

**COLORADO SUPREME COURT
COMMITTEE ON RULES OF CIVIL PROCEDURE
MINUTES OF MEETING**

January 25, 2008

The Colorado Supreme Court Civil Rules Committee was called to order by Richard W. Laugesen at 1:36 p.m. in the Supreme Court Conference Room, Fifth Floor, Colorado Judicial Building, 2 East 14th Avenue, Denver, Colorado.

The following members were present:

Michael H. Berger
Janice B. Davidson
David R. DeMuro
Peter A. Goldstein
Lisa Hamilton-Fieldman
Richard P. Holme
Charles Kall
Richard W. Laugesen
David C. Little

David L. Michael
Christopher B. Mueller
Nancy E. Rice
Andrew M. Rosen
Ann Rotolo
Frederick B. Skillern
Lee N. Sternal
Jane A. Tidball
John R. Webb

The following members were excused:

James Abrams
John A. DeVita, II
Hubert A. Farbes, Jr.
Carol Haller

Thomas K. Kane
Howard I. Rosenberg
Robert V. Trout
Shirley Williams

Approval of Minutes:

The August 30, 2007 Minutes of the Civil Rules Committee were approved as submitted.

Information Items

Mr. Laugesen pointed out several information items in the Agenda Packet: the 2008 Committee Meeting Schedule; an updated member roster; information about federal e-discovery; proposed amendments to federal rules related to time; and information on pattern interrogatories for use with C.R.C.P. 369

C.R.C.P. 121, § 1-15 ¶ 3)--Concern About the Feature of Failure of a Party to File a Response Being Considered a Confession of the Motion.

The issue was brought to the Committee's attention by a letter from Judge Webb. Mr. Laugesen asked Judge Webb to advise the Committee of his concerns and proposed remedy. Judge Webb indicated that there appears to be a problem with the way trial court judges and law clerks are interpreting C.R.C.P. 121, § 1-15, ¶ 3. If a response is not filed, some judges are granting motions by default. He suggested that perhaps a committee comment should be developed to clarify the rule.

Andy Rosen indicated that this may be an education issue. Orders should not be entered by default. Parties have the obligation to file a response, but judges should be looking at the issues and merits involved in motions.

Another member stated that particularly, motions to dismiss and motions for summary judgment should not be granted by default.

Judge Davidson commented that a change of rule should not be based on a few cases. She felt that the rule should remain as it is at least as to non-dispositive motions.

Lee Sternal suggested adding language: "except in case of a dispositive motion" before "failure of a responding party to reply."

Several members stated their agreement with that approach, and the discussion turned to types of motions that should perhaps be excluded from operation of the rule when there is no response. Richard Holme suggested that other types of motions be added as the Committee becomes aware [in addition to the motions noted at the bottom of Judge Webb's letter (C.R.C.P. 12(b)(5) and 56)].

Mr. Rosen thought this could be even more of a problem than just dispositive motions. Some motions that are not dispositive at the time may become dispositive in the future.

Michael Berger suggested language: "all dispositive motions included under C.R.C.P. 12(b) and 56." He observed that there are also other motions that are dispositive in effect, such as C.R.C.P. 36.

A motion was made and seconded to adopt a language suggested in Judge Webb's letter:

“...a confession of the motion, except motions under C.R.C.P. 12(b)(5) or 56.”

The motion was defeated 6:7.

There was then discussion about alternative language that would take into consideration that there are other motions that could be considered dispositive.

Mr. Berger indicated that he felt the Court of Appeals was correct in its treatment of the issue; however, the treatment is inconsistent with the rule. He felt motions should not be granted just because no response was received if the issue is of great importance. He felt that exception language should be expanded to include all C.R.C.P. 12(b) motions, and was also concerned about C.R.C.P. 12(c).

A motion was made and seconded to adopt the language in Judge Webb's letter with a slight change: “...a confession of the motion, except motions under C.R.C.P. 12(b) or 56.” After further discussion, the motion and the second were withdrawn.

Judge Tidball expressed concern about changing the rule. She noted it had been in force for a long time and helped in efficient handling of matters on courts' very substantial dockets. She felt that the burden of responding should not be shifted to the courts.

Several members expressed concern about moving too rapidly on the issue. They stated that if the Committee is contemplating a change to the existing Practice Standard, it should at least consider the exact motions that will be affected.

Another member suggested more broadly stating the exception as dispositive motions and “any motion seeking the sanction of dismissal.”

Another member reminded the Committee of the challenge of pro se parties.

Another member noted that motions related to questions of law or sanctions do not fall under the suggestion.

Charles Kall suggested use of a Committee Comment to cite cases. He observed that this would be a warning to practitioners that responses must be filed. He was concerned that the message may be opposite if exceptions are stated.

Another member suggested no rule but let the response to the issue develop through case law.

There was further discussion about C.R.C.P. 12(b) and (c) in connection with C.R.C.P. 121, § 1-15 ¶ 3. Several members felt that if the difference between confessing under these two rules cannot be explained, then the proposed change should not be adopted. Mr. Rosen also noted that motions for judgment on the pleadings is dealt with in the same manner as C.R.C.P. 56. Mr. Berger inquired if there is a class of motions that a trial judge should not be able to grant without a response.

A member suggested amending the language:

“...a confession of the motion, except dispositive motions under C.R.C.P. 12(c) and 56.”

A motion was made and seconded to refer the C.R.C.P. 121, § 1-15 ¶ 3 issue to a subcommittee. The motion was approved 15:2.

Mr. Laugesen appointed Michael Berger, Judge Tidball, Professor Mueller and Judge Webb to the subcommittee, with Judge Webb to serve as Subcommittee Chair.

C.R.C.P. 47(h) and 347(h)--Whether the Rules Should Be Changed to Clarify That Peremptory Challenges Cannot Be Waived and May Be Made to Any Member of the Panel.

Mr. Laugesen next directed the Committee's attention to Agenda Item 5 concerning peremptory challenges. In a letter by Peter Goldstein on behalf of the CBA Litigation Section Council, it was stated that the Council feels very strongly that while judges should be permitted individualism in running their courts and trials, jury selection should not involve procedures where differences occur. Specifically, the Council pointed out what appeared to be a contradiction between C.R.C.P. 47(h) and C.J.I.(4th) 1:2, which instructs the panel that each side “must” exercise all of their peremptory challenges. The Council's recommendation was to add language to C.R.C.P. 47(h) stating that peremptory challenges may not be waived and that peremptory challenges may be made to any member of the panel, including additional panel members who are seated as potential alternates.

Mr. Laugesen asked Peter Goldstein to articulate the Litigation Section Council's concerns and proposal.

Following Mr. Goldstein's presentation of the issue, discussion turned to how peremptory challenges are being handled in the various districts. It was noted that, generally, it was the same way, except that some judges in some cases also seat additional panelists as alternates, which necessitates permitting additional peremptory challenges. One of the Litigation Council's concerns was being able to use allotted challenges as to any of the panelists instead of separating challenges for the prospective alternates.

After a discussion of the issues, a motion was made and seconded to approve only the second sentence of the proposed changes to C.R.C.P. 47(h) and 347(h): "Peremptory challenges may be made to any member of the panel." After discussion, the motion was defeated 5:7.

Another motion was made and seconded to adopt Mr. Goldstein's proposed changes to C.R.C.P. 47(h) and 347(h) as set forth on page 36 of the Agenda Packet. After further discussion, the motion was defeated 3:10.

Mr. Goldstein was asked to communicate the Committee's comments and disposition to the Litigation Section Council.

LexisNexis Fees--Should There Be a Rule That Provides Relief From Payment for Indigent Persons.

Mr. Laugesen next called Agenda Item 6 to the Committee's attention. He noted that the matter had been raised by Committee member Jim Abrams, whose inquiry was included in the Agenda Packet at pages 46-48.

Mr. Rosen observed that there was no need for a special rule if the court itself can waive the filing fee.

Mr. Laugesen reported that Carol Haller had advised that State Judicial was dealing with the concern through its contract with LexisNexis and that an attempted rule would probably not be helpful.

After a brief discussion, a motion was made and seconded to table the issue. The issue was tabled to allow State Judicial to deal with the concern.

C.R.C.P. 503 and JDF Form 250--Whether the Rule and Form Are Compliant With C.R.S. 13-6-411.5(2), and If Not, Whether Clarification is Needed.

Mr. Laugesen directed the Committee's attention to Agenda Item 7 concerning language in Small Claims Court Form JDF 250 dealing with venue. The issue was raised by Magistrate Daniel Winograd in a letter set forth at page 49 of the Agenda Packet.

Mr. Rosen noted that there is a problem where a tenant rents in a particular county [such as Pueblo] and owes money, but then moves to another county [such as Logan], Where does the landlord sue? Under C.R.C.P. 503(a) and the form, the landlord may sue in both Pueblo and Sterling. Under the statute, a landlord can sue only in the county where the former tenant resides. Mr. Rosen stated that the rule and form were inconsistent with the statute and that the rule and form should be made consistent with the statute.

A member suggested removing the last sentence from C.R.C.P. 503(a).

Mr. Rosen stated that the statute refers to disputes over security deposits or damaged property. If the defendant owes more than the security deposit and the landlord sues, the statute does not apply because the dispute also involves monies above and beyond the security deposit.

Magistrate Hamilton-Fieldman observed that in the landlord-tenant relationship, the landlord sues in the county where the property is located. In the statute, a security deposit is handled first bringing the matter to the front, and other issues may then be brought in afterward.

A motion was made and seconded to refer the matter to a subcommittee for further study and recommendation. The motion was approved 13:1. Mr. Laugesen appointed a subcommittee consisting of Magistrate Ann Rotolo, Andrew Rosen, Magistrate Hamilton-Fieldman and Magistrate Daniel Winograd. Magistrate Rotolo was appointed to serve as Subcommittee Chair.

Federal Rules Subcommittee--Report of the Subcommittee as to Whether Any of the Changes to Federal Rules Should Be Considered for State Courts.

Mr. Laugesen next called the Committee's attention to Agenda Item 8 and requested that David DeMuro, Chair of the Standing Federal Rules Subcommittee, provide the Committee with the Subcommittee's Report concerning recent changes and developments with the Federal Rules and whether the Committee should be considering any of what the Feds have done or are doing for possible state court adoption.

Mr. Demuro reported that effective December 1, 2007, the Federal Rules were substantially restyled and rewritten. There were no substantive changes. Changes include use of active voice; simplified language; reorganization by creation of subparts; renumbering; removal of empty subsections; omission of the word "shall" substituting words such as "must," "may" or "should;" and moving of items within rules. He observed that while some of the massive restyling and rewriting would have been good at the time the rules were first written, doing it at this late stage probably creates more difficulties (particularly in researching particular rules) than benefit. It was also noted that the Feds are presently contemplating more "fixes" to their time and time-counting rules.

A motion was made and seconded that the Committee not attempt to make similar changes to Colorado court rules. The motion was approved 13:0.

A member suggested continuing to observe how changes in the Federal Rules are working before even thinking about making any similar state court changes. Mr. DeMuro agreed, suggesting that any style and format changes be made only as particular rules are [from time-to-time] amended.

Mr. DeMuro also reported that the Feds had made substantive changes to their E-Discovery Rules. He also noted that, as observed in the article in the information section of the Agenda Packet [page 6], litigants were finding that E-Discovery under the Federal Rule approach to be very, very expensive and was making federal court litigation of small cases cost prohibitive.

Mr. DeMuro observed that Colorado has existing rules that sufficiently deal with E-Discovery so that there has been no need for special rules. He reported that the Standing Subcommittee would, however, continue to track the E-Discovery issue and report to the full Committee.

Archaic Language Subcommittee—Report of the Subcommittee.

Mr. Laugesen noted that Professor Rosenberg was out-of-state and unable to attend the meeting. The Agenda Item was therefore passed to the next meeting.

The meeting was adjourned at 4:03 p.m. The next regular meeting is scheduled for **Friday, February 29, 2008** at 1:26 p.m., Supreme Court Conference Room, Fifth Floor, 2 East 14th Avenue, Denver, Colorado.

Respectfully submitted,

April Bernard