

MEMORANDUM

To: Civil Rules Committee

From: Judge Jones

Re: Subcommittee on C.R.C.P. 4(m)

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This subcommittee was created to look at how C.R.C.P. 4(m) — which deals with dismissal of an action if the plaintiff fails to timely serve the defendant — might be amended to clarify whether language in a standard delay reduction order can qualify as “notice” under the rule when a court considers dismissal on its own. But the subcommittee took a difference tack: the focus became the timing of such notice (rather than the nature or content of the notice). As well, the subcommittee looked at making explicit that a court that has dismissed an action under the rule must notify the parties of that dismissal.

To those ends, the subcommittee considered a number of potential revisions, which are shown in my memorandum to the subcommittee of November 19, 2019. *See Attachment 1.* Consensus emerged over the latter issue: notice of the dismissal should be expressly required by the rule. There was a lesser degree of agreement over the notice-timing issue. (Indeed, one district court judge, who didn’t serve on the subcommittee, suggested that the notice provision be eliminated. *See Attachment 2.*) But there is significant support on the subcommittee for saying when the court must give the required notice, as well as for making explicit that the provisions of C.R.C.P. 6(b) apply to requests for extensions of time to effect service.

The proposed amendments appear as follows, with new material shown in italics:

**(m) Time Limit for Service.** If a defendant is not served within 63 days ~~(nine weeks)~~ after

the complaint ~~is~~ *was* filed, the court — on motion or on its own after notice to the plaintiff — shall dismiss the action without prejudice against that defendant or order that service be made within a specified time. *Any such notice by the court shall be served on the plaintiff no sooner than 35 days after the complaint was filed and no later than 7 days before the case is dismissed.* But if the plaintiff shows good cause *or excusable neglect in accordance with C.R.C.P. 6(b) before the court dismisses the action under this subdivision (m),* the court shall extend the time for service for an appropriate period. *If the court dismisses the action under this subdivision (m), the court shall immediately serve the order of dismissal on all parties in accordance with C.R.C.P. 5.* This subdivision (m) does not apply to service in a foreign country under rule 4(d).

If these amendments are approved, a standard case management order sent out at the beginning of the case likely wouldn't satisfy the notice requirement (because it would be sent out too soon). Any such notice would have to be in some separate, subsequent document. That would be consistent with *Curry v. Zag Built LLC*, 2018 COA 66, ¶ 38, which held that a boilerplate delay reduction order doesn't satisfy Rule 4(m)'s notice requirement. The objective is to assure that a plaintiff is clearly aware that the court will dismiss the case if the plaintiff fails to serve the defendant within the sixty-three-day period. Hopefully, that will spur plaintiffs to get their cases moving.

The requirement to notify the plaintiff of a dismissal in accordance with C.R.C.P. 5 is also new. It appears that some courts simply enter an order of dismissal and close the case without any such notice, potentially impacting the plaintiff's ability to seek to set aside the judgment.