SUPREME COURT
COMMITTEE ON RULES OF CIVIL PROCEDURE
MINUTES OF MEETING

August 30, 2012

The Colorado Supreme Court Civil Rules Committee was called to order by Richard W. Laugesen at 1:40 p.m. in the 5th Floor, Denver News Agency Building, 101 West Colfax Avenue, Denver.

The following members were present:

Michael H. Berger
Janice B. Davidson
David R. DeMuro
Peter A. Goldstein
Lisa Hamilton-Fieldman
Richard P. Holme
Richard W. Laugesen
David C. Little
Howard Rosenberg
Andy Rosen
Frederick B. Skillern
Ben Vinci
John R. Webb

The following members were excused:

James Abrams
Ann Frick
Carol Haller
Charles Kall
Thomas K. Kane
Cheryl Layne
Christopher B. Mueller
Justice Nancy Rice
Ann Rotolo
Lee N. Sternal
Jane A. Tidball

Approval of Minutes:

The April 27, 2012 minutes were approved as submitted.

Information Items:

Chairman Richard Laugesen called the Committee's attention to:

- Notices Concerning Colorado's New E-Filing System [ICCES] Scheduled to Launch January 1, 2013 [pp 1-4 of the Agenda Packet];
- Notices From State Judicial of Revisions of Various Forms [pp 5-12 of the Agenda Packet];
- Tweet Article on the Civil Access Pilot Project [pp 13-14 of the Agenda Packet];
- Tweet From CBA on Upgrades to The New Casemaker [pp 15-16 of the Agenda Packet]; and

- Ad for The New CBA/CLE "Legal Connection" Feature [p 17 of the Agenda Packet].

Chairman Laugesen asked Magistrate Hamilton-Fieldman (who is on the State Judicial ICCES Committee) to provide the Civil Rules Committee a brief update on what is happening with ICCES. She reported that (as many of the members already knew), LexisNexis will be replaced by ICCES on January 1, 2013. All electronic filings for civil cases in the District, County and Colorado Appellate Courts will be made through the new ICCES program. Beginning October 1, 2012, Colorado Courts will begin the live transition from LexisNexis to ICCES in select judicial districts using ICCES as a pilot project from October 1 through December 31st. The pilot courts will be the 8th, 14th, 17th and 20th judicial districts. During the three-month pilot, ICCES and File and Serve will run parallel. Magistrate Hamilton-Fieldman suggested that everyone, including legal assistants, attend training before the change. CBA issued a notification to all members on August 13, 2012 providing the e-mail address and a link to further information on training. There should also be separate notices issued on dates and times of the training sessions.

Magistrate Hamilton-Fieldman also urged that members not forget to register for the new system. The website for preregistration is http://www.courts.state.co.us/icces. She noted that ICCES will be similar to LexisNexis, however it is more intuitive. Security will be more rigorous, including a more complex password that must be changed more frequently.

C.R.C.P. 45—Reconsideration of Proposed New C.R.C.P. 45 and Accompanying Forms Following Receipt of Comments From The Public and The Court—Subcommittee Report and Recommendation

Chairman Laugesen next directed the Committee's attention to Agenda Item 4 [pp. 18-72 of the Agenda Packet] concerning the Committee's reconsideration of its proposed new C.R.C.P. 45 and accompanying forms following receipt of comments from the public and the Court. Mr. Laugesen reminded the Committee that following submission of the Committee's proposed repeal and readoption of an entirely new C.R.C.P. 45 with related forms, the proposal was published in the June Colorado Lawyer with invitation to public comment by 5:00 p.m. on June 29, 2012. The Court received several comments summarized in a memorandum by Sarah Clark [pp 37-39 of the Agenda Packet]. There was also a Supreme Court decision [In re Wiggins] bearing on subpoenas to produce [pp 40-45 of the Agenda Packet] since the Committee's submission. Mr. Laugesen reported that the public comments and the Wiggins decision were sent to the Subpoena Rule Subcommittee for its further review and final recommendations.

Chairman Laugesen asked Subcommittee Co-Chairs Richard Holme and Magistrate Hamilton-Fieldman to report on the Subcommitee's further review and recommendations.

After describing the Subcommittee's meeting and decided-upon approach to dealing with the public comments and Wiggins decision, using the proposed rule [pp 19-23 of the Agenda Packet] together with summarized comments [pp 24-28 of the Agenda Packet] and copy of the Wiggins decision [pp 40-45 of the Agenda Packet], Mr. Holme went through each of the comments/suggestions and provided the Subcommittee's thoughts and recommendations:

(1) The first comment/suggestion [p 24 of the Agenda Packet] concerned the involved time for service [(b)(1) of the proposed new rule]. The comment was that it was unclear whether the timing for service for a subpoena to attend was the same as the timing for a subpoena to attend and produce or to just produce. Mr. Holme stated that the Subcommittee acknowledged that the provision should be clearer and that while the problem could be solved with two minor changes, it would be better to reformat (b)(1) as follows:

> "**(b) Service.**
>
> ***(1) Time for Service.*** Unless otherwise ordered by the court for good cause:
>
> (A) *Subpoena for Trial or Hearing Testimony.* Service of a subpoena **only** for testimony in a trial or hearing shall be made no later than 48 hours before the time for appearance set out in the subpoena.
>
> (B) *Subpoena for Deposition Testimony.* **Service of a subpoena only for testimony in** ~~and for~~ a deposition ~~only~~ shall be made not later than 7 days before compliance is required.
>
> (C) *Subpoena for Production of Documents.* Service of ~~a~~ **any** subpoena commanding a person to produce records or tangible things in that person's possession, custody, or control shall be made not later than 14 days before compliance is required."

It was moved and seconded that the proposed reformatted language be substituted into the proposed new rule. Following discussion, the motion carried 12:0.

(2) Mr. Holme noted that an attorney was concerned about the timeline of 48 hours for service of a subpoena to attend only--that if a subpoena is served on a Friday, there is no time for objections to be made and heard. Mr. Holme responded to the concern, observing that because the 48-hour time interval has been in place for years with no real problems on subpoenas to attend only; because the subpoena is hand delivered; because the new time computation rules are now in force; because there is no longer a 3-day rule; and because an attend-only subpoena can be dealt with the following Monday, there was no need for a change. The Committee unanimously agreed with Mr. Holme's recommendation of no change.

(3) The Committee next turned to (b)(4) pertaining to proof of service. Mr. Holme reported that the Subcommittee felt it important that items produced in

response to a subpoena to produce be made available to other parties in the case rather than forcing them to issue their own subpoenas or file a motion to produce. He recommended moving (4)(B) to a new (5) as follows:

> "**(5) *Notice to Other Parties.***
>
> **(A)** ~~**(B)**~~ *Service on the Parties.* Immediately following service of a subpoena, the party or attorney who issues the subpoena, shall serve a copy of the subpoena on all parties pursuant to C.R.C.P. 5; provided that such service is not required for a subpoena issued pursuant to C.R.C.P. 69.
>
> **(B) *Notice of Changes.* The party or attorney who issues the subpoena must give the other parties reasonable notice of any written modification of the subpoena or any new date and time for the deposition, or production of records and tangible things.**
>
> **(C) *Availability of Produced Records or Tangible Things.* The party or attorney who issues the subpoena for production of records or tangible things must make available in a timely fashion for inspection and copying to all other parties the records or tangible things produced by the responding party."**

A member disagreed, asking why he needs to share records he obtained without being able to first ascertain whether he wants to use them and disclose them as exhibits. Other members responded that subpoenaed documents do not belong to the subpoenaing attorney just because he was the one who subpoenaed them. Another member expressed concern about the burden of having to automatically provide copies to other parties as with documents received in response to a Request for Production. It was pointed out that the proposed language would only require "making the subpoenaed documents or things available for inspection or copying"--not that the subpoenaing attorney be required to automatically provide copies.

On motion, which was seconded, the consensus of the Committee was that the above proposed language be approved and inserted into a new (b)(5).

The Committee next turned their attention to a possible difficulty with proposed (b)(1)(C), which provides an absolute 14-day period between the date of service and the subpoenaed person's compliance. The difficulty is that there are sometimes expedited hearings set within less than 14 days so that it would be impossible without a motion, hearing and order for the subpoena recipient in those situations to comply.

There followed a number of proposed additions to solve the difficulty. After collaborative discussion, a motion was made and seconded to adopt the following language:

> "(C) *Subpoena for Production of Documents.* Service of a **any** subpoena commanding a person to produce records or tangible

things in that person's possession, custody, or control shall be made not later than 14 days before compliance is required. **In the case of an expedited hearing pursuant to these rules or any statute, service shall be made as soon as practicable before compliance is required.**"

The motion carried 11:1.

The Committee next turned to (c)(2)(A). The public comment was that this subsection seemed to fit more logically under subsection (d) which outlined the duties in responding to subpoenas. Mr. Holme advised that the Subcommittee felt this is a protection, not a duty, and should be left as it is. He did note that the word "appearance" needed to be changed to "attendance" for consistency of language. He noted that the same change needed to be made in (c)(3)(C) and on the proposed subpoena forms. Mr. Holme noted that the public comment also suggested that the early production problem of Wiggins could be addressed here as well, and reported that the Wiggins difficulty was dealt with by the Subcommittee by changes to (d)(1) [discussed below]. The Committee agreed with the Subcommittee's recommendations.

Mr. Holme next turned to (c)(2)(B), citing public comments inquiring what would happen if there is more than one party who holds a privilege. Mr. Holme stated that to deal with that possibility, "**or holders**" should be added to deal with situations where there may be more than one privilegeholder. A member noted that the same change should be made to (c)(2)(B)(ii). Another member inquired about using "(s)" instead of repeating the word. Several members responded that while that was a good thought, statutes and rules do not seem to allow the use of (s).

A motion was made and seconded to make the following change to the proposal:

"**(c) Protecting a Person Subject to a Subpoena.**

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction, which may include lost earnings and reasonable attorney's fees, on a party or attorney who fails to comply.

(2) Command to Produce Records or Tangible Things.

(A) ***Attendance*** ~~*Appearance*~~ *Not Required.* A person commanded to produce records or tangible things need not ***attend*** ~~appear~~ in person at the place of production unless also commanded to ***attend*** ~~appear~~ for a deposition, hearing, or trial.

(B) *For Production of Privileged Records.*

(i) If a subpoena commands production of records from a person who provides services subject to one of the privileges established by C.R.S. § 13-90-107, or from the records custodian for that person, which records pertain to services performed by or at the direction of that person ("privileged records"), such a subpoena must be accompanied by an authorization signed by the privilege holder **or holders** or by a court order authorizing production of such records.

(ii) Prior to the entry of an order for a subpoena to obtain the privileged records, the court shall consider the rights of the privilege holder **or holders** in such privileged records, including an appropriate means of notice to the privilege holder **or holders** or whether any objection to production may be resolved by redaction."

The motion carried 10:0.

A public comment asked whether a "signed authorization" as called for in (c)(2)(B)(iii) is the same as a "waiver" as used in (c)(3)(A)(iii). Mr. Holme responded, stating that "waiver" and "signed authorization" are in fact different in that "waiver" is broader than, but inclusive of a "signed authorization", e.g., an oral waiver made in open court. The Committee felt that no differentiation was needed.

The Committee next turned its attention to (c)(2)(C). A public comment stated that it was unclear whether these types of objections can be made exclusively in response to subpoenas to produce, or could also be made in response to combined subpoenas to attend and produce. Mr. Holme responded that this had been dealt with by the change in (b)(1) above. The comment also stated that it was unclear how these types of objections would relate, if at all, to motions to quash or to modify a subpoena-- that this may cause confusion for unrepresented non-parties. Mr. Holme responded, stating that (c)(2)(C) [pertaining to objections made by the recipient to the serving party] and (c)(3) [pertaining to motions to quash filed with court] are two different means of objecting, neither of which is dependent upon the other. It was the consensus of the Committee that no attempted clarification was needed.

The Committee next moved to (c)(2)(D). The public comment suggested that like (c)(2)(A), (c)(2)(D) seems to fit more logically under subsection (d) which outlines the duties in responding to subpoenas. Mr. Holme responded that (D) should be moved to (d) and included as part of (d)(1). The (d)(1) provision would then read as follows:

"(d) Duties in Responding to Subpoena.

(1) Producing Records or Tangible Things. ~~If not objected to, a person responding to a subpoena to produce records or tangible things must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand and must permit inspection, copying, testing, or sampling of the materials. Production shall not be made until at least 14 days after service of the subpoena.~~

(A) Unless agreed in writing by all parties, the privilege holder or holders and the person subpoenaed, production shall not be made until at least 14 days after service of the subpoena, except that, in the case of an expedited hearing pursuant to these rules or any statute, in the absence of such agreement, production shall be made only at the place, date and time for compliance set forth in the subpoena; and

(B) If not objected to, a person responding to a subpoena to produce records or tangible things must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand and must permit inspection, copying, testing, or sampling of the materials."

Mr. Holme noted that there were several comments that a strictly applied 14-day rule would not allow production of subpoenaed materials in less than 14 days. He observed that he Wiggins decision allows a more immediate production if there is consent by the privilegeholder and all parties; hence adding an exception [in (d)(1)(A)] for certain expedited hearings would solve that problem.

A motion was made and seconded to approve the above (d)(1) language. The motion carried 10:0.

The Committee next moved on to a comment concerning (c)(3)(B), which concerned whether the subsection contemplated other confidential information such as the employment records that were sought in Wiggins. Mr. Holme explained that this concern was covered by the "other protected matter" language of Subsection (c)(3)(A)(iii). That language was taken verbatim from Federal Rule 45. The Committee nodded their agreement that the comment had been appropriately dealt with.

A member asked the Committee to look again at a privilegeholder's objections, including how they are made. Mr. Holme directed the Committee's attention to (c)(2)(B), indicating that if a party objects to the subpoena, they should not respond [see (c)(2)(C) pertaining to objections, as well as (c)(3) pertaining to quashing or modifying a subpoena].

The member asked about producing records or tangible things when a subpoena does not comply with (c)(2)(B)(iii). Mr. Holme suggested sending a letter under (c)(2)(C). Several members affirmed their interpretation that silence or no response is an objection. Another member stated that no response may cause difficulty. There then followed a discussion about the language in (c)(2)(B)(iii) and whether "shall" needed to be changed to "should." Another member pointed out that the change may raise even more questions--that the subpoenaed party should not have to respond with an objection. Mr. Holme suggested deleting the last sentence of (c)(2)(B)(iii)--that the subpoena is void if there is no authorization or order--that (c)(2)(C) is in addition to (B).

A motion was made and seconded to delete the last sentence of C.R.C.P. 45(c)(2)(B)(iii) to read as follows:

> "(iii) If a subpoena for privileged records does not include a signed authorization or court order permitting the privileged records to be produced by means of subpoena, the subpoenaed person shall not appear to testify and shall not disclose any of the privileged records to the party who issued the subpoena. ~~Instead, the subpoenaed person, before the subpoena appearance date, shall submit a written objection to the party who issued the subpoena setting forth the reason for the objection.~~"

The motion carried 10:1.

A member asked about moving (c)(1) ["Avoiding Undue Burden or Expense; Sanctions"] to the end of the section--stating that he did not like starting the section with a sanction. Mr. Holme responded that the section is modeled after the federal rule in terms of organization, and it is important to let attorneys know that there should be no undue burden on third parties. Another member suggested a new title for the section, such as "Reasonability Towards a Person Subject to Subpoena." The Committee's consensus was to leave the language as it is.

The Committee next turned to the subpoena forms [pp 32-39 of the Agenda Packet]. The notice form [p 35 of the Agenda Packet] is required by the proposed rule to contain everything in (c) and (d) to provide the subpoenaed party with information on what to do. All of the adjustments made to (c) and (d) will be included in the notice. It was the consensus of the Committee to communicate to the Court that the comments on the notice form were reviewed and that nothing [other than adjustments to the rule and the bottom form number and title] is needed.

As to the district court subpoena form [pp 32-34 of the Agenda Packet], Mr. Laugesen indicated that several corrections were needed. They were:

> Eliminate the box before District Court [at the top left of the form].
>
> Change the semi-colon to a period after the word "action" in the second from bottom line in the middle box of the form.
>
> Change the semi-colon to a period after the word "audio" in the last line of the middle box of the form.
>
> Change the word "APPEAR" to "ATTEND" in the bottom of the page title line of the first page of the form.
>
> Change the language in the lower right small box in the top larger box on page 2 of the form to read:
>
> > "Date and Time of Production: Unless otherwise agreed to in writing by all parties and the privilege holder or holders and the

person subpoenaed, production must be made no sooner than 14 days from the date of service of this subpoena and no later than _____. In case of an expedited
Date and Time
hearing pursuant to C.R.C.P. 45 or any statute, service shall be made as soon as practicable before compliance is required."

Change the word "APPEAR" to "ATTEND" in the bottom of the page title line of the second page of the form.

Change the word "APPEAR" to "ATTEND" in the bottom of the page title line of the third page of the form.

Upon motion, there was consensus of the Committee to make all of the suggested corrections/ changes to the proposed District Court Subpoena form.

Mr. Laugesen noted there will be a separate subpoena form for the County Court. As decided at a previous meeting, the present JDF 80 form will be revised and used as the form for County Court. The Committee authorized Mr. Laugesen to work with the State Judicial forms-person to develop the County Court subpoena form.

A member noted that there is no 14 day timeline if the subpoenaed person responds by immediately producing the requested items. Another member added that there is nothing in the current rule that provides for a subpoena to produce only. Several others noted that the subpoena form does, and as a practical matter, the subpoena form is used for a deposition to produce or request of a non-party to produce. If the requested production is made in advance, there is no deposition. "Attend and produce" means that the person must actually appear for a deposition. Several members suggested that the language added to the box on the third page of the subpoena form be also added to the bottom box of the first page of the form so that any sharing of records before the running of the 14-day timeline should be agreed-to in writing to deal with and allow for the Wiggins problem.

A motion was made and seconded to add the "date and time of production" language from the third page of the subpoena form to the bottom box of the first page of the form. The motion carried 8:2.

There being nothing further on the C.R.C.P. 45 proposal, Chairman Laugesen thanked Mr. Holme, Magistrate Hamilton-Fieldman and the Subcommittee for their work.

C.R.C.P. 354, 103 and 403—Change proposals From The County Court Rules Committee.

Chairman Laugesen next turned to Item 7 [pp 97-104 of the Agenda Packet] out of order to accommodate availability of a Committee member. Mr. Laugesen noted that the proposals came from the County Court Rules Committee of which Civil Rules Committee Member Ben Vinci is a member.

Mr. Laugesen asked Mr. Vinci to provide a brief overview of the County Court Rules Committee's proposals.

Mr. Vinci first addressed proposed amendments to C.R.C.P. 354(h) pertaining to revival of judgments [p 98 of the Agenda Packet], giving a brief background of the rule as being a rule-only means [there is no statute] of keeping a judgment alive after running of an arbitrarily established six-year period. The proposed amendments would shift from the court clerk to the judgment creditor the burden of giving the judgment debtor notice that the judgment creditor is requesting a revival of the judgment; allow that notification to be made by mailing to the last known address of the judgment debtor; extend the time [14 days to 21 days] within which the judgment debtor can object to the proposed revival; and eliminate some no-longer applicable language. Mr. Vinci reported that court clerks generally favor the proposal. He stated that the clerks have informed him that there are no longer any judgments prior to 1981 so that referencing that date in the rule is no longer necessary.

Mr. Vinci noted that the only controversial aspect of the proposal is the proposal's change from personal service of the notification under C.R.C.P. 304 to the creditor's [rather than the clerk's] mailing the motion to the debtor's last known address.

A member asked whether changes would also be needed for C.R.C.P. 54. Mr. Vinci responded that although the language is somewhat different, changes to that rule would also need to be considered.

Mr. Vinci continued, stating that the proposed change is based on the practical matter of collectability of a debt. If a person is on social security and 72 years old, it is highly unlikely that collection efforts will lead to payment. On the other hand, different circumstances will cause the judgment creditor to want to continue his/her/its collection efforts.

Several members voiced due process concerns--a creditor's knowledge that an address is invalid when he/she sends notice would be a violation of due process. Mr. Vinci responded that the County Court Rule Committee had not addressed that issue--only the validity of "mailing to the last known address." In addition, it is the party's duty to provide a change of address form.

Magistrate Hamilton-Fieldman voiced concern about the 6-year life of a judgment. Most people do not know that they have an obligation to keep someone apprised of their address. Other members responded that, to their knowledge, the defendant is not required to notify the court of address changes.

Another member joined, stating that lawyers must notify the Supreme Court about address changes; however, there is no obligation for a debtor to let the creditor know where they are--it is important that the debtor receive the notice; hence, a motion to revive could be filed and the debtor may not know about the requested revival.

There then followed a discussion as to whether the court maintains jurisdiction over a defendant after a judgment is entered or revived. Several members took the position that the court had no jurisdiction once the case was complete or a judgment was

entered. Others indicated that the court originally had and retains jurisdiction to collect the judgment and maintains that jurisdiction as long as the judgment debt is owed.

A member mentioned a case in Arkansas concerning violation of due process involving a notice of sale of a property at a tax deed sale. Notice by mail was given to the property owner at an address known to be inaccurate--that the personal service requirement exists in the rules to satisfy due process. The member suggested that, because the length of time a judgment remains in force is by rule only, the revival feature should be eliminated and instead, the amount of time a judgment remains in force extended.

A member noted that the reason for the relatively short period of time the judgment remains in force is to enable courts to clear their records--that concern is not as important nowadays with the advent of electronic storage.

Another member voiced concern about forcing people to find those who don't want to be found--to him that was unreasonable. Another member responded that the statutes require a good faith effort to find people and give them notice. Mr. Vinci responded that the proposed change would not eliminate due process--notices will be mailed and returned and garnishments will be given to the employer to hand to the employee--there was originally personal jurisdiction--why should the defendant [now a judgment debtor] be entitled to be personally served again.

A member commented that if an attorney knows where the defendant works, then he knows how to find the debtor. Another member responded that it is difficult to serve defendants at work. A member suggested signing an affidavit indicating that the defendant is believed to be working at a particular place and that the notice was sent to that address. The original language of the rule had the clerk issuing the notice--that that part of the proposed change is definitely good.

A member reminded the Committee that C.R.C.P. 304 was recently amended to include substituted service when the defendant cannot be found or is difficult to serve--why is that feature in this proposal any different?

There then began a discussion about the life of a judgment and whether the court maintains personam jurisdiction after entry of a judgment. However, because a number of members were leaving the meeting, Chairman Laugesen declared the quorum lost and the meeting adjourned. Agenda items 5 and 6 were also ordered tabled to the next meeting. The time of the adjournment was 4:15 p.m.

The next regular meeting is scheduled for **Friday, September 28, 2012** at 1:26 p.m., in the Fifth Floor Conference Room, Denver News Agency Building, 101 West Colfax Avenue, Denver, Colorado.

Respectfully submitted,

April Bernard