opinion and providing enforcement power. Thus, proposed Rule 16(b) has been completely rewritten to include a joint report to the court in the form of a Proposed Case Management Order. It can be approved or modified by the court to become the official Order. It is to be filed with the court no later than 42 days after the case is at issue, but at least 7 days before the Case Management Conference. Under Rule 16(b)(1), the “at issue” date (unchanged by the proposed amendments), occurs when all parties are served and all pleadings permitted by C.R.C.P. 7 have been filed.

The new rule lists the required contents of the Proposed Case Management Order and also provides a form that can be downloaded for preparation of the Proposed Order. Although at first glance, the new rule appears somewhat onerous, most of the information sought is relatively easy to include, and should be discussed by opposing counsel or parties in any event at the outset of the case. The judge-members of the IAJ all felt that the required information was important and useful for a meaningful Case Management Conference.

The joint report/Proposed Case Management Order is to contain the following information, which is unchanged from the current Rule 16(b)(1)-(3): the “at issue” date, contact information for the “Responsible Attorney,” and a description of the “meet and confer” discussions. The joint report is also to provide:

* a brief description of the case per side, and issues to be tried (one page per side);
* a list of pending, unresolved motions;
* an evaluation of the proportionality factors from Rule 26(b)(1);
* a confirmation that settlement has been discussed and description of prospects for settlement;
* proposed deadlines for amending the pleadings;
* the dates when disclosures were made and any objections to those disclosures;
* a disclosure of why, if applicable, full disclosure of damages has not been completed and when it will be;
* subjects for expert testimony with a limit of only one expert per side per subject, unless good cause is established consistent with proportionality;
* acknowledgement that oral discovery motions may be required by the court;
* provision for electronic discovery where significant electronic discovery is anticipated;
* estimated time to complete discovery and length of trial so the court can set trial at the Case Management Conference; and
* a catchall for other appropriate matters.

The existing provisions in Rule 16(c) relating to Modified Case Management Orders are repealed as moot, but are replaced with the deadlines for pretrial motions presently contained in Rule 16(b)(9).

Rule 16(d) is rewritten to require personal or telephonic attendance at the Case Management Conference by lead counsel. In anticipation that judges will not want to (or need to) hold in person Case Management Conferences in all cases, Rule 16(d)(3) allows the court to dispense with a Case Management Conference if it is satisfied that the lawyers are working together well and that the joint report contemplates appropriate and proportionate pretrial activity. However, it is recommended that Case Management Conferences are always held where one or more of the parties are *pro se*. This gives the court the opportunity to try to keep the case and pro se party focused and on track from the beginning.

*Rule 26.*

Rule 26 sets the basis for discovery of information by (1) defining the scope of discovery (26(b)(1)); (2) requiring certain initial disclosures prior to discovery (26(a)(1)); (3) placing presumptive limits on the types of permitted discovery (26(b)(2)); and (4) describing expert disclosure and discovery (26(a)(2) and 26(b)(4)).

Scope of discovery. Perhaps the most significant proposals submitted by the IAJ are in Rule 26(b)(1). This language is taken directly from the proposed federal Rule 26(b)(1). For a more complete statement of the changes and their rationales, one can read the extensive commentary proposed for the federal rule. First, the slightly reworded concept of proportionality is moved from its present hiding place in C.R.C.P. 26(b)(2)(F)(iii) into the very definition of what information is discoverable. Second, discovery is limited to matters relevant to the specific claims or defenses of any party, and is no longer permitted simply because it is relevant to the “subject matter involved in the action.” Third, it is made clear that while evidence need not be admissible, this does not allow broadening the basic scope of discovery. In short, the concept is to allow discovery of what a party/lawyer *needs* to prove its case, but not what a party/lawyer *wants* to know about the subject of a case.

Limitations on discovery. The presumptive limitations on discovery presently in Rule 26(b)(2) – *e.g.,* a deposition of an adverse party and two other persons, or only 30 interrogatories, etc. – are not proposed to be changed. They may, however, be reduced or increased by the parties or court consistent with the requirement of proportionality.

Initial disclosures. Proposed amendments to C.R.C.P. 26(a)(1) concerning initial disclosures are not as significant. Nonetheless, it is intended that disclosures should be quite complete and that, therefore, further discovery should not be as necessary as it has been historically. In this regard, the proposed amendment to section (a)(1) adds to the requirement of disclosing four categories of information that the disclosure include information “whether or not supportive” of the disclosing party’s case. This should not be a significant change from current practice. In 2000, federal Rule 26(a)(1) was changed to narrow the initial disclosure requirements to information a party might use to support its position. Colorado, however, declined to adopt that limitation and continued to require identification of persons and documents that were relevant to disputed facts alleged with particularity in the pleadings. Thus, it was intended that disclosures were to include matter that might be harmful as well as supportive. (It was assumed that limiting disclosure to supportive information would only encourage initial interrogatories and document requests that would disclose harmful information.)

Changes to subsections (A) (persons with information) and (B) documents of Rule 26(a)(1) are proposed to require information related to claims for relief and defenses (consistent with the scope of discovery in Rule 26(b)(1)). Also the identification of persons with relevant information calls for a “brief *description* of the *specific* information that each individual is known or believed to possess” as changed from the current “identifying subject of information.” Currently, disclosures tend to identify numerous witnesses, with the identification of “X is expected to have information and may testify relating to the facts of this case.” The change is designed to obtain some better idea of which witnesses might actually have genuinely significant information.

Expert disclosures.

Retained experts are to sign written reports much as before except with more disclosure of their fees. Their testimony is limited to what is disclosed in detail in their report. C.R.C.P. 26(a)(2)(B)(I).

“Other” (fact-witness) experts are to make disclosures that are less detailed, which, if needed, may be prepared by the lawyers. In either event, the expert testimony is to be limited to what is disclosed in detail in the disclosure. C.R.C.P. 26(a)(2)(B)(II).

Expert discovery.

Experts may be deposed for up to 3 hours, unless changed by the court, which shall consider proportionality. C.R.C.P. 26(b)(4)(A).

In either case, if a deposition reveals additional opinions, the previous expert disclosures must be supplemented before trial if the witness is to be allowed to express these new opinions at trial. C.R.C.P. 26(e). However, the trial court is not required to allow the new opinions in evidence. *Id.*

*Rule 30*

Rule 30 is amended to reduce the time for ordinary depositions from seven to six hours and to take account of the different proposed limitations on the length of expert depositions as set forth in C.R.C.P. 26(b)(4)(A).

*Rule 31*

Rule 31 is changed for two minor typos.

*Rule 34*

Rule 34 is changed to adopt similar revisions in federal Rule 34 designed to make responses to requests for documents more meaningful and transparent. The first amendment is to avoid the practice of repeating numerous boilerplate objections to each request which do not identify specifically what is objectionable about specific document requests. The second amendment is to allow production of documents in place of permitting inspection but to require that the production be scheduled to be when the response to the document request is due, or some other specific and reasonable date. The third change is to require that when an objection to a document request is made the response must also state whether, in fact, any responsive materials are being withheld due to that objection. The final change is simply to clarify that an objection to production under this Rule is adequate to stop production without also filing a motion for a protective order.