
TASK FORCE REPORT GETS WIDE PUBLICITY

“The report has been like a breath of fresh air, and it has stimulated wide interest and a great deal of thought, a great deal of conversation about the topic . . . excessive cost. It’s really caught the attention of the trial bar and of the corporate bar as well.”



Paul Saunders

This observation by Thomas Allman, co-chair of the Sedona Conference Working Group on Electronic Document Retention and Production, quoted in *BNA: Digital Discovery & e-Evidence*, May 4, 2009, reflects the public’s reception of the final report of the joint project of American College of Trial Lawyers Task Force on Discovery and the University of Denver-based Institute for the Advancement of the American Legal System.

That report, setting forth the recommended principles for reform of civil procedure, has received wide publicity in the media and has generated widespread interest among those charged with civil rulemaking in various jurisdictions.

Accepted and approved by the Board of Regents on February 25, 2009 and released for publication on March 11, the report was the subject of a presentation by **Paul C. Saunders**, the chair of the College’s effort, at the College’s Spring 2009 meeting in Puerto Rico.

In the intervening three and one-half months, an Associated Press story on the release of the report was

republished by 157 press, broadcast, television and other media outlets across the United States. The report has been the subject of articles in publications ranging from *The National Law Journal*, *BNA: Digital Discovery & e-Evidence*, *The New York Times*, *USA Today*, *The Washington Post*, and *The Wall Street Journal* to the *Billings, Montana Gazette* and the *Fort Mill (South Carolina) Times*. It has been linked on at least 29 blogs and already cited in at least three academic papers.

In draft form, the Principles outlined in the report had been the subject of a public hearing before the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, in which Saunders, Institute Executive Director **Rebecca Love Kourlis** and College Treasurer **Gregory P. Joseph**, a former chair of the College's Federal Civil Procedure Committee, had participated.

The released report was then a major subject at a Civil Rules Summit in early March, sponsored by the Institute, which was attended by over thirty delegates from the bench, academia, representative clients and the practicing bar. Attendees included members of the Judicial Conference's Standing Committee, including its chair, and the chair of the Civil Rules Advisory Committee, as well as six Fellows who had participated in the Task Force's work.

THE GENESIS OF THE PROJECT

The project was perhaps unique in the College's history, since it involved a joint effort with an outside institution. It had its genesis when former Colorado Supreme Court Justice Rebecca Love Kourlis, the Executive Director of the Institute, a national non-partisan organization dedicated to improving the process and culture of the civil justice system in the United States, participated in the College's Spring 2007 meeting program. At that meeting, several speakers addressed the phenomenon of the vanishing civil trial. After then attending a meeting of the College's Federal Civil Procedure Committee and listening to the discussion, Justice Kourlis had offered the research and financial resources of her organization for a joint study with the College of this growing problem.

In response, then College President **David J. Beck** appointed an ad hoc College task force to work jointly with the Institute. Chaired by Fellow Paul C. Saunders, New York, New York, the Task Force included eighteen Fellows drawn from varied segments of the civil trial bar, including advocates of the viewpoints of both plaintiffs and defendants, and two judges, one from the United States, one from Canada. Notably, three of its members, **Phillip R. Gar-**

ison, Springfield, Missouri, **Robert L. Byman**, Chicago, Illinois and **Francis M. Wikstrom**, Salt Lake City, Utah, have since been elected to the College's Board of Regents.

Although originally intended to focus primarily on problems with the civil discovery process, the Task Force quickly perceived that the subject could not be addressed in isolation, and the mandate of the project was thus broadened to examine other parts of the civil justice system that relate to and have a potential impact on discovery.

THE PROCESS

The Task Force meetings were jointly led by Saunders and Justice Kourlis. Members of the Institute staff assigned to the project staffed the meetings and provided research support. The expense of the meetings was borne by the Institute. College past president **E. Osborne (Ozzie) Ayscue, Jr.**, who is a member of the Institute's Board of Advisors, participated as its liaison to the project. Over the course of their work, the participants held seven two-day meetings and participated in additional lengthy conference calls, devoting hundreds of hours to the task. They began by studying the history of the Federal Rules of Civil Procedure, past attempts at reforms, prior cost studies, academic literature commenting



on and proposing changes to the rules and media coverage of the cost of litigation.

The first goal of the project was to determine from factual analysis whether a problem actually existed and, if so, to determine its dimensions. The Task Force therefore worked with an outside consultant to design and conduct a survey of the Fellows of the College engaged in civil trial practice to create a database from which to work. IAALS contracted with Mathematica Policy Research, Inc. to manage the survey and bore its full cost. Mathematica then compiled the results of the survey and issued a lengthy report.

The survey was administered over a four-week period in the Spring of 2008. The response rate was a remarkably high 42 percent. On average, the respondents had practiced law for 38 years. Twenty-four percent represent plaintiffs exclusively, 31 percent represent defendants exclusively and 44 percent represent both, but primarily defendants. About 40 percent of the respondents litigate complex commercial disputes, but fewer than 20 percent litigate primarily in federal court (although nearly a third split their time equally between federal and state courts).

For the most part there was no substantial difference between the responses of those who represent primarily plaintiffs and

those who represent primarily defendants, at least with respect to the action recommended in this report.

SURVEY RESULTS

Three major themes emerged from the Survey:

1. Although the civil justice system is not broken, it is in serious need of repair. In many jurisdictions, today's system takes too long and costs too much. Some deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test, while some other cases of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them.

2. The existing rules structure, including notice pleading as opposed to fact pleading, does not always lead to early identification of the contested issues to be litigated, which often leads to a lack of focus in discovery. As a result, discovery can cost far too much and can become an end in itself.

3. Judges, preferably a judge who will handle the case through trial, should have a more active role from the beginning of a case in designing the scope of discovery and the direction and timing of the case from the pleading stage through trial.

In September 2008, the Task

Force and the Institute published a joint Interim Report, describing the results of the survey in much greater detail. It was the subject of an article in the Fall 2008 issue of the *College Bulletin*, Issue 60 at page 4, and was posted on the websites of both the College, www.actl.com, and the Institute, www.du.edu/legalinstitute. That report itself attracted wide attention in the media, the bar and the judiciary.

DEVELOPMENT OF SUGGESTED PRINCIPLES FOR REFORM

Recognizing the need for serious consideration of change in light of the survey results, the Task Force and the Institute continued to study ways of addressing the problems they highlighted. It had the benefit of participants who practice under various civil procedure systems in the United States and Canada, including both notice pleading and code pleading systems. It examined in detail civil justice systems in Canada, Australia, New Zealand and Europe, as well as arbitration procedures and criminal procedure, and compared them to our existing civil justice system.

The Task Force and the Institute ultimately agreed on a proposed set of Principles that would shape solutions to the problems it had identified. These Principles were developed to work in tandem with one another and are intended

to be evaluated in their entirety. The Task Force recommended and the College's Board of Regents agreed that the proposed Principles, which can be applied to both state and federal civil justice systems, be made the subject of public comment, discussion, debate and refinement by all the stakeholders with an interest in a viable civil justice system, including state and federal judiciaries, the academy, practitioners, bar organizations, clients and the public at large. The Principles are set out below.

NEXT STEPS

It was the hope of the Task Force and the Institute that their joint report would inspire substantive discussion among practicing lawyers, the judiciary, the academy, legislators and, most importantly, clients and the public. The participants believed that if so, these Principles might one day form the

bedrock of a reinvigorated civil justice process and spawn a renewal of the flagging public faith in America's system of justice.

From the reception the report has received, it is apparent that it has indeed caught the attention of many stakeholders in the civil justice system. The report has already been downloaded from the Institute's website alone over three hundred times. Justice Kourlis and Paul Saunders have already responded to a number of requests for presentation of the Principles to various interested groups, and those requests have continued to come in. The Section of Litigation of the American Bar Association, whose incoming chair attended the Institute's Civil Rules Summit, is itself administering the survey in a modified form to its members.

At least thirteen jurisdictions have indicated an interest in con-

sidering a monitored pilot project to test the effectiveness of the Principles proposed by the Task Force and the Institute. In response to this interest, the Task Force decided to continue its work with the Institute. It is now working on a set of model rules that might be used in such monitored pilot projects.

It appears that rule makers, prompted in part by the Task Force report, are for the first time in a long while taking an objective look at the civil rules in their entirety, as opposed to addressing only discrete parts of them.

Fellows of the College are urged to study both the Interim Report and the Final Report, so that they may be prepared to assist in any studies or projects that these reports may inspire in their own jurisdictions.

— E. Osborne Ayscue, Jr.

THE SUGGESTED PRINCIPLES

The Principles suggested by the Task Force and the Institute follow in bold, with prefatory notes in italics. The extensive comments that explain these Principles and relate them to the results of the survey of the Fellows of the College to which they are intended to respond may be found on both the College's and the Institute's websites, **www.actl.com** and **www.du.edu/legalinstitute**.

The Purpose of Procedural Rules: Procedural rules should be designed to achieve the just resolution of every civil action. The concept of just resolution should include procedures proportionate to the nature, scope and magnitude of the case that will produce a reasonably prompt, reasonably efficient, reasonably affordable resolution.



1. GENERAL

The “one size fits all” approach of the current federal and most state rules is useful in many cases but rule makers should have the flexibility to create different sets of rules for certain types of cases so that they can be resolved more expeditiously and efficiently.

2. PLEADINGS

The Purpose of Pleadings: Pleadings should notify the opposing party and the court of the factual and legal basis of the pleader’s claims or defenses in order to define the issues of fact and law to be adjudicated. They should give the opposing party and the court sufficient information to determine whether the claim or defense is sufficient in law to merit continued litigation. Pleadings should set practical limits on the scope of discovery and trial and should give the court sufficient information to control and supervise the progress of the case to trial or other resolution.

Notice pleading should be replaced by fact-based pleading. Pleadings should set forth with particularity all of the material facts that are known to the pleading party to establish the pleading party’s claims or affirmative defenses.

A new summary procedure should be developed by which parties can submit applications for determination of enumerated matters (such as rights that are dependent on the interpretation of a contract) on pleadings and affidavits or other evidentiary materials without triggering an automatic right to discovery or trial or any of the other provisions of the current procedural rules.

3. DISCOVERY

The Purpose of Discovery: Discovery should enable a party to procure in admissible form through the most efficient, nonredundant, cost-effective method reasonably available, evidence directly relevant to the claims and defenses asserted in the pleadings. Discovery should not be an end in itself; it should be merely a means of facilitating a just, efficient and inexpensive resolution of disputes.

Proportionality should be the most important principle applied to all discovery.

Shortly after the commencement of litigation, each party should produce all reasonably available nonprivileged, non-work product documents and things that may be used to support that party’s claims, counterclaims or defenses.

Discovery in general and document discovery in particular should be limited to documents or information that would enable a party to prove or disprove a claim or defense or enable a party to impeach a witness.

There should be early disclosure of prospective trial witnesses.

After the initial disclosures are made, only limited additional discovery should be permitted. Once that limited discovery is completed, no more should be allowed absent agreement or a court order, which should be made only upon a showing of good cause and proportionality.

All facts are not necessarily subject to discovery.

Courts should consider staying discovery in appropriate cases until after a motion to dismiss is decided.

Discovery relating to damages should be treated differently.

Promptly after litigation is commenced, the parties should discuss the preservation of electronic documents and attempt to reach agreement about preservation. The parties should discuss the manner in which electronic documents are stored and preserved. If the parties cannot agree, the court should make an order governing electronic discovery as soon as possible. That order should specify which electronic information should be preserved and should address the scope of allowable proportional electronic discovery and the allocation of its cost among the parties.

Electronic discovery should be limited by proportionality, taking into account the nature and scope of the case, relevance, importance to the court’s

adjudication, expense and burdens.

The obligation to preserve electronically-stored information requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation; however, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant electronically stored information.

Absent a showing of need and relevance, a party should not be required to restore deleted or residual electronically-stored information, including backup tapes.

Sanctions should be imposed for failure to make electronic discovery only upon a showing of intent to destroy evidence or recklessness.

The cost of preserving, collecting and reviewing electronically-stored material should generally be borne by the party producing it but courts should not hesitate to arrive at a different allocation of expenses in appropriate cases.

In order to contain the expense of electronic discovery and to carry out the Principle of Proportionality, judges should have access to, and attorneys practicing civil litigation should be encouraged to attend, technical workshops where they can obtain a full understanding of the complexity of the electronic storage and retrieval of documents.

Requests for admissions and contention interrogatories should be limited by the Principle of proportionality. They should be used sparingly, if at all.

4. EXPERTS

Experts should be required to furnish a written report setting forth their opinions, and the reasons for them, and their trial testimony should be strictly limited to the contents of their report. Except in extraordinary cases, only one expert witness per party should be permitted for any given issue.

5. DISPOSITIVE MOTIONS

The Purpose of Dispositive Motions: Dispositive motions before trial identify and dispose of any issues

that can be disposed of without unreasonable delay or expense before, or in lieu of, trial.

6. JUDICIAL MANAGEMENT

A single judicial officer should be assigned to each case at the beginning of a lawsuit and should stay with the case through its termination.

Initial pretrial conferences should be held as soon as possible in all cases and subsequent status conferences should be held when necessary, either on the request of a party or on the court's own initiative.

At the first pretrial conference, the court should set a realistic date for completion of discovery and a realistic trial date and should stick to them, absent extraordinary circumstances.

Parties should be required to confer early and often about discovery and, especially in complex cases, to make periodic reports of those conferences to the court.

Courts are encouraged to raise the possibility of mediation or other form of alternative dispute resolution early in appropriate cases. Courts should have the power to order it in appropriate cases at the appropriate time, unless all parties agree otherwise. Mediation of issues (as opposed to the entire case) may also be appropriate.

The parties and the courts should give greater priority to the resolution of motions that will advance the case more quickly to trial or resolution.

All issues to be tried should be identified early.

These Principles call for greater involvement by judges. Where judicial resources are in short supply, they should be increased.

Trial judges should be familiar with trial practice by experience, judicial education or training and more training programs should be made available to judges.

