SUPREME COURT COMMITTEE
ON RULES OF CIVIL PROCEDURE
MINUTES OF MEETING

April 27, 2012

The Colorado Supreme Court Civil Rules Committee was called to order by Richard Laugesen at 1:40 p.m. in the Court of Appeals Conference Room, 8th Floor, Denver News Agency Building, 101 West Colfax Avenue, Denver.

The following members and guests were present:

Michael H. Berger
Linda Bowers
Janice B. Davidson
Lisa Hamilton-Fieldman
Carol Haller
Charles Kall
Thomas K. Kane
Christopher B. Mueller
Nancy Rice
Ann Rotolo
Frederick B. Skillern
Lee N. Sternal
Ben Vinci
John R. Webb

The following members were excused:

James Abrams
David R. DeMuro
John A. DeVita, II
Ann Frick
Peter A. Goldstein
Richard P. Holme
Cheryl Layne
David C. Little
Jane A. Tidball

Approval of Minutes:

The minutes of the March 30, 2012 meeting were approved as submitted.

Information Items:

Chairman Richard Laugesen called the Committee's attention to:

- Article by Hon. John Webb on Interlocutory Appeals in Civil Cases
- CBA Casemaker Training and Digest
- Report on Progress With Time Interval/Time Computation Omnibus Bill
  Chairman Laugesen reported that Senate Bill 175 passed the Senate and is now in the House. The Judiciary Committee will meet to consider the bill on May 2, 2012. [*Postscript: S.B. 12-175 passed both houses on May 9, 2012.]

C.R.C.P. 121, § 1-26, ¶¶ 1(f); 6; 7; 8; 9; 13 and 15; C.R.C.P. 305.5(a)(6); (f); (g); (h)(3); (i); (j); (n); (o); (p); and (q)(1); and C.R.C.P. 5--Proposed Amendments to The Electronic Filing And Serving Rules to Deal With Electronic Signatures.

Chairman Laugesen directed the Committee's attention to Agenda Item 4 [pp 7-12 of the Agenda Packet] concerning a proposed change to the C.R.C.P. 121, § 1-26 Electronic Filing and Serving Practice Standard, C.R.C.P. 305.5; and C.R.C.P. 5. Linda Bowers [Court Services Manager] attended the meeting to answer any questions. Chairman Laugesen reminded the Committee that the proposed changes had been discussed and approved in principle at the March 30, 2012 meeting. The discussion and prior Committee action are detailed in the March 30, 2012 minutes. Mr. Laugesen also provided as handouts the final drafts of the change proposals approved at the March meeting and asked the Committee to review and approve the final drafts. Following the Committee's review, there were no further changes or corrections. Chairman Laugesen ordered that the final drafts stand as approved for submission to the Supreme Court.

C.R.C.P. 4 and 304—Reconsideration of the "who resides therein" Portion of the Proposed Amendments and Final Committee Approval of Amendments

Chairman Laugesen next directed the Committee's attention to Agenda Item 5 [pp 13-49 of the Agenda Packet] concerning additions to C.R.C.P. 4 and 304. Mr. Laugesen reminded the Committee that C.R.C.P. 4 was approved by the Committee at the last meeting by a narrow margin, and that the Committee had also considered similar changes to C.R.C.P. 304, but the "who resides therein" language in Section (e)(1) had been rejected by a narrow margin. He noted that the reasoning for the rejection was principally the differences in the types of cases in the two courts--county court having a large volume of collection matters and pro se parties. Near the end of the April meeting, it was realized that having different personal service rules in the two courts was also problematic and could result in confusion of persons serving process. As a result, final disposition was tabled for further discussion and Committee action at this meeting.

Mr. Laugesen noted that Judge Davidson had provided some research on the "who resides therein" language. Her law clerk's memorandum setting forth that research was provided in the Agenda Packet [pp 14-35].

Mr. Laugesen asked Judge Davidson to open the discussion with her thoughts concerning the research and the issue.

Judge Davidson observed that while there was some comfort in seeing the number of other jurisdictions, including U.S. District Court, having the "who resides therein" language in their rules, there was still concern about the significant difference in the types of cases and parties in the county court, and the potential for difficulties in having different personal service rules in district and county court--i.e., how much discretion should be given to the process server?--assuming that due process is being met, would such a rule be fair in all courts?--would there be an increase in litigation on the validity of service?

Another member joined, observing that he was bothered by the different ways in which courts approached the analysis. The number of cases in other jurisdictions is not overwhelming, but there were enough to raise some concern. There are a number of default judgments in county court, and county court matters, although sometimes appealed [appeal is to district court], they seldom reach an appellate court where decisions are published. Most, if not all, the decisions from other jurisdictions appear to be appeals from district court-level matters.

Another member noted that particularly in county court, there are individuals who cannot afford the legal fight and don't do anything about the matter even when they did not receive the process.

Another member voiced support for the "who resides therein" language. He observed that a WestLaw search on the subject shows very little litigation. If a default judgment is entered and the party claims he did not receive the process at all or in a timely fashion, the court usually considers the matter and works with the person. He further observed that the lengths of time the rule has been in effect throughout the country, including the U.S. District Court, and the small number of decisions generated, are indications that the rule works.

Another member took issue with the appearance of a small number of cases. He observed that many of the people in this situation who have not received service may be unsophisticated and resource poor. They do not have sufficient resources to even challenge the matter in county court, let alone through the court system to a court where their matter might be published. The member expressed sympathy for the frustration collection agencies face in trying to find an individual who is intentionally avoiding service; however, there is a genuine due process issue for those who are harmed and are not being heard.

Another member who specializes in collections countered that most of those involved in collections are or soon become sophisticated, and attempt to avoid service. Family members will claim they are "just a roommate." The present rule is insufficiently archaic since there are so many different living situations, e.g., life partners, boyfriend/girlfriend, etc. He observed that many states use the age of thirteen as being suitable for receipt of service. The proposal for our state would retain the "eighteen years of age or older" requirement. The member noted that courts seem to be able to handle these situations, and if there has been some impropriety, quash the service.

Another member followed suggesting availablility of C.R.C.P. 60 or 360 if the person really did not timely receive the process.

Another member [a District Court Magistrate] observed the average person has no experience with the legal system and does not understand the notion of service or default judgment--most people don't understand the system. The proposed change makes it easier for the system to move along, but a person may not learn of a default judgment and face a garnishment for years after the judgment was entered. They do not

know how to challenge the service or the underlying default judgment--further, the proposed change is contrary to the idea of simplicity and access in the county court.

Another member responded stating that the idea that expanding the number of persons who can receive service equates to harm for unsophisticated persons is wrong. The member stated that it is unlikely that a process server would leave process with just anyone who happens to be at or on the property. They want their service to be proper. They do not want difficulty. They don't want to have to come to court to testify about their service. The rule is/should be for what is usual--not to foil all forms of possible abuse.

Another member responded stating that he was bothered by the generalization that process servers are generally ok and that it is the defendants who create the problem by trying to avoid service. Some process servers are a problem--some defendants create problems. The member stated he was more concerned about parties who do not receive notice about the matter. He stated it seemed reasonable to conclude that a family member will transmit a document to another family member, but that someone other than a family member does not comfortably give rise to that same expectation. It is not farfetched to anticipate that there would be a number of individuals who would not receive service and face a default judgment. Protecting deviants and trying to help or hurt the process server are not the reasons for lack of support for the proposed change.

There then followed joinder in the several competing comments and examples given on each side of the issue.

A motion was made and seconded to adopt the proposed changes to C.R.C.P. 4 and 304, except for the "who resides therein" language in both of the proposed rules to provide as follows:

PROPOSED AMENDMENTS

"Rule 4. Process

(a) through **(d)** * * * * [NO CHANGE].

(e) Personal Service. Personal service shall be as follows:

(1) Upon a natural person whose age is eighteen years or older by delivering a copy thereof to the person, or by leaving a copy thereof at the person's usual place of abode, with any person whose age is eighteen years or older and who is a member of the person's family, or at the person's usual workplace, with the person's supervisor, secretary, administrative assistant, bookkeeper, human resources representative or managing agent; or by delivering a copy to a person authorized by appointment or by law to receive service of process.

(2) and (3) * * * * [NO CHANGE]

(4) Upon any form of corporation, partnership, association, cooperative, limited liability company, limited partnership association, trust, organization, or other form of entity that is recognized under the laws of this state or of any other jurisdiction, (including any such organization, association or entity serving as an agent for service of process for itself or for another entity) by delivering a copy thereof to the registered agent for service as set forth in the most recently filed document in the records of the secretary of state of this state or of any other jurisdiction, or that agent's secretary or assistant, or one of the following:

(A) An officer of any form of entity having officers; or that officer's secretary or assistant;

(B) A general partner of any form of partnership; or that general partner's secretary or assistant;

(C) A manager of a limited liability company or limited partnership association in which management is vested in managers rather than members; or that manager's secretary or assistant;

(D) A member of a limited liability company or limited partnership association in which management is vested in the members or in which management is vested in managers and there are no managers; or that member's secretary or assistant;

(E) A trustee of a trust; or that trustee's secretary or assistant;

(F) The functional equivalent of any person described in paragraphs (A) through (E) of this subsection (4), regardless of such person's title, under:

(I) the articles of incorporation, articles of organization, certificate of limited partnership, articles of association, statement of registration, or other documents of similar import duly filed or recorded by which the entity or any or all of its owners obtains status as an entity or the attribute of limited liability, or

(II) the law pursuant to which the entity is formed or which governs the operation of the entity;

(G) If no person listed in subsection (4) of this rule can be found in this state, upon any person serving as a shareholder, member, partner, or other person having an ownership or similar interest in, or any director, agent, or principal employee of such entity, who can be found in this state, or service as otherwise provided by law.

(5) through (12) and (f) through (k) * * * * [NO CHANGE]"

"Rule 304. Process

(a) through **(d)** * * * * [NO CHANGE].

(e) Personal Service. Personal service shall be as follows:

(1) Upon a natural person whose age is eighteen years or older by delivering a copy thereof to the person, or by leaving a copy thereof at the person's usual place of abode, with any person whose age is eighteen years or older and who is a member of the person's family, or at the person's usual workplace, with the person's supervisor, secretary, administrative assistant, bookkeeper, human resources representative or managing agent; or by delivering a copy to a person authorized by appointment or by law to receive service of process.

(2) and (3) * * * * [NO CHANGE]

(4) Upon any form of corporation, partnership, association, cooperative, limited liability company, limited partnership association, trust, organization, or other form of entity that is recognized under the laws of this state or of any other jurisdiction, (including any such organization, association or entity serving as an agent for service of process for itself or for another entity) by delivering a copy thereof to the registered agent for service as set forth in the most recently filed document in the records of the secretary of state of this state or of any other jurisdiction, or that agent's secretary or assistant, or one of the following:

(A) An officer of any form of entity having officers~~;~~, or that officer's secretary or assistant;

(B) A general partner of any form of partnership~~;~~, or that general partner's secretary or assistant;

(C) A manager of a limited liability company or limited partnership association in which management is vested in managers rather than members~~;~~, or that manager's secretary or assistant;

(D) A member of a limited liability company or limited partnership association in which management is vested in the members or in which management is vested in managers and there are no managers~~;~~, or that member's secretary or assistant;

(E) A trustee of a trust~~;~~, or that trustee's secretary or assistant;

(F) The functional equivalent of any person described in paragraphs (A) through (E) of this subsection (4), regardless of such person's title, under:

(I) the articles of incorporation, articles of organization, certificate of limited partnership, articles of association, statement of registration, or other documents of similar import duly filed or recorded by which the entity or any or all of its owners obtains status as an entity or the attribute of limited liability, or

(II) the law pursuant to which the entity is formed or which governs the operation of the entity;

(G) If no person listed in subsection (4) of this rule can be found in this state, upon any person serving as a shareholder, member, partner, or other person having an ownership or similar interest in, or any director, agent, or principal employee of such entity, who can be found in this state, or service as otherwise provided by law.

(5) through (12) and (f) through (k) * * * * [NO CHANGE]"

The motion carried 11:0.

C.R.C.P. 47—Proposed Rule Change to Deal With Concerns Expressed by the CBA Litigation Section.

Chairman Laugesen next directed the Committee's attention to Agenda Item 6 [pp 50-61 of the Agenda Packet]. The proposal was submitted by Committee Member Peter Goldstein, but because Mr. Goldstein was unable to attend the meeting, Mr. Laugesen asked if there was another Committee member who could speak to the matter. Mr. Laugesen also stated that it might be better to have both Mr. Goldstein and Judge Tidball present so that all sides of the issue can be considered.

Mr. Laugesen ordered that there not be any Committee action on the proposal at this meeting, but stated that the Committee could begin its discussion of the matter.

Lee Sternal stated that he could provide some information about the issue. He stated that the issue has arisen as a result of the way peremptory challenges are being handled by judges throughout the state--that there is no uniformity, and that the Litigation Section Council's proposal was an attempt to establish uniformity.

Mr. Laugesen noted that there was a poll last month of District Court judges and that the result of that poll was included in the Agenda Packet [pp 52-59]. He asked Carol Haller [who administered the poll for the Committee] for her comments on the poll.

Carol Haller reported that many of the responses reflected an uncertainty about what the issue is. There was also some discussion by the judges about the requirements of the current rule. There were concerns voiced about the "shall exercise peremptory challenges" language of the proposal which would create a requirement for some of them to spend time on something they felt was unnecessary when a jury had already been formed.

A member [a District Court Magistrate] stated that she thought she could identify the issue: That some judges may not allow peremptory challenges to alternate jurors.

Judge Kane stated that the concern may be related to exercising the peremptory challenge to the full panel instead of just the alternate jurors. Mr. Sternal joined stating that some judges begin challenges with the alternate jurors. He added that another issue with alternate jurors is the requirement that one of a party's peremptory challenges must be used on an alternate juror.

Ms. Haller further reported that one of the reporting judicial districts believes that the rule should not be changed--that the current system works. A member pointed out that there is definitely variation in selecting a jury between districts and judges, as well as between civil and criminal matters.

A member confided that he likes having the ability to exercise a peremptory challenge on the entire proposed panel, rather than having to use one of his four on one of the alternate jurors. Another member inquired as to whether there was any uniformity as to how alternate jurors are selected.

A member indicated that the problem with the proposed rule change is the mandatory exercise of the peremptory challenge--if challenges for cause are completed and everyone is satisfied with the particular panel, why should peremptory challenges be mandatory? The member stated he liked the idea of exercising a peremptory challenge on any juror and being able to pass a juror for cause.

Another member addressed the differences in the jury selection process between judicial districts. In rural areas, more potential jurors may be excused for cause because potential jurors may know one or both fof the parties, attorneys or other jurors. In some districts there may be fourteen jurors placed in the box initially, but that number must be narrowed to six. If peremptory challenges are not exercised by the parties, then the court must randomly strike eight (or 7 if there is to be an alternate) to arrive at the correct number of jury members for the case. The proposed rule does not allow for variation in the jury selection process and does not allow for situations where peremptory challenges do not need to be exercised.

One of the judges explained his process for selecting a jury panel. Fourteen potential jurors are placed in the jury box. Three jurors are placed in the front of the box and one of those will become an alternate juror. Four per side peremptory challenges are exercised to the fourteen and one to the three in front so that the proper number of jurors and alternate are attained. The judge observed that while that is his preferred selection proceeding, a variation, depending upon the available facility isn't necessarily bad.

Mr. Sternal proposed not requiring use of a peremptory challenge on the alternate jurors.

Another member suggested and commented on allowing a fifth peremptory challenge as to all potential jurors.

Another member expressed concern about selection of a jury panel with no challenges if peremptory challenges were not used appropriately. Judge Kane responded that he explains the jury selection process to attorneys before commencement of the trial so that they understand how it will operate in his court for that particular matter. Sometimes, depending upon numbers and sides of the parties or the potential length of the trial, additional alternates may be needed. All of that is explained and usually agreed-to by the parties before the trial commences.

Several of the judge members described the jury selection process in their courtrooms currently and in the past. They noted that the fifth challenge is usually peremptory and that attorneys typically know (or are told) which jurors are designated as alternate. A member stated that he liked the description of that process; however, not knowing which jurors are alternate has its own problems.

Several members described differing approaches they have experienced in several courts around the state and difficulties presented because of lack of uniformity.

Carol Haller noted that judges do receive training on jury selection and judges have a Bench Book for civil and criminal jury instructions. She suggested that it is best to ask the particular judge how the process works in his/her courtroom--that if there are concerns, those concerns should be shared with the judge in the particular case.

Ms. Haller also addressed the concern for lack of uniformity in selecting juries among the districts. The main reason is that jury boxes are different in each judicial district--some with only six chairs. Because there may be fourteen or more people, improvising for a particular facility is necessary.

Another member observed that there is a difference between small and large jurisdictions in terms of the number of jurors and juror seats, as well as how jurors are passed for cause. Sometimes all of the citizens who appear pursuant to a mailed summons are used as jurors and additional jurors are still needed requiring a sheriff's officer to go out onto the street and bring in townspeople to complete the panel.

Justice Rice joined stating that jury selection has always been a key conversation between judges and attorneys.

Ms. Haller joined, suggesting the importance of making a record--go through the jury selection process and record which jurors were picked, those rejected and why.

Ms. Haller stated that for the next meeting, she would attempt to gather training materials provided to judges on the subject to provide a reference for the Committee.

There being no further discussion, Chairman Laugesen declared the matter tabled until both Mr. Goldstein and Judge Tidball can be present.

C.R.C.P. 121, § 1-1--Entry of Appearance--Is There a Scope of Applicability Problem?

Chairman Laugesen next directed the Committee's attention to Agenda Item 7 [pp 62-66 of the Agenda Packet]. Mr. Laugesen asked the Committee if the definition of "pleading" needs to be broadened or changed. He noted that the issue was raised by Judge Edward Moss of the Seventeenth Judicial District.

A member suggested adding the word "motion" to the language in the rule to solve the judge's concern.

A member asked if the court is obliged to instruct an attorney to enter an appearance to conduct business when a motion is filed and the attorney asks for action from the court.

Another member responded that signing the pleading preserves the special appearance distinction. With a motion to quash service, there is assertion of lack of jurisdiction. The party need not appear unless the court disagrees.

Another member noted that the C.R.C.P. 121 Practice Standards speak to the limited appearance of attorneys. There then followed discussion about events triggering an appearance.

Another member inquired about a possible change to C.R.C.P. 121, § 1-10 instead of § 1-1.

Mr. Laugesen pointed out that in the federal courts, motions are pleadings. A member indicated that it seems logical that if an attorney files a motion to dismiss he is entering his appearance at least for the purposes of the motion. Another member reminded the Committee that there really is no limited appearance under the rules--that there is a difference between the attorney entering his/her appearance and appearance by a party.

There was then discussion about requirements to fully represent a party versus just filing a motion as part of the attorney's unbundled services agreement, but not becoming involved in the entire case. In that event, C.R.C.P. 11(b) is applicable and important. The judge cannot just bring the attorney into or keep an attorney in the case.

A member suggested adding the language "or motion of" to C.R.C.P. 121, § 1-1, ¶ 1.

Another member expressed concern about unintended consequences of changing the rule. Several other members expressed their agreement stating that there really did not seem to be a problem with the current rule and that an attempted fix may create other problems.

A motion was made and seconded to make no change to existing rules for the issue.

The motion carried 10:0.

There being no other business, the meeting adjourned at 3:08 p.m. The next meeting is scheduled for **Thursday, May 24, 2012 at 1:26 p.m.** in the Court of Appeals Conference Room, 101 West Colfax Avenue, 8th Floor, Denver, Colorado.

Respectfully submitted,

April Bernard