AGENDA

COLORADO SUPREME COURT
COMMITTEE ON THE
RULES OF CIVIL PROCEDURE

Friday, June 23, 2017, 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 March 31, 2017 minutes [Page 1 to 5]

III. Announcements from the Chair

Rule 16.1 and JDF 601 posted for public comment

IV. Business

A. C.R.C.P. 53—(Judge Zenisek) [Page 6 to 10]

B. C.R.C.P. 57(j) & Fed. R. Civ. P. 5.1—(Stephanie Scoville)

C. C.R.C.P. 121 §1-15—(Judge Jones)

D. C.R.C.P. 58 & 59—(Judge Jones) [Page 11 to 12]

E. C.R.C.P. 80—(Judge Espinosa)

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

G. Consideration of detailed rules governing the making and opposition to summary judgment motions—(Judge Berger)

H. C.R.C.P. 16 & 26—(Damon Davis) [Page 13 to 16]

I. C.R.C.P. 69—(Brent Owen) [Page 17 to 18]

V. New Business

VI. Adjourn—Next meeting is September 29, 2017 at 1:30pm

Michael H. Berger, Chair
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Conference Call Information:

Dial (720) 625-5050 (local) or 1-888-604-0017 (toll free) and enter the access code, 29368692, followed by # key.

Colorado Supreme Court Advisory Committee on the Rules of Civil Procedure
March 31, 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 Ann Frick		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	
Debra Knapp		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 Allison Eid, Liaison		X
Jeannette Kornreich	X	

I. Attachments & Handouts

A. March 31, 2017 agenda packet
B. Supplemental Material – Rule 120 memo

II. Announcements from the Chair

- The January 27, 2017 minutes were adopted as submitted;
- New member John Lebsack was introduced and welcomed;
- Longtime member and former chair Richard Laugesen has resigned from the committee. In 2014, a reception was held for Mr. Laugesen who was thanked for his 31 years of service as committee chair. Judge Berger proposed having another thank-you reception, before today's meeting, to thank Mr. Laugesen for his almost 40 years of committee membership, but due to a number of reasons Mr. Laugesen declined. Mr. Laugesen's contribution to civil practice in Colorado is invaluable and his work and leadership will never be forgotten. The committee is thankful for Mr. Laugesen's stellar legacy of commitment and service; and
- The county court jurisdictional increase proposed by the committee in March of 2016 will be moving forward. As a reminder, the committee recommended an increase from the current $15,000 to $35,000, and the committee's recommendation was posted for public comment. The increase will likely be in the realm of $25,000, and Judge Berger will keep the committee updated on the statutory change.

III. Business

A. C.R.C.P. 16.1

On page 6 of the agenda packet, two alternative statements were listed. The statement the committee selects will have to be inserted in a few places throughout the draft. There was a motion to adopt the first statement that passed 18:1. There were other changes throughout the draft, mostly editorial, that elicited no discussion. Finally, there was a motion to adopt the comment, at pages 21-22 that passed unanimously. Hearing no further discussion, Judge Berger will prepare a letter and transmit the draft to the supreme court. Richard Holme, as well as the rest of the subcommittee, were thanked for their work.

B. New form for admission of business records under hearsay exception rule

Damon Davis began and reminded the committee that the forms at pages 32-37 of the agenda packet were the county court forms and instructions that were approved at the last meeting. Today, the committee was reviewing the district court forms that were virtually identical, minus the numbering and caption. There was a motion to adopt the district court forms that passed unanimously. Finally, Rule 16 was amended to include a reference to the forms. There was a motion to adopt Rule 16, correcting the rule reference from "9.2" to "902" that passed unanimously. Judge Berger will prepare a letter and transmit the drafts to the supreme court.

C. C.R.C.P. 120

Fred Skillern began and stated that he retired from the committee in 2015, but came back to resume the Rule 120 Subcommittee deliberations as chair. The subcommittee consisted of Jose Vasquez, Debra Knapp, Judge Haglund, Judge Hannon, Chuck Calvin, Keith Gantenbein, Deanna Stodden, and Elizabeth Marcus. The subcommittee met and addressed the objections raised in Mr. Terry Jones's letter (dated April 6, 2016) sent in response to Rule 120's public comment period. Mr. Skillern went through the subcommittee's annotated draft in response to Mr. Jones's objections.

1. The last sentence 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 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 recommends 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 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), is 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, like junior lien or easement holders. There was a motion and a second to adopt the subcommittee's recommended language and discussion ensued.

   Members asked what does "entitled to" mean, and is it clear where one would go to find those who are "entitled to" notice of the foreclosure? The subcommittee stated that yes, the title report would list anyone entitled to notice. The committee was not swayed, and an alternative motion was proposed, as follows: (iv) will end at "demand for sale", and additional language would appear in new romanette (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." There was a 2nd and the alternative motion was adopted unanimously.

4. In subsection (b)(4), the amendment 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 "single point of contact" as defined in section 38-38-100.3, C.R.S., is "an individual or team of personnel." Also, the subcommittee explained that "loss mitigation" is terminology that those involved in a foreclosure will know.

Members asked at this stage in the foreclosure, who is the debtor put in contact with? The subcommittee explained that this 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. There was a motion to adopt the language as submitted by the subcommittee that passed unanimously.

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 Mr. Jones's 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 Mr. Jones's 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 language is simpler, more consistent with subsection (d)(4), and less redundant. A motion to adopt the language passed unanimously.

Judge Berger will draft a transmittal letter and resubmit Rule 120 to the supreme court. Fred Skillern and the subcommittee were thanked for all of their hard work.

D. C.R.C.P. 57(j)

Tabled until the May 19, 2017 meeting.

E. C.R.C.P. 83

Senate Bill 17-154, the Uniform Unsworn Declarations Act, will be signed by the governor soon, and the subcommittee will no longer pursue enacting a civil rule. This bill provides verification langue that will appear at the end of judicial department forms.

F. C.R.C.P. 80

Chief Justice Directive 05-03 basically supersedes the civil rule, and the criminal rule, Crim. P. 55, references the civil rule. Judge Berger and Judge Dailey are considering appointing a joint subcommittee to draft a rule that reflects current practice. There are many issues to consider, including the cost of an electronic recording compared to a court reporter. A subcommittee, which will include a court reporter, will be formed and will follow-up at the next meeting.

G. C.R.C.P. 4 – Judge Elliff

On further examination, Judge Elliff stated that no change was necessary.

H. C.R.C.P. 107 – Judge Berger

Judge Berger received a letter from an attorney stating that the rule should be amended to allow the award of attorney fees to the prevailing party. Also, the availability to collect costs and attorney fees should be discussed as related to punitive contempt. A subcommittee will be set-up to decide what, if any action, will be taken.

IV. Future Meeting

May 19, 2017

The Committee adjourned at 3:20 p.m.

Respectfully submitted,
Jenny A. Moore

THIRD SUPPLEMENTAL REPORT REGARDING C.R.C.P. 53 AMENDMENT

A. Background Information

Following full committee approval of the recommended rule regarding special masters, the Supreme Court received public comment. Following receipt of a letter, the Supreme Court requested that the Committee re-visit the Rule's proposed comment. Judge Berger requested that the Subcommittee meet and report back to the full Committee regarding the comment.

Members will recall that the proposed comment, passed by full Committee, reads:

"In appointing special masters, judges should be mindful of C.R.C.P. 122 regarding appointed judges. In this regard, section (a)(1)(C) of the Rule should not be utilized on the basis of lack of professionalism by one or more counsel."

The comment addresses two concerns. First, that the Rule might inadvertently discourage use of appointed judges who are available pursuant to C.R.C.P. 122. Second, that judges might over-utilize the appointment of special masters, or appoint them when circumstances did not warrant appointment.

B. Subcommittee Meeting

The Civil Rules' Committee, Subcommittee regarding Special Masters, met April 28, 2017. The following individuals appeared at the telephonic meeting:

Judge Christopher Zenisek (Chair)
Brent Owen, Esq.
David Tenner, Esq.
Gregory Whitehair, Esq.

The following members were unable to attend:

Chief Judge Janice Davidson (Ret.)
Richard Holme, Esq

Three of four of the members attending the meeting supported striking the comment in its entirety. The members also discussed the views and concerns articulated by others which led to the initial comment. Some members believed the second sentence was unnecessary and confusing because appropriate standards are set forth within the body of the rule.

Following the meeting, attending members consulted with those unable to attend. The Subcommittee now reports that it **unanimously** suggests striking the second sentence, and

replacing the proposed comment with: "See also C.R.C.P. 122 (regarding party consented appointment of retired judges)."

The proposed rule and comment are provided below for reference (red-lined against the Federal Rule and prior draft comment).

C.R.C.P. 53 (PROPOSED)

(a) Appointment.

(1) ***Scope.*** A reference to a master shall be the exception and not the rule. Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by:

(i) some exceptional condition; or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pretrial and posttrial matters that cannot be effectively and timely addressed by ~~an available~~the appointed district judge ~~or magistrate judge of the district~~.

(2) ***Disqualification.*** A master must not have a relationship to the parties, attorneys, action, or court that would require disqualification of a judge under ~~28 U.S.C. § 455,~~ the Colorado Code of Judicial Conduct, Rule 2.11, unless the parties, with the court's approval, consent to the appointment after the master discloses any potential grounds for disqualification.

(3) ***Possible Expense or Delay.*** In appointing a master, the court must consider the proportionality of the appointment to the issues and needs of the case, consider the ~~-~~fairness of imposing the likely expenses on the parties, and ~~must~~ protect against unreasonable expense or delay.

(b) Order Appointing a Master.

(1) ***Notice.*** Before appointing a master, the court must give the parties notice and an opportunity to be heard. If requested by the Court, ~~A~~any party may suggest candidates for appointment.

(2) ***Contents.*** The appointing order must direct the master to proceed with all reasonable diligence and must state:

(A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);

(B) the circumstances, if any, in which the master may communicate ex parte with the court or a party;

(C) the nature of the materials to be preserved and filed as the record of the master's activities;

(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(g).

(3) ***Issuing.*** The court may issue the order only after:

(A) the master files an affidavit disclosing whether there is any ground for disqualification under the Colorado Code of Judicial Conduct, Rule 2.11, ~~28 U.S.C. § 455~~; and

(B) if a ground is disclosed, the parties, with the court's approval, waive the disqualification.

(4) ***Amending.*** The order may be amended at any time after notice to the parties and an opportunity to be heard.

(5) *Meetings.* When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 14 days after the date of the order of reference and shall notify the parties or their attorneys.

(c) Master's Authority.

(1) ***In General.*** Unless the appointing order directs otherwise, a master may:

(A) regulate all proceedings;

(B) take all appropriate measures to perform the assigned duties fairly and efficiently; and

(C) if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence.

(2) ***Sanctions.*** The master may by order impose on a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

(d) Master's Orders. A master who issues ~~an~~ a written order must file it and promptly serve a copy on each party. The clerk must enter the written order on the docket. A master's order shall be effective upon issuance subject to the provisions of section (f) of this Rule.

(e) Master's Reports. A master must report to the court as required by the appointing order. The master must file the

report and promptly serve a copy on each party, unless the court orders otherwise. A report is final upon issuance. A master's report shall be effective upon issuance subject to the provisions of section (f) of this Rule.

(f) Action on the Master's Order, Report, or Recommendations.

(1) ***Opportunity for a Hearing; Action in General.*** In acting on a master's order, report, or recommendations, the court must give the parties notice and an opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions.

(2) ~~***Time to Object or Move to Adopt or Modify.*** A party may file objections to or a motion to adopt or modify the master's order, report, or recommendations no later than 21 days after a copy is served, unless the court sets a different time.~~ ***Time to Object or Move to Modify.*** A party may file objections to or a motion to modify the Master's proposed rulings, order, report or recommendations no later than 7 days after service of any of those matters, except when the Master held a hearing and took sworn evidence, in which case objections or a motion to modify shall be filed no later than 14 days after service of any of those matters.

(3) ***Reviewing Factual Findings.*** The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, stipulate that:

(A) the findings will be reviewed for clear error; or

(B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.

(4) ***Reviewing Legal Conclusions.*** The court must decide de novo all objections to conclusions of law made or recommended by a master.

(5) ***Reviewing Procedural Matters.*** Unless the appointing order establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

(g) Compensation.

(1) ***Fixing Compensation.*** Before or after judgment, the court must fix the master's compensation on the basis and terms stated in the appointing order, but the court may set a new basis and terms after giving notice and an opportunity to be heard.

(2) ***Payment.*** The compensation must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(3) ***Allocating Payment.*** The court must allocate payment among the parties after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than other parties for

the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

~~**(h) Appointing a Magistrate Judge.** A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge states that the reference is made under this rule.~~

Comment See also C.R.C.P. 122 (regarding party consented appointment of retired judges). ~~In appointing special masters, judges should be mindful of C.R.C.P. 122 regarding appointed judges. In this regard, Section (a)(1)(B) of this Rule should~~ ~~not~~ be utilized ~~on the basis of lack of professionalism by one or more counsel~~.

MEMORANDUM

To: Judge Berger

From: Judge Jones

Re: Potential problems related to the interaction of "entry of judgment" under C.R.C.P. 58(a) and the time for filing post-trial motions under C.R.C.P. 59(a)

Rule 59(a) says that post-trial motions under Rule 59 must be filed "[w]ithin 14 days of entry of judgment as provided in C.R.C.P. 58 . . . ." Rule 58(a) says that "[t]he effective date of entry of judgment shall be the actual date of the signing of the written judgement."

The problem that has arisen relating to those provisions is that a judgment signed on one day may not be served, either by mail or electronically, until several days later. The effect is to significantly shorten the time that a party has to prepare a post-trial motion. I believe there have even been cases where the delay in service was more than 14 days, leaving parties with no option other than to file a motion for an extension of time to file post-trial motions. But any such motion is arguably foreclosed by C.R.C.P. 6(b), which says that the court may not extend the time for taking any action under Rule 59, except "under the conditions" stated in Rule 59. On the other hand, Rule 59(a) says that the court may allow more than 14 days to file post-trial motions, but does not state any conditions for enlarging the time.

All this raises two questions in my mind:

1. Should Rule 58(a) be amended to make the date a judgment is served, rather than signed, the effective date of the judgment for purposes of Rule 59?

2. Does Rule 6(a) somehow conflict with Rule 59(a) regarding extensions of time?

I wonder if these matters should be brought to the full Civil Rules Committee.

J. Keith Killian◆
Damon J. Davis
Christopher H. Richter●
Nicholas W. Mayle
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Thursday, May 25, 2017

Hon Michael Berger
Colorado Civil Rules Committee

Via e-mail: Michael.berger@judicial.state.co.us

RE: C.R.C.P. 16(b)(1); 16(f)(3)(I); 26(a)(2)(B)(II)

Dear Judge Berger:

Over the last year or so I have noted some language in the rules that can produce apparently anomalous results, and has produced such results on occasion. I do not know if these issues warrant action by the committee, but thought I would bring them to the committee's attention for consideration. I have listed the issues and possible ways of addressing them below.

C.R.C.P. 16(b)(1)

Rule 16(b)(1) states that a case is at issue when "all parties have been served and all pleadings permitted by C.R.C.P. 7 have been filed or defaults or dismissals have been entered *against all non-appearing parties...*" (emphasis added). But what happens when a party appears by filing a C.R.C.P. 12 motion and is dismissed on that motion? Technically, as currently worded, the case is not at issue.

There have been a couple cases where we have had to push defendants to acknowledge the case was at issue when a party was dismissed, or file a motion to deem the case at issue. The matter came to a head in a multi-defendant case where a government defendant was dismissed under C.R.C.P. 12(b)(1) on grounds of governmental immunity. The remaining defendants did not want to proceed with the case when the entity's dismissal might be reversed on appeal, so they argued the case was not at issue. The trial court ultimately agreed and determined the case should not proceed until the appeal was completed.

Perhaps this was the intent of the rule. But it seems to me a better rule would be that as soon as all of the pleadings permitted by Rule 7 have been filed by the parties, or they have otherwise been dismissed or defaulted – whether they have appeared or not – the case should be at issue.

A possible rewording would be: "A case shall be deemed at issue when all parties have been served and all parties have filed the pleadings permitted by C.R.C.P. 7, or have had defaults or dismissals entered against them...."

Another possibility is: "A case shall be deemed at issue when all parties have been served and all pleadings permitted by C.R.C.P. 7 have been filed by the parties, or defaults or dismissals have been entered against them...."

There may of course be other and better ways or wording the rule, but these are a couple of suggestions. Or the committee may feel the present wording is fine and need not be changed. In any event, I at least wanted to raise the issue.

C.R.C.P. 16(f)(3)(I)

This rule requires each party to provide "a summary identification of the claims and defenses remaining for trial" and that "[a]ny claims or defenses...which will not be at issue at trial shall be designates as 'withdrawn' or 'resolved.'" C.R.C.P. 16(f)(3)(I). The rule, as worded, creates a grey area: what if a claim or defense is pled, but is not listed at all, either as an issue for trial or as being withdrawn or resolved?

This came up in another case. One of the defendants pled the statute of limitations as an affirmative defense. But the defense was not listed in the TMO; it was not listed as being at issue for trial or as being withdrawn or resolved. Following federal precedent regarding the requirements of a pre-trial order, the trial court ruled that the defense was waived because it was not listed in the TMO.

In an unpublished opinion, the Colorado Court of Appeals reversed this order. It held that a claim or defense was only waived if it was listed as "withdrawn" or "resolved." Silence in the TMO would not, by itself, create a waiver. I believe the court also felt it was not really prejudicial in light of other facts in the case, but part of the holding was that a claim is not waived unless listed as withdrawn or resolved.

My concern is that this grey area, where a claim is not listed as being at issue for trial or as being withdrawn or resolved, creates opportunities for gamesmanship. Parties can fail to list a claim or defense in hopes it will be overlooked, especially if it was not a claim or defense that was emphasized during discovery or pre-trial matters. The party may then hope to spring it on the other party at trial. We felt that this happened to us, although the court of appeals obviously disagreed.

I do not know if there is enough risk of gamesmanship to make a change in the rule necessary, but I at least wanted to bring this grey area to the committee's attention. One way to address it would be to expressly require that all claims and defenses raised in the pleadings be addressed in the TMO by the party raising it. This would, in theory, require that all claims or defenses be listed as either at issue for trial or listed as being withdrawn or resolved.

Another option would be to remove the language about listing claims and defenses as withdrawn or resolved and simply require claims for trial be listed. This would move more toward the federal interpretation and would likely result in waiver of any claim or defense not listed.

Another option, which would be a sort of compromise, would be to add to the rule, or a comment, the following: "If a claim or defense is not listed as being at issue for trial, and the failure to list it is prejudicial to another party, it may be deemed waived by the court." This would likely eliminate any gamesmanship, because there would be an express risk of losing the claim or defense.

Again, the rule may be fine the way it is, but I at least wanted to call attention to this potential grey area in the rule.

C.R.C.P. 26(a)(2)(B)(II)

There seems to be confusion and dispute over how C.R.C.P. 26(a)(2)(B)(II) is to apply. The comment to Rule 26 states that: "Non-retained experts are persons whose opinions are formed or reasonably derived from or based on their occupational duties." C.R.C.P. 26, 2015 Comments [19]. The comment does not say anything about what is in the non-retained expert's report, but instead relies on the circumstances in which the expert formed the opinions. Likewise, another comment states: "In either event, the expert testimony is to be limited to what is disclosed in detail in the disclosure. Rule 26(a)(2)(B)(II)." C.R.C.P. 26, 2015 Comments [18]. Again, the limit is what is in the disclosure, not the expert's own records. Likewise, the rule itself limits non-retained experts to testifying to what is disclosed, not what is in a self-generated report.

Shortly after the amended rules were adopted in 2015, Dick Holme wrote an article for the Colorado Lawyer, which I think expressed the intent of how Rule 26(a)(2)(B)(II) is to function. It stated in part:

> For example, in addition to opinions and diagnoses reflected in the 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, if appropriately disclosed, may be offered at trial without the witness having first prepared a full, retained expert report.

Richard P. Holme, *New Pretrial Rules for Civil Cases – Part II: What is Changed*, The Colorado Lawyer, 44 Colo. Law. 111 (July 2015). The article makes clear he was not speaking for the committee or Supreme Court, but it was an informed statement.

However, many parties are moving to strictly limit experts to what is contained in their written reports, regardless of what is disclosed in the C.R.C.P. 26(a)(2)(B)(II) disclosures. Most often this arises with medical experts. A motion is filed to limit the doctors to strictly what is in their medical records, even if they have additional opinions formed during the course of treatment and those opinions are disclosed. It can also apply to police officers by seeking to limit them strictly to what is in their police reports. Some trial courts are granting these motions and so limiting the non-retained experts.

I am not sure where this argument comes from. But it seems to me it is contrary to the intent of the rule and the comments. And it seems to be contrary to Rule 1, because it basically

pushes people to expend more money and resources on retained experts, rather than rely on non-retained experts who are already familiar with the case and are often less expensive.

In order to clarify the rule, I suggest that the committee propose to the Supreme Court that they adopt the above quote from Dick Holme's article as a comment to the rule, starting at "in addition." I think that this would eliminate confusion about how the rule is to be interpreted and ensure it is applied as intended. It would also encourage the use of non-retained experts rather than more expensive retained experts.

Conclusion

I wanted to call the committee's attention to these matters. I am not sure if anything needs to be done, but thought the issues were worth addressing.

Yours truly,

KILLIAN, DAVIS, Richter & Mayle, PC

Damon Davis

/DJD

cc: Jenny Moore (jenny.moore@judicial.state.co.us)

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April 25, 2017

The Honorable Judge Michael H. Berger
Colorado Court of Appeals
2 East 14th Avenue, Third Floor
Denver CO 80203

Judge Berger:

I write to recommend the Colorado Supreme Court Committee on Rules of Civil Procedure evaluate Colorado Rule of Civil Procedure 69. As currently drafted, Rule 69 provides antiquated and internally inconsistent mechanics for obtaining discovery to aid in recovery against a judgment. For instance, subsection (h) permits a witness to be subpoenaed as provided by Colorado Rule of Civil Procedure 45; and subsection (i) permits a "deposition of any person including the judgment debtor, in the manner provided in these rules"; yet other subsections of Rule 69 require the judgment debtor to produce documents to "the court, master or referee" adding a hurdle (of unclear value) to obtain post-judgment discovery of documents, including against the person most likely to have useful information—the judgment debtor. In any event, the rule would benefit by being brought in line with modern discovery practices, including the delivery of documents to counsel's office (not the court), and the use of Colorado Rule of Civil Procedure 45 as the mechanism for obtaining post-judgment discovery.

The analogous federal rule already takes this approach. Federal Rule of Civil Procedure 69 provides in pertinent part:

> (2) **Obtaining Discovery**. In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person—including the judgment debtor—as provided in these rules[.]

Fed. R. Civ. P. 69(a)(2).

Consistent with the current movement to bring Colorado's Rules of Civil Procedure in line with the Federal Rules of Civil Procedure, I recommend the Committee study a possible revision to Colorado Rule of Civil Procedure 69(e)-(h) to match Federal Rule of

Civil Procedure 69(a)(2). This approach would benefit Colorado litigants by clarifying Rule 69 and streamlining discovery efforts in aid of collecting judgments. The change, moreover, would make it clear that a judgment creditor should use the commonly understood and widely accepted subpoena mechanics in Colorado Rule of Civil Procedure 45 to pursue post-judgment discovery.

My colleague, Aaron Boschee (copied), is also familiar with the issues caused by Colorado Rule of Civil Procedure 69 as currently drafted. We have grappled with these issues in ongoing collection efforts against a judgment debtor in Colorado litigation. If you believe it is appropriate, Aaron is willing lend his expertise and experience by serving in an advisory role on any subcommittee that might evaluate Rule 69.

Sincerely,

Squire Patton Boggs (US) LLP

Brent R. Owen

cc: Aaron Boschee