

**COLORADO SUPREME COURT
COMMITTEE ON RULES OF CIVIL PROCEDURE
MINUTES OF MEETING**

January 30, 2009

The Colorado Supreme Court Civil Rules Committee was called to order by Richard W. Laugesen at 1:39 p.m. in the Supreme Court Conference Room, Fifth Floor, Colorado Judicial Building, 2 East 14th Avenue, Denver, Colorado.

The following members were present:

Michael H. Berger
Janice B. Davidson
David R. DeMuro
John A. DeVita, II
Peter A. Goldstein
Lisa Hamilton-Fieldman
Richard P. Holme
Charles Kall

Thomas K. Kane
Richard W. Laugesen
David L. Michael
Nancy E. Rice
Andrew M. Rosen
Howard I. Rosenberg
Frederick B. Skillern
Jane A. Tidball

The following members were excused:

James Abrams
C. Scott Crabtree
Hubert A. Farbes, Jr.
Christina Habas
Carol Haller
David C. Little

Christopher H. Mueller
Ann Rotolo
Lee N. Sternal
Robert V. Trout
John R. Webb
Shirley Williams

Approval of Minutes:

The Minutes of the September 26, 2008 Civil Rules Committee meeting were approved as submitted.

Chairman's Report/Information Items

Chairman Laugesen thanked the Committee for its understanding of the cancellation of several of the scheduled Civil Rules meetings this past year due to lack of sufficient business to justify a meeting. He noted that it was good that the

Committee had no pressing business--that meant that the rules were working as they should and that changes or remediation were not necessary.

Chairman Laugesen called to the Committee's attention the information items in the Agenda Packet:

- The 2009 Civil Rules Committee Meeting Schedule
- The Updated Civil Rules Committee Member Roster
- The Supreme Court's Announcement of a New Rule Requiring Lawyers to Disclose Their Professional Liability Status
- State Judicial's Updated Listing of Mandatory E-Filing Courts
- State Judicial's Updated Schedule of State Court Filing Fees, Surcharges and Costs
- The Colorado Lawyer Listing of New Probate Court Forms
- State Judicial's Announcement of Amendment of Chief Justice Directive 08-02 (Pertaining to Assessment of Cost Recovery Fees for Maintaining Technical Infrastructure Necessary to Support Electronic Access to Court Records)
- State Judicial's Announcement of Amendment of Chief Justice Directive 98-01 (Pertaining to Costs for Indigent Persons in Civil Matters)
- Supreme Court Order Amending C.R.C.P. 503(a) and Form JDF 250, Effective November 13, 2008
- Notification by Colorado Court of Appeals of Its New Policy Concerning Citations to Electronic Records and Electronically Filed Briefs (to Become Effective March 1, 2009)
- Announcement of New F.R.E. 502 Pertaining to Inadvertent Disclosure of Attorney-Client or Work-Product Privileged Matters

- Supreme Court Announcement of Its New Policy of Issuing of Its Attorney Registration Statements and Attorney Responses by Electronic Rather Than Paper Means

E-Discovery Subcommittee Report on Its Review of the National Conference on Uniform State Laws' Proposal and The Subcommittee's Thoughts Generally.

Chairman Laugesen directed the Committee's attention to Agenda Item 4 concerning E-Discovery--part of the Subcommittee's review of the National Conference on Uniform State Laws E-Discovery Rules Proposal.

Mr. Laugesen asked Subcommittee Chair Richard Holme to inform the Committee of the background of the matter and the Subcommittee's recommendations. The Committee's attention was directed to pages 39-57 of the Agenda Packet.

Richard Holme reported that pursuant to the Committee's charge, the Subcommittee met and discussed the National Conference on Uniform State Laws proposed rules. Mr. Holme noted that the Uniform Rules [set forth in the Agenda Packet at pages 40-53] were similar to the Federal Rules, and like the Federal Rules, difficult to reconcile with Colorado's existing case management system and means of dealing with all forms of information [specifically C.R.C.P. 16, 16.1, 16.2 and 26]. C.R.E. 1001 defines writings and recordings to include letters, words or numbers or their equivalent, set down in handwriting, typing, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation. Current rules in Colorado contemplate early intervention by the Court in discovery matters and support the issuance of a Case Management Order by the Court calling for tailored discovery in each particular case so that discovery can be fashioned for each particular matter on an as-needed basis rather than attempting a one-size-fits-all approach.

Mr. Holme reported that members of the Subcommittee determined that there had been few complaints regarding the process of discovery under current state rules. The Institute for the Advancement of the American Legal System and American College of Trial Lawyers had conducted recent studies concluding that Federal Rules have received considerable criticism [see summary at page 54 of the Agenda Packet]. The most common criticism is the added, sometimes massive expense of complying with Federal and Federal-like E-Discovery rules. Those studies found that not only was the added cost of E-Discovery substantial, but often deters parties from bringing or defending lawsuits, and that rulings by Federal Court judges and

local rules adopted to implement the Federal E-Discovery approach have expanded mandated costs even further.

Mr. Holme noted that matters in Federal Court frequently involve large monetary claims that may justify some additional expense, whereas a majority of state court cases seek recoveries of less than \$100,000 and often involve pro se litigants. He noted that there was the additional concern that special rules such as the Federal and Conference on Uniform State Laws approach would not only add unnecessary cost in most cases, but attorneys would feel compelled to request electronic discovery in every case, either to show their zealotry on behalf of their client or to protect themselves from assertions that they committed malpractice by failing to do so.

Mr. Holme reported that it is virtually impossible to justify the likely incremental cost of such an arrangement. In those larger cases filed in Colorado state courts that might justify more elaborate E-Discovery rules, either party can seek permission from the judge under existing case management rules to be allowed to utilize particular kinds of E-Discovery without the risk of imposing the complications and mandatory costs of the Federal system on all state court litigants.

Mr. Holme reported that based on its study, discussion and lack of need to adopt rules specifically on E-Discovery, the Subcommittee recommended that the Committee not adopt either the Uniform or Federal E-Discovery rules, and that Colorado's present arrangement remain unchanged.

A motion was made, second and approved 12:0 to accept the recommendations of the Subcommittee and leave Colorado's present system in dealing with E-Discovery unchanged. The Committee also approved the Subcommittee's proposed report to the Colorado Legislature [attached in draft at pages 56-57 of the Agenda Packet]. Mr. Laugesen will place that report into appropriate final form and submit it to Carol Haller to be forwarded to the state legislator who had requested the Committee's position concerning suitability of the Uniform Rules.

A member inquired about guidelines for records retention. Several members responded that there are no specific guidelines in any of the rules. Rather, there are two types of recommendations: Save everything or systematically destroy. It was observed that the need for retention will vary, and will generally be a matter of individual choice. Of course, if a dispute or controversy is foreseen, it is always wise for the person or entity to maintain all data on that particular matter.

Chairman Laugesen thanked the Subcommittee for its work and asked that they continue to monitor the various approaches so that Colorado's approach can be effectively evaluated from time-to-time.

C.R.C.P. 411(a)--Are There Language Difficulties in the Rule That Necessitate Clarification?

Chairman Laugesen next directed the Committee's attention to Agenda Item 5 concerning C.R.C.P. 411(a) and Andy Rosen's observation that the rule has several inadequacies.

Mr. Laugesen asked Andy Rosen to inform the Committee of his concerns and recommendations, and directed the Committee's attention to pages 58-61 of the Agenda Packet.

Andy Rosen noted that C.R.C.P. 411(a) deals with appeals from county to district court. In recently filing an appeal, he noticed that there appear to be two problems that frequently arise--docketing of matters in a timely manner and orderly determination of the bond amount. He observed that procedures set forth in the present rule were substantially less than adequate and needed clarification. Mr. Rosen proposed changing the rule to track with appeals from District Court to the Court of Appeals. His proposal [set forth in the Agenda Packet at page 59] would be to file Notice of Appeal in the District Court, with service on the County Court. In his proposal, the appeal bond would be posted 15 days after the court ordered the bond amount. Mr. Rosen stated that, under his proposal, the proper means of docketing would be made clear and the appealing party would be able to ascertain the bond amount, or, whether a bond is even necessary in a matter that does not involve a monetary judgment.

A member mentioned that the proposed changes are contrary to the current process in District Court, and may require a bond in instances where a bond is not currently required. Mr. Rosen responded that a bond can be waived as well as some costs, but that would be dealt with by the court in its fixing of the bond amount.

Several members voiced concern over the proposed change and that it might adversely affect how the clerks handle such matters. They felt that there needs to be input by clerks as to how the proposal might affect them. There were also questions and concerns about electronic filing and which judge would set the bond--i.e., the county or district court judge. Another member noted that the appeal process may be statutory and that there would need to be a review of statutory requirements before attempting any change.

A motion was made, seconded and approved 12:0 to refer the issue to a subcommittee. Chairman Laugesen appointed Judge DeVita, David Michael, Shirley Williams, Judge Rotolo and Andy Rosen. Chairman Laugesen appointed Andy Rosen to serve as Subcommittee Chair.

C.R.C.P. 6(a)--Is Further Refinement of the Days-Counting Rules Necessary for Counting Backward?

Chairman Laugesen next directed the Committee's attention to Agenda Item 6 concerning C.R.C.P. 6(a) and whether further refinement of the days-counting rules was necessary for counting backward.

Mr. Laugesen directed the Committee's attention to pages 62-70 of the Agenda Packet and asked Subcommittee Chair Richard Holme to review for the Committee the background of the issue and his Subcommittee's proposal.

Mr. Holme reviewed the Committee's efforts in developing rules concerning time computation, noting that those rules are all based on counting forward. He further noted that there is also sometimes a necessity of counting backward, which can be challenging. As noted in his submissions at pages 62-64 of the Agenda Packet, when counting backward and ending on a weekend or holiday, the question becomes whether one continues to count backward or should they count forward? The word "subsequent" in the rule is not providing guidance. Mr. Holme suggested adding a comment to further explain the meaning of counting both directions and how the process should be done. He noted that this sort of proposed change was being made to the Federal rules that will be up for approval in December of 2009. In the proposed Federal changes, counting was redone; a day is a day; and there are no holidays. Forward and backward are defined and practitioners count in the same direction.

Several members mentioned that the proposed comment may create conflicts with other rules and statutes. Another observed the changes in the Federal rules may mean more changes to Colorado rules. It was therefore moved that the proposal be tabled for further study. The motion was approved 10:2. Chairman Laugesen asked Mr. Holme to continue with his study and report back at the next meeting.

Whether County Court E-Filing/Serving [Presently in Place by Way of a Chief Justice Directive] Should Be Made Into a Permanent Rule.

Chairman Laugesen next directed the Committee's attention to Agenda Item 7 concerning the County Court E-Filing/Serving rules now existing by way of a Chief

Justice Directive [CJD 06-02], and the question of whether the pilot project arrangement should be made into a permanent rule. The Committee's attention was directed to pages 71-72 of the Agenda Packet.

Mr. Laugesen noted that the County Court E-Filing/Serving arrangement was patterned after and is very similar to C.R.C.P. 121, § 1-26 in the District Court, except that the District Court rule is found in the C.R.C.P. 121 Practice Standards, whereas the County Court does not have Practice Standards. He suggested possible placement of the County Court approach as a permanent rule as a new C.R.C.P. 305.5. Mr. Laugesen also proposed submitting the issue and further refinement of the arrangement to the E-Filing/Serving Subcommittee for direction.

A member inquired if there had been problems with pro se parties. Mr. Laugesen responded that the Subcommittee would have information about that issue and would also be considering other needed refinements to the County Court arrangement.

A motion was made, seconded and approved 13:0 to submit the question of transforming the County Court E-Filing/Serving pilot program into a permanent rule to the County Court E-Filing/Serving Subcommittee for its study and recommendations. Chairman Laugesen will reconvene the Subcommittee and coordinate the Committee's charge.

A member suggested a poll of County Court clerks and judges as to how the pilot program has been working. Mr. Laugesen responded that he would add that to the charge.

Garnishment Rules and Forms--Whether a Revision Is Necessary Upon the January 1, 2009 Increase in the State Minimum Wage.

Chairman Laugesen next directed the Committee's attention to Agenda Item 8 on whether any revision of garnishment rules or forms has become necessary upon the January 1, 2009 increase in the state minimum wage.

Mr. Laugesen directed the Committee's attention to pages 73-83 of the Agenda Packet and asked the Subcommittee Chair, Andy Rosen, to provide a report of the Subcommittee's review and recommendation.

Mr. Rosen reported that the last revision of garnishment forms purposefully removed federal and state minimum wage numbers so that computations may be made by using whatever the minimum wage may be at the time. He reported that because

of that approach, no changes are necessary or will be necessary in the future as changes are made in federal and state minimum wage amounts.

By consensus, the Committee approved Mr. Rosen's report and recommendation of no change.

Federal Rules Subcommittee--Whether Any of the Recent Changes to the Federal Rules Should be Considered for Incorporation Into Colorado Rules.

Chairman Laugesen next directed the Committee's attention to Agenda Item 9 concerning consideration of recent federal rule changes and whether any of those changes might be suitable for Colorado. Mr. Laugesen asked Federal Rule Subcommittee Chair David DeMuro to report on his Subcommittee's activities.

Mr. DeMuro reported that the only change to the federal rules on December 1, 2008 related to maritime claims. He noted that there are some proposed changes that will be up for approval in December of 2009. Those proposals include changes to rules on days-counting; classes of experts; and summary judgment motions. He also noted the recent addition of new F.R.E. 502 [mentioned previously in the Agenda's Information Items]. Mr. DeMuro stated that nothing needs to be addressed presently, and that his Subcommittee would continue to follow the federal proposals, particularly the days-counting issue.

Archaic Language Subcommittee--Further Proposals by the Subcommittee.

Chairman Laugesen next directed the Committee's attention to Agenda Item 10 pertaining to the ongoing work of the Archaic Language Subcommittee.

Mr. Laugesen referred the Committee to pages 84 to the end of the Agenda Packet and asked Subcommittee Chair Professor Howard Rosenberg to provide his Subcommittee's report. Professor Rosenberg presented several proposed amendments to rules having archaic language. In C.R.C.P. 17(b) and (c), 55(b) and 57(d), Professor Rosenberg recommended replacing the word "infant" with "minor child" and to also replace the terms "father and mother" in C.R.C.P. 17, with the term "parents." Professor Rosenberg also recommended throughout the rules replacing "mental incompetent," "incompetent person" and "lunatic" with "mentally disabled person" or "mental incapacitated person." Further adding to his list, Professor Rosenberg recommended replacing the term "averment" in C.R.C.P. 8(b) with "truth of any claim." He also noted several gender references ["his" or "him"] needing change in C.R.C.P. 17(b) and 55(b).

In discussing Professor Rosenberg's recommendations, several members were concerned about the replacement of "lunatic" with "mentally disabled." A member suggested "persons under a disability" as defined in C.R.S. 13-31-101. Another member mentioned that the term "disability" is sometimes a defined term--that there is merit for replacing the word "lunatic" in the rules, but a correct word should be selected. Another member suggested that perhaps adding reference to adjudication would help. Several other members stated there are no problems with the term, and it should not be changed. Mr. Laugesen noted that the many new probate forms and rules should be consulted if changes are to be made. Another member suggested the Probate Committee should be consulted on any proposed change.

A motion was made, seconded and approved 14:0 to replace the words "mother" and "father" in C.R.C.P. 17(b) and throughout the rules with the term "parents" or "parent."

Another motion was made, seconded and approved 12:0 to replace the word "infant" with the word "minor" or "minor child" throughout the rules. Andy Rosen volunteered to do a word search of the rules and replace "infant" with "minor" or "minor child" throughout. Chairman Laugesen noted that the county court and small claims rules should also be made consistent.

C.R.C.P. 121, § 1-1, Notice of Withdrawal to Corporate Entities.

Not on the Agenda was a topic raised by Magistrate Hamilton-Fieldman concerning notice to corporate or other legal entity that an attorney will not provide representation. She states that in her handling of cases that such parties need to be told that they do not have an attorney. She notes that officers or managers often appear not understanding they are not represented by an attorney and cannot themselves appear on behalf of the corporation. Magistrate Hamilton-Fieldman stated that the Practice Standard [C.R.C.P. 121, § 1-1] needs to be amended to deal with this problem.

The Committee, through a straw vote, favored changing the substance of the Practice Standard to deal with the problem. Magistrate Hamilton-Fieldman will develop language for the Committee's review and submit it next meeting.

The meeting was adjourned at 3:29 p.m. The next regular meeting is scheduled for **Friday, February 27, 2009** at 1:26 p.m., Supreme Court Conference Room Fifth Floor, 2 East 14th Avenue, Denver, Colorado.

Respectfully submitted,

April Bernard