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Reforming The Rules of Civil Procedure: The ACTL Final Report

The Editor interviews ***Paul C. Saunders****, Partner, Cravath, Swaine & Moore LLP.*

Editor: Tell us about the American College of Trial Lawyers (ACTL).

Saunders: The ACTL is an invitation-only organization composed of some of the country's best trial lawyers. Fellows are selected by their peers in a process that the invitees don't even know about. You simply receive a letter one day in which you are told that you have been selected to become a Fellow of the ACTL. It takes about two years of investigation for candidates to be approved, the process is very long and detailed and many, many more candidates are rejected then are accepted. So the Fellows who are in the ACTL are very experienced, knowledgeable trial lawyers. It's the premier organization of its type in the country. We also have Fellows from Canada and honorary Fellows from England.

Editor: How did the ACTL become involved in reforming judicial procedures?

Saunders: In 2006, Rebecca Love Kourlis, Executive Director of the Institute for the Advancement of the American Legal System (IAALS) addressed the ACTL. Becky is a very impressive person. She was a judge on the Colorado Supreme Court for about 15 years. She stepped down from the bench to head IAALS, which is an institute to study problems of civil justice in the United States and is headquartered at the University of Denver in Colorado. She has a small but brilliant staff.

In her 2006 address to the ACTL, Becky spoke about problems in the civil justice system – concerns that the justice system was too expensive, took too long, was too cumbersome, was turning away cases that should be brought and was forcing settlements in cases that should be tried. In sum, the system had gotten overly complex to the point where many perceived that it really wasn't delivering on its promises.

Paul C. Saunders

The President of the ACTL and its Board of Regents decided that looking into the kinds of issues that Becky raised was something that the ACTL ought to undertake. So in 2007, the president of the ACTL, David Beck, asked me to chair a Task Force on discovery in litigation. The perception then apparently was that the principal problem that was causing expense and delay in the system was primarily discovery – that discovery had become an end in itself.

Beck created a Task Force of 17 Fellows from around the country and Canada. We had plaintiff's lawyers, defendant's lawyers, judges, complex litigation lawyers like me and lawyers who handled very small cases in very small towns. Our discussions were some of the most intense in

which I have ever participated. The first year we met six or eight times, and the meetings would last all day and into the evening.

So the members of the Task Force had a wide variety of experience, including that of both plaintiff's and defendant's counsel. The first thing that we decided to do was to find out whether there really was a problem. We thought it would be putting the cart before the horse if we started to suggest remedies to problems that may not actually exist. With help and funding from IAALS, 3,812 Fellows of the College were sent surveys in April 2008.

A company called Mathematica made sure that the questions worked and were in a form that could be administered and analyzed. We had a remarkably high response rate of 42 percent. The results of the survey confirmed our suspicions, but it is important to remember that the Task Force did not see itself as being limited in our proposals to the results of the survey; we wanted to bring our own experience and our own judgment and ideas to the table even if they conflicted with some of the results of the survey. And that happened in a few cases.

I should back up and say that, in the course of our work on the Task Force, we spent a long time looking at the work that had already been done in commenting on and critiquing rules of civil procedure. We studied the history of the Federal Rules of Civil Procedure generally, with a particular emphasis on the discovery rules; we looked at state rules and we even looked at the various international arbitration rules. We also looked at surveys that had been done by the RAND Corporation and others and we studied the process for amending the rules. With that as background, we set to work. We decided that rather than attempting to draft a new set of rules, it would be more productive to see whether or not we could agree as a group on a set of principles that would guide those who might be involved in drafting rules or making modifications or amendments to rules.

Our goal was to agree on principles that would make the system less expensive and more efficient. We felt that the current rules were way too complex. This is compounded by fact that the amendment procedure is difficult and convoluted and can take something like five years just to change a comma. So we adopted the approach of putting the existing rules aside and we focused on articulating principles that we thought would work.

We spent the better part of a year discussing and debating proposed principles. I created the first draft, but the Task Force discussed and debated every word. We probably spent another four months revising the draft. After much debate, we came up with a set of 29 Principles on which we all agreed. We presented the Principles in a Final Report with a commentary on each one. We made a presentation of the Final Report in a draft form in February 2009 to the full Standing Committee on Rules and Procedures of the Federal Judicial Center, the committee headed by Judge Lee Rosenthal from Texas.

When the Final Report was submitted to the Board of Regents of the ACTL, it was unanimously adopted not just by the Board of Regents but as a report of the ACTL itself. It was published in March 2009.

The ACTL and the Task Force members decided that the work of the Task Force wasn't finished. It authorized the Task Force to go to the next phase which was the pilot project phase. The ACTL then asked us to change the name of our Task Force to indicate that our charge was broader than just discovery, so the name was changed to the "Task Force on Discovery and Civil Justice." The incoming President of the ACTL, Joan Lukey, who is the current President, decided to make our report and work the centerpiece of her term as President.

Several judges around the country suggested that for the purpose of the pilot project, the Principles should be embodied in a set of rules. We spent the better part of last year converting the Principles into a set of rules. These are not federal rules. They are not state rules. They are just rules. We then published those rules, and they are now referred to as the Pilot Project Rules.

We then assisted the IAALS in creating a set of guidelines for judges who wish to implement the Pilot Project Rules in a pilot project. That is a document that is sometimes referred to as the Civil Case Flow Management Guidelines, and it is posted on both the ACTL and IAALS Web sites in a document called the *21st Century Civil Justice System: A Roadmap for Reform*.

A number of state and federal judges have told us that they are going to implement the Pilot Project Rules, and the Task Force and the IAALS are working on a set of metrics that could be used to decide whether the pilot project really succeeded in reducing cost and delay and making the system more efficient. The IAALS is also about to publish the results of its study on litigation costs.

There has been a lot of discussion about this project. The ABA Section of Litigation, which is a much larger group than the ACTL, asked for permission last year to administer our survey to the entire ABA Section of Litigation, and we gave them permission to do that with the request that they collect increased demographic information. We were concerned that, unlike the ACTL, the ABA Section of Litigation has a lot of members who don't try cases very often. The Federal Judicial Center has also administered its own survey and the results of both surveys have now been published.

I anticipate the results of these surveys will be discussed at a conference at Duke Law School in May. This two-day conference is a rules conference under the aegis of the Federal Civil Rules Advisory Committee. One section of the conference is devoted to a report on the various surveys, including those of the ACTL, the ABA Section of Litigation and the Federal Judicial Center.

Editor: Is there a need for data regarding the internal and external litigation costs of the judicial system such as I understand is being studied by the Searle Center of Northwestern University School of Law?

Saunders: Yes, absolutely, and I understand there are a number of other studies and surveys being conducted that will deal with the systemic problems that the ACTL identified in its survey and Final Report. Therefore it is very important for litigants and practitioners to supply such data when asked.

Editor: How do you respond to the criticism that the views of practitioners should be discounted?

Saunders: Our intention was to generate a good faith dialogue among people who know about the system to see how we can collectively make it better. Some of our Principles are controversial; we know that. But we thought that we could contribute to the debate if instead of just saying the system is broken, we were to propose concrete changes that our experience told us could improve the system of civil justice. We couldn't possibly change the rules ourselves.

There are those who say that the views of practitioners should be discounted or ignored because they have vested interests in the outcome of litigation. In fact, there are scholars who say the only people who ought to make proposed changes in the rules are scholars who have no vested interest in the system. I don't agree with that. I think practitioners who have experience in working with the rules ought to be heard from when they make proposals for reform in good faith. Those charged with changing

the rules can then separate out proposals that foster vested interests from those that make real, needed and neutral reforms.

Editor: Did you want to mention a few of the important Principles proposed by the Task Force?

Saunders: The most radical and important of the Principles in the ACTL's Final Report deal with pleading and discovery. Notice pleading has permitted litigants to bring complaints without alleging sufficient facts to support their claims, and current discovery rules have enabled those claimants to engage in extensive and often limitless discovery.

It's interesting to review how the federal discovery system was created. Everybody thinks that the Federal Rules of Civil Procedure were written by Professor Charles Clark in 1938. That is true except for the discovery rules. The discovery rules were actually written by Professor Sunderland from the University of Michigan Law School.

At the time Professor Sunderland started his work, most federal districts had their own rules and many of them copied state rules of procedure. Sunderland surveyed all of the states to see what kinds of discovery tools they had. He found they had interrogatories, document requests, requests for admissions, depositions, etc. He couldn't decide which ones worked and which ones didn't, so he decided to put them all in the federal rules.

The original rationale for the broad discovery rules in the federal system in 1938 was to avoid surprises at trial. Their purpose was to reveal what your adversary was going to do at the trial. Over time that rationale has completely flipped; now the principal purpose of discovery is to get evidence that you can use at trial, not to find out what evidence your adversary is going to use at trial.

The present default for discovery is that litigants get as much discovery as they want of any kind unless somebody says "no." However, it is very, very hard in practice to persuade a judge to limit discovery.

Judges sometimes say that even if broad discovery turns out to be unnecessary or irrelevant, they will be able to sort out at trial what is admissible and what is not. That is of course true, but it often comes at a severe cost. Any sense of proportionality, of relating the extent of the discovery efforts to what is at stake in the litigation, can get lost.

It's understandably very hard for courts to decide at the beginning of a case how much discovery is appropriate because they just don't know much about the case at that stage. Especially where there is notice pleading, how can a judge possibly decide how much discovery is really necessary? Judges have no meaningful way to do that in many cases, so the default is that the current rules allow broad discovery. Unfortunately, as we have seen in too many cases, discovery takes on a life of its own and we often see "discovery about discovery."

Therefore, the Task Force decided that the default should be changed. The default should be that litigants can have only limited discovery. I don't mean to say you don't get any, you get limited discovery, and then you get no more unless you can persuade a judge that more is needed. We did not attempt to define limited discovery; that is a much larger debate. But, for example, we expected that specialty bars will be able to define the default discovery in certain types of cases. We want to get away from the "one size fits all" methodology. Also, despite much criticism, we would improve initial disclosures. "Hiding the ball" should not be tolerated.

One of our Principles that has received a lot of discussion is our support for fact-based pleading. Since we wrote our report the U.S. Supreme Court endorsed fact-based pleading in recent cases like *Twombly* and *Iqbal*. However, we reached that conclusion before *Twombly* was decided.

The reason we thought fact-based pleading should be followed was because we thought that it would reduce the need for discovery. Actually, if you look at our definition of fact-based pleading it is quite nuanced. I can't tell you how long it took us to come up with this definition; we discussed it for days. We say in Principle number two that "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." Every word of that was debated and discussed at great length. We came to that conclusion because we hoped that if the pleading party sets forth all of the material facts that the pleading party knew about to establish its claims, it would reduce the need for discovery somewhat. That is why we did it. We didn't do it to make it harder for plaintiffs to bring cases.

Editor: Why was proportionality deemed to be of such great importance?

Saunders: What we were trying to do was to find ways to improve the system of civil justice by reducing costs and delay. Discovery has taken on a life of its own in too many cases. Sometimes litigants lose sight of the ultimate goal of the system of justice and they use discovery in ways in which it was never intended to be used.

The proper focus should be to look at how much is at stake in a case and how important is it to get a quick resolution. An assessment needs to be made at the outset. If a case is worth $100,000, there is no justification for requiring the plaintiff to spend $200,000 on discovery. That is why the Task Force considered proportionality to be a most important consideration. We did not believe that the tail should wag the dog.

Editor: Tell us how the Principles treat preservation of evidence and litigation holds.

Saunders: A litigation hold can be very expensive and very controversial and can give rise to sanctions issues before a judge ever gets involved. Our Principles recognize that even when a party operates in good faith, controversies can arise with respect to the effectiveness and extent of the hold and mistakes can be made. Therefore, we recommend that sanctions should be imposed for failure to make electronic discovery only upon a showing of intent to destroy evidence or recklessness.

Our Principles say that promptly after litigation is commenced the parties should discuss the preservation of electronic documents and attempt to reach agreement. If the parties cannot agree, the court should issue an order with respect to electronic discovery as soon as possible because the obligation is triggered immediately, even before a judge ever gets involved, and it can be very difficult to effectuate and it can be very costly.

Editor: Is there any indication that the Federal Judicial Conference would be willing to adopt any of the ACTL Principles?

Saunders: I cannot speak for the rules makers, but I can tell you that the Principles were presented to the full Federal Standing Committee On Rules And Procedure in draft form last year and I expect that many proposals for reform, including the Principles, will be discussed again at the two-day conference at Duke in May under the leadership of Judge John Koeltl.

I believe that by bringing together surveys and other data and taking into consideration input from our and other organizations, the May conference at Duke will be another important milestone in reforming the federal rules to meet the needs of the 21st century.