

# **Colorado Supreme Court Committee on Rules of Appellate Procedure**

## **Thursday, March 4, 2010, 1:30 p.m.**

The Colorado Supreme Court Committee on Rules of Appellate Procedure was called to order by Chief Judge Janice Davidson at 1:30 p.m. in the Second Floor Conference Room at the Colorado Judicial Building, 2 East 14<sup>th</sup> Avenue in Denver.

The following members were present:

Catherine Adkisson

Judge John Dailey

Chief Judge Janice Davidson

Anne Gill

Joseph Goldhammer

Carol Haller

Richard Laugesen

Andy Low

Norman Mueller

Karen Taylor

The following members were excused:

Michael Berger

Justice Nancy Rice

### **Approval of Minutes**

The April 9, 2009 Appellate Rules Committee meeting minutes were approved as submitted.

### **Chair's Report**

The recommended changes to C.A.R. 28, 32 (with Form 6), and 52, were approved by the Supreme Court.

The proposed new rule for interlocutory appeals in civil cases, and the related statutory change to section 13-4-102(1) and new section 13-4-102.1, remain pending. The Supreme Court has indicated that it approves of the concept but will not consider adoption of a rule until the statutory changes are enacted.

Richard Laugesen gave an update on the proposed legislation, and reported that the CBA had agreed to sponsor the bill. To date, this effort is in progress.

### **Proposal to Amend C.A.R. 4(d) to Reference Crim. P. 32**

As chair of the subcommittee, Judge Dailey explained that the purpose of the suggested amendment was to reconcile appellate and criminal rules relating to the death penalty cases.

The subcommittee, (2-1), proposed deleting C.A.R. 4(d)(2), and substituting as the new C.A.R. 4(d)(2), the following language:

**Procedure.** The procedure for pursuing appeals in cases in which a sentence of death has been imposed is as set forth in Rule 32.2 of the Colorado Rules of Criminal Procedure.

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In the discussion that followed, one member suggested that any amendment should wait for the outcome of appeals pending related to the unitary appeal procedure. Another member commented that it might be preferable for the Criminal Rules Committee to deal with the trial portion of changes and the Appellate Rules Committee to deal with the appellate portion. There also were comments that in the criminal rules, the current timelines for appeals in death penalty cases seemed too short.

After further discussion, a motion was made and seconded to change C.A.R. 4(d)(2), as submitted, as follows:

### **Rule 4. Appeal as of Right -- When Taken**

#### **(d) Appeals of Cases in Which a Sentence of Death Has Been Imposed.**

##### **~~(2) Procedure and Conditions.~~**

~~(I) The trial court, at the time of imposition of a sentence of death, shall enter an order staying execution of the judgment and sentence until further order of the Supreme Court, and shall direct the clerk of the trial court to mail to the Supreme Court, within seven days of imposition of sentence, a copy of the judgment, sentence, and mittimus.~~

~~(II) The record, as described in subsection (3) of this Rule, shall be prepared in the same form as any other record to be presented to the Supreme Court and shall be transmitted by the clerk of the trial court within forty days of imposition of sentence, or such additional time as may be allowed by the Supreme Court.~~

~~(III) Except as provided by subsection (e) of this Rule, the Colorado Appellate Rules governing criminal appeals shall apply to appellate review of sentences.~~

##### **(2) Procedure.**

The procedure for pursuing appeals in cases in which a sentence of death has been imposed is as set forth in Rule 32.2 of the Colorado Rules of Criminal Procedure.

The motion carried 5:3.

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### **Revisiting Appellate Time Computation Rules**

Court of Appeals' Deputy Clerk Polly Brock submitted a proposal to amend appellate time computation rules to track changes made in the federal rules. The federal approach uses a "days are days" approach, and resets time deadlines, when possible, as multiples of seven. Ms. Brock noted, however, that the federal approach keeps the three-day mailing rule, but her proposal suggests eliminating that rule.

In the ensuing discussion, the members responded extremely favorably to the "days are days" and the use of multiples of seven. One member noted how much easier it is under the federal approach to calculate filing deadlines. Some members noted, however, that the multiple of seven may not be feasible if a statute provides otherwise. Another member thought perhaps that conforming statutory fixes could be made, either contemporaneously with or after enactment of the new rules.

After additional discussion, all of the members indicated that they were in favor of eliminating the three day mailing timeline.

A motion was made and seconded to adopt in concept the federal approach to days and time periods in multiples of seven, and to eliminate the three day time period for mail service. The motion carried 8:0.

It was agreed that the next step is propose new, specific deadlines as reconfigured under the new approach. A subcommittee was created to do so, consisting of Catherine Adkisson, Ms. Brock, Judge Davidson, Anne Gill, and Andy Low.

However, it was noted that a subcommittee of the civil rules committee is already developing a proposal to submit to the full committee, and the criminal rules committee indicates it will soon begin working on a similar proposal. The goal is to have uniform time computation rules for all of the rules of procedure – civil, criminal, and appellate. Accordingly, the members agreed that, once the respective rules committees have agreed upon an approach, prior to sending any proposed rule changes to the Supreme Court, the chairpersons of the three committees should meet to coordinate proposals. The members also agreed that, before making any further efforts on specific rule changes, which will be a highly time-intensive effort, the committees should seek input from the Supreme Court as to whether it approves of the committees' general recommended approach to time computation.

### **Proposed Clarification to C.A.R. 35(e) Concerning Affirmance by an Equally Divided Supreme Court**

Judge Davidson indicated that the proposed change in the language of C.A.R. 35(e) was to clarify that it is the judgment of the court appealed from that is affirmed when the Supreme Court is equally divided. She noted that the original rule was likely enacted when there was no intermediate appellate court.

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After brief discussion, a motion was made and seconded to adopt the amendment to C.A.R. 35(e) as follows:

### **Rule 35. Determination of Appeal**

**(e) Disposition of Cause.** In all cases on appeal the appellate court may enter final judgment and may issue execution thereon, or may remand the cause to the trial court in order that execution may there be issued or that other proceedings may be had therein. Any judgment may be affirmed without written opinion, but on reversal the court shall give its reasons for such action, except in cases where it renders judgment or directs what judgment shall be entered in the trial court. When the Supreme Court acting en banc is equally divided in an opinion, the judgment of ~~the trial court~~ **appealed from** shall stand affirmed. The appellate court shall disregard any error or defect not affecting the substantial rights of the parties.

The motion was approved 8:0.

### **Proposed Addition to C.A.R. 5(5)(b) Concerning Attorney Notice of Withdrawal**

A motion was made and seconded to adopt the following proposal outlining changes to C.A.R. 5(5)(b). After brief discussion, the motion carried unanimously 8:0.

### **Rule 5 Entry of Appearance and Withdrawal**

**(a) [no change].**

**(b) Withdrawal.**

**7) If the client is not a natural person, that it must be represented by counsel in any appellate proceeding unless it is a closely held entity and first complies with section 13, 1-127, C.R.S.; and**

**8) That process may be served upon the client at his last known address; and**

**9) Of the client's right to object within 15 days of the date of the notice.**

**(c) [no change]**

### **Correction to Statutory Citation in C.A.R. 3.3**

Judge Davidson indicated that there is a typographical error in C.A.R. 3.3.

A motion was made and seconded to make the proposed change to C.A.R. 3.3 to correct the error.

### **Rule 3.3 Appeals of Grant or Denial of Class Certification**

An appeal from an order granting or denying class certification under C.R.C.P. 23(f) may be allowed pursuant to the procedures set forth in that rule and C.R.S. § 13-20-910**901**.

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The motion was approved unanimously 8:0.

**C.A.R. 32(a)(2)-Letter from William McDonald**

Judge Davidson explained that she had received and responded to the letter, which concerned expansion of acceptable fonts. The members agreed that no further action was required.

**Next Meeting-Adjournment**

The meeting adjourned at 2:54 p.m. The next meeting date was not discussed.

Respectfully submitted by April Bernard