Dispositive Motions Practice in Colorado

Best Practices and Challenges amid the Pandemic

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Colorado's federal and state courts continue to adapt to challenges during the COVID-19 pandemic that are rooted in preserving constitutional rights and protecting public health and safety. Starting in March 2020, both federal and state courts in Colorado issued orders continuing civil and criminal trials, allowed telephone hearings and videoconferences in lieu of in-person hearings, and prioritized essential matters.[1] Courts continue to issue orders based on new public health information and new court operations protocols. Simultaneously, courts are now facing a backlog of cases filed pre-pandemic while also preparing for newly filed or soon-to-be-filed lawsuits.

Courts, judges, and attorneys have a unique opportunity right now to seize on federal and state courts' ability to embrace change quickly and to make the civil litigation process more efficient for all. While past civil reform efforts emphasized proportionality in discovery and early case management rule changes, discovery is only part of a civil case's lifecycle. Motions practice—as much as discovery—plays a critical role in making the civil process more efficient and less costly, especially now that court resources are at capacity. Dispositive motions, when used appropriately, can save courts and litigants time and money. But when attorneys file motions reflexively and courts do not thoughtfully manage or timely rule on them, such motions inject additional cost and delay into court systems across the country, ultimately undermining access to justice for all.[2]

In this article, a federal district court judge and a state district court judge share advice for attorneys navigating dispositive motions practice. Much of this advice is drawn from a 2019 report from the Institute for the Advancement of the American Legal System (IAALS report),[3] which examined civil dispositive motions practice by conducting empirical research and identifying opportunities for improvement and innovation. The IAALS report contains more than just a collection of best practices; it calls for the bench and bar to actively engage in a more targeted and focused approach to dispositive motions to better serve clients and the system. Courts and attorneys are encouraged to review the report's recommendations, along with the judges' practice standards and suggestions below, and rethink dispositive motions practice in civil litigation.

Judge R. Brooke Jackson, US District Court for the District of Colorado

Motions to dismiss and motions for summary judgment filings have become routine in most civil cases, whether or not there is a realistic possibility of success. Motions practice can be a critical part of the prosecution or defense of a case. It can also be cause for delay, a burden on the court, and costly to parties.

Motions to Dismiss

The replacement of "notice" pleading required by Federal Rule 8(a) with the *Twombly/Iqbal* "plausibility standard"[4] has resulted in a common trend I have witnessed on the federal bench: motions to dismiss that are quickly followed by a motion to amend the complaint with a proposed amended complaint attached that either eliminates claims or amplifies allegations of fact—or both. These motions to dismiss rarely result in a complaint being fully dismissed with prejudice but commonly create

unwarranted filings that largely consume judges' and law clerks' time.

Effective December 1, 2019, I revised my practice standards to try to improve dispositive motions practice in civil cases by incorporating the IAALS recommendations for making the pretrial dispositive motions process more efficient.[5] To encourage communication between opposing counsel, I request that the parties meet and confer in *good faith and a meaningful way* before filing a motion to dismiss. While in-person meetings are at least temporarily not feasible, I strongly encourage counsel to pick up the phone, or even better, have a videoconference call, to discuss:

- the issues that the movant intends to raise in the motion to dismiss;
- whether the parties could resolve all or some of those issues without a motion;
- the reasons that the movant believes those issues are legally meritorious;
- the reasons that the non-movant believes the motion should be denied;
- whether there are any alternatives to the motion that would suffice (e.g., could the plaintiff simply amend the complaint?); and
- whether the motion could be resolved through a streamlined process (e.g., letters instead of briefs, or in a conference with the court).

The purpose of counsel speaking directly face-to-face (now by video or telephone) is to candidly talk through the issues and any deficiencies in a complaint and work toward a practical resolution. If unresolved issues remain, counsel on both sides must submit a short letter to the court before filing a motion to dismiss. My experience so far at the motion to dismiss level is that at least one and usually both parties submit three-page letters indicating that they have conferred, that the plaintiff has narrowed his or her claims, and that there still is a Rule 12(b)(6) issue, which they identify. I typically review the letters and make comments.

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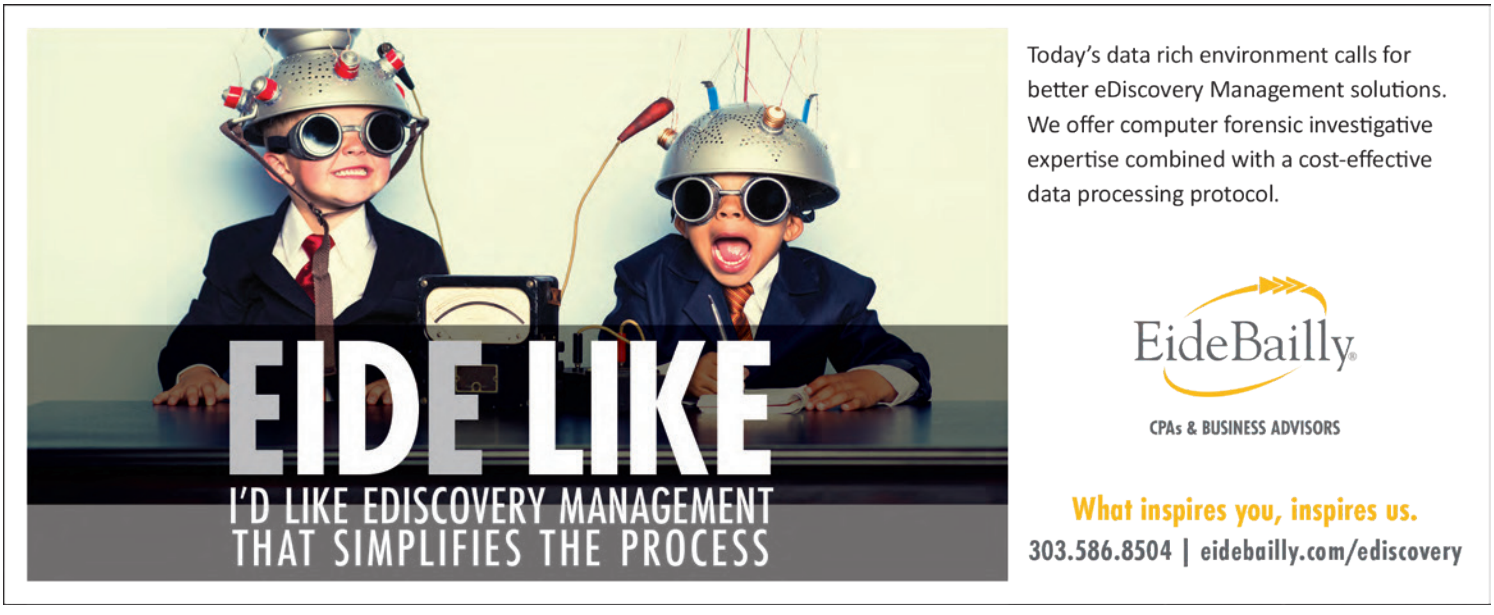
Depending on the facts and law of each case, I may (1) suggest that proceeding with a motion to dismiss will be a waste of time, (2) indicate that the defendant has raised a legitimate issue and should proceed, or (3) suggest that the motion be limited to one or two issues. I never outright say the defendant cannot file a motion to dismiss. Overall, the process seems to be effective. It requires a little extra time up front for the attorneys and for me, but I believe it reduces the ultimate amount of time spent on these motions by eliminating some of the "just because" motions and focusing more narrowly on the key issues.

Motions for Summary Judgment

My practice standards now require counsel to submit a short letter to the court explaining why summary judgment is appropriate, so that I may make suggestions on the issues and responses. I have had less experience so far with letters of intent to file motions for summary judgment, as my new practice standards concerning motions went into effect with cases filed after December 1, 2019. At a minimum, it causes the attorneys



to think again about whether a motion for summary judgment makes sense. In my view, filing a summary judgment motion to "educate the judge," to avoid the theoretical possibility of a malpractice claim, or "just because" that is the way it's done in modern civil litigation practice are not good reasons to file. I hope that my modified approach will help eliminate some of those reasons.

Other Practical Tips

Prompt rulings on dispositive motions are important to you and your clients. If a motion has been fully briefed and there has not been a ruling within what strikes you as a reasonable time, you are welcome to call chambers and inquire about the status of the motion. Sometimes a motion falls through the cracks. But I hope you will understand that the volume of dispositive motions we receive is sometimes too much for my law clerks and me to handle as promptly as we would like.

Please avoid making personal attacks on opposing counsel or parties. Examples include calling the opponent's argument "outrageous," "absurd," or even "silly." Now, more than ever, life is too short, and those editorial comments don't increase the persuasiveness of your motion or response. In fact, it's quite the opposite.

Back when I was a practitioner, I enjoyed having a good relationship with opposing counsel, spending more time preparing for trial and less time on motions and discovery, being an advocate by figuring out substantive arguments after candidly disclosing contrary authority, and having a good relationship with the court staff. I encourage attorneys today to do the same. It's more satisfying—and more effective—that way.

Judge John Wheeler,
Arapahoe County District Court

The IAALS report addresses the challenges judges and attorneys face at the most basic level of the civil litigation system. Rather than merely "cursing the darkness,"[6] as we district court judges are wont to do, the report provides (1) hard statistics demonstrating the problem; (2) five principles to guide both the filing and the determination of dispositive motions; and (3) eight concrete recommendations for improving the quality, efficiency, and effectiveness of dispositive motions practice.

State Court Resources

The pandemic has accelerated the need for attorneys and judges to rethink the procedural structure of dispositive motions practice in state courts. State courts already work with fewer resources than prior years. Of the 23 Colorado state judicial districts (including Denver), 12 districts have moved away from using *any* law clerks assigned to individual judges and toward a pool of a few "legal research attorneys." Only seven districts continue to use law clerks at all, and four districts use neither. This means that, for the foreseeable future, judges are researching and writing their own orders, largely without assistance.

Complicating this reduction in staff (at least at the state court level) is the "*Warne* effect" on Rule 12(b)(5) motions practice. When the Colorado Supreme Court adopted the *Twombly/Iqbal* plausibility standard in *Warne v. Hall* in 2016,[7] the common wisdom within the judiciary was that plaintiffs' attorneys would start filing 50-page complaints alleging every conceivably relevant fact supporting a claim in an effort to avoid dismissal. Instead, while complaints remained largely unchanged, the number of Rule 12(b)(5) motions filed by defense counsel skyrocketed. The default procedure for a deficient complaint is for the district court judge to (1) detail the deficiencies under *Warne*, and (2) permit the plaintiff to amend under Rule 15(a) before dismissing the complaint—geometrically increasing the courts' dispositive motions load. Based on the pandemic, reduction of district court judges' resources, and the *Warne* effect, counsel and judges alike must rethink the way they approach dispositive motions to develop a more collaborative, focused, and efficient approach to motions practice.

The IAALS recommendation for a pre-Rule 12(b) motion conference between counsel is particularly important as an opportunity for plaintiffs to amend *without leave of the court* under Rule 15(a),[8] thereby avoiding the expense and delay associated with Rule 12(b) motions and avoiding the plaintiff's "mid-motion" amendments, which complicate the briefing process. Under this recommendation, certification under Rule 121(c) § 1-15(8) of any Rule 12(b) motion would include confirmation, at the pre-Rule 12(b) conference, that the plaintiff was offered the opportunity to amend.

As an alternative to the court merely granting the plaintiff leave to amend the complaint in lieu of granting the defendant's Rule 12(b) motion, we have found that staying the briefing to provide the plaintiff with an opportunity for "early discovery" under Rule 26(d)[9] allows the plaintiff to gather evidence that is only in the defendant's possession before responding to a Rule 12(b) motion.

Summary Judgment

Several years ago, our civil division adopted the federal practice of requiring all Rule 56 dispositive motions to be prefaced with a list of facts purported to be undisputed upon which the motion is based: one fact per numbered sentence with reference to a document or sworn statement/affidavit. The response brief then indicates (in correspondingly numbered paragraphs) whether the fact is admitted or denied—and if denied, the factual basis for the denial. The response brief may then cite to additional facts in the same format, with the movant addressing each additional fact in the reply brief. In this manner, the court and other parties are provided with a quick reference to the admitted and disputed facts upon which the court's decision will be based.

In this vein and premised on the IAALS report's first recommendation for a "pre-motion conference" with counsel, I also suggest that movant's counsel, as part of the pre-motion conference, forward a complete list of all facts (with documentary/sworn statement support) to opposing counsel, and then confer in good faith on (1) a *stipulated list of undisputed facts* to preface the summary judgment motion, and (2) an additional list of disputed facts, thereby permitting the parties and the court to concentrate only on those disputed facts, and eliminating the "back-and-forth" procedure currently used. This recommendation also provides the court a more focused and properly narrowed Rule 56 motion.

The IAALS report provides a long-overdue evaluation of traditionally outdated litigation practices with practical recommendations for improving the efficiency and lowering the cost of civil litigation.

A pre-Rule 56 motion conference with the court also avoids the dreaded "dueling" Rule 56 motions that seem to proliferate current civil litigation (i.e., the summary judgment motion that draws an immediate and competing motion from opposing counsel on the same issues). Addressing such competing motions is awkward and extremely time-consuming for the court. If the court conference reveals competing motions, our civil division requires counsel to submit simultaneous initial motions and simultaneous responses with no reply briefs—instead of two "packages" of three briefs—thereby giving each party two briefs.

Pro Se Parties

Ever-present in state courts is the extra care required when pro se parties are involved. The confusion and "deer-in-the-headlights" reaction of pro se litigants to litigation in general is exponentially compounded when opposing counsel files a dispositive motion of any type. The tension inherent in courts holding pro se litigants to the same rules as represented parties and providing them with assistance in understanding those rules[10] is readily apparent. To address these issues, our civil division finds that an immediate telephone status conference with the pro se party and opposing counsel (1) is appropriate to explain both the procedure and the importance of Rule 12 and 56 motions to pro se litigants, (2) does not overstep the court's ethical boundaries, and (3) improves the efficiency of motions practice. We further facilitate communication between counsel and pro se parties by requesting counsel to email all filings with or by the court to the pro se party immediately, in addition to service by US mail. This procedure places the parties on a more level field.

The IAALS report provides a long-overdue evaluation of traditionally outdated litigation practices with practical recommendations for improving the efficiency and lowering the cost of civil litigation. We, as a division, are hopeful that the Colorado Supreme Court Civil Rules Committee will adopt the IAALS recommendations.

Conclusion

Courts around the country are answering the call for improvement and innovation by incorporating the IAALS recommendations into their practice standards. Learn more about implementing recommendations for dispositive motions at https://iaals.du.edu/projects/efficiency-motion, as well as other efforts to improve our state and federal court system at https://iaals.du.edu/projects.



R. Brooke Jackson is a judge for the US District Court for the District of Colorado. Before his appointment to the federal bench in 2011, he served as a district court judge for the First Judicial District from 1998 to 2011, where he also served as chief judge from 2003 to 2011. Previously, he was a partner at Holland & Hart, LLP. **John L. Wheeler** was appointed to the 18th Judicial District as a district court judge in 2006. Before his appointment to the bench, he was a partner at Pryor Carney & Johnson PC, from 1983 to 1995, and then a partner at Antonio Bates Bernard PC until 2006, with a focus on civil law. Judge Jackson and Judge Wheeler extend their gratitude to **Brooke H. Meyer**, IAALS manager of Civil Justice Reform, for her thoughtful insights on this article and her commitment to improving the judicial system.

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NOTES

1. Order Regarding COVID-19 and Operation of Colorado State Courts, Colo. Supreme Court (Mar. 16, 2020); General Order 2020-2, Court Operations Under the Exigent Circumstances Created by COVID-19, US Dist. Court for the Dist. of Colo. (Mar. 13, 2020).

2. The most common dispositive motions filed are motions to dismiss for failure to state a claim (CRCP 12(b)(5) and Fed.R.Civ.P. 12(b)(6)) and motions for summary judgment (CRCP 56 and Fed.R.Civ.P. 56).

3. Kauffman, *Efficiency in Motion: Recommendations for Improving Dispositive Motions Practice in State and Federal Courts* (IAALS 2019). The IAALS report is the culmination of nearly three years of research, surveys, and expert input into the opportunities for improvement and innovation. The recommendations were built on IAALS' empirical study of summary judgment in 10 US district courts. Kauffman and Cornett, *Efficiency in Motion: Summary Judgment in the U.S. District Courts* (IAALS 2018).

4. *Warne v. Hall*, 373 P.3d 588 (Colo. 2016). *See also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

5. My practice standards are available on the US District Court's website (rev. Dec. 1. 2019), http://www.cod.uscourts.gov/Portals/0/Documents/Judges/RBJ/RBJ_Practice_Standards.pdf.

6. Watkinson, *The Supreme Conquest, and Other Sermons Preached in America* 217–18 (1907).

7. *Warne*, 373 P.3d 588. *See also Twombly*, 550 U.S. 544; *Iqbal*, 556 U.S. 662.

8. CRCP 15(a) ("A party may amend his pleading once as a matter of course at any time before a responsive pleading is filed . . . .").

9. CRCP 26(d) ("*Except when authorized* by these Rules, *by order*, or by agreement of the parties, a party may not seek discovery from any source before service of the Case Management Order pursuant to C.R.C.P. 16(b) . . . .") (emphasis added).

10. Colo. Code Jud. Conduct, Rule 2.2, cmt. 4 ("It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard."). *See also Negron v. Golder*, 111 P.3d 538, 541 (Colo.App. 2004) ("pro se litigants are bound by the same rules of civil procedure as attorneys licensed to practice law in this state.").

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