SUPREME COURT COMMITTEE
ON RULES OF CIVIL PROCEDURE
MINUTES OF MEETING

March 30, 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
John A. DeVita, II
David R. DeMuro
Ann Frick
Steven Glenn
Peter A. Goldstein
Lisa Hamilton-Fieldman
Carol Haller
Richard P. Holme
Charles Kall
Thomas K. Kane
Cheryl Layne
David C. Little
Christopher B. Mueller
Ann Rotolo
Lee N. Sternal
John R. Webb

The following members were excused:

James Abrams
Nancy Rice
Frederick B. Skillern
Jane A. Tidball
Ben Vinci

Approval of Minutes:

The minutes of the February 24, 2012 meeting were approved as submitted.

Information Items:

Chairman Richard Laugesen called the Committee's attention to:

- Colorado Lawyer Article on 2012 Rule Changes
- Report on Progress With Time Interval/Time Computation Omnibus Bill

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

Chairman Laugesen directed the Committee's attention to Agenda Item 4 [pp 3-18 of the Agenda Packet] concerning a proposed change to the C.R.C.P. 121, § 1-26 Electronic Filing and Serving Practice Standard. Linda Bowers, Court Services Manager, attended the meeting to speak on the issue.

The proposed changes come from the ISIS Oversight meeting and the County Court Civil Reforms Committee. The changes accommodate issues with signatures as they are accepted into the new e-filing system. Ms. Bowers shared the statutory definition of an electronic signature as a sound, symbol or process.

In order to maintain accurate address information, the proposed changes would require entering or confirming an address in the system for service. Other changes relate to cleaning up language and processes and catching-up language with practice.

The committee decided to take each change individually for discussion and a vote. The first item discussed was C.R.C.P. 121, paragraph 1(f). The change relates to parties identifying themselves when submitting documents electronically. Parties may submit a signed copy that will be scanned and uploaded by the clerk's office. There is a $50 fee to register with the e-file system.

Chairman Laugesen asked for an example of a sound as a signature. Ms. Bowers responded that a program allows for association of a sound or image with a signature. The result is a wave file that may be saved on a computer and accessed via a secure password. For example, a ringing bell may be used. Carol Haller gave the example of the Secretary of State making recorded names of candidates available for blind voters.

The same sound may be used by several different people. However, affixing the sound along with the date and time stamp makes it a personal signature. Ms. Bowers acknowledged that some sounds may be similar but no one can change the sound of a signature. The sound typically doesn't come with pictures.

Chairman Laugesen asked how one would know if a specific sound is a signature. Ms. Bowers responded that an individual selects the sound and creates the signature. Mr. Laugesen wondered if pro se individuals would understand a sound as being a signature. Ms. Bowers responded that the electronic signature is defined in the same manner in the rules and elsewhere in statutes and rules. Our system will have instructions to make the process easy and define how to create a signature.

Mr. Laugesen asked about the federal government's definition of electronic signature. Ms. Bowers responded that the federal verbiage is close to what is proposed. Mr. Laugesen asked if a sound signature would work. Ms. Bowers responded in the affirmative, but indicated that it is more common to use a graphic.

Another member asked about the type of image that may be used. Ms. Bowers responded that most people use a photocopy of their signature; however, anything may be used.

There was discussion about paragraph 6, E-Service. Dick Holme asked about the situation where a party changes their email and doesn't let anyone know. Ms. Bowers responded that the rule requires updating address information. The filing party has a certificate of service with the other party's address. Peter Goldstein talked about a change in language: "the filing party is required to enter and confirm if possible." A member pointed out that a party may have moved.

David DeMuro noted that at the last meeting the committee discussed judicial officers having to look through paperwork to find a pro se's address. Magistrate Lisa Hamilton-Fieldman added that the address needs to be readily available for judicial officers.

Mr. Holme suggested the word "enter" instead of "confirm." Other members suggested the words "list" or "record." Several members asked when and how the address is entered or confirmed. Ms. Bowers responded that the most current address would be confirmed.

Mr. Laugesen mentioned that a standardized certificate of service might be useful; however, each attorney often devises his/her own form. Mr. Holme asked if the challenge is the language on the form or the information on the form. Mr. Laugesen responded that both the language and the information can sometimes be an issue.

Judge John DeVita added that it could be a matter of lack of knowledge when it comes to pro se parties. They don't know what is needed. Mr. Holme suggested a certificate of service form be included as an example.

Magistrate Hamilton-Fieldman responded that the issue is not the certificate of service itself. Pro se parties are frequently lax about keeping everyone informed of their mailing address for the purpose of service. The court has an obligation to ensure that all parties receive an order of the court. To comply with this requirement the court may have to manually look for and enter addresses from paper pleadings. The opposing party or plaintiff may have better or more recent knowledge about where a person is.

Mr. Goldstein proposed language: "if known, the filing party should enter or confirm the opposing party's address." He didn't think this step should be mandatory. He also proposed removing "additionally" and moving the last proposed sentence to the beginning of the proposed change. He proposed that additional language also be included: "every party needs to keep the court apprised."

Judge Ann Frick suggested entry of the physical address into the e-filing system once a party is served at a physical address. If electronic addresses are found by parties, those may be added or updated later. Mr. Goldstein wondered if the certificate of service contained the most recent address information. Judge DeVita responded that the address isn't always current. In response, Mr. Goldstein suggested the addition of "if known."

A member pointed out that clerks don't enter an updated address into the system. Magistrate Hamilton-Fieldman responded that an updated address needs to be entered.

There was some confusion about the use of the term "filing party." A "filing party" may be the plaintiff who initiates the suit or the person that files a pleading. If the plaintiff initiating the filing provides the latest address that may not be a problem, but it could be a problem when a party files a pleading three weeks later. Would the party then need to go out a find the person?

Magistrate Hamilton-Fieldman stated she would approve the "if known" language. She did not think that parties should be required to go out and find individuals. The purpose is to have the most current information known so that judges don't have to search through paperwork.

Chairman Laugesen asked about changing "filing party" to "plaintiff." Another member offered the language "address where served and/or best known address." Mr. Holme voiced a preference for the "best known address" language. Judge Frick pointed out that the onus is on the plaintiff's attorney to know where to reach the plaintiff. For subsequent filings, the onus would be on whoever is filing. The onus is also on the defendant to know the location of the plaintiff.

Chuck Kall pointed out that it may be necessary to add language about why the address is needed. He suggested: "The court needs to know how to contact individuals." Magistrate Hamilton-Fieldman noted that the rationale for requiring current addresses was originally included; however, comments about the rule asked for the removal of that wording. Mr. Kall pointed out that everyone involved in a lawsuit should be required to keep the court informed. Magistrate Hamilton-Fieldman indicated that pro se parties may not understand the process and believe they are done after filing an answer. Mr. Holme pointed out that pro se parties probably won't read the rules. Judge Frick added that pro se parties often call the courts to get information.

Chairman Laugesen suggested that whatever language is developed for district court be used in C.R.C.P. 305.5.

Mr. Goldstein asked about adding language to paragraph 4. "The commencing party or attorney shall advise the court or place on the e-filing system the location of service and the best known address of parties served." Mr. Holme questioned the need for "location of service." Another member suggested: "Once service is accomplished, the party commencing action...."

Judge Frick asked to focus on language in paragraph 6. She suggested "best known address." A member suggested using the address as opposed to the physical location as in the case of a post office box. Magistrate Hamilton-Fieldman stated her preference for a physical address, as the e-filing system is not set up for e-service outside the judicial system.

Steven Glenn pointed out that if people don't want you to know where they live, they move, use an old address, or may not provide the correct address. Magistrate Hamilton-Fieldman commented that such situation is unfortunate. However, from a due process perspective where an individual is served is what matters. The party pursuing the action may have better information about where a party is located.

Chairman Laugesen asked the committee to look at the language in paragraph 4 first. Mr. Goldstein suggested adding a second sentence: "Once service is completed, the serving party or their attorney shall place in the e-filing system the best known address for all parties served."

Mr. Holme suggested removal of the word "all." Another member suggested "After service of a summons" to start the sentence. Magistrate Hamilton-Fieldman proposed: "once a party has been served." Another member suggested "Once any party has been served the serving party or their attorney shall place in the e-filing system the best known address for all parties served."

Michael Berger pointed out that in the case of a petition to compel arbitration there is no summons. A member suggested adding the word "any." Ms. Hamilton-Fieldman suggested: "the serving party shall confirm the best known address." Another member suggested "the serving party or their attorney."

Ms. Hamilton-Fieldman asked the committee if it would be better to work on language outside the meeting and come back to the April meeting with proposed language. Ms. Bowers voiced a concern about delaying the electronic signature piece as filings are currently being submitted that are contrary to this rule. Lee Sternal asked if parties are receiving instruction on the signature process. Ms. Bowers responded that instructions are summarized in an Adobe Acrobat document or handout.

Mr. Holme suggested adopting the electronic signature piece and dealing with the remainder of the changes at a later date, noting that it is challenging to craft language in a large group.

The proposed revised language for paragraph 4 was read as: "Once any party has been served the serving party or their attorney shall place in the e-filing system the best known address for each served party as they are served."

Another member suggested, "The serving party or the party's attorney shall enter into the e-system the best known address for each served party as that party is served." Mr. Holme moved and another member seconded adoption of that language. The motion carried 14:0. The approved language is as follows:

Rule 121. Local Rules-Statewide Practice Standards Section 1-26

ELECTRONIC FILING AND SERVICE SYSTEM

1. Through 3. * * * [NO CHANGE]

4. **Commencement of Action--Service of Summons:** Cases may be commenced under C.R.C.P. 3 by E-Filing the initial pleading. Service of a summons shall be made in accordance with C.R.C.P. 4. The serving party or the party's attorney shall enter into the e-system the best known address for each served party as that party is served.

The committee moved on to paragraph 6. The second proposed sentence was moved to the beginning of the proposed language. The proposed language would be as follows: "Parties shall keep their address and contact information updated in the e-system. If known, the filing party shall enter or confirm the served party's address and shall enter the best known address in the e-system."

Several changes to language were suggested, including: "the party filing any paper" and "the party filing anything."

A further suggestion was made: "A registered party or that party's attorney shall enter or confirm an unregistered party's address in the system." There was some discussion about updating addresses. If parties are registered in the system, they should receive documents in electronic form.

Other suggestions included: "Parties shall keep their address and contact information updated in the e-system. If known, the filing party shall enter or confirm the served party's address and shall enter the best known address in the e-system."

Another member suggested "anyone using the system." There was a discussion about the definition of a system user—i.e. anyone using the system to file anything.--A system user is a party who files anything with the court. Another member suggested changing qualifying party to "filing party"--that the act of filing triggers an action.

The discussion included a number of variations in the language. "Parties shall enter or confirm the served parties last known address." "The party filing any paper." A member pointed out that there are sometimes individuals who are not a party, but make requests, such as journalists asking to televise proceedings. In response, a member suggested "filing party or non-party." Another member suggested "anybody who files anything."

The discussion returned to the language, "If known, a filing party shall enter or confirm the served party's address and shall enter the best known address in the e-system." A member observed that entering and confirming are two different things. The party may have been served somewhere else but has a street address. A member mentioned that the current term of art for "best known" is "last known."

A motion was made and seconded to adopt the proposed language in paragraph 6. "Parties shall keep their address and contact information updated in the e-system. A filing party shall enter or confirm the served party's last known address in the e-system." The motion also included adding "last known" to paragraph 4. The motion carried 13:0.

Rule 121. Local Rules-Statewide Practice Standards Section 1-26

ELECTRONIC FILING AND SERVICE SYSTEM

2. Through 3. * * * [NO CHANGE]

4. **Commencement of Action--Service of Summons:** Cases may be commenced under C.R.C.P. 3 by E-Filing the initial pleading. Service of a summons shall be made in accordance with C.R.C.P. 4. The serving party or the party's attorney shall enter in the e-system the last known address for each served party as that party is served.

5. [NO CHANGE]

6. **E-Service - When Required - Date and Time of Service:** Documents submitted to the court through E-Filing shall be served under C.R.C.P. 5 by E-Service. Parties shall keep their address and contact information updated in the e-system. A filing party shall enter or confirm the served party's last known address in the e-system. A document transmitted to the E-System Provider for service by 11:59 p.m. Colorado time shall be deemed to have been served on that date.

The committee next turned their attention to paragraph 1(f). A motion was made and seconded to approve the proposed changes. The motion carried 12:1. The approved language is as follows.

Rule 121. Local Rules-Statewide Practice Standards Section 1-26

ELECTRONIC FILING AND SERVICE SYSTEM

1. Definitions:

(a) Through (e) * * * [NO CHANGE]

(f) ~~**S/ Name**~~**Signatures:** ~~A symbol representing the signature of the person whose name follows the "S/" on the electronically or otherwise signed form of the E-Filed or E-Served document.~~

1) Electronic Signature: an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by the person with the intent to sign the E-filed or E-served document.

2) Scanned Signature: A graphic image of a handwritten signature.

A motion was then made and seconded to approve the proposed changes to paragraph 7.

The proposed change is moving an existing sentence to another location. Judge Frick asked about stipulated permanent orders. Magistrate Hamilton-Fieldman responded that that is subsumed in the separation agreements and parenting plans by the stipulated decree. The motion carried 14:0. The approved language is as follows.

Rule 121. Local Rules-Statewide Practice Standards Section 1-26

ELECTRONIC FILING AND SERVICE SYSTEM

7. **Filing Party to Maintain the Signed Copy - Paper Document Not to Be Filed - Duration of Maintaining of Document:** A printed or printable copy of an E-Filed or E-Served document with original, electronic, or scanned signatures shall be maintained by the filing party and made available for inspection by other parties or the court upon request, but shall not be filed with the court. When these rules require a party to maintain a document, the filer is required to maintain the document for a period of two years after the final resolution of the action, including the final resolution of all appeals. For domestic relations decrees, separation agreements and parenting plans, original signature pages bearing the attorneys, parties', and notaries' signatures must be scanned and E-filed. For probate of a will, the original must be lodged with the court.

The committee next shifted focus to the proposed changes to paragraph 8. A motion was made and seconded to accept the proposed changes to paragraph 8. The motion carried 15:0. The approved language is as follows.

Rule 121. Local Rules-Statewide Practice Standards Section 1-26

ELECTRONIC FILING AND SERVICE SYSTEM

8. **Documents Requiring E-Filed Signatures:** ~~For domestic relations decrees, separation agreements and parenting plans, original signature pages bearing the attorneys', parties', and notaries' signatures must be scanned and E-filed.~~ For ~~all other~~ E-Filed and E-Served documents, signatures of attorneys, parties, witnesses, notaries and notary stamps may be ~~in S/Name~~ affixed electronically or documents with signatures obtained on a paper form scanned. ~~typed form to satisfy signature requirements, once the necessary signatures have been obtained on a paper form of the document. For probate of a will, the original must be lodged with the court.~~

The committee next discussed paragraph 9. There was a discussion about whether or not the rule applied to pro se parties. Members determined that C.R.C.P. 11(b) applies to pro se parties and C.R.C.P. 11(a) applies to attorneys.

Mr. DeMuro observed that pro se parties must certify to the best of their knowledge--this seems like a lot to ask of a pro se. Magistrate Hamilton-Fieldman responded that the rule only requires compliance with C.R.C.P. 11(a).

A member took issue with the language in the second sentence, noting that the rule only refers to the signature. The rule is really an attempt to tell parties that they must comply with the signature requirements. Mr. Holme suggested that the second sentence be dropped. Another member suggested putting the letter "(a)" after "C.R.C.P. 11" in the first sentence to note the correct section of the rule. Mr. Laugesen pointed out that C.R.C.P. 11 is descriptive as to whom the rule applies.

Several members were concerned about pro se parties not understanding the rule. Mr. Holme pointed out that the rule is related to signature requirements. The language refers broadly to C.R.C.P. 11 when there is nothing in C.R.C.P. 11(b) that speaks to signatures. There was a mention and expression of concern for language: "A party e-filing agrees to comply with the signatory requirements of parties"--will attorneys be the only individuals needing to comply?

A member wondered if there are other signature requirements in rules. There was some concern expressed about references to C.R.C.P. 11 if the rule changes in the future and there will not be a traditional signature. Another member responded that the signature indicates that a party is bound by rule 11 even with e-service.

Mr. Kall pointed out that initiating a lawsuit subjects all the parties to the rules of civil procedure.

Magistrate Hamilton-Fieldman suggested the word "parties" instead of "party." There were also suggestions to remove various portions of the rule since the language seemed overly broad.

A member suggested moving the second sentence to the beginning of the paragraph and changing the language: "Use of the e-system constitutes compliance with the signatory requirements of C.R.C.P. 11."

Another member suggested removing paragraph nine or moving that paragraph to another section. Mr. Laugesen brought up the extreme difficulty that would result from renumbering the rules. Mr. Holme suggested repealing the rule. Another member suggested that the rule be left where it is and that the proposed changes be adopted.

A member proposed language to the effect: "use of the e-system constitutes compliance with the rules of civil procedure." There was some discussion about whether or not the rule referred to just signatures rather than all of the requirements of C.R.C.P. 11.

Several members pointed out that an electronic signature is the same as a written signature. Language to that affect was proposed, including "An e-signature is a signature," or "An e-signature is a signature for the purposes of C.R.C.P. 11." Several members suggested that "all purposes" be used instead of "C.R.C.P. 11." Another member expressed preference for the specific reference to the rule.

A member questioned whether pro se parties will understand the rule, but noted that attorneys should understand this rule, as it has been around for some time.

A motion was made and seconded to approve a simple statement for paragraph 9: "An e-signature is a signature for the purposes of C.R.C.P. 11." The motion carried 13:0. The approved language is as follows:

Rule 121. Local Rules-Statewide Practice Standards Section 1-26

ELECTRONIC FILING AND SERVICE SYSTEM

9. **C.R.C.P. 11 Compliance:** ~~Use of the E-System by an attorney constitutes compliance with the signature requirement of C.R.C.P. 11. An attorney using the E-System shall be subject to all other requirements of Rule 11.~~ An e-signature is a signature for the purposes of C.R.C.P. 11.

The discussion next turned to proposed changes in paragraph 13. It was noted that there are still some judicial districts where e-filing is not mandatory. Even with the new system, electronic filing will not be universally mandated. Individual courts will continue to have the option of mandating e-filing.

There was some discussion about a $50 fee for uploading paper filed documents. It was observed that there are still some attorneys who are not connected to the system and rural jurisdictions where high speed Internet access does not exist. Several members felt uncomfortable with the fee. Another member responded that there are additional costs in working with pro se parties.

A member suggested adjusting the language to exclude pro se parties universally, even if a district mandates e-filing. Another member responded, noting that the last sentence of the paragraph addresses the issue.

There was some discussion about attorneys filing the bulk of items. In the case of domestic relations many parties must use the system, but file documents by hand on handwritten forms that are printed at a library. Court staff must upload these documents. Pro se parties are e-filing and will continue to be able to do so in the new system. Members discussed whether or not pro se parties would e-file if there was no incentive. Several members indicated that given the choice, most parties probably won't want to go to the court to file documents.

A motion was made and seconded to leave paragraph 13 as is, without the proposed additions. The motion carried 10:3.

Ms. Bowers next outlined proposed changes to paragraph 15—which is simply updating the number of the applicable Chief Justice Directive. A motion was made and seconded to adopt the proposed change. The motion carried 13:0. The approved language is as follows:

Rule 121. Local Rules-Statewide Practice Standards Section 1-26

ELECTRONIC FILING AND SERVICE SYSTEM

15. Form of Electronic Documents

(a) **Electronic document format, size and density:** Electronic document format, size, and density shall be as specified by Chief Justice Directive # ~~05-02~~ 11-01~~, as amended~~.

The next item, proposed changes to C.R.C.P. 305, was reviewed by the Committee. Ms. Bowers indicated that these changes are identical to those made to C.R.C.P. 121, Section 1-26 and suggested that the same verbiage approved for C.R.C.P. 121 be used in C.R.C.P. 305.5. There was, however, a discussion about amending the rule to place it in compliance with time computation changes.

A motion was made and seconded to adopt and use the changes that were approved in C.R.C.P. 121, Section 1-26 for C.R.C.P. 305.5--that the two rules conform. There will be no renumbering, but instead only showing the repeal of C.R.C.P. 305.5(n). Any necessary changes to comply with the time computation rule changes will be made. The motion carried 12:0. The approved language is as follows.

Rule 305.5 Electronic Filing and Serving

(a) Definitions

(1) Through (5) * * * [NO CHANGE]

(a) ~~**S/ Name**~~**Signatures:** ~~A symbol representing the signature of the person whose name follows the "S/" on the electronically or otherwise signed form of the E-Filed or E-Served document.~~

A. Electronic Signature: an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by the person with the intent to sign the E-filed or E-served document.

B. Scanned Signature: A graphic image of a handwritten signature.

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

(d) **Commencement of Action-Service of Summons:** Cases may be commenced under C.R.C.P. 303 through an E-Filing. Cases commenced under C.R.C.P. 303 through an E-Filing must be E-Filed to the court no later than ~~five (5)~~ seven(7)~~business~~ days before the set return date, if any. Service of a summons shall be made in accordance with C.R.C.P. 304

(e) [NO CHANGE]

(f) **E-Service - When Required - Date and Time of Service:** Documents submitted to the court through E-Filing shall be served under C.R.C.P. 5 by E-Service. Parties shall keep their address and contact information updated in

the e-system. A filing party shall enter or confirm the served party's last known address in the e-system. A document transmitted to the E-System Provider for service by 11:59 p.m. Colorado time shall be deemed to have been served on that date.

(g) **Filing Party To Maintain the Signed Copy, Paper Document Not To Be Filed, Duration of Maintaining of Document:** A printed or printable copy of an E-Filed or E-Served document with original, electronic, or scanned signatures shall be maintained by the filing party and made available for inspection by other parties or the court upon request, but shall not be filed with the court. When these rules require a party to maintain a document, the filer is required to maintain the document for a period of two years after the final resolution of the action, including the final resolution of all appeals.

(h) **Default Judgments and Original Documents:**

(1) and (2) * * * [NO CHANGES]

(3) When the return of service is required for entry of default, the return of service may be scanned and E-Filed. In accordance with paragraph (i) of this Rule, signatures of attorneys, parties, witnesses, notaries and notary stamps may ~~be in S/ name typed form~~ electronically affixed or documents with signatures obtained on a paper form may be scanned into the system to satisfy signature requirements~~,~~ ~~once the necessary signatures have been obtained on a paper form of the return of service.~~

(i) **Documents Requiring E-Filed Signatures:** E-Filed and E-Served documents, signatures of attorneys, parties, witnesses, notaries and notary stamps may be electronically affixed or documents with signatures obtained on a paper form may be scanned into the system ~~in S/ name typed form~~ to satisfy signature requirements~~,~~ ~~once the necessary signatures have been obtained on a paper form of the document. It is preferable that such documents be scanned into the system.~~

(j) through (m) * * * [NO CHANGES]

~~(n) **Section 13-1-113, C.R.S. Compliance:** Use of an electronic seal by the clerk of the court or public officer for E-Filing shall be the same as impressing a seal as required by Section 13-1-113, C.R.S.~~

(o) through (p) * * * [NO CHANGES]

(q) **Form of Electronic Documents**

(1) Electronic Document Format, Size, and Density: Electronic document format, size, and density shall be as specified by Chief Justice Directive # 11-02 ~~05-02, as amended~~.

The committee moved on to C.R.C.P. 5. Discussion about the changes included combining the proposed sentence with the second sentence. Several members voiced a preference for the word "consent."

"Or an email address" was added to the second sentence. The word "pleading" in the same sentence was replaced by "filing." If both an email address and fax number are given, either method may be used. Faxes are still important in rural areas.

A motion was made and seconded to approve the proposed changes, including the committee edits. The motion was carried 13:0. The approved language is as follows:

Rule 5 Service and Filing of Pleadings and Other Papers

(a) [NO CHANGE]

(b) Making Service:

(1) [NO CHANGE]

(2) Service under C.R.C.P. 5(a) is made by:

(A) Through (C) * * * [NO CHANGE}

(D) Delivering a copy by any other means, including E-Service, other electronic means or a designated overnight courier, consented to in writing by the person served. Designation of a facsimile phone number or an email address in the ~~pleadings~~ filing effects consent in writing for such delivery. Parties who have subscribed to E-Filing, pursuant to C.R.C.P. 121 Section 1-26 § 1.(d), have agreed to receive E-Service. Service by other electronic means is complete on transmission; service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery. Service by other electronic means or overnight courier under C.R.C.P. 5(b)(2)(D) is not effective if the party making service learns that the attempted service did not reach the person to be served.

C.R.C.P. 4 and 304. Report and Recommendations by Subcommittee

Chairman Laugesen next directed the Committee's attention to Agenda Item 5 [pp 19-29 of the Agenda Packet] concerning C.R.C.P. 4 and 304. These proposed changes add several categories of individuals that may accept service on behalf of another person. Mr. Sternal asked about the tenant in a basement. If the tenant is served, is that equivalent to service on the owner or landlord? Mr. Goldstein responded in the affirmative.

Mr. Sternal asked about the meaning of "residing". How long does a person have to live in a location? Several members responded that the person must be staying awhile or indefinitely.

Mr. Berger asked that the committee consider requiring service by mail when someone other than the defendant is served. This may avoid setting aside a default judgment. Perhaps the tenant threw the documents in the waste basket. Is there any reason not to also require mailing of the documents?

Mr. Laugesen stated he off-hand could not think of a reason not to require mailing. Professor Christopher Mueller voiced interest in adopting mailing, as this procedure is used in the federal system. Judge Frick noted that C.R.S. § 7-90-704 speaks to service on an entity. If there is no registered agent or the registered agent cannot be located at the entity's address the entity may be served via certified mail.

Mr. Glenn asked about the need for inclusion of service by mail. In attempting to serve documents a roommate or fiancé may answer the door. These individuals usually ask if they can accept the documents for the individual, and usually accept certified mail, too. It seems like requiring mailing would simply be adding another unnecessary step. Many times, when serving documents there is a conversation about the service. If the person is uncooperative service is not made. Mr. Glenn wondered if the court would accept the service as valid if individuals mailed documents after claiming that they couldn't find individuals or the individual wouldn't accept service.

Several judges indicated that they allow mailed service with an affidavit of general due diligence indicating that service was attempted. In many offices there generally is a registered agent with an office who accepts service on behalf of a company. There usually is a way to effect service.

Mr. Berger asked about a catch-all phrase: "or as otherwise provided by statute". There are other statutes that speak to this service of service. A rule can't displace a statute.

Mr. Glenn mentioned allowing mail service by mail after due diligence to personally serve documents is permitted under Rule 4(f) now. However, usual service by mail only should not be an option. Mr. Berger responded that service by mail appears to be okay as long as it is authorized by statute.

Mr. DeMuro mentioned C.R.C.P. 4(e)(4) as a means for serving corporations. C.R.C.P. 4(e)(4)(G) seems to be a catch-all but isn't comprehensive. Mr. Holme pointed out that the rule mentions the use of mail as it relates to real property, except as otherwise provide by law. Mail under other circumstances seems ok. Several members thought that the rule and statute seem to sometimes allow for service by mail. Mr. DeMuro asked about adding some general language indicating that service under C.R.C.P. 4(e) should also include mail. This, however, would be an extra step. Mr. Berger commented that this would expand the universe of people to serve. Without the mail there is a greater risk that the person that is supposed to be served doesn't get notice.

Mr. Glenn mentioned that service by mail may be appropriate if the documents aren't served on a family member. Magistrate Hamilton-Fieldman indicated her agreement that trying to include mailing after service overly complicates the matter. She indicated

that if service was accomplished in some manner, that should be it. She suggested possibly adding language to the proposal, "shall be confirmed."

Mr. Berger said that he is not suggesting that mailing be the service. Magistrate Hamilton-Fieldman stated that she is more concerned about actual notice, as some documents may need to be served in a specific manner. Several expressed concern about arguments pertaining to sufficient service, due diligence, and substituted service.

Mr. Berger pointed out that the rule indicates that mailing does not constitute service. Mr. Glenn pointed out that either way, personal service or mail, some individuals will try to avoid service. Service may be attempted on a person or responsible party, but sometimes, a former girlfriend or boyfriend may receive the documents and throw them in the trash.

Judge DeVita voiced a preference for a motion to set aside service if not properly accomplished instead of someone contesting not having also received the process by mail. There were then several comments about substitute service. Judge Frick responded that setting aside a default judgment doesn't come up that much. Magistrate Hamilton-Fieldman added that a person may indicate that they were not served after receiving notice by mail. The action may move forward as substituted service may be permitted. Mr. Glenn stated that there may be problems with backlog and due process if both personal service and mailing are required.

Mr. Goldstein pointed out that the issue before the committee is acceptance or rejection of the recommended changes for the district court on page 20 of the agenda packet. Once the vote is known the committee may start considering changes to the rules. A member voiced concern about the constitutionality of the changes.

Several members thought that proceedings involving a Judge may increase if one must also mail notice of the service.

David Little asked about sending a letter to the opposing party when it is uncertain whether the party is represented by an attorney. Mr. Berger responded that a letter about the service could still be sent--he only wanted to add the extra step of notice by mail under the rule.

A member voiced concern about one of the proposed changes--that there may be litigation tied to the "who resides therein" language. With regard to the proposal to also mail notice, the member stated he was not sure that extra step was really necessary.

There then followed a great deal of discussion about the proposed "who resides therein" language. Several members stated they were uncomfortable with that addition.

It was noted that the federal rule [F.R.C.P. 4(e)(2)(B)] contains similar "who resides therein" language as do a number of other states.

Professor Mueller joined, stating that C.R.C.P. 4(e)(1) is a good provision and the "who resides therein" language is constructive. He went on to say that there are some

federal cases, but not many. The language is not terribly problematic. He moved that the committee adopt the proposed changes to C.R.C.P. 4(e)(1). The motion was seconded.

Further discussion ensued. Magistrate Hamilton-Fieldman voiced a concern for the "who resides therein" language. She noted that federal and state litigation can be different. Federal courts do not deal with domestic cases as in the state courts. In addition, some older homes are divided into apartments and are not clearly marked, making "residing therein" ambiguous.

Magistrate Hamilton-Fieldman asked Professor Mueller if there were federal cases dealing with a served person as an illegal alien. Professor Mueller wasn't aware of any such cases.

Mr. DeMuro indicated that the federal rule clarifies and qualifies "who resides therein" as suitable age and discretion. He wondered if the subcommittee considered using the same language. Mr. Glenn responded that the subcommittee [Mr. Glenn was on the subcommittee] chose not to amend the existing age qualification--there are some states that use the age of 13 or "of suitable age and discretion" language, but that, he felt, goes too far.

Mr. Goldstein asked if there were other states that adopted the "who resides therein" language. Mr. Glenn responded that there are 45 states that have adopted this language.

Judge Frick suggested removal of the word "family." Mr. Laugesen responded that that was a longstanding provision that was clear and reasonable. The subcommittee was not recommending elimination of any of the existing methods.

Upon calling for a vote, the motion carried 7:6. The approved language is as follows:

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 who resides therein, 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.

A motion was then made and seconded to accept the subcommittee's proposed changes to C.R.C.P. 4(e)(4), C.R.C.P. 4(e)(4)(A), C.R.C.P. 4(e)(4)(B), C.R.C.P.

4(e)(4)(C), C.R.C.P. 4(e)(4)(D) and C.R.C.P. 4(e)(4)(E). There was some discussion about moving these portions of the rule elsewhere. Several members objected, due to the renumbering that would be necessary. Another member indicated that the proposed changes outlined relate to the paragraph above in C.R.C.P. 4(e)(4). The motion carried 11:0. The approved language is as follows:

Rule 4. Process

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

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

(1) [VOTED ON BY COMMITTEE EARLIER]

(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 of 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;

A motion was made and seconded to adopt the same changes that were approved for C.R.C.P. 4(e)(1) and C.R.C.P. 4(e)(4) in the county court rule [C.R.C.P. 304]. The motion was defeated 5:7.

Mr. Goldstein proposed removing the "who resides therein" language from the county court rule proposal. A motion was made and seconded to adopt the proposed changes to the county court rule without the "residing therein" language. During discussion,

Mr. Glenn voiced a concern about the district and county court rules on service being different and not being able to serve others at a residence, such as a girlfriend or fiancé. Several other members responded, agreeing that county court is different. The motion carried 11:1. The approved language is as follows:

Rule 304. Service of Process

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

(d) 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, 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 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;

Chairman Laugesen stated that the two rules, although different, will be sent to the Supreme Court as approved by the committee.

Mr. Berger moved to table both rule changes for reconsideration--after additional research he stated he felt having two different rules on the same subject poses unacceptable risks in state court. Parties may not receive notice of judicial matters and it doesn't seem correct to have different rules in district and county court.

Magistrate Hamilton-Fieldman voiced concern about process servers, particularly those that aren't professional process servers, not understanding the difference between district and county court. There was also concern about domestic relations matters.

A member cautioned that it will be important to point out the difference between the two rules when the changes are submitted to the Supreme Court. Another member stated his agreement that the issue should be tabled and reconsidered at a later date.

Mr. Goldstein suggested going ahead with the submission, but reporting to the Court that the committee was in unanimous agreement about changes to the district and county rules with the exception of the language "who resides therein" in C.R.C.P. 4(e)(1) and C.R.C.P. 304(d)(1), and as to that, the committee needs additional time. Another member stated he did not think that would help the Court. Another member thought that the Court may want to implement both changes at the same time, rather than doing it separately.

Mr. Glenn offered to invite a member of the National Association of Professional Underwriters to help with defining those individuals "who reside therein." Another member asked that the committee go ahead with submitting the changes that were accepted and review the issue in six months. Mr. Glenn observed that the differing rules may create problems with those servers who are not professionals. He would prefer to clarify the issue before final adoption.

Some members wondered about tabling decided matters to allow for further consideration. There was discussion about when the federal rule came into being. A member wondered if this was a practical or constitutional problem. Another member responded that there is litigation on the subject of suitable age or responsibility.

With a number of members leaving, the quorum was lost.

Chairman Laugesen declared the matter tabled to the next meeting.

C.R.C.P. 121, § 1-1-Entry of Appearance—Is There a Scope of Applicability Problem?—E-mail by Hon. Edward Moss

This issue was not discussed due to lateness of the hour.

There being no other business, the meeting adjourned at 4:12 p.m. The next meeting is scheduled for **Friday, April 27, 2012 at 1:26 p.m.** in the Columbine Conference Room, 101 West Colfax Avenue, 5th Floor, Denver, Colorado.

Respectfully submitted,

April Bernard