SUPREME COURT
COMMITTEE ON RULES OF CIVIL PROCEDURE
MINUTES OF MEETING

January 25, 2013

The Colorado Supreme Court Civil Rules Committee was called to order by Richard W. Laugesen at 1:38 p.m. in the 4th Floor, Supreme Court Conference Room, 2 E 14th Ave, Denver CO.
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The following members were present:

David R. DeMuro
Peter A. Goldstein
Carol Haller
Lisa Hamilton-Fieldman
Richard P. Holme
Charles Kall
Thomas K. Kane
Richard W. Laugesen
Cheryl Layne
David C. Little
Justice Nancy Rice
Frederick B. Skillern
Lee N. Sternal
John R. Webb
Jenny Moore
Ben Vinci

The following members were excused:

James Abrams
Michael H. Berger
Janice B. Davidson
Christopher B. Mueller
Howard Rosenberg
Ann Rotolo
Jane Tidball

Approval of Minutes:

The October 26, 2012 minutes were approved with a correction to page 12 where a typo was corrected [in the second from the bottom line of the first paragraph of the quoted material, the word “bet” should be “but”].

Information Items:

Chairman Richard Laugesen called the Committee’s attention to the following:

- The 2013 Civil Rules Committee Meeting Schedule, and that the Committee’s meetings will be in the new Ralph Carr Judicial Building, 2 East 14th Avenue, Denver, Colorado [page 1 of the Agenda Packet].

- Chairman Laugesen called to the Committee’s attention that April Bernard [who served the Committee for many years] has taken a new position in

Jefferson County Court as the pro se coordinator [page 2 of the Agenda Packet].

- Chairman Laugesen called the Committee's attention to new address and telephone numbers for the Supreme Court, Court of Appeals, and State Court Administrator office [page 3 of the Agenda Packet].

- Chairman Laugesen called the Committee's attention to the roll out for ICCES. Carol Haller reported statistics on use thus far [pp 4-6 of the Agenda Packet].

- Chairman Laugesen noted the *Colorado Lawyer* piece by Dick Holmes on the new C.R.C.P. 45 [pp 7-16 of the Agenda Packet].

- Chairman Laugesen called the Committee's attention to an announcement on the new IAALS study on C.R.C.P. 16.1 [pp 17-18 of the Agenda Packet].

- Chairman Laugesen called the Committee's attention to a piece on The CBA Casemaker Research Program [discussed pp 19-20 of the Agenda Packet].

- Justice Rice discussed how to access the 4th Floor conference room for future meetings. Building security prevents access to certain areas. Justice Rice offered to provide a short tour of the building [and did].

- Jenny Moore from the Supreme Court Law Library attended the meeting and was introduced to the Members. The Law Library may be taking over the staffing of the several rules committees, including taking and archiving minutes.

Proposed Amendment to C.R.C.P. 15(c) and a Proposed New C.R.C.P. 4(m) to Deal With Relation-Back of Amended Pleadings.

Chairman Laugesen called the Committee's attention to Item 4 of the Agenda Packet [pp 21-35] and noted that the matter had been brought to the Committee's attention by the Committee's Federal Rules Subcommittee. Mr. Laugesen asked Subcommittee Co-Chair David DeMuro to provide a brief background of the matter and the Subcommittee's proposal.

In providing background, Mr. DeMuro brought to the Committee's attention a recent Colorado Supreme Court decision [Garcia v. Schneider Energy Services, Inc, 287 P.3d 112] that dealt with and illustrated the problem. The case dealt with relation-back of amended pleadings when the amendment changes the party against whom the claim is asserted. The Court held that the district court erred in granting summary judgment to the defendant based on statute of limitations, because the defendant received notice of the claim within a reasonable time after the complaint was filed, which notice allowed the amended complaint to name the new defendant and relate-back

under C.R.C.P. 15(c) to the original timely-filed complaint. Both the majority and dissenting opinions in the case referred to relatively recent federal rule changes to F.R.C.P. 15(c) and 4(m), which the Subcommittee took as a suggestion to review and possibly amend Colorado's state court rules. Mr. DeMuro reported that the Subcommittee feels that the federal rule's treatment of the issue would be beneficial.

Mr. DeMuro reported that the Subcommittee's proposal is to amend C.R.C.P. 15(c) to follow the principle in the federal rule that when a court determines whether an amendment changing the party against whom the claim is asserted relates-back to the original complaint, it should look at the period provided in what would be a new C.R.C.P. 4(m) to determine whether the new defendant received timely notice. Colorado presently has no rule that specifically provides a period of time in which the defendant must be served following the filing of the complaint. He noted that the Subcommittee's proposed new 4(m) follows the comparable the federal rule, except that the Subcommittee's proposal significantly reduced the amount of time in which the defendant must be served from 120 days [in the federal rule] to 63 days [in the proposal]. Mr. DeMuro stated that the Subcommittee was persuaded to shorten the time period because (1) Many state district courts routinely enter Delay Reduction Orders following the filing of the complaint that require the defendant to be served in even less than 63 days, and (2) the proposed rule requires the court to extend the time for service if the particular plaintiff can show good cause for failure to serve the defendant within 63 days [such as where service has been attempted but defendant is avoiding service].

A member asked whether the intent of 4(m) is to make the 63 days the outside limit, or whether it would be to a maximum of 63 days--some judges presently issuing their Delay Reduction Orders in less than 63 days. Mr. DeMuro responded that the 63-day time interval was meant to be a guideline of an acceptable time interval that is extendable.

Another member asked if it was the intent of the Subcommittee that 63 days now be the limit and that the court should not do a Delay Reduction Order before the 63 days expires? Mr. DeMuro responded that that may be the effect, because heretofore, there was no guideline, and judges were using their own less-than-uniform perception of a reasonable time.

Another member stated his observation that he agreed that 120 days was too long, but felt that 63 may be too short. Committee Member Judge Kane stated that 63 days is, in his view, an appropriate length of time--that in the El Paso District, it is their practice to contact the plaintiff with a Delay Reduction Show Cause Order after 60 days of no service.

Member Lee Sternal commented that, to him, 63 days is too short and would advocate no limit, or at least, no shorter time interval than the federal rule.

Another member asked what "good cause" means for extending the time. Another member responded, stating that the federal rule is longer because it allows for service by mail first, and if that fails, then the service must be effected by personal service, which accounts for the allotment of extra time. He further noted that the reason for the

stated time is to unify and identify the time to be allotted and avoid the variety of times now being used in Delay Reduction Orders--i.e., that no order need be issued prior to the 63 days, and then, permit the Court's discretion in allowing additional time for service.

It was moved and seconded that the Subcommittee's proposals to amend C.R.C.P. 15(c) and add a new C.R.C.P. 4(m) [both proposals as set forth on page 24 of the Agenda Packet] be approved by the Committee for recommendation to the Supreme Court. The language of the proposals would be as follows:

PROPOSED AMENDMENT

"**Rule 15. Amended and Supplemental Pleadings**

(a) and (b) * * * * [NO CHANGE]

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by ~~law for commencing the action against him~~ Rule 4(m) for serving the Summons and Complaint, the party to be brought in by amendment: (1) Has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

(d) * * * * [NO CHANGE]"

PROPOSED NEW RULE

"**Rule 4. Process**

(a) through (k) * * * * [NO CHANGE]

(l) No Colorado Rule.

(m) Time Limit for Service. If a defendant is not served within 63 days (nine weeks) after the complaint is filed, the court--on motion or on its own after notice to the plaintiff-- shall dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court shall extend the time for service for an

appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(d)."

During discussion on the motion, a member inquired whether 15(c) should say:

> "time in subsection 4(m) plus any extensions"?

Is it obvious that the statement in 15(c):

> "…is satisfied ~~and within the period provided~~ by and accomplished within the provisions of 4(m)…."

conveys what needs to be done. To him, the language of the proposal does not appear to follow the federal rule. Mr. DeMuro responded that the proposed language is sufficient.

Another member observed that the 63 days includes the amended complaint because there is no distinction in 4(m) between an original or amended complaint. The member then suggested a friendly amendment to add in the second line of 4(m):

> "…after the complaint or amended complaint is filed…".

Mr. DeMuro responded that the present language is sufficiently clear and that the friendly amendment was respectfully declined.

Another member inquired whether the amended complaint needs to be filed within the original 63 days. Mr. DeMuro responded that it did--that that is the reason for the provision if one wants it to relate-back to take advantage of the original filing date to preserve the case from the running of the statute of limitations--that there is, in effect, a 63-day safe harbor to file an amended complaint and have it relate-back to the original date of filing.

Another member asked how the change impacts the change of parties or the adding of parties. Mr. DeMuro responded that subsection 4(m) only poses a problem where a case is filed near the end of the running of the statute of limitations and a substitution needs to be made outside the expired limitation period. This is the mechanism to deal with that problem.

Another member asked about the "nine weeks" description of the 63 days, and whether that causes confusion. Another member responded, stating that additional reference to weeks was done throughout all the rules as an aid. Because it is mathematically the same as the reference to 63 days, there should not be confusion.

Another member again raised the question about what constitutes "good cause" noting that it could vary greatly from personal reasons to legal reasons. Mr. DeMuro responded, noting that the "good cause" standard is used in a number of rules and should present no real problem.

Upon call for the vote, the motion carried 7:4.

C.R.C.P. 54--Further Consideration of the County Court Rule Subcommittee Change Proposal.

Chairman Laugesen next directed the Committee's attention to Item 5 of the Agenda Packet [pp 36-42]. Mr. Laugesen noted that the proposal had been before the Committee at a previous meeting and had been tabled for further study and consideration by the Subcommittee. Chairman Laugesen asked Subcommittee Member Ben Vinci to provide a brief background of the matter and the Subcommittee's proposed amendment.

Mr. Vinci provided the Committee with the background of the matter, pointing out the particular need in county court where the duration of a judgment is now only six years [distinguished from 20 years in the district court], creating a need for reviving/extending a judgment beyond that relatively short period of time. He noted that a part of the concept of the proposal was whether the court retains personam jurisdiction after entry of the judgment, and the Subcommittee's view that it does. Mr. Vinci called to the Committee's attention the e-mailed memo from Committee Member Howard Rosenberg who has expressed concerns about due process. Mr. Vinci handed out his response memo and gave examples of other instances where it appeared that the court did retain personam jurisdiction after entry of a judgment. He also directed the Committee's attention to his research [page 39 of the Agenda Packet] on what is done in other states about continuing jurisdiction. Mr. Vinci noted that the main feature of the proposal is to eliminate the need to personally serve the debtor with a motion to revive the judgment--the rule change does not prohibit the debtor from arguing that the revival should not be permitted or that, if permitted, was granted in error.

Committee Member Fred Skillern asked what the motion will mean to the debtor if it does not state that there is any action required on the part of the debtor. He noted that there was nothing in the motion to indicate what actions are available to the debtor of that revival will occur if no action is taken by the debtor. He further noted that the present rule (being in the form of a "show cause") clearly tells the debtor that there must be action taken if the debtor disagrees with the revival. He noted that the proposal would also eliminate the show cause return date. Mr. Skillern stated he also had other concerns as well: If the debtor is represented by counsel, the proposed motion would go to the debtor not the lawyer, which could cause some difficulty. He stated he also had some concern about what the "last known address" of the debtor would be--i.e., the creditor may have a recent address due to interrogatories or garnishments, but the rule does not require the creditor to use the "best address" the creditor has for the debtor.

Mr. Vinci responded that the Subcommittee was open to accommodating these sorts of concerns if the main difficulty of not having to find and again personally serve the debtor is approved.

Magistrate Hamilton-Fieldman stated that she also does not believe the proposal protects the due process rights of the debtor. She observed that other states may have different statutory schemes which add to due process. Mr. Vinci responded stating that placing the burden on the creditor to personally re-serve papers to a debtor who has

sometimes purposefully avoided paying the judgment is overly burdensome and unnecessary--the creditor has had to do that initially to get the judgment; he should not be put to that burden again to extend it.

A member asked whether the judgment can be "extended" as opposed to "revived"--the statute speaking in terms of "reviving" a judgment. Mr. Vinci responded that the request for the "revival" must be made and ruled upon while the judgment is still in force so that it is really, in effect, an "extension." Again, now being a very short period, and in effect being an extension, the judgment creditor should not be again burdened with having to find and personally serve the judgment debtor, who often, again, attempts to avoid being found or served.

Another member suggested that the proposal be changed to require a copy of the notice go to the lawyer. Mr. Vinci responded that the Subcommittee would probably not object to that suggestion--however, as to the last known address, the burden should be on the judgment debtor to keep the address with the court current.

Another member suggested that the judgment creditor should provide an affidavit of the last known address, similar to the certification used in an insufficient funds case. Mr. Vinci stated that the suggestion was certainly worthy of consideration.

Mr. Holme asked why this was not a policy decision for the legislature. Mr. Skillern added that the involved statute is C.R.S. 13-52-102, which sets forth the expiration date of a judgment and allows for revival by law. He noted that there is no statutory provision for revival, so the Supreme Court has set out the process to revive a judgment by rule.

Another member stated that he disagreed that the court continues jurisdiction over the judgment debtor--in his understanding, the court retains subject matter jurisdiction, but not personal jurisdiction. He noted that personal service is required in many instances after a judgment enters--however, because the Supreme Court stepped into the void, the Committee has the authority to determine this matter.

Magistrate Hamilton-Fieldman stated that if this is done by motion, there needs to be sufficient efforts to find the person and provide their location by affidavit. The motion should be standardized with an answer form provided to the debtor and a deadline by which the action needs to be taken. She observed that there should also be a time period in which to act established on the form.

Mr. Vinci agreed to take these ideas and considerations back to the Subcommittee. Chairman Laugesen declared the matter again tabled for further Subcommittee review and report at a future meeting.

Request for Change in Form 20 [Appendix to Chapters 1 to 17A] to Allow Saving of Paper by Being Permitted to Serve Only Those Portions of the Lengthy Form of Pattern Interrogatories Applicable to the Particular Request

Chairman Laugesen next brought to the Committee's attention Item 6 of the Agenda Packet [pp 43-54]. Mr. Laugesen noted that the suggestion came from Arthur

Abplanalp, Jr., Esq., of Fort Collins. It was his concern that attorneys often serve the entire 14 pages of pattern interrogatories [with checkmarks in the boxes of those to be responded to], even though only some or even a small part of the pattern interrogatories are actually being used. He suggests saving paper by making it clear in the rule for the pattern interrogatory instructions that only those being used are being served.

Magistrate Hamilton-Fieldman suggested a change to the language on the form to allow that not all questions have to be asked or used.

Another member stated that he does not feel the need to be told not to send all the pattern interrogatories when only parts are being used. He has had no problem serving only those he is using.

Another member observed that if only part of the pattern interrogatories are used, and the unused parts not sent and not explained as not being sent, there could be some uncertainty or confusion about whether those sent were the only interrogatories to be answered.

Another member stated this did not appear to be a problem sufficient to necessitate a change in the rule and/or the form--that if the party sending the interrogatories feels that clarification as to which of the pattern interrogatories is being used, that can be handled by letter or some other form of communication.

The Committee nodded their agreement and suggested a letter by the Chair to Mr. Abplanalp advising of the Committee's view of the matter.

Proposal to Change/Make Uniform the Court's Signature Block at the End of Orders to Reflect that the Court's Approval and Signature Are on the First Page Top Right of the Order Document

Chairman Laugesen next called to the Committee's attention Item 7 of the Agenda Packet [pp 55-59] concerning a proposal again by Arthur A. Abplanalp, Jr., Esq., of Fort Collins, to mandate a uniform court's signature block at the end of all orders as shown on page 56 of the Agenda Packet.

Magistrate Hamilton-Fieldman indicated the new e-filing system may resolve this concern. She is a member of that Committee and advises that something similar is presently under consideration by that Committee. She also observed that technology has changed over the past several years making electronic signatures more feasible and usable. She requested that Chairman Laugesen advise Mr. Abplanalp that something like his proposal is already under consideration by another, more suitable Committee.

Other Matters

Magistrate Hamilton-Fieldman informed the Committee that she had been hired to be Special Master of the Court of Federal Claims in Washington D.C., but wishes to remain on the Civil Rules Committee, as she is commuting to that job and will be available to

meet with the group on Fridays. Committee Members congratulated her on her new position, wished her well, and looked forward to seeing her at the next meeting.

Adjournment

There being no further business, Chairman Laugesen declared the meeting adjourned at 3:08 p.m.

The next regular meeting is scheduled for **Friday, February 22, 2013 at 1:26 p.m.**, in the Conference Room 4244, Ralph Carr Judicial Building, Supreme Court, 2 E. 14th Avenue, Denver, Colorado.

Respectfully submitted,

Carol Haller