AGENDA

COLORADO SUPREME COURT
COMMITTEE ON THE
RULES OF CIVIL PROCEDURE

Friday, January 26, 2018, 1:30p.m.
Ralph L. Carr Colorado Judicial Center
2 E.14th Ave., Denver, CO 80203
Fourth Floor, Supreme Court Conference Room

I. Call to order

II. Approval of October 27, 2017 minutes **[Page 1 to 5]**

III. Announcements from the Chair

A. Transmittal Letter November 17, 2017 **[Page 6 to 13]**

B. Email from Justice Gabriel re rule proposal **[Page 14]**

C. New Members:

- Michael Hofmann, Bryan Cave
- Jeremy Botkins, Legal Counsel, State Court Administrator's Office

D. Member Introduction

IV. Business

A. C.R.C.P. 6 & 59—(Judge Jones) **[Page 15 to 16]**

B. Need for civil practitioner representation on a Public Access Committee subcommittee dealing with redaction of court-filed documents—(Judge Jones)

C. C.R.C.P. 107—(Lisa Hamilton-Fieldman)

D. Comment to C.R.C.P. 26—(Richard Holme) **[Page 17 to 18]**

E. Memorandum and minor changes to C.R.C.P. 16 & 26—(Richard Holme) **[Page 19 to 21]**

F. Fixing Discrepancy in existing C.R.C.P. 26 re expert depositions—(Richard Holme) **[Page 22 to 23]**

G. C.R.C.P. 69—(Brent Owen)

H. C.R.C.P. 58(a) & 79— (Judge Webb) **[Page 24 to 31]**

I. Procedure for Appeals from Municipal Courts of Record from Judge Moss—(Judge Berger) **[Page 32]**

J. Suggestion regarding TMO witness list requirements— (Damon Davis) **[Page 33 to 35]**

K. C.R.C.P. 121 §1-26—(Judge Berger) **[Page 36 to 40]**

L. C.R.C.P. 80 & 380—(Judge Espinosa)

V. New Business

VI. Adjourn—Next meeting is March 30, 2018 at 1:30pm

Michael H. Berger, Chair
michael.berger@judicial.state.co.us
720 625-5231

Jenny Moore
Rules Attorney
Colorado Supreme Court
jenny.moore@judicial.state.co.us
720-625-5105

Conference Call Information:

Dial (720) 625-5050 (local) or 1-888-604-0017 (toll free) and enter the access code, 24075260 followed by # key.

Colorado Supreme Court Advisory Committee on the Rules of Civil Procedure
October 27, 2017 Minutes

A quorum being present, the Colorado Supreme Court Advisory Committee on Rules of Civil Procedure was called to order by Judge Michael Berger at 1:30 p.m., in the Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Colorado Judicial Center. Members present or excused from the meeting were:

Name	Present	Excused
Judge Michael Berger, Chair	X	
Chief Judge (Ret.) Janice Davidson	X	
Damon Davis	X	
David R. DeMuro	X	
Judge J. Eric Elliff	X	
Judge Adam Espinosa	X	
Judge Fred Gannett	X	
Peter Goldstein	X	
Lisa Hamilton-Fieldman		X
Richard P. Holme	X	
Judge Jerry N. Jones	X	
Judge Thomas K. Kane	X	
Cheryl Layne	X	
John Lebsack	X	
Judge Cathy Lemon	X	
Bradley A. Levin	X	
David C. Little	X	
Chief Judge Alan Loeb		X
Professor Christopher B. Mueller	X	
Gordon "Skip" Netzorg		X
Brent Owen	X	
Judge Sabino Romano	X	
Stephanie Scoville	X	
Lee N. Sternal	X	
Magistrate Marianne Tims		X
Jose L. Vasquez	X	
Ben Vinci	X	
Judge John R. Webb	X	
J. Gregory Whitehair	X	
Judge Christopher Zenisek	X	
Non-voting Participants		
Justice Richard Gabriel, Liaison	X	

I. Attachments & Handouts

October 27, 2017 agenda packet

II. Announcements from the Chair

- The September 29, 2017 minutes were approved as submitted;
- Justice Eid wanted to be at the meeting today, because this will likely be her last meeting, but yesterday the Senate Judiciary Committee approved her nomination and a vote in front of the senate will likely be held on Thursday. Friday or Monday of the following week she will be sworn in as a judge on the 10th Circuit Court of Appeals. Justice Gabriel is our new liaison. He had another meeting scheduled this afternoon, but he will be here as soon as it's over to officially introduce himself; and
- The C.R.C.P. 79 & 379 subcommittee was formed at the last meeting, and Judge Webb is chair.

III. Business

A. Judicial Department Forms

Judge Berger introduced three guests, Mr. Jacque Machol, private practitioner, Steven Vasconcellos, Senior Court Programs Manager at SCAO, and Claire Walker, Court Services Manager at SCAO, and began with some background information related to the Judicial Department Forms (JDF).

The forms were locked down, meaning they were posted in a non-editable format, so users couldn't modify them. At some point in the past, copyright notices were added, and recently, in response to the forms being locked down, checkboxes were added. Now, the user of the form must check one of two checkboxes indicating that the JDF has or has not been modified. If the JDF has been modified, the copyright and JDF number at the bottom of the form must be removed. Ben Vinci and Mr. Machol sent objections related to the checkboxes and copyright notice to Judge Berger and their emails are included in the agenda packet. Also, Judge Berger met with the Counsel to the Chief Justice and received some background information related to the forms. Judge Berger believed the committee should take this up, because some forms are amended by this committee and others are amended by SCAO. What, if any, role should this committee have on forms that relate to the civil rules? At this point, Judge Berger turned discussion over to Mr. Vasconcellos.

Mr. Vasconcellos stated that there are many forms online available for litigants that are maintained by SCAO in conjunction with the Legal Team. The forms cover different types of filings, and most forms are for domestic relations, whereas district civil has very few forms. Although some attorneys do use them, the primary intended customer for the forms are self-represented litigants, and forms have grown to offer procedural guidance to self-represented parties. The trial bench has been concerned that the forms appear to be a specific JDF, but have been altered. For instance, a form is filed stating that it is JDF X, but because certain subsections of the form have been deleted or modified, it isn't JDF X as published by the judicial department. The trial bench has asked that there be an indication on the form alerting the judge that it has been modified.

Not long after the forms were locked down, the Probate Rules Committee was formed, and it and the probate bar were very vocal that they wanted the forms unlocked.

Ultimately, SCAO agreed, but if the probate forms were going to be unlocked, then so must all other forms. As a compromise, the checkboxes emerged to show a trial judge that the form been modified, while enabling the forms to be posted in an editable format. The checkboxes are not mandatory and filings will not be rejected if the checkboxes are not marked. Court Services trains trial court staff statewide, and the checkboxes will not be reviewed by the clerk's office, they are only for the judicial officer. The Chief Justice's office, the Probate Rules Committee, SCAO Court Services, and Legal Team were involved, but the change and issues surrounding the change could have been better communicated.

A member stated that some of the rules refer to the forms, so if a rule refers to a form it should be amended by the committee. Another member pointed out that some rules impact forms, and when the rules are amended the forms must also be changed, so the rules and forms are consistent. Another member asked if the supreme court wanted the committee to weigh-in on this, and the consensus from the Chief Justice's counsel was no. Another member asked if checkboxes don't affect filing, then why is the committee discussing them? Another member stated that forms attached to the rules should be amended by the committee, but global issues aren't for the committee. A member suggested we have an open dialog with SCAO to discuss changes and that while the committee should communicate better with SCAO, the Civil Rules Committee doesn't want to get in the forms business.

There were a few questions and comments about the copyright. A member asked if the JDFs been filed with the copyright office? Another member asked why publicly used forms are being copyrighted? Most members thought that the copyright symbol at the bottom of the forms should be removed. Mr. Vasconcellos doesn't have information related to when copyright notices were added to the forms, except that they were on the forms before the checkboxes were added.

There was a motion to recommend removal of the parenthetical information in the second checkbox that passed 24:0. Judge Berger paused committee discussion to introduce Justice Gabriel, the committee's new liaison justice. Justice Gabriel stated that he is always available and very happy to be working with the committee. Judge Berger asked if the committee should establish a standing subcommittee that would have some interface with SCAO regarding the forms; while the committee wasn't interested in doing that it agreed that Mr. Vinci's County Court Rules subcommittee will be the liaison for the county court forms and Greg Whitehair will be the liaison for the Domestic Relations forms.

B. County Court Jurisdiction

Judge Berger reminded the committee that it proposed a county court jurisdictional increase from the current amount of $15,000 to $35,000. The proposed increase was posted for public comment and the county court bench worried that the increase would dramatically increase their workload. Also, there were concerns that an increase in county court jurisdiction could increase default judgments, which may adversely affect many self-represented parties proceeding in county court. Subcommittee chair, Judge Davidson,

stated that Court Services did workload studies and it thought $35,000 was appropriate and workable and that county courts have the personnel to absorb the increase. In August, Judge Berger appeared before the Court Services Committee to discuss the recommendation, and the committee endorsed it. A motion to reaffirm that the committee stands by its proposal to increase county court jurisdiction to $35,000 and that the increase is consistent with other rule changes in the last two years aimed at access to justice and the just and efficient resolution of cases passed 23:1.

C. C.R.C.P. 16.1

Rule 16.1 was posted for public comment and CDLA submitted the only comment received. Richard Holme's response to CDLA is embedded in the letter on pages 23-24 of the agenda packet. If the committee approves Mr. Holme's response, Judge Berger will write a letter to Justice Gabriel retransmitting the proposed change to the supreme court. Mr. Holme stated that CDLA is concerned with things the committee already discussed, but that a comment could be drafted in the way they recommend.

There was a motion to amend the comment as suggested by CDLA, with one amendment: in the second sentence insert "may" before "impose". Some members thought that the committee shouldn't make any additional changes to the comment, because the comment, with no additional amendment, allows trial judges to be tougher and force complete disclosure. The comment, with no additional amendment, is in-line with the spirit of simplified procedure and it shouldn't be changed. Based on discussion, the motion to amend the comment was withdrawn.

Another amendment was offered, but it wasn't in response to the CDLA's letter; the committee decided that it was only considering amendments in response to CDLA's letter, so the amendment was withdrawn. A motion to adopt no new changes in response to CDLA's letter and resubmit Rule 16.1 to the supreme court passed 21:2.

D. Letter stating concerns about *Catholic Health Initiatives Colorado v Eric Swensson Assoc's, Inc.*, (2017 CO 94)

Mr. Holme brought this to the committee, because he is concerned with the negative implications of *Swennson*, to include the assumption that Rule 37(c) always controls decisions whether expert testimony should be limited or precluded. Mr. Holme's memorandum and recommended revisions are on pages 34-41 of the agenda packet.

Judge Berger was hesitant to bring this up, because as a committee of the supreme court, he wasn't sure if it's appropriate to debate the opinions of the court. A member stated he agreed with Judge Berger and there may be unintended consequences of amending rules in response to an opinion. Another member asked why would the court adopt rule changes that would overturn an opinion? The committee generally agreed that any action would be inappropriate. There was a motion to take no action in response to the opinion that passed 18:4.

E. C.R.C.P. 6 & 59

Judge Jones reminded the committee that at the last meeting the committee narrowly approved a recommendation to adopt, in concept, changes to Rules 6 & 59 that mirror their federal counterparts. The subcommittee's report is on pages 44-45, but the memo on pages 46-51 is solely Judge Jones's work. Rule 60 does not need to be amended, because it doesn't say anything about extensions of time, but Rule 62(a) provides an automatic stay for 14 days. He looked at the federal rules and their automatic stays are 14 days, but he wants to raise this as the only potential additional change for the committee to consider. There was a motion to adopt the proposal on pages 44-45, and discussion on the motion began.

A member stated that she will be voting against the proposal. She believes that the committee shouldn't do anything, because if there is a problem, where is the data supporting it? The anecdote about parties losing their right to file under Rule 59 is not supported. Not allowing for extensions is harsh and courts will still encounter situations where an extension should be granted. Also, a change here could have unforeseen consequences with other rules and procedures. Alternately, another member stated that at some point, the case needs end; twenty-eight days with no extensions will allow things to end, and there must be finality to file an appeal. Twenty-eight days is an appropriate time frame for most cases, and rules should be drafted for common circumstances, not rare situations. The time frame has been a federal rule for 80 years and they haven't experienced the problems discussed. A vote was taken, and the motion failed 7:15. Hearing no motion, the subcommittee offered to draft a fallback or compromise language and present at the next meeting.

F. C.R.C.P. 26

Tabled to November 17, 2017 meeting.

G. C.R.C.P. 107

Tabled to November 17, 2017 meeting.

IV. Future Meeting

November 17, 2017
The Committee adjourned at 3:45 p.m.

Respectfully submitted,
Jenny A. Moore

Court of Appeals

STATE OF COLORADO
2 EAST FOURTEENTH AVENUE
DENVER, COLORADO 80203
720-625-5000

Michael H. Berger
Judge

November 17, 2017

Honorable Richard Gabriel, Liaison Justice
Colorado Supreme Court

Re: Recommendations of the Civil Rules Committee—C.R.C.P. 53; 120; 121, Section 1-15; Business Records exception forms and change to C.R.C.P. 16

Dear Justice Gabriel:

I write to you in your capacity as the Liaison Justice to the Civil Rules Committee.

The Committee presents the following four recommendations to the Court.

1. C.R.C.P. 53—Masters

The Committee previously recommended a major rewrite of Rule 53 both to conform to Federal Rule of Civil Procedure 53 and to address a number of other issues that have arisen regarding the operation of the rule.

Over the years many questions have been raised by lawyers and judges regarding when the appointment of a master was appropriate or necessary. There was general agreement within the Committee that masters should not be appointed merely to offload

the work of busy district judges, but instead such appointments should be limited. The proposed rule accordingly tightens the appointment criteria.

The question of costs is a major consideration in the appointment of masters. When a district judge decides a case or a matter, there is no assessment to the litigants for the actual costs of that adjudication. The judge and the other court employees earn state-paid salaries, but there is no specific assessment to litigants for those costs. The situation is exactly the opposite when a master is appointed: the costs, sometimes very substantial, are charged directly to the litigants who must pay the charges under pain of contempt. This difference in cost allocation informs, or should inform, when it is appropriate for a court to appoint a master.

The costs also bear upon access to justice because the appointment of a master may greatly increase the costs of the litigation. Many litigants simply do not have the economic resources to pay these additional litigation expenses.

Finally, the existing rule is unclear as to the meaning of de novo review, provided for in C.R.C.P. 53(j). De novo review means different things in different contexts and the Committee believes that the rule should explicitly address the meaning of the term in this context. The proposed rule does so.

These proposals initially were submitted to the Court in December 2016 and the Court posted the proposed rule for public comments. One comment was received, and in view of the comment, the Committee reconsidered its proposal. After further discussion, the Committee recommends one change to its original proposal: that the proposed Comment to Rule 53 be revised to include a reference to C.R.C.P. 122 in the first sentence of the

comment but to delete the second sentence of the proposed Comment.

The Committee recommends that if the Court adopts the proposed rule that it become effective on the first day of the first month following the Court's adoption of the proposed rule.

The Committee's revised proposal, in the format required by the Court, is attached hereto as Appendix A.

2. **C.R.C.P. 120—Orders Authorizing Sales Under Powers**

The Committee proposed major changes to C.R.C.P. 120 in late 2015. The proposal was posted for public comment and a hearing was held on the proposal in November 2016. After the hearing, the Court remanded the matter to the Committee for further consideration based on written comments from the Colorado Bankers Association. The Committee then reconstituted its Rule 120 subcommittee (persuading its Chair, former Judge Fred Skillern, to return from retirement) and considered those comments. After extensive further discussions, the Committee responds to the comments as follows:

1. The last sentence of the earlier version of subsection (a) read as follows: "The motion shall be captioned: 'Verified Motion for Order Authorizing a Foreclosure Sale under C.R.C.P. 120,' and shall be verified by a person with direct knowledge who is competent to testify regarding the facts stated in the motion."

   The subcommittee acknowledged the phrase "direct knowledge" is ambiguous and any knowledge the entity or its representative has is likely from business records. The subcommittee recommended changing "direct knowledge" to "with knowledge of the contents of the motion." The

Committee voted unanimously to adopt the recommended change.

2. In subsection (a)(1)(B), language was added to limit the time spent searching clerk and recorder records. The revised proposal states that the motion will contain addresses of interested persons found in the clerk and recorder records in the county where the property is located. The Committee voted unanimously to adopt the recommended change.

3. The amendment in subsection (a)(1)(B)(iv) was intended to name and give notice to parties with interests that the moving party seeks to terminate by foreclosure. Notice would be provided not only to debtors and co-signers, but people who have acquired an interest in the property between the recording of the mortgage and the beginning of the foreclosure, such as junior lien or easement holders. The question arises, however, as to how to determine who are "entitled to" notice of the foreclosure and when the cutoff should be set. To respond to this valid comment, the Committee unanimously recommends the following changes:

   > (iv) will end at "demand for sale", and additional language would appear in new subsection (v); the "and" at the end of (iii) would move to the end of (iv); and, the following text would appear in (v): "those persons whose interest in the real property may otherwise be affected by the foreclosure."

4. An amendment to proposed subsection (b)(4), recognizes the practical problem that a debtor who is in discussions with a large lending organization will not speak to one or the same person, and that a "single point of contact" as defined in section 38-38-100.3, C.R.S. 2017, is "an individual or team of personnel." Also, the subcommittee explained that "loss mitigation" is terminology that those involved in a foreclosure will know.

   The subcommittee explained that the contact is the person the debtor calls to begin the process of working out a loan

The subcommittee explained that the contact is the person the debtor calls to begin the process of working out a loan modification. It is intended to get the debtor to the loss mitigation representative and get the debtor's information into a model or sent to a lender to see if a modification is allowed or possible. The Committee discussed using a different word other than "address", like "receive" but ultimately decided "address" was the best option.

5. In subsection (d)(1)(B), the citation to the Servicemembers Civil Relief Act was updated.

6. In subsection (d)(1)(D), the subcommittee recommended no change in response to the Colorado Bankers Association letter. The subcommittee believes that more general language is preferred in a regulatory scheme that is constantly in flux. The Committee unanimously voted to accept the subcommittee's recommendation to keep the subsection as is.

7. In subsection (d)(1)(D)(2), the subcommittee recommended no change in response to the Colorado Bankers' Association letter. The security follows the note, and lenders will elect to describe how the entity became the moving party. The creditor attorneys on the subcommittee didn't view this as a problem, and judges on the subcommittee emphasized that review of the motion should not be mechanical. The Committee unanimously voted to accept the subcommittee's recommendation to keep the subsection as is.

8. In subsection (g), the new proposed language is simpler, more consistent with subsection (d)(4), and less redundant. The Committee unanimously approved this change.

Appendix B to this letter contains the revised proposal unanimously recommended by the Committee.

The Committee recommends that the revised rule become effective on March 1, 2018, allowing for a reasonable ramp-up time for district courts and lawyers.

3. C.R.C.P. 121, Section 1-15—Local Rules—Statewide Practice Standards

The subcommittee, chaired by Court of Appeals Judge Jerry Jones recommended four changes to this rule. They are:

1. The first recommendation, approved unanimously by the Committee, is to amend the first sentence of part (3) by deleting "C.R.C.P. 56" and replace it with "written". There is no reason to limit the operation of this rule to summary judgment motions.

2. The second recommendation, by a vote of 17 to 1, is to amend the second sentence of part (3) by adding a clause limiting its application to motions not seeking to dispose of a claim or defense. Colorado appellate courts uniformly have held that a dispositive motion may not be granted by default. The proposed amendment would generally conform the rule to case law.

3. The third recommendation is to amend part (8) to require an attempt to confer by and with a self-represented party before filing a motion that includes a description of the nature of any efforts to confer. An additional issue arose in the subcommittee about whether exceptions to this requirement should be included; for instance, excluding the conferral requirement for incarcerated parties or parties subject to a restraining order. To address this question, the Committee proposes, by a 16-10 vote, that Section 8, Duty to Confer be amended to read as follows:

   8. Duty to Confer. Unless a statute or rule governing the motion provides that it may be filed without notice, moving counsel and any self-represented party shall confer with opposing counsel and any self-represented parties before filing a motion. The requirement of self-

represented parties to confer and the requirement to confer with self-represented parties shall not apply to any incarcerated person, or any self-represented party as to whom the requirement is contrary to court order or statute, including, but not limited to, any person as to whom contact would or precipitate a violation of a protection or restraining order. The motion shall, at the beginning, contain a certification that the movant in good faith has conferred with opposing counsel and any self-represented parties about the motion. If the relief sought by the motion has been agreed to by the parties or will not be opposed, the court shall be so advised in the motion. If no conference has occurred, the reason why, including all efforts to confer, shall be stated.

4. The fourth recommendation, approved unanimously by the Committee, is to amend part (1)(a) by deleting the word limits in the second and third sentences and replacing those limits with a cross-reference to Rule 10(d) in the last sentence.

The Committee's revised proposal, in the format required by the Court, is set forth in Appendix C.

Because these are not substantive changes, the Committee recommends that these amendments be effective on the first day of the first month following the Court's adoption of the changes.

4. District Court and County Forms for the admission of records under the business records exception, CRE 803 (6).

A recommendation was made both to the Supreme Court Civil Rules Committee and the Supreme Court Rules of Evidence Committee that forms be promulgated to facilitate the admission of evidence under CRE 803(6), commonly known as the business records exception to the hearsay rule. This rule is routinely used for the admission of business records. Particularly in view of the

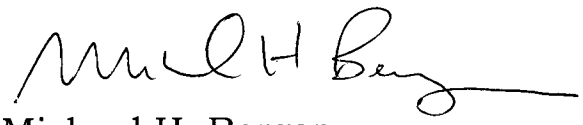
increased participation in litigation by self-represented parties, both the Evidence Committee and the Civil Rules Committee thought this was a good idea. The Evidence Committee, however, decided not to pursue the matter, not because it wasn't a good idea, but because there are no forms contained in the Colorado Rules of Evidence. On the other hand, the Civil Rules do contain many forms.

In any event, a subcommittee of the Civil Rules Committee drafted two forms, one for use in district courts and one for county court use. The Committee unanimously recommends that the Court approve the two forms as well as an amendment to C.R.C.P. 16 that refers to the forms.

The Committee's proposal, consisting of the two forms as well as a conforming amendment to C.R.C.P. 16, is attached as Appendix D.

The Committee does not believe that either public comment or hearing is necessary with respect to this proposal and further recommends that, if the Court, adopts this proposal, that it be effective immediately.

Respectfully submitted,



Michael H. Berger
Chair, Civil Rules Committee

Cc: Jenny Moore, Esq.

From: gabriel, richard
Sent: Thursday, December 07, 2017 1:12 PM
To: berger, michael; moore, jenny
Subject: Civil Rules Committee's Recommendations re C.R.C.P 53; 120; 121, section 1-15; Business Records Exceptions forms and change to C.R.C.P. 16

Dear Mike and Jenny –

I am pleased to report that the Court has approved the four recommendations contained in Mike's November 17, 2017 letter to me. The Chief asked me to convey to you how much we appreciate your recommendation letters. They are extremely helpful to the Court. I couldn't agree more.

Jenny, I assume that you will get me any orders that I need to sign.

Thank you both!

Rich

Richard L. Gabriel
Justice, Colorado Supreme Court
2 East 14th Avenue
Denver, Colorado 80203
(720) 625-5440
richard.gabriel@judicial.state.co.us

MEMORANDUM

TO: Civil Rules Committee

FROM: Judge Jones

RE: Suggested changes to C.R.C.P. 6(b) and 59(a) redux (or "lite," if you prefer)

DATE: January 17, 2018

At the last full committee meeting the committee considered, and voted down, proposed changes to C.R.C.P. 6(b) and 59(a) that would've aligned those rules with their federal counterparts. The proposed changes were to amend Rule 6(b) to say that a court may not extend the time for filing motions under Rules 59(a) and 60(b), and to amend Rule 59(a) to delete the language allowing a court to extend the time for filing post-trial motions.

During the meeting, some members continued to suggest that to the extent Rules 6(b) and 59(a) are confusing (or misleading) on a couple of points, those rules should be clarified. The subcommittee has considered those concerns and recommends the following changes to those rules as follows.

The last clause of Rule 6(b) currently says, "but it may not extend the time for taking any action under Rules 59 and 60(b),

except to the extent and under the conditions therein stated." The rule is unclear, at least to some of us, in two respects. First, no "conditions" are stated in Rule 59. And second, Rule 60(b) doesn't say anything about extensions of time, so applying the language in Rule 6(b) "except to the extent and under the conditions therein stated" to Rule 60(b) doesn't make sense. These problems can be solved by changing the last clause of Rule 6(b) to read as follows: "but it may not extend the time for taking any action under Rule 60(b) and may extend the time for taking any action under Rule 59 only as allowed by that rule."

Rule 59(a) currently says that a party must file a post-trial motion thereunder "[w]ithin 14 days of entry of judgment as provided in C.R.C.P. 58 or such greater time as the court may allow . . . ." To make it clear that a motion for extension of time must be filed within 14 days of the entry of judgment, the subcommittee proposes to recommend amending the first sentence of Rule 59(a) to say "Within 14 days of entry of judgment as provided in C.R.C.P. 58 or such greater time as the court may allow <u>pursuant to a request for an extension of time made within that 14-day period</u> . . . ." (The underlined portion is added; the rest remains unaltered.)

Proposed Revisions to C.R.C.P. 26(a)(2)(B)(II) – Comment 18.

The Civil Rules Committee proposes the insertion of some additional language in Comment [18] of C.R.C.P. 26 relating to requirements for expert disclosures for non-retained experts. The Committee has received copies of motions and orders limiting opinion testimony by treating physicians unless they have prepared full expert reports as required from retained experts. Although those motions and orders presently predate the 2015 revisions to Rule 26, they are being pressed upon some trial courts now as being good law. The argument seems to be that if an opinion goes beyond what is in the medical records (or whatever records the non-retained expert keeps), it converts the expert into a retained expert. There also seems to be an argument that if the doctor/expert forms an opinion they were not required to form as part of their job, then offering that opinion converts them into a retained expert. In other words, if a doctor has an opinion on causation formed during treatment, but did not have to form that opinion to provide treatment, then offering the opinion makes the doctor a retained expert. This same line of argument could apply to police officers, in-house accountants, auto repair mechanics or any other type of non-retained experts.

This limitation and requirement is contrary to what the Committee thinks is the clear meaning of existing Rule 26(a)(2)(B)(II) and Comments [18] and [21]. Such limitations and requirements certainly violate the intent of the Committee when it was preparing the 2015 amendments to Rule 26(a)(2)(B)(II). The Committee believes that it could be several years before an appellate case would raise this issue for a judicial determination. Because the Committee believes these rulings are so clearly contrary to the intent of the Rule, it requests the Court to amend Comment [18] to limit the mischief that could occur in the interim.

The Committee believes a modest change to Comment [18] should clarify any possible confusion. (*See* Holme, *New Pretrial Rules for Civil Cases – Part II: What is Changed*, 44 *The Colorado Lawyer*, 111, 118 (July 2015).

Proposed revisions to Comment [18] to Rule 26.

[18] Expert disclosures.

Retained experts must sign written reports much as before except with more disclosure of their fees. The option of submitting a "summary" of expert opinions is eliminated. Their testimony is limited to what is disclosed in detail in their report. Rule 26(a)(2)(B)(I).

"Other" (non-retained) experts must make disclosures that are less detailed. Many times, a lawyer has no control over a non-retained expert, such as a treating physician or police officer, and thus the option of a "statement" must be preserved with respect to this type of expert, which, if necessary, may be prepared by the lawyers. **For example, in addition to the opinions and diagnoses reflected in a plaintiff's medical records, a treating physician may have reached an opinion as to the cause of those injuries gained while treating the patient. Those opinions may not have been noted in the medical records but, as long as the physician developed the opinions prior to a request from a party or its counsel for purposes of litigation, and if sufficiently disclosed in a written report or statement as described in Comment [21], below, such opinions may be offered at trial without the witness having first prepared a full, retained expert report.** In ~~either~~ **any** event, the expert testimony is to be limited to what is disclosed in detail in the disclosure. Rule 26(a)(2)(B)(II).

TO: Judge Michael Berger

FROM: Dick Holme

DATE: January 18, 2018

SUBJECT: Proposed Minor Changes to Rules 16 and 26

In late 2016, Chief Justice Rice enlisted Loveland attorney Edward Gassman (one of the original developers of Rule 16.1) to create a "very small committee" to interview a number of district court judges about their views of and any suggestions they might have about the effectiveness of the 2015 amendments to the Rules of Civil Procedure. In turn, Gassman asked former Jefferson County District Court Chief Judge Steve Munsinger and me to assist him on this task. Over the next several months, the three of us had lunch meetings with the civil judges in the First (Jeffco), Second (Denver), Fourth (El Paso), Eighth (Larimer), Tenth (Pueblo), Seventeenth (Adams), Eighteenth (Arapahoe), and Nineteenth (Weld) judicial districts (and I might be missing one). (We failed after several attempts to arrange a meeting with the Fifth (Eagle and Summit) and Ninth (Pitkin and Garfield) districts.)

Attendance at all of them was quite good. Ed, Steve and I were all struck by the fact that in all meetings the judges seemed to be using the rule changes as intended, and specifically using the initial Case Management Conferences to discuss the cases substantively and with the intent of applying the concept of proportionality to control discovery practices. Most of the judges had also adopted the practice encouraged under the rules of requiring oral discovery motions before allowing written motions. This practice received a strongly favorable acceptance by the judges. I think that Ed, Steve and I were all pleasantly surprised at the apparent ease of implementing the new procedures and willingness of most of the judges to make them work.

Part of our meetings involved asking the judges if there were any changes or amendments they would like to see adopted. There were a few suggestions that received support from a number of the judges and which I have included below in this Memo. None of them change the nature of the 2015 amendments, and several clarify and enforce those earlier amendments. Given the fact that the 2015 amendments are now a year and a half old, it seemed like these tweaks could now be appropriately considered.

I think most of the proposals are self-explanatory but I can offer some additional explanations if desired or needed.

RULES CHANGES SUGGESTED BY DISTRICT COURT JUDGES

C.R.C.P. 16

(b) Case Management Order.

(6) Evaluation of Proportionality Factors. The proposed order shall provide a brief assessment of **the facts supporting** each party's position ~~on~~**concerning** the application of any factors to be considered **by the court** in determining proportionality, including those factors identified in C.R.C.P. 26(b)(1).

(10) Computation and Discovery Relating to Damages. **A claiming party shall state the categories of damages sought as disclosed pursuant to C.R.C.P. 26(a)(1)(C) and shall state its belief as to the total amount of damages at issue in the case.** If any party asserts an inability to disclose fully the information on damages required by C.R.C.P. 26(a)(1)(C), the proposed order shall include a brief statement of the reasons for that party's inability as well as the expected timing of full disclosure and completion of discovery on damages.

(16) Trial Date and Estimated Length of Trial. The proposed order shall provide the parties' best estimate of **the date when** the **parties can probably be ready for trial** ~~**time required for probable completion of discovery**~~ and of the length of the trial. The court shall include the trial date in the Case Management Order, unless the court uses a different trial setting procedure.

C.R.C.P. 26

(b) Discovery Scope and Limits. Unless otherwise modified by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General.

(2) Limitations. Except upon order for good cause shown and subject to the proportionality factors in subsection (b)(1) of this Rule, discovery **up to the following presumptive maximum amounts** shall be limited as follow

(A) A party may take **up to** one deposition of each adverse party and of two other persons, exclusive of persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2). The scope and manner of proceeding by way of deposition and the use thereof shall otherwise be governed by C.R.C.P. 26, 28, 29, 30, 31, 32, and 45.

(B) A party may serve on each adverse party **up to** ~~**30**~~ **15** written interrogatories, each of which shall consist of a single question. The scope and manner of proceeding by means of written interrogatories and the use thereof shall otherwise be governed by C.R.C.P. 26 and 33.

(C) No change

(D) A party may serve each adverse party requests for production of documents or tangible things or for entry, inspection or testing of land or property pursuant to C.R.C.P. 34, except such requests for production shall be ~~**limited**~~ **up** to 20 in number, each of which shall consist of a single request.

(E) A party may serve on each adverse party **up to** 20 requests for admission, each of

Formatted: Font: Bold
Formatted: Font: Bold
Formatted: Font: Bold
Formatted: Font: Bold
Formatted: Font: Bold
Formatted: Font: Bold
Formatted: Font: Bold
Formatted: Font: Bold
Formatted: Font: Bold
Formatted: Font: Bold
Formatted: Font: Bold

which shall consist of a single request. A party may also serve requests for admission of the genuineness of up to 50 separate documents that the party intends to offer into evidence at trial. The scope and manner of proceeding by means of requests for admission and the use thereof shall otherwise be governed by C.R.C.P. 36.

(F) In determining good cause to modify the ~~limitations of this~~ **amounts of discovery authorized by** subsection (b)(2), the court shall consider the following:

(I) – (IV) No change

C.R.C.P. 121.

Section 1-15 DETERMINATION OF MOTIONS

1. Motions and Briefs; When Required; Time for Serving and Filing -- Length.

(a) No change.

(b) **Except for a motion pursuant to C.R.C.P. 56,** ~~T~~**the** responding party shall have ~~21~~ 14 days after the filing of the motion or such lesser or greater time as the court may allow in which to file a responsive brief. **For a motion pursuant to C.R.C.P. 56, the responding party shall have 21 days after the filing of the motion or such lesser or greater time as the court may allow in which to file a responsive brief.** If a motion is filed 42 days or less before the trial date, the responding party shall have ~~14~~ 7 days after the filing of the motion or such lesser or greater time as the court may allow in which to file a responsive brief.

(c) – (d) No change.

Formatted: Font: Bold

Formatted: Font: Bold

Formatted: Font: Bold

Formatted: Font: Bold

Formatted: Font: Bold

Formatted: Font: Bold

Formatted: Font: Bold

Formatted: Font: Bold

Discrepancy Between C.R.C.P. 26(b)(2)(A) and 26(b)(4)(A) Regarding Permitted Depositions of "Other" [Non-Retained] Experts

An associate in my firm recently pointed out a discrepancy between Rule 26(b)(2)(A) [Discovery Limitations] on one hand, and 26(b)(4)(A) [Trial Preparations] and C.R.C.P. Form JDF 622, ¶11 [Proposed Case Management Order], on the other hand.

As shown below, 26(b)(2)(A) allows automatic depositions of all "retained experts" and "other experts," while 26(b)(4)(A) and JDF 622, ¶11, allow only automatic depositions of "retained experts," but not "other experts." Thus:

Rule 26(b)(2)(A) provides:

> A party may take one deposition of each adverse party and of two other persons, exclusive of persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2) ["Disclosure of Expert Testimony].

Rule 26(a)(2), in turn, requires "expert testimony" to be "disclosed" by both "Retained Experts" (26(a)(2)(B)(I)) and "Other Experts" (26(a)(2)(B)(II)).

Rule 26(b)(4)(A), however, provides:

> A party may depose any person who has been identified as an expert disclosed pursuant to subsection 26(a)(2)(B)(I) [*i.e.,* only "Retained Experts"] of this Rule whose opinions may be presented at trial. . . .

Form JDF 622 ¶11 adopts this same limitation as it provides in part:

> Proposed limitations on and modifications to the scope and types of discovery consistent with the proportionality factors in C.R.C.P. 26(b)(1): _____.
>
> Number of depositions per party (C.R.C.P. 26(b)(2)(A) limit 1 of adverse party + 2 others + experts per C.R.C.P. 26(b)(4)(A) [*i.e.,* only "Retained Experts"]). . . .

Concerning whether depositions of "Other [non-retained] Experts" should be automatically available, my recollection is that when the 2015 rule changes to Rules 16 and 26 were being developed, the object was to limit as much as possible the number of expert depositions and to limit the personal difficulties and delays of scheduling depositions of people like treating physicians and police officers who were witnesses only because of their personal knowledge about and involvement in the subject matter of the lawsuit. The prior version of Rule 26(b)(4)(A) did not include the cross reference to Rule 26(a)(2)(B)(I). Furthermore, the ability to depose "two others" would allow parties to take one or two non-retained experts if they felt a real need. Finally, even if depositions of non-retained witnesses were not allowed, their testimony still would be limited to their written disclosures.

It also should not be forgotten that trial courts will continue to be able to grant more or fewer depositions depending on requests by the parties and considering proportionality and the other limitations on discovery contained in Rule 26(b)(1).

However, under any scenario the Rules should be consistent. Thus, I recommend that one of the following two alternatives should be submitted to the Supreme Court (my personal preference would be alternative (1)):

(1) Amend Rule 26(b)(2)(A) [Discovery Limitations] as follows to prevent automatic rights to depose "other experts by adding the highlighted additional subsection reference –

> A party may take one deposition of each adverse party and of two other persons, exclusive of persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2)(B)(I)
>
> or

(2) Amend Rule 26(b)(4)(A) [Trial Preparations] as follows to allow for depositions of both retained and "other" experts by deleting the highlighted subsection –

> A party may depose any person who has been identified as an expert disclosed pursuant to subsection 26(a)(2)~~(B)(I)~~ of this Rule whose opinions may be presented at trial. . . .

Neither of these changes would require any change to Form JDF 622, ¶ 11, because it already incorporates Rule 26(b)(4)(A).

TO: STANDING COMMITTEE

FROM: RULE 58(a) / 79 SUBCOMMITTEE

RE: FINAL REPORT

DATE: JAN. 9, 2018

The C.R.C.P. 58(a) / 79 subcommittee respectfully submits the following final report.[1]

I. Executive Summary

The subcommittee was formed because of concerns that the written, signed, and dated requirement to create a judgment under Rule 58(a) can create delay and uncertainty. *See Casper v. Guarantee Tr. Life Ins. Co.*, 2016 COA 167, cert. granted sub nom. *Guarantee Tr. Life Ins. Co. v. Estate of Casper by & through Casper*, 17SC2, 2017 WL 2772221 (June 26, 2017) (copy attached). However, after considering alternative language that focused on entry in the register of actions as indicia of a judgment, the subcommittee reluctantly concluded that a change would probably create more problems than it solved.

[1] Cheryl Layne and Claire Walker (non-member from SCAO Court Services Division) brought revisions to Rules 79/379 to the committee for what seemed like a routine/administrative amendment.

II. Background

Rule 58(a) provides:

> (a) Entry. Subject to the provisions of C.R.C.P. 54(b), upon a general or special verdict of a jury, or upon a decision by the court, the court shall promptly prepare, date, and sign a written judgment and the clerk shall enter it on the register of actions as provided in C.R.C.P. 79(a). The term "judgment" includes an appealable decree or order as set forth in C.R.C.P. 54(a). The effective date of entry of judgment shall be the actual date of the signing of the written judgment. The notation in the register of actions shall show the effective date of the judgment. Entry of the judgment shall not be delayed for the taxing of costs. Whenever the court signs a judgment and a party is not present when it is signed, a copy of the signed judgment shall be immediately mailed or e-served by the court, pursuant to C.R.C.P. 5, to each absent party who has previously appeared.

The federal counterpart is attached. Consideration of the federal rule would be consistent with the supreme court's comment in *Warne*, that "our case law interpreting the Colorado Rules of Civil Procedure . . . reflects first and foremost a preference to maintain uniformity in the interpretation of the federal and state rules of civil procedure and a willingness to be guided by the Supreme Court's interpretation of corresponding federal rules whenever possible,

rather than an intent to adhere to a particular federal interpretation prevalent at some fixed point in the past . . . ." 2016 CO 50, ¶2.

III. Discussion

In addition to *Casper*, the subcommittee considered an unpublished decision where doubt about finality arose because:

> the district court entered a "MINUTE ORDER RE: JURY TRIAL" that directed the clerk to enter into the register of actions a list of trial proceedings. That list includes the names of court reporters, attorneys, and witnesses; exhibits; a day by-day list of trial events; and an annotation that the jury had reached a verdict in favor of Stamps. The minute order also indicated that the parties had thirty days to file any post-trial motions. The minute order was entered in the register of actions as an order — not a judgment — and with the description "Ruling: SO ORDERED, Document Title: Minute Order, Jury Trial June 13-20, 2016."

The subcommittee considered two alternative versions of Rule 58. Both versions:

- replaced the written, signed, and dated requirement with a requirement that the trial court direct the clerk to make an entry in the register of actions conforming to the jury's verdict or the court's decision;

- provided that making the entry in the register of actions should not be delayed to determine prejudgment interest, costs, or attorney fees; and
- made the date of the verdict or decision the judgment date for all purposes.

After some wordsmithing, however, the subcommittee reluctantly concluded that any cure was probably worse than the disease.

On the one hand, and notwithstanding *Casper*, the subcommittee could not identify any published case where a similar problem had arisen. Still, one member offered that delay between accepting verdicts and creating signed, written judgments is an ongoing problem, at least from a plaintiff's perspective. Even so, the subcommittee recognized that just as a trial court might lose track of the need to create a signed and dated written judgment, a court might also fail to promptly direct the clerk to make an entry in the register of actions. In other words, as has often been observed by members of the Standing Committee, "we can't make the rules idiot proof."

On the other hand, problems with elimination of the signed, dated, and written requirement include lack of judicial control over

exactly what appears in the register of actions. How a process that lacked this requirement would play out where a bench trial ended with an oral ruling seemed unclear. The same might be true where the judgment had to include multiple rulings.

Additional concerns that were raised included:

- uncertainty about finality for appellate purposes;
- uncertainty about the exact contours of the judgment for purposes of execution;
- difficulties encountered by self-represented litigants in obtaining transcripts of oral rulings;
- the need that a final judgment resolve prejudgment interest, *see Grand Cty. Custom Homebuilding, LLC v. Bell*, 148 P.3d 398, 401 (Colo. App. 2006); and
- the need that a final judgment resolve attorney fees, at least where fees are an element of damages or an aspect of the property disposition in dissolution cases.

Finally, the subcommittee noted that in the electronic age, requiring a signed writing seemed anachronistic. Indeed, no other

rule imposes a similar requirement on trial courts.[2] Polly Brock, who recently assumed the position of Court of Appeals clerk, assured the subcommittee that in the Colorado Courts E-Filing System (CCE), a soft copy document with an electronic signature would suffice.

IV. Conclusion

The subcommittee recommends against further action concerning Rule 58(a) at this time. However, the subcommittee suggests that possible revision of Rule 58(a) be reconsidered after the supreme court issues its opinion in *Casper*.

Respectfully submitted,

_____/s/_____

John R. Webb,

Subcommittee Chair

[2] Rule 45 requires the clerk of court to issue a signed subpoena but does not explicitly include a written or dated requirement. Rule 16 provides that trial management orders include "a place for the court's approval." A court of appeals division concluded that Rule 107(f) (providing that contempt and sanctions orders shall be final) requires a magistrate to issue a signed, written order, but such language does not appear in the rule. *In re M.B.-M.*, 252 P.3d 506, 509 (Colo. App. 2011).

Attachment Text: Federal Rule of Civil Procedure 58

(a) Separate Document. Every judgment and amended judgment must be set out in a separate document, but a separate document is not required for an order disposing of a motion:

(1) for judgment under Rule 50(b);
(2) to amend or make additional findings under Rule 52(b);
(3) for attorney's fees under Rule 54;
(4) for a new trial, or to alter or amend the judgment, under Rule 59; or
(5) for relief under Rule 60.

(b) Entering Judgment.

(1) Without the Court's Direction. Subject to Rule 54(b) and unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

(A) the jury returns a general verdict;
(B) the court awards only costs or a sum certain; or
(C) the court denies all relief.

(2) Court's Approval Required. Subject to Rule 54(b), the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

(A) the jury returns a special verdict or a general verdict with answers to written questions; or
(B) the court grants other relief not described in this subdivision (b).

(c) Time of Entry. For purposes of these rules, judgment is entered at the following times:

(1) if a separate document is not required, when the judgment is entered in the civil docket under Rule 79(a); or
(2) if a separate document is required, when the judgment is entered in the civil docket under Rule 79(a) and the earlier of these events occurs:

(A) it is set out in a separate document; or
(B) 150 days have run from the entry in the civil docket.

(d) Request for Entry. A party may request that judgment be set out in a separate document as required by Rule 58(a).

(e) Cost or Fee Awards. Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

Procedure for appeals from municipal courts of record

Muncipal Rule of Procedure 237(b) – Appeals from courts of record

"Appeals from courts of record shall be in accordance with Rule 37 of the Colorado Rules of Criminal Procedure."

CRCrimP 37(e) – Briefs

Opening – 21 days after certification of record
Answer – 21 days after service of opening brief
Reply - 14 days after service of answer brief
(no page or word limits indicated)

CRS 13-10-116, Appeals

. . .

(2) Appeals Appeals taken from judgments of a qualified municipal court of record shall be made to the district court of the county in which the qualified municipal court of record is located. The practice and procedure in such case shall be the same as provided by section 13-6-310 and applicable rules of procedure for the appeal of misdemeanor convictions from the county court to the district court, and the appeal procedures set forth in this article shall not apply to such case.

CRS 13-6-310, Appeals from County Court

(1) Appeals from final judgments and decrees of the county courts shall be taken to the district court for the judicial district in which the county court entering such judgment is located. Appeals shall be based upon the record made in the county court.

(2) The district court shall review the case on the record on appeal and affirm, reverse, remand, or modify the judgment; except that the district court, in its discretion, may remand the case for a new trial with such instructions as it may deem necessary, or it may direct that the case be tried de novo before the district court.

(3) Repealed by Laws 1985, H.B.1074, § 12, eff. Nov. 14, 1986.

(4) Further appeal to the supreme court from a determination of the district court in a matter appealed to such court from the county court may be made only upon writ of certiorari issued in the discretion of the supreme court and pursuant to such rules as that court may promulgate.

Dear Judge Berger,

I got an email from the CTLA with a suggestion regarding TMO witness list requirements; the CTLA asked me to pass it along. The CTLA also contacted Brad, so if he already contacted you then please disregard this.

The problem the CTLA pointed to is that when parties prepare their witness lists, they are required to estimate how much time the other side will need for cross-examination. This can be a challenge because you do not what the other side has in mind. Sometimes a party wants to conduct an cross-examination far longer than the direct examination. This might not be a big deal for those judges conducting clock trial, but it can create issues when the court has divided the trial days between the parties.

The CTLA's suggestion was to borrow from federal judge Brimmer's trial procedures. Judge Brimmer requires each side to file their proposed witness list with their direct times included. Then, within two days, the parties are required to field their estimated times for cross-examination of the opposing party's witnesses.

This proposal could be made a formal part of the exchange of draft witness lists, or could be part of the TMO filing.

One would hope that the parties were discussing cross-examination times as part of the conferral process for the TMO set forth in Rule 16(f)(2)(A), but it sound like this may not be happening and is not being addressed with the judges at the trial management conference. In any event, I wanted to pass the idea along and see if the committee thought that an amendment was appropriate or if there were any other ideas for addressing the issue.

Sincerely,

Damon Davis
Killian Davis Richter & Mayle, P.C.
202 North 7th Street
Grand Junction, CO 81502
Ph. 970-241-0707
Fax. 970-242-8375

PRACTICE STANDARDS
(Civil cases)

JUDGE PHILIP A. BRIMMER
UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Courtroom A701
Alfred A. Arraj United States Courthouse

Chambers A741, Seventh Floor
Alfred A. Arraj United States Courthouse
901 19th Street
Denver, CO 80294

Telephone: (303) 335-2794
FAX: (303) 335-2782
E-mail: Brimmer_Chambers@cod.uscourts.gov

Effective: December 1, 2015

confirm the trial date, confirm the Trial Preparation Conference date, and specify the tasks to be completed before the Trial Preparation Conference.

1. Jury Instructions and Verdict Forms:

a. **Fourteen days** before the trial preparation conference, counsel and any pro se party shall submit proposed jury instructions and verdict forms. The jury instructions shall identify the source of the instruction and supporting authority, e.g. § 103, Fed. Jury Practice, O'Malley, Grenig, and Lee (6th ed.). The parties shall submit their instructions and verdict forms both via CM-ECF **and** by electronic mail to brimmer_chambers@cod.uscourts.gov in Word Perfect format (Word Perfect 12 or a later version) or Word format. Verdict forms shall be submitted in a separate file from jury instructions. Within the jury instruction document, each jury instruction shall begin on a new page.

b. Each instruction should be numbered (e.g., "Plaintiff's Instruction No. 1") for purposes of making a record at the jury instruction conference. The parties shall attempt to stipulate to the jury instructions, particularly "stock" instructions and verdict forms.

c. In diversity cases where Colorado law applies, please submit instructions and verdict forms that conform to the most recent edition of CJI-Civ.

2. Exhibit and Witness Lists: **Seven days** before the trial preparation conference, the parties shall file their proposed witness and exhibit lists via CM-ECF. The form of such lists are found at http://www.cod.uscourts.gov/Judges/Judges.aspx. **Two days** after witness lists are filed, the parties shall file estimates of time required for their cross-examination of the opposing party's witnesses. **Seven days** before trial the parties shall exchange, whether electronically or in hard copy, the exhibits listed on their trial exhibit lists. For additional matters regarding exhibit and witness lists, see Sections II.C and II.D. above.

3. Voir Dire: **Seven days** before the trial preparation conference, the parties shall file their proposed *voir dire* questions.

F. Jury Trials

1. Counsel and pro se parties shall be present on the first day of trial at 8:00 a.m. Jury selection will begin at 8:30 a.m. The second day of trial will begin at 8:30 a.m. and continue until 5:00 p.m. The trial day will have morning and afternoon recesses of approximately fifteen minutes duration. A lunch break of

I have attached a copy of The Colorado Lawyer, Vol 31, No. 4 Article on electronic filings under C.R.C.P. 121 § 1-26. Under the section "Digital Signatures" it states that although a physical signature need not be transmitted to the court, a printed copy with original signature must be maintained by the filing party. This, perhaps, show better than my prior e-mails to you, why there is some confusion as to whether an original physical signature must be made and a copy thereof maintained by the filing party, or whether the filing party need only maintain the pleading with the computer generated printout of the attorneys name, prefaced by the sign /s/, the same as filed with the court. I would request that this be considered by the Rules Committee for clarification. Thank you for your patience and Committee's consideration. John W. Madden, III, No. 5125.

31 Colo.Law. 41
Colorado Lawyer
2002.
2002, April, Pg. 41. Electronic Filing's First Year In Colorado

Vol. 31, No. 2, Pg. 41

The Colorado Lawyer
April 2002
Vol. 31, No. 4 [Page 41]

Departments
Technology and Law Practice
Electronic Filing's First Year In Colorado
by Elizabeth Robertson

Elizabeth Robertson, Denver, practices law with Duncan, Ostrander & Dingess, P.C. (303) 779-0200; erobertson@dodpc.com. Robertson was a law clerk for Judge Kenneth K. Stuart, Chief Judge of the Arapahoe County District Court, the first district court in Colorado to implement eFiling. She also has had substantial contact with CourtLink®; has participated in an eFiling planning meeting coordinated by the State Court Administrator's Office; and remains in contact with various court officials, CourtLink® executives, and attorneys regarding eFiling issues.

During the past decade, district court filings in Colorado have increased 19 percent.1 Given this increase and the day-to-day demands on legal services providers, tools that improve efficiency are now even more important to the practice of law and the justice system. To this end, Colorado became the first state to offer electronic filing ("eFiling") statewide at the district court level. "CourtLink® eFile,"2 formerly known as "JusticeLink®," is the state's exclusive electronic system for filing and serving documents with district courts. Statewide implementation was completed in January 2001.

This article provides a status report on the system's first year and how law firms and the courts are using eFiling. It also provides some tips on filing and service. First, some background information may be in order.

What is eFiling

CourtLink® eFile is a secure Web-based service for filing and serving legal documents. The eFile application replicates in an electronic format the process of filing paper documents. Colorado court rules denote that an eFiled pleading is the equivalent of a paper filing for all purposes.3 The two elements of the eFile application are eFiling and electronically serving ("eServing") documents. EFiling allows documents to be electronically transmitted and filed with or by the court. EService allows filing attorneys to designate opposing counsel to be served documents. The eFile application produces printable receipts (confirming that an eFiling was successfully transmitted) and

e-mail notifications of filings and orders. All eFiled documents are stored on CourtLink servers for electronic retrieval at any time via the Internet.

The eFiling application is currently a pilot program in Colorado and is limited to specific case types and courts. Colorado attorneys may file documents in district court for civil, domestic, probate, and water cases using the eFiling system. However, the eFiling system is not currently available for criminal and mental health cases in district court, and no such filings are available in county and appellate courts.

eFiling and Law Firms

Without ever leaving their desks, attorneys, or authorized members of the attorney's staff or firm, can electronically transmit a document to the court for filing and also can serve other Colorado licensed attorneys. Additionally, filings completed by 11:59 p.m. via CourtLink® eFile are now timely filed with the Clerk of the Court on that date, eliminating 5:00 p.m. deadlines.

Firms that have used eFiling most successfully have ensured adequate training of their users. The dangers of misuse of the system include failure to check for notification of filings

eServed on a firm's attorneys, resulting in missed deadlines; failure to update the system with changed subscriber information, resulting in misrouted eFilings; and failure to serve opposing counsel properly.

Court Use

Use of the eFiling system varies widely from court to court. Judges and court staff can view and print eFiled documents at any time, as well as issue orders through the system. A proposed order can be transmitted to the court by an attorney with an eFiled motion. The judge can then retrieve the motion from the eFile system, make changes, and issue the order electronically. Some judges require eFiling exclusively in specific cases, and some eFile all of their orders. For example, in Douglas County, Judge Paul King has mandated the use of eFiling for one of his construction defect cases. This mandate has allowed him and his division staff to better manage the flow of documents in and out of the court. During the last six months, the number of judges and magistrates eFiling orders has increased substantially. Judges in Weld, Boulder, Adams, Broomfield, Eagle, Huerfano, and Douglas Counties routinely issue orders electronically. Moreover, subscribers to the eFile system benefit by getting e-mail and online notification of the eFiled orders almost immediately after the orders are issued.

In the new Broomfield District Court, Chief Judge Harlan Bockman has issued an Order and Notice requiring counsel to eFile all pleadings, motions, briefs, exhibits, and other documents in domestic, probate, and civil cases filed in that court.4 The State Court Administrator's Office is currently working with the Broomfield District Court on the challenges (for example, potential power failures, server failures, and pro se filings) involved in making Broomfield a "paperless" court.

Digital Signatures

While eFiling emulates the traditional paper world, a physical signature need not be transmitted to the court. Pursuant to Colorado Rules of Civil Procedure ("C.R.C.P.") 121, § 1-26, use of the eFiling system constitutes compliance with C.R.C.P. 11's signature requirement. Therefore, a document eFiled with the court subjects the authorizing attorney to C.R.C.P 11's requirements, even without a physical signature. However, a printed copy of the document with original signature must be maintained by the filing party and made available for inspection by other parties or the court on request.

Tips on Filing and Service

During the first year of eFiling, courts, attorneys, and CourtLink® experienced growing pains with some aspects of the system. The following tips address some continuing concerns about how attorneys can use the system proficiently.

Exhibits

Many courts prefer that exhibits are scanned with the document so that only one document (including exhibits) is eFiled. Scanning a "title" page with an exhibit identifier (for example, "Exhibit A") or otherwise identifying each exhibit clearly is recommended, particularly when an exhibit is a copy of a previously filed pleading. This reduces the possibility of confusion regarding attachments.

If exhibits are eFiled separately from a motion or other pleading, the court may edit the "document title" to indicate that there are accompanying exhibits that are in the case jacket. If the court does edit a document title to reflect the existence of exhibits or other documents, the filer and authorizing attorney will receive an e-mail notification of the change.

Proposed Orders

Some courts prefer that a proposed order be eFiled with a motion, as one document. In this case, when choosing the "Filing Type" (type of document being submitted to the court; for example, "Motion," "Complaint," "Answer"), the filer should select "Motion," not "Motion and Order." It is important to note that no document is considered an Order until it is signed by a judge or a magistrate. The "document title" should use language indicating that the document includes a "proposed order." Incorrect designation of a proposed order may result in the court rejecting or editing the filing, but the proposed order will be viewed or printed by the court.

When a proposed order is eFiled separately, the filer should select a filing type, "Filing Other," along with a descriptive document title. The court likely will "accept without docketing" the separately eFiled proposed order. In other words, the proposed order becomes part of the electronic "case file" and may have been printed, but it is not a separate entry in the court's case management system.

Electronic Service of Documents
On Attorney-Subscribers

Documents may be served under C.R.C.P. 5 through eService or through a combination of eService and other authorized means of service (such as mail, hand delivery, or facsimiles). When attorneys subscribe to CourtLink® eFile, they may be served electronically by another eFile subscriber on any case in which they are attorneys of record. The system provides e-mail and online notification to attorneys when they are served electronically. Attorneys also can designate up to four other subscribers in the firm (including other attorneys, paralegals, and legal secretaries) to receive notification both online and through e-mail when they are eServed.

Although e-mail notification of eServed documents is convenient, it is important to remember that the official repository of eFiled documents is the CourtLink® website. CourtLink® can guarantee that all e-mail notifications are sent by its system, but it cannot guarantee the timely and successful delivery of e-mail messages to specific accounts. The rule describes eService as filings delivered through CourtLink® on its website to individual eFile accounts.5 The rule does not require timely and successful delivery of e-mail notifications.

Therefore, subscribers should regularly check the CourtLink® website to verify receipt of eServed documents. Users may check service documents for all users in a firm by choosing "Search Filings," then selecting an appropriate date range to search. The CourtLink® eFile search default is for "Firm Filings" ("All Filings" can also be selected for searching filings where the searching attorney or firm is not involved). A search can be further narrowed to a particular case or to filings from a specific attorney or judge. The eServed documents can then be printed or downloaded and distributed through the firm according to regular routing procedures.

Serving Other Parties

CourtLink® provides three options for delivery of documents (or notice of their filing) via the eFile system: service, notice, and delivery to an additional recipient. EService can be used in conjunction with other methods of service (unless the court has ordered eService exclusively). To complete service, a filer must select the "Service" designation in the Service/Notice screen. Service is legal service, and Notice is simply notice that the document has been filed. Filers also can send eFiled documents by e-mail or fax to additional recipients, including non-parties and clients.

When using CourtLink® for service, it is important to confirm that the appropriate attorneys of record are listed as available for service. Only attorneys licensed in Colorado can be served. Filers can review the parties available for service on the CourtLink® Service/Notice screen. If the attorney for service does not appear there, attorneys should contact the court clerk's office so that the appropriate additions can be entered.

Updating Attorney-Subscriber Information

It is important to update firm records with CourtLink® when an attorney-subscriber leaves an organization so that eFiled documents can properly be served and routed. The following four steps should be completed when an attorney leaves an organization:

1) Remove the attorney user from the Firm Profile in CourtLink®;

2) Notify CourtLink® eFile Customer Service that the person should be removed;

3) Build a report on the eFile application to show which eFiled cases display that attorney as an attorney of record; and

4) If withdrawal or substitution of counsel is appropriate, formal withdrawal or substitution is necessary.

Updating information in CourtLink® is not a substitution for withdrawal, and courts will not generally remove an attorney from the CourtLink® service list without an order of the court. (After the court has approved the substitution or withdrawal of counsel, it is recommended that attorneys verify with the court clerk's office that the case changes have been recorded in the state's case management system.)

What to Expect in the Future

The state of Colorado and CourtLink® eFile have been working together to progressively develop improvements to the state's eFiling system. Developments scheduled for 2002 include: (1) pro se eFiling; (2) eFiling in county court civil cases; and (3) court ability to redact information from publicly available documents posted on CourtLink® eFile.

Additionally, some jurisdictions are considering storing archived cases on the eFile system or uploading paper filings to CourtLink® eFile to make active case files complete on the eFile system. Currently, only eFiled documents are available on the system. Uploading paper filings would essentially allow electronic access to complete court files via any computer with Internet access.

Conclusion

Colorado's eFiling system has proven to be a tool that can make attorneys and courts more efficient. It is the first statewide eFiling service in the country. In its first year, the system can be considered to be a success in terms of its innovative use of technology in law practice and the courts. As long as eFiling continues to be secure and is reliable for the courts and attorneys, its impact will continue to grow.

More information about the eFile system is available on the CourtLink® website: http://www.lexisnexiscourtlink.com, or by calling its offices: (888) 529-7587 or (720) 904-3340.

NOTES

1. See FY2000 Annual Report of the Colorado Judicial Branch at 9: www.courts.state.co.us/annualrpt/annual2000/narrative00.pdf.

2. Lexis-Nexis® recently acquired CourtLink®. This acquisition does not change the current eFiling system in Colorado and does not require attorneys to be Lexis-Nexis® customers in order to eFile documents with Colorado courts.

3. C.R.C.P. 121, § 1-26, Interim Rule for Electronic Filing and Service System, Pilot Project.

4. Chief Judge Order and Notice issued by Broomfield County District Court Chief Judge Bockman on November 7, 2001.

5. Supra, note 3.

Editor's Note: Technology and Law Practice (formerly "Automation Annotations") publishes articles on technology as it relates to law practice management, including the use of computer hardware and software, the Internet, and office equipment. This Department welcomes submissions of articles and article topics of a practical nature that do not advocate a position or promote a product. For more information about the Department guidelines or to submit an article or topic suggestion, please contact one of the following Department editors: Larry Smith, (303) 832-4643 or larry.smith@lawofficeconsulting.com; Carrol Reeves, (303) 377-3580 or carroltmreeves@aol.com; Sue Borgos, (303) 422-2229 or sborgos@nsbs.com.