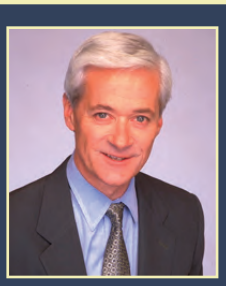
Dunn on Damages

The Economic Damages Report for Litigators and Experts



Robert L. Dunn

Please enjoy the following article, reprinted from *Dunn on Damages*, with my compliments!

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Court Rules and Pilot Programs Intended to Reduce Litigation Costs and Delays

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WHAT'S BEEN HAPPENING

Over the last few years, the number of local and federal pilot programs (Pilots) and rule changes have increased. These changes are all designed to lower the cost of litigation through making it more efficient and effective for all participants, including the judiciary. NOTE: The author is not an attorney. This article is written from the perspective of an expert participating in the judicial system.

Because the views on what "more efficient" looks like and which inefficiencies warrant attention differ among the players, the Pilots and rule changes vary in focus from place to place. All of the listed system participants have distinct points of view and varying degrees of influence on how the litigation process should work:

- Defense and plaintiff's bars
- Specialty bars (medical malpractice, employment, securities, etc.)
- Judiciary
- ADR providers
- Other providers, such as court reporters and videographers, process servers, court employees, providers of technology services (electronic filing and retrieval providers, electronic evidence protection, electronic data discovery and storage providers, structured settlement providers, etc.)
- Expert witnesses

This article reflects knowledge gained through participation in and observation of various rule changes and Pilots in Colorado, research into efficiency efforts being made in other venues, and participation on the Civil Justice Task Force (Task Force) that was established by the Forensic and Valuation Services Executive Committee of the American Institute of Certified Public Accountants (AICPA) to partner with IAALS, the Institute for the Advancement of the American Legal System (see side bar at right for more information about IAALS). The Task Force mandate was "to work with IAALS to identify causes and facilitate solutions to the barriers raised by costs and delays encountered in the pretrial handling of civil disputes, and to develop key recommendations for streamlining the civil pretrial process and reducing costs for clients." In late 2012, the AICPA and IAALS published *Another Voice: Financial Experts on Reducing Client Costs in Civil Litigation* summarizing the Task Force findings. See the article sidebar on page 17 summarizing the findings. To access the full report, go to: *http://bit.ly/ZPrpEW.*

The generally agreed-upon goals of IAALS and other organizations and individuals supporting increased efficiency are:

- Improving access to the courts by reducing litigation costs, especially for litigants with smaller disputes or limited resources where cost can be a significant barrier for one or both parties
- Reducing costs for all litigants by better managing pre-trial activities
- Streamlining cases and thereby reducing the judicial case load so that all cases can get more attention
- Sustaining the viability of the judicial system in light of increasing use of alternative dispute resolution venues

The underlying rationale for these goals is the desire to comply with Rule One of the Federal Rules of Civil Procedure (which are similar to many state court rules) that requires that all parties before the court receive "a speedy, inexpensive and just determination of every action." Many involved in the justice system believe that justice is being denied due to prohibitive costs and excessive delays (delays have been found to directly increase expert and other costs). This belief and the desire to address the underlying issues has led IAALS, judges, attorneys, rulemakers, academics, and other organizations to identify, assess, implement and evaluate possible solutions. It is worth noting at this point that it is not unusual for one party or the other to a litigation to be unmotivated by the desire to be efficient or effective, which does affect the other parties and the court. That issue is not addressed in this article.

Descriptions of some of the efforts, outcomes and unintended consequences follow. As an introduction, see the sidebar on Hot Tubbing, as practiced in Aus-

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THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (IAALS)

The Institute for the Advancement of the American Legal System (IAALS), an independent research center located on the University of Denver campus, was founded by Justice Rebecca Love Kourlis.

It is "dedicated to continuous improvement of the process and culture of the civil justice system." It leverages both empirical and legal research in collaboration with educational institutions, foundations, judicial systems organizations, law firms and associations of lawyers in order to implement new models and measure the impact on identified problems. The ultimate goal is a "more accessible, efficient and accountable civil justice system."

See *http://iaals.du.edu* for more information on IAALS and its projects.

tralia. While the U.S. has not adopted Hot Tubbing directly, knowledge of the practice may be part of the reason why experts are playing larger roles in fact finding and assisting with resolving disputed issues in a variety of ways. In a surprise finding, the experienced experts surveyed[1] by the AICPA and IAALS, in significant numbers, said that their participation in ad hoc collaborative efforts during discovery and settlement negotiations and on behalf of the courts had a positive impact on efficiency.

WHAT'S BEEN DONE – OUTCOMES, PROS AND CONS

Federal Rules of Civil Procedure

Changes to the Federal Rules of Civil Procedure (Federal Rules) are permanent (i.e., rules about discovery of electronically stored information,[2] rules about expert disclosures[3]) because they must be made through a pre-defined process culminating in approval by the Supreme Court.[4] Changes to Federal Rules can result in changes to local rules because many jurisdictions adopt the Federal Rules.

In evaluating the changes to the Federal Rules, the change relating to the management of electronically stored information requires that the parties address how electronic data will be managed and produced. It also requires reporting the parties' agreement, or lack thereof, to the judge. This provides the potential for significant and early involvement by the judge/magistrate in resolving disputes, which is generally viewed as positive from an efficiency point of view. From the view of the financial/accounting expert, resolving access to and formats of electronically stored information early is a good thing. However, it is often the case that the expert is not yet hired and frequently the attorney does not understand the expert's substantive and format data needs. It is still common to encounter an attorney who agrees to accept all discovery in PDF or TIF, not thinking at this stage about the benefit, in certain circumstances, of data provided in native format. While awareness of the benefits of obtaining native format documents for specific types of documents is increasing, it is still common for attorneys handling electronic production protocols to not be aware of the differences between the type of production needed for accounting and worksheet-based data and for other types of records that are useable as flat (e.g., snapshots) files. Providing accounting and worksheet-based data in native format is virtually a necessity for any type of efficient assessment,[5] versus PDF or TIF formats that work well for emails, memos, invoices, marketing, correspondence, etc. In summary, if these distinctions are known and handled early, the new rules work well; if not, then there may be significant additional expense as the expert tries to deal with performing analysis using inefficient tools to access needed information.

The other recent big changes to the Federal Rules are the changes to Rule 26 relating to the production of expert drafts and non-discovery of communications that don't provide information the expert relies upon in reaching an opinion. One of the benefits proposed as a basis for this amendment was that there would be more open communication with the expert and less discovery time spent on expert drafts. Spoliation cases relating to expert drafts had resulted in increased expert and attorney time spent on managing drafts and on managing compliance with the relevant cases, not all of which reached similar findings. The amendment did make it easier for the expert to communicate with the attorney and reduced the effort needed to manage drafts in federal cases or in venues where the Federal Rules were adopted. However, as an unintended consequence, some attorneys now feel

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TASK FORCE CONCLUSIONS:

The Task Force believes that its five recommendations will maximize both the effectiveness of financial experts and the efficiency of their use in the civil pre-trial process:

- **Judges should implement early and consistent active case management**
- **Clients and attorneys should involve experts early in the process**
- **Attorneys should target, focus and streamline expert depositions and discovery**
- **Attorneys' *Daubert*-like challenges should be appropriately targeted and acted upon promptly by the court**
- **Attorneys and the court should develop a process for the collaboration and cooperation of opposing experts where appropriate**

Although the expert voice is not typically heard in connection with reforming civil pre-trial processes, the financial expert can offer substantive support if involved in the conversation.

WHAT IS HOT TUBBING?

Hot Tubbing has the experts interacting with each other around their respective opinions. As designed in Australian courts, initially the experts meet pre-trial to identify areas where they agree and where they disagree. At trial, the experts are sworn in at the same time and the judge chairs a discussion between the experts. The discussion agenda is developed from the pre-trial document identifying the areas where the experts disagree. Counsel for the parties ask questions of the experts either when the judge directs or permits. The experts can also ask questions of each other. This Australian practice, which is perceived to save time and enhance the ability of the experts to meet their obligation of assisting the court, is spreading to international arbitrations and other parts of the Commonwealth.

that they can and therefore want to be more involved in the expert's drafting of the report and opinions. In some cases, this has resulted in the attorney micromanaging the report and placing additional pressure on the expert to reach helpful conclusions.

There may be more changes to the Federal Rules directed at efficiency. The Civil Rules Advisory Committee has proposed amendments to the Federal Rules relating to proportionality, preservation and spoliation problems related to electronically stored information and taking into account the speed at which technology is changing.

While the Federal Rules move more slowly, local procedures are used in applying them and those local procedures can be revised in much the same way as the Local Rules. For instance, local procedures focused on e-discovery are being used to implement Federal Rules in Colorado via an e-discovery task force and in Illinois via an e-discovery Pilot. Also, the Southern District of New York implemented a Pilot program for complex cases. It did not change the Federal Rules to effect efficiency, but looked at greater case management, focusing on the initial pre-trial conference, streamlining discovery disputes and holding pre-motion conferences to provide information feedback on strengths and weaknesses of the proposed arguments.

Local Rules

Since many local jurisdictions do not adopt Federal Rules, adopt them only in part, or defer adoption, attorneys in those districts must work with multiple sets of rules. With the Pilots, the rules may not affect the entire state or other jurisdictions. In those cases, attorneys must work with the Federal Rules, the existing local rules, and the Pilot rules. And of course, there will also be existing cases under old rules. In Colorado, where all of those situations are occurring, we are observing frustration and a lack of clarity on the implementation and applicability of the Pilot rules. Generally these Pilot programs are followed by an assessment of the effectiveness of the changes.

Not all changes to the Local Rules are made via Pilots. For instance, improvements to the process were made in Oregon and Utah without implementing a Pilot.

Regardless of the process, both permanent and temporary rules can mandate changes that affect experts, sometimes having unintended consequences and sometimes not increasing efficiencies relating to experts.

Pilot programs or rule changes are active in Alabama, California, Colorado, Delaware Court of Chancery, Florida, Illinois, Iowa, Louisiana, Minnesota, New Hampshire, New York, Texas, Utah and Washington State. Note: This is not a comprehensive list; there may be other states with existing Pilots or rule changes. Described below are selected provisions aimed at increased efficiency for some of the states listed above.

Arizona

Changes to the Arizona Rules of Civil Procedure include accelerated discovery and automatic production of certain defined information. In addition, depositions of lay or expert witnesses are limited to four hours of actual examination, without stipulation or court order. The number of document requests is limited to 10 and there can be only one expert per side per issue. Many of these features are similar to those of the Colorado Pilot.

Colorado

The Colorado Civil Access Pilot Project (Colorado Pilot) covers four of the Colorado judicial districts, including six Colorado counties, all of which are located in the Denver metro area. The rules published by the Supreme Court of Colorado, Office of the Chief Justice, relate only to business disputes, but include business v. consumer disputes. They include professional malpractice actions, except for medical malpractice, which were specifically excluded, even though some of the provisions in the rules were specifically designed to address perceived expert abuses in those types of cases. An early assessment of the Pilot reported in the October 4, 2012 PrawfsBlawg is that discovery has become more proportional, which was a specific goal of the Pilot.

Proportionality is specifically mentioned in Pilot Project Rule (PPR) 1.3; however the costs of experts are not specifically addressed. The Colorado Pilot does limit the parties to one expert per topic per side, but that will not address the issue of needing an expert for a very small case.

The Pilot Project Rules state that expert opinions will be provided via a written report in a required format and that "The substance of each expert's direct testimony shall be fully addressed in the expert's report. Any then-existing trial exhibits are due with the report, as is an accounting of all time spent on the case. Experts shall be limited to testifying on direct examination about matters disclosed in reasonable detail in their written reports." The Pilot Project Rules also state that there will be no expert depositions. However, the expert's file must be voluntarily produced at the time the witness is disclosed; the file content to be produced is defined and, as with the Federal Rules, report drafts do not need to be produced.

An unusual feature of the Colorado Pilot is that the same judge will be assigned to the case until final resolution; the consistency and institutional knowledge gained by this would appear to be beneficial. An even more unusual feature is that each and every paragraph must be initialed by the expert; this appears to add cost without benefit.

The directive adopting the Colorado Pilot and issuing the related Rules is at *http://bit.ly/ZPurJw.*

Colorado already has in place a rule that attempts to address approximately the lowest tier of the new Utah rules. This rule, Rule 16.1, was intended to benefit litigants where the amounts at issue were below $100,000. Based on the assessment of this rule done by IAALS, it appears that attorneys were using the process only when bringing suit against defaulting or pro se defendants and were unlikely to use the process when there were going to be disputed issues. It also appears that the courts did not expedite these cases. While this Rule may benefit some litigants, it appears that it did not achieve its intended objectives.[6]

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Iowa
A task force to look at a possible Pilot is in place in Iowa.

Massachusetts
A Pilot is in place in Massachusetts that is similar to Colorado's, limiting discovery and providing litigant access to judges in business disputes.

Minnesota
There is also a task force in place looking at a possible Pilot in Minnesota.

Oregon
In Oregon, there is no expert discovery; that means that no expert report or expert deposition is allowed. As a result, the opposing side may not know if you have an expert or who that expert is or what opinions will be given until and unless there is a trial. Of course, during the course of discovery it is possible that the expert may become known, but it is not required. The attorneys in Oregon are used to this, but do find it challenging to prepare for cross-examining the opposing expert and to provide the fact testimony necessary to undermine expert assumptions.

Utah
In November 2011, after four years of research, negotiation and drafting, Utah passed a comprehensive new set of Rules of Civil Procedures, with major changes made to the discovery rules, which had been based on the Federal Rules. The most unusual change, apparently based on frustration with perceived excessive and abusive discovery under the Federal Rules, is that discovery is prohibited unless the rules or judge say otherwise. This is in contrast to the Federal Rules, which allow discovery unless it is specifically prohibited under the rules. The parties select one of three tiers of discovery at the beginning of the case, and each tier has specific levels of standard recovery. The levels are tied to the right to recover ($50,000 or less for Tier 1 and above $300,000 for Tier 3).

Looking Overseas

France, Germany and Italy
In all three countries, single experts are chosen by the court to represent both parties. In U.S. courts, it is not uncommon for joint experts to be retained in marital cases, but the author is not otherwise aware of the routine use of joint experts.

England and Wales
In these parts of Great Britain, it is common for parties to retain their own experts, but the Civil Procedure Rules do not permit expert depositions. They do, however, provide for direct discussion between experts in order to identify expert issues and discuss areas of agreement and disagreement.

EFFICIENCY AND RELATED LITIGATION COST REDUCTIONS

The intended efficiencies in all of the above efforts can be grouped into the following categories:

- *Costs expended pre-trial are proportional to the amounts in dispute.*

The concept of proportionality can be seen clearly in the new Utah rules. It is also becoming very important in discovery of electronically stored information, in addition to considering case size in tailoring discovery and case management.

- *Discovery is defined early in the case.*

Discovery may be managed mechanically by the size of the case, or it may be managed through discovery management orders to be effective in terms of the issues.

- *Claims and disputes are identified and focused early in the case.*

This generally involves expanded involvement of the judge or magistrate as an essential ingredient. This assessment allows both of the two previous points to be executed effectively.

- *Case scheduling is defined early in the case.*

In some of the Pilots, there are defined time frames that the courts are encouraged to abide by; in others there is more flexibility.

- *Expert costs are scaled back in a variety of ways.*

Expert costs are scaled back directly when depositions and/or expert reports are eliminated. They are scaled back indirectly, and potentially in a more meaningful way, by the early definition and organization of the case.

COST REDUCTIONS RELATING TO EXPERTS

Not all of the hoped-for efficiencies directly relate to expert services, but most relate at least indirectly. However, from a perception point of view, in a survey of judges and trial lawyers[7] about the cost of litigation, expert witness costs were identified by the survey respondents as material to the high cost of litigation. These expert witness costs include amounts paid directly to the expert, and related necessary costs (discovery of relevant information, discovery disputes and management, attendance of counsel at depositions, reporting [video becoming more common] and transcription costs, and travel costs) are counted as part of expert witness costs. It is worth noting that the surveys did not discriminate based on engagement size; however, in the author's experience, expert-related expenses are much more likely to impair the prosecution or defense of smaller cases or cases where one of the parties is at an economic disadvantage. In at least some situations, if there are no liability or damages experts available at a fee that is proportionate to the claim, it may not be possible to prosecute the case.

The expert witness costs cited in the survey increase when important information is either not requested with other documents or it is not requested in useful formats. This can happen when experts do not have input into what is requested and its format prior to discovery cutoff deadlines. The discovery process then becomes more expensive due to the need to try to get important information post discovery cutoff, or the experts are forced to take extra steps, sometimes extensive and therefore very expensive extra steps, in order to access that important information that was either not requested or requested in a not easily used format. These costs can be managed by educating counsel or involving financial experts early in the case. There is, however, significant resistance to hiring experts early. Many attorneys think assistance at the discovery level means full-blown involvement and the availability of all evidence, rather than early involvement limited to assessing the type of information needed and its for-

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mat. An experienced expert will be able to do that in most situations at a reasonable cost. It is also possible to focus an expert on settlement and get the benefit of settlement models or critiques to add comfort to possible settlement amounts. However, the client and attorney frequently believe that the case will settle, and if it does, that will certainly reduce expert costs. If it doesn't, then a mad dash to prepare the report will likely not be efficient.

In using proportionality as a cost reduction solution, financial experts will face problems in certain situations.[8] For instance, certified public accountants (CPAs) will be in violation of very specific valuation standards (Statement on Standards for Valuation Services No. 1) if they do not perform all the required steps. With accounting- and finance-related testimony, there are expectations of accuracy that may not be possible to achieve within the time and discovery limits. Failing to meet these expectations may result in opportunities for cross-examination and may impair the CPA's reputation. It is also worth noting that it can be very difficult to next to impossible to prepare a reasonable accounting without having the records and reconstructing them, and that big numbers and little numbers are comingled and difficult to address separately. It is also common that the smaller the business, the worse the business records, making the time needed inversely related to the size of the case.

There is one area where efforts to increase efficiency have had significant staying power. In many jurisdictions, divorcing couples are strongly encouraged to use a joint valuation expert in an effort to increase efficiency. While this may be effective for smaller cases in Colorado, for estates of any size, this usually means that the parties hire their own valuation experts to evaluate what the joint expert is doing. When that happens, it is appears unlikely that the use of a joint expert has resulted in a saving to the parties. Note: This may not be the case in all jurisdictions. Other difficulties can arise if, when a joint expert is retained, the joint expert has relationships with counsel for both parties. This is a difficult position in which to be. For that reason, and the potential to be treated with hostility by one spouse or the other (and potentially the court), it is also a role that many valuation experts dislike, some going so far as to refuse to serve as joint experts.

CONCLUSION

A variety of sincere well-thought-out efforts have been and are being made to reduce litigation costs and delays. Some of these are working; some of them are having unintended consequences. Assessments of the various programs are starting to come in and some Pilots are expanding or converting to standing rules. In all these situations, the expert along with the attorney needs to be aware of these new local rules.[9] They also need to be aware that if they haven't seen a Pilot or effort to change the rules yet, they may well do so soon. In October 2012, IAALS, along with the American Board of Trial Advocates and the National Center for State Courts, published *A Return to Trials: Implementing Effective Short, Summary, and Expedited Civil Action Programs*[10] as a model and guide for local and national jurisdictions wanting to implement reform programs. It also may be as useful to remove provisions that had unintended negative consequences as it will be to expand the provisions that are having a positive impact on efficiency. Promoting model rules that combine the most effective procedures may be the best strategy for implementing the most effective strategies.

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1 The Forensic and Valuation Services survey was administered in January and February of 2012 by IAALS and the AICPA FVS Executive Committee to members of the AICPA Forensic and Valuation Services Section.

2 Rules 16, 26, 33, 34, 37 and 45.

3 Rule 26.

4 The Civil Rules Advisory Committee has proposed amendments to the Federal Rules of Civil Procedure to address proportionality, preservation, and spoliation problems associated with today's swiftly evolving technology.

5 In cases where accounting and related analysis is done using proprietary or industry-specific programs, additional negotiations will be required during the electronic production negotiations in order to ensure efficient access to that data.

6 The complete evaluation of the implementation of this rule is summarized in *Measuring Rule 16.1: Colorado's Simplified Civil Procedure Experiment* published by IAALS at *http://bit.ly/Yu3JSj*.

7 The Federal Judicial Center (FJC) surveyed judges on expert witnesses in 1991 and again in 1998, with a follow-up survey of attorneys in 1999. The FJC issued a report in 2002 synthesizing judges' and attorneys' perspectives on experts from these surveys. The FJC surveys also provide a comparative perspective on the changing practices regarding expert evidence in light of *Daubert*-related cases decided in the 1990s. The FJC also administered a national survey of attorneys in federal civil cases in 1997. This study focused on the broad issues of disclosure and discovery, but included questions on expert disclosure and discovery.

8 For a summary on the application of proportionality guidelines, see *http://bit.ly/YdoItb.*

9 Experts may also want to provide feedback to any local committees. Experts are generally not included in surveys about the pilot project results, or for that matter the typical process surveys sent to parties and counsel after cases are tried.

10 See *http://bit.ly/YbAGXw* .