SUPREME COURT COMMITTEE
ON RULES OF CIVIL PROCEDURE
MINUTES OF MEETING

June 28, 2013

The Supreme Court Civil Rules Committee was called to order by Richard W. Laugesen at 1:39 p.m. in the 4th Floor, Supreme Court Conference Room, 2 East 14th Avenue, Denver, Colorado.

The following members were present:

Chief Judge Janice Davidson
David R. DeMuro
Peter A. Goldstein
Carol Haller
Cecily Harms
Judge Thomas K. Kane
Richard W. Laugesen
Cheryl Layne
David C. Little
Jenny Moore
Christopher B. Mueller
Teresa Tate for Justice Rice
Frederick B. Skillern
Lee N. Sternal
Judge John R. Webb

The following members were excused:

Judge Ann Frick
Lisa Hamilton-Fieldman
Richard P. Holme
Charles Kall
Judge Ann Rotolo
Judge Jane A. Tidball
Ben Vinci

Approval of Minutes:

Following correction of a typo at page 8, ¶ 5, line 2 [“gchange” to “change”], the January 25, 2013 minutes were approved.

Information Items:

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

- An updated membership roster (on the table as a handout). Members should check its accuracy and notify Jenny Moore with any corrections or changes.

- A blog post from CBA providing notification that Justice Rice will be the new Chief Justice of the Supreme Court upon Chief Justice Bender's retirement [pages 1 and 2 of the Agenda Packet].

- The CBA blog also provided notification that Chief Judge Janice Davidson of the Colorado Court of Appeals is retiring in October. Judge Alan Loeb will become Chief Judge upon her retirement.

- C.R.C.P. 121, § 1-25, ¶¶ 4 and 6 and C.R.C.P. 305.5(f) were changed back to their pre-amendment language because ICCES is currently unable to accommodate the input of addresses that the amendments required [pages 3 to 8 of the Agenda Packet].

- Supreme Court's Orders adopting amendments to C.R.C.P. 16.2(5) and C.R.C.P. 313(b)(2) [page 9 of the Agenda Packet].

- Supreme Court's Orders adopting amendments to C.R.C.P. 103(g)(1), C.R.C.P. 121, § 1-15, ¶ 10; C.R.C.P. 403(g)(1); and C.R.C.P. 411(b) [pages 10 through 12 of the Agenda Packet].

- A Colorado Lawyer article by Dick Holme on "No Written Discovery Motions Technique" [pages 13 through 16 of the Agenda Packet]. Member Lee Sternal asked if Dick Holme is looking for a potential rule change. Chairman Laugesen responded: "possibly."

- A Colorado Lawyer Point/Counterpoint article on C.R.C.P. 16.1 [pages 17 through 21 of the Agenda Packet].

- Notification of revisions to probate forms approved by the Colorado Supreme Court. The revised forms will be on the State Judicial Website and in the July Colorado Lawyer.

Proposed Amendment to CRM 6(c)(1)(E) or CRM 7(a)(8) to Deal With the Anomaly of a Magistrate Making a Discovery Ruling That Effectively Ends the Litigation

Chairman Laugesen called the Committee's attention to Item 4 of the Agenda Packet [pp 22-25] and noted that the matter had been brought to the Committee by Committee member Judge John Webb. Mr. Laugesen asked Judge Webb to share his concerns and proposed remedy.

In providing background, Judge Webb noted that CRM 6(c)(1)(E) empowers magistrates, without consent, to hear and rule upon "all motions relating to discovery and disclosure." Where review of such a ruling is sought under CRM 7(a)(8), the district

court "may conduct further proceedings, take additional evidence, or order a trial *de* novo."

Judge Webb further noted that when imposed by a district court, discovery sanctions are reviewed on an appeal for an abuse of discretion. Because district court review of a magistrate's decision is akin to appellate review, the district court could apply that standard of review.

These underlying principles create a potential anomaly wherein a magistrate makes a discovery ruling, including a sanction that is effectively litigation ending, although not in the form of a default judgment. For example, in a professional negligence case, the magistrate strikes an expert witness disclosure as inadequate or denies a motion to extend the expert disclosure deadline. In such instance a summary judgment motion by the defense would then likely follow. The magistrate could not have entered the summary judgment directly, but his/her prior discovery or disclosure ruling brings about that case-ending effect.

Judge Webb suggests a change to CRM 7(a)(8) to require de novo review by the district court of any effectively litigation-ending discovery or disclosure ruling, or the approach of amending CRM 6(c)(1)(e) to exclude from "all motions" those that are effectively litigation-ending. He opined that the suggested change to CRM 7(a)(8) [bottom of page 23 of the Agenda Packet] was preferable because the effect of the magistrate's discovery motion ruling is more likely to have ripened by the time the district judge is reviewing the case.

Member Lee Sternal commented that he agreed with the proposed need for change and asked Judge Webb if he had thought about extending the consideration to situations where a magistrate is serving with consent. Judge Webb replied that he had not, but that would be different. In that setting, the magistrate is acting as the district court judge.

Regarding the proposed amendment to CRM 6(c)(1)(e), Member Peter Goldstein asked who would make the determination: the parties, magistrate, district court, any, all? Judge Webb responded that that is why the CRM 7(a)(8) amendment is preferable. It makes it clear that it would be the district court drawing the line.

Member David Little asked if magistrates deal with matters other than discovery and disclosure where they could rule on a motion that effectively ends litigation, such as in a matter involving violation of a service of process or joinder rule? Judge Webb replied that CRM 6 doesn't go into that level of detail, but that there is a good argument that magistrates should not be taking up those decisions. Member Little noted that if the proposed amendment to CRM 7(a)(8) referred to CRM 6(c)(1) and not to CRM 6(c)(1)(E) specifically, that would address the problem he presented.

Member Christopher Mueller asked for clarification that the proposed amendment to CRM 7(a)(8) would not mean a discovery order would be appealable in itself, but instead appealable after summary judgment. Judge Webb replied that anything labeled final could be appealed to district court. The intent of the amendment is to make it so

when an order comes to district court for review--it would carry the baggage of entitlement to de novo review if it was litigation-ending.

Member Mueller asked if one can appeal any order a magistrate enters that is final. Judge Webb responded stating that an order is not appealable to the Court of Appeals until there is a final judgment. Mr. Mueller asked if a district court can get involved in the magistrate's rulings in a case piece-by-piece. Judge Webb replied that it could.

Member David DeMuro asked if CRM 7(a)(3) could be expanded to make a wider class of orders reviewable. Judge Webb replied that changing what is appealable to district court does not address the concern regarding the scope of review in district court.

Member DeMuro stated that it appears reviewing judges at the district court level are supposed to have the greatest possible leeway in reviewing magistrates' rulings. Judge Webb responded stating that while that is so, the concern is district courts having a very discretionary approach to magistrate rulings in these kinds of situations. He wants to constrain discretion in litigation-ending rulings.

Chief Judge Davidson stated that she is uncomfortable with the proposed changes because the Rules for Magistrates are complex and none of the present Committee members practice in this area. She expressed her concern for the potential ripple effect on the other magistrate rules if this rule were to be changed in a vacuum. She moved to submit the issue to a subcommittee. There was no second at that time.

Member Goldstein asked how these situations play out when the aggrieved party goes to the district judge. Judge Webb replied that the district court applies a very deferential level of review. The district court usually finds either that the magistrate's ruling was an acceptable exercise of discretion or the district judge looks to see if the ruling can stand because it is supported by the record. The difficulty then arises when the district court takes up summary judgment, which in some cases with no expert becomes a foregone conclusion.

Judge Kane stated that he disagreed.

Member Mueller stated that on an appeal from district court, the review for error would be de novo. Mr. Goldstein stated that he is not talking about a tried case. Member Mueller asked if there is just review for clear error, why would there be a more intense review when a magistrate has entered a dispositive-in-effect order in discovery. Judge Webb stated that he could not explain the seeming inconsistency between subsection 6(a)(8) and (9).

Judge Davidson asked if there are magistrates involved in civil discovery. Judge Kane answered that in some districts there are--El Paso does not. He commented that Jane Tidball when she was a magistrate encountered this situation and on appeal, the court said she stepped outside the Rules for Magistrates. Judge Davidson asked why review would be different once a case came up on a final order, because a single discovery order wouldn't be final and magistrates can't dismiss a case. Chairman Laugesen responded that the situation arises in cases that require experts. Judge Davidson

asked how such a case would get to the district judge, who would enter summary judgment. Judge Webb stated that the situation arises where an aggrieved party seeks district court review of a magistrate discovery ruling then while or after that issue is going up to district court, the other party files a motion for summary judgment. Both motions may or may not come to the district court at the same time. The district court affirms the magistrate's discovery ruling using an "abuse of discretion" standard, and then there is nothing left to do but grant the requested summary judgment.

Member Sternal asked doesn't the district court judge have the right to amend his own order prior to trial, and would the judge be precluded from reviewing a magistrate ruling. Judge Kane responded, stating district judges look to see if the magistrate's ruling was supported by the record, and that it is not de novo. He stated that just this week the Supreme Court issued an opinion requiring district courts to seize more control of discovery issues early on--that district courts will now likely try more to get magistrates set up to handle discovery issues.

Judge Davidson stated that this problem is specific to civil magistrates. Domestic relations magistrates are different. Magistrate rules weren't created with the idea of so much delegation to magistrates in civil cases--that's a federal court luxury. The bigger question is whether magistrates are exercising too much power because judges are giving them too much--maybe a broader remedy is needed through the rules.

Judge Kane stated that he supported the idea of submitting the issue to a subcommittee to see what other district courts are doing and what the impact is.

Judge Davidson's motion to submit the issue to a subcommittee was renewed and seconded.

Upon call for the vote, the motion carried 8:2.

Chairman Laugesen asked for volunteers for the subcommittee. Judge Webb volunteered. Member Sternal suggested Member Lisa Hamilton-Fieldman as probably wanting to be on the subcommittee.

Chairman Laugesen stated that he would appoint the remainder of the subcommittee and attempt to include several other district court magistrates.

Proposed Amendment to C.R.C.P. 54(d) to Deal With the Perceived Chilling Effect of Large Costs Awards

Chairman Laugesen next called the Committee's attention to Item 5 in the Agenda Packet [pp 26-34] and asked Member Lee Sternal for an overview of his and CTLA's concern and proposed solution.

Member Sternal provided background on the issue, stating that he has been concerned for a long time about costs. He reported that, as can be seen by the redacted COPIC letter [pp 30-31 of the Agenda Packet], huge costs awards can be disastrous for

claimants. Amounts of costs are ever-increasing and types of costs expanding. Mr. Sternal stated that it is also concerning that fewer jury trials are happening in civil cases--ostensibly the only parties going to jury trials being the very rich (who are unaffected by increasing costs) and the very poor (who are judgment proof). He noted that the problem of ever-increasing costs goes back to the case of Cherry Creek No. 5 v. Voelker, 859 P.2d 805 (Colo. 1993), where the Supreme Court began allowing costs for items other than those specified by statute. He further opined that if whether to award costs is in the discretion of the trial court, then courts need to consider other issues as well, including the relative economic circumstances of the parties. He reported that CTLA recently met with Supreme Court Chief Justice Bender, and that Chief Justice Bender said that drafting a rule change to address huge costs awards would be a matter for the Civil Rules Committee or the legislature. Mr. Sternal opined that the Committee should give the Supreme Court the chance to either adopt the proposed language or say that the issue is a matter exclusively for the legislature.

Member Goldstein stated that while the underlying thought of the proposal is good, he felt the proposed language does not consider whether the defending party has insurance, which he felt makes it inadequate. Insurance companies can list these costs as expense and do not have to comply with Colorado statutes saying they should account for recovered costs as part of their disclosed rate structure. Mr. Laugesen added that insurers charge and collect a premium for their undertaking to pay and protect against litigation costs. Member Sternal responded, stating that having insurance is an economic circumstance of the parties so that the proposed language should be sufficient as is.

Judge Kane stated that the issue is a problem of access to the courts; that he believes the concern is a legislative issue--not one that the Committee should attempt to take up.

Judge Webb suggested a change of the proposed amendment language to:

> "after consideration which includes the relative economic circumstances of the person or entity that actually incurred the cost."

Judge Davidson stated that the Civil Access Pilot Project was designed to address this concern, but the project was limited to just "business cases." This change would need to be done on a broader basis.

Member Mueller stated that the Committee should be able to address the recommended change. Rule 26 and the Zubulake v. UBS Warberg, 216 FRD 280, 287-91 (S.D.N.Y. 2003), litigation dealt with allocating costs and stated that the financial situations of parties should be considered.

Member DeMuro stated that federal courts do not share this problem--they are more restrictive on what are allowed as costs. He also commented that although the amended language is not written this way, the amendment would make costs only go one way, and that no potential costs may mean no cases get tried. He believes it is an issue for the legislature, not the Committee, and stated that C.R.C.P. 54(d) has never been used in the way the amended language proposes.

Member Frederick Skillern stated that even in business litigation the prospect of huge cost awards deters people from coming to court. He further stated that C.R.C.P. 16.1 has not helped the issue, and that every reform intended to address it (such as the Civil Access Pilot Project) seems to increase the cost of litigation.

Judge Webb stated that it makes more sense for the Committee to submit the proposed amendment to the Supreme Court than to have the issue initially addressed by the legislature because it will be easier for the Court to decide if it is a political issue to be addressed by the legislature than for the legislature to decide if it is an issue for the Court.

Member Little commented that the additional threat of Rule 11 or statutory sanctions for frivolous and groundless claims actions are also being added in letters like the COPIC letter [pp 30-31 of the Agenda Packet]--the apparent goal of such language being to drive a wedge between attorney and client. He further commented that he has seen an increase in cases he describes as "lawyer lawsuits," where the claim may be appropriate but it is driven more by the opportunity to recover costs or fees than value of the suit itself.

Judge Webb noted that C.R.S. 13-16-103(1) allows a judge to consider the relative financial position of parties, and that that provision bolsters the Committee's ability to suggest the proposed amendment.

Member Sternal asked if the issue was about whether to award costs or how much costs should be? Member Mueller responded, stating that the issue really concerns both.

Member DeMuro stated that C.R.S. 13-16-122 allows a judge to award costs in specific categories, and that he agrees with Judge Webb that the categories are expanding.

A suggestion was made to change the proposed language to:

> "after consideration which includes the relative economic circumstances of the person or entity that actually incurred the cost."

During discussion of the language, Member DeMuro opined that the proposed amendment will have the collateral effect of undercutting the Offer of Settlement statute, and reiterated that he believes this is an issue for the legislature.

Member Little inquired what "after consideration" in the proposed language refers to. Member Sternal replied it is to whatever the trial court thinks is relevant. Member Sternal further commented that the question surrounding the "after consideration" language is what other things can be considered other than economic circumstances. Member Mueller suggested a further change to the proposed language: "due consideration of all relevant factors."

Judge Davidson stated that the statute and C.R.C.P. 54 work differently, and asked how the proposed change to C.R.C.P. 54(d) would impact the statute. Member DeMuro stated that the amendment would not impact C.R.S 13-16-122. Judge Davidson asked why a party could not just ask for costs under the statute. Member DeMuro stated that it is because the expansion in types, amounts and new categories of costs have been by case law. Member Goldstein added that the statute lists costs by category but the rule does not, so early cases say that if the statute does not include a specific cost, it is not to be awarded. The rule has become more open-ended because of case decisions.

Judge Davidson asked why the proposed language would not have the opposite effect--litigators then asking for costs under the statute rather than under C.R.C.P. 54(d) with the amended language. The response was that discretion is also arguably allowed under the statute with the policy set by the rule.

It was moved and seconded to amend C.R.C.P. 54(d) as follows:

PROPOSED AMENDMENT

Rule 54. Judgments; Costs

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

(d) **Costs.** Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs after consideration of all relevant factors, which may include the relative economic circumstance of the party or entity that actually incurred the costs; but costs against the state of Colorado, its officers or agencies, shall be imposed only to the extent permitted by law.

(e) through (h) * * * * [NO CHANGE]

Upon call for the vote, the motion carried 8:2.*

* Postscript: Since the meeting Member Sternal has suggested that additional clarifying language be added to the proposal as follows: after the phrase "incurred the costs," insert: "and of the party from whom costs are sought." Whether to add that language will be taken up at the next Civil Rules Committee meeting.

Language of the Warning Provision of the District Court Summons Form

Chairman Laugesen called the Committee's attention to Item 6 in the Agenda Packet [pp 35-37] and stated that the current language in the warning of the district court civil summons form may constitute a trap by telling defendants that they need not do anything. Chairman Laugesen noted that a plaintiff could potentially file the case after 14 days and get a default judgment, with the defendant not learning about the late filing and default in time to respond. Chairman Laugesen directed the Committee's attention

to a suggested fix on page 37 of the Agenda Packet, noting that he preferred the first of the two proposals.

Member Mueller asked why a summons is not sealed by the court. Chairman Laugesen replied that lawyers usually sign the summons, and lawyers are officers of the court. The form in the Agenda Packet is the JDF form for pro ses. Form 1 in the Appendix to the Rules has the attorney signature block. Both forms would have the warning.

Motion was made and seconded to include the first of the two proposed changes in the District Court civil summons form.

Member Lee Sternal asked why the name and address of the attorney were omitted on the face of the summons in the Agenda Packet. Member Carol Haller noted that there is no signature line for an attorney on the form because it is a form for pro se litigants and that attorneys usually draft their own summons or use Form 1 from the Appendix.

Member Cheryl Layne stated that the flexible caption is left out of the attorney address on this summons. She stated that if someone comes to the clerk's office inquiring about a case that the clerk's office does not have a record of, they tell the person to call the attorney's office to ask why nothing has been filed.

Teresa Tate observed that the language of the warning seems to say that if the case hasn't been filed, then they need to file a motion to have the case that wasn't filed dismissed. Member Mueller suggested changing the proposed language to:

> "if the plaintiff files more than 14 days after the date this summons was served on you, the case may be dismissed upon motion."

It was the conclusion of the Committee that Mr. Mueller's language was better. It was moved and seconded that the warning on all the forms of district court summons should read as follows:

PROPOSED FORM CHANGE

District Court Civil Summons
JDF 600 R2-13

> **WARNING:** A valid summons may be issued by a lawyer and it need not contain a court case number, the signature of a court officer, or a court seal. The plaintiff has 14 days from the date this summons was served on you to file the case with the court. You are responsible for contacting the court to find out whether the case has been filed and obtain the case number. If the plaintiff files the case within this time, then you must respond as explained in this summons. If the plaintiff ~~does not file within this time, then you need not take any action~~, files more than 14 days after the date the summons was served on you, the case may be dismissed upon

motion and you may be entitled to seek attorney's fees from the plaintiff.

Upon call for the vote, the motion carried 10:0.

C.R.C.P. 354(h)--Further Consideration of Change Proposal on Revival of County Court Judgments

Chairman Laugesen reported that Item 7 of the Agenda Packet [pp 38-42] would be further postponed because Member Ben Vinci (the member proposing the amendment) was not able to be present.

Discovery Rule for Probate Court Proceedings

Chairman Laugesen called to the Committee's attention a mini-packet distributed as a handout at the meeting. The mini-packet concerns a proposed discovery rule for probate proceedings proposed by the Colorado Bar Association's Probate Section and developed into a recommended new rule by the Probate Rules Committee.

Chairman Laugesen asked Carol Haller to provide the background of the proposal and why it was submitted to the Civil Rules Committee for its consideration.

Ms. Haller read a memo from the drafting Subcommittee's chairperson regarding the proposed new rule. The memo stated that the Subcommittee passed the rule unanimously; that the goals of the rule are to eliminate motions practice and promote judicial economy if discovery is allowed in a probate matter; and the proposed rule was designed to permit a court to establish any discovery structure it deems appropriate for the particular matter before it.

Member Lee Sternal expressed concern that the proposed rule allows a court to decide on a discovery structure without giving any advance notice of it. He was also concerned that there appeared to be no requirement for uniformity between probate courts so that the procedure would be too wide open. Member DeMuro responded that the wide-open possibility is not unusual--that despite specific rules, district court judges currently can permissibly set out their own pre-trial procedures, including changes to discovery rules.

Judge Davidson expressed support for the proposed rule and stated that courts, particularly probate courts, should have the authority to decide what discovery is appropriate for each case. Member Goldstein commented, stating that the concern is that the proposed rule does not require a probate judge to announce his or her discovery structures so that lawyers know what they are. Judge Davidson responded that instructions are implicit in a discovery order and that this would no doubt be addressed at a case management-type conference or in a case management order.

Member DeMuro expressed concern about the language in the proposed rule that seems to say that unless the court stops them or holds a conference, anyone can start

discovery--that there is no start date as in civil proceedings. He would prefer to see control over that aspect. Judge Davidson responded, stating that the default is for the parties to begin discovery and then ask for a hearing if something comes up. That approach better fits with ordinary probate proceedings where litigation is not the main focus of the court's business.

Chairman Laugesen stated that his only concern was with the placement of the proposed rule--it being almost the very first rule in the Rules of Probate Procedure. He suggested that it would be better for the proposed rule to be placed as one of the C.R.P.P. 8 series--specifically 8.9.

Carol Haller noted that the periods after each subsection letter also needed to be removed.

A motion was made and seconded to recommend adoption of the Probate Rules Committee's recommendation for a rule concerning discovery in probate matters, numbered as C.R.P.P. 8.9, the language of the proposed new rule being as follows:

PROPOSED NEW RULE

C.R.P.P. ~~1.1~~ 8.9 (new rule)

Rule ~~1.1~~ 8.9 Discovery

(a)~~.~~ This rule establishes the provisions and structure for discovery in all proceedings seeking relief under Title 15, C.R.S. Nothing in this Rule shall alter the court's authority and ability to direct proportional limitations on discovery or to impose a case management structure or enter other discovery orders. Upon appropriate Motion or *sua sponte*, the court may apply the Rules of Civil Procedure in whole or in part and may fashion discovery rules applicable to specific proceedings and may apply different discovery rules to different parts of the proceeding.

(b)~~.~~ Unless otherwise ordered by the court, the parties may engage in the discovery provided by Rules 27-37, C.R.C.P. Any discovery conducted in Title 15 proceedings prior to the issuance of a case management or other discovery order shall be subject to Rule 26(a)(3)(A) and (B), (4)-(5) and (b)-(g). However, due to the unique, expedited and often exigent circumstances in which probate proceedings take place, Rules 16, 16.1, 16.2 and 26(a)(1), C.R.C.P., do not apply to probate proceedings unless ordered by the court or stipulated to by the parties.

(c)~~.~~ Rule 45 and 121 (section 1-12), C.R.C.P. are applicable to proceedings under Title 15.

(d). Notwithstanding subsections (a)-(c) of this rule 1.1 8.9 subpoenas and discovery directed to a respondent in proceedings under Part 3 of Article 14 of Title 15, shall not be permitted without leave of court, or until a petition for appointment of a guardian has been granted under section 15-14-311, C.R.S.

On call for the vote, the motion carried 8:1.

Other Business

Member Lee Sternal noted that several active Committee members are listed on the Roster as having expired terms. Carol Haller responded, stating that there is an updated Roster that will be soon distributed showing member reappointment terms.

Adjournment

There being no further business, Chairman Laugesen declared the meeting adjourned at 3:43 p.m.

The next regular meeting is scheduled for **THURSDAY, AUGUST 29, 2013 at 1:26 p.m.** in **Conference Room 4244, Ralph L. Carr Judicial Building, 2 East 14th Avenue, Denver, Colorado.**

Respectfully submitted,

Jenny A. Moore