

MEMORANDUM

TO: SUPREME COURT RULES AND FORMS COMMITTEE

FROM: PROBATE TRIAL AND PROCEDURE COMMITTEE

RE: RULE 8.8

The Probate Trial and Procedure Committee is a joint subcommittee of the Elder Law/Trust & Estate Sections of the Colorado Bar Association that reviews matters related to litigation in probate cases, including reviewing, revising and drafting rules and legislation. In 2014, the subcommittee began a review of Rule 8.8, primarily to address the issues raised by the ruling in Estate of Murphy, 195 P.3d 1147 (Colo. App. Div. 3 2008), in which the Court held that Rule 8.8 has no application to dispositive motions.

Over a number of months, the Probate Trial and Practice Subcommittee met to discuss possible changes to Rule 8.8 to address the above issue and other issues that came up during the months of discussion. These meetings were very well-attended and there was vigorous discussion, disagreement and compromise regarding proposed changes. Some of the discussion points were as follows:

- In reality, dispositive motions in probate cases are set on the non-appearance docket on a regular basis and this allows these unique cases to progress in a fluid manner on an expedited basis.
- Ongoing confusion about petitions versus motions and whether they should be defined, and whether only petitions should be set on the non-appearance docket with motions to be governed by Rule 121.
- Ongoing confusion about deadlines to respond to a petition versus motion.
- Whether a conferral requirement should be added to the notice.
- Concerns that many of the objections we see filed in probate cases are “general” objections, usually filed by pro se parties that often lack merit and delay the proceedings to the detriment of the other parties.
- Abuses by practitioners using the current Rule.

- Whether to change the provision of the Rule providing for dismissal with prejudice.

The subcommittee ultimately voted to approve the draft of the Rule that is now before this Committee. There were several points of consideration that weighed heavily with the subcommittee when voting to approve this current draft.

- In the experience of members of the subcommittee, most of the probate cases have pro se parties – in fact it is not unusual to have only one represented party with all other parties being pro se. Further, these cases can involve many parties, such as when a decedent devised assets to many individuals or charities, or where remote heirs have to be located. The Notice of Non-Appearance hearing is an effective way to advise all parties, most notably the pro se parties, of their rights and the consequences of failing to file an objection and the need for filing specific objections. The subcommittee believed that this approach is in the best interests of moving the case forward with any and all objections being identified, with specificity, so that they can be heard in a timely manner.
- The 14 day notice of non-appearance hearing is consistent with the Probate Code notice provisions found in C.R.S. § 15-10-401(1). Subsection (2) permits the court for good cause shown to provide for a different notice or time of giving notice of any hearing. In addition, while this period is shorter than what is applicable in a motions practice, the information contained in the Notice of Non-Appearance Hearing provides recipients with detailed instructions so there is no element of surprise as to when an objection is due.
- The proposed rule provides for 14 days notice and dismissal of tardy objections with prejudice. In approving the notice and dismissal with prejudice the subcommittee recognized that the 14 days is less notice than afforded to parties under C.R.C.P. Rule 121. However, the shorter time frame is consistent with the purpose of the code to “promote a speedy and efficient system for settling the estate of the decedent and making distribution to his successors.” In addition, the dismissal with prejudice of tardy claims affords the estate finality with regard to court orders promoting expedited estate administration.
- The dispositive issue raised in the Murphy case is problematic. Attempting to limit the non-appearance docket to routine matters that are not dispositive is nearly impossible. There is no definition of a routine matter and at present, dispositive matters, such as a determination of heirs, sale of real estate, approval of settlement agreements, etc. is set on the non-appearance docket. The subcommittee also recognizes that the court has discretion to order the matter set on the appearance docket.

- Similarly, attempting to limit the non-appearance docket to only those matters that are expected to be unopposed is problematic. As mentioned above, with cases that can often involve a number of pro se parties, attempting to confer and determine what is or is not unopposed can be a complete waste of time and ultimately, impossible, overly burdensome and expensive for the estate.

With all of the above in mind, the subcommittee ultimately determined that these probate cases and the parties involved in them would be best served by allowing any petition or motion to be placed on the non-appearance docket. Further, the subcommittee felt the proposed Rule probably reflects the reality of how the non-appearance docket is currently being used and therefore, adopting this Rule would not fundamentally change the proceedings but would eliminate the confusion and problems caused by the Murphy case.