

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

September 24, 2007

The Colorado Supreme Court Committee on Appellate Rules of Procedure was called to order by Janice B. Davidson, Chair, at 1:35 p.m., in the Colorado Court of Appeals 2nd Floor Conference Room, 2 East 14th Avenue.

The following members were present:

Catherine P. Adkisson
Michael H. Berger
John Daniel Dailey
Janice B. Davidson
Anne W. Gill

Joseph M. Goldhammer
Richard W. Laugesen
Kathleen A. Lord
Norman R. Mueller
Justice Nancy E. Rice

Approval of Minutes:

The minutes of the August 21, 2006 meeting, were approved with no corrections. A suggestion was made to eliminate references to agenda items in the minutes.

Chair's Report:

Judge Davidson reported that all the Rule changes recommended by the Appellate Rules Committee at the August 21, 2006 meeting were adopted. Rule 3.4 and Rule 4 were adopted by the Court on November 9, 2006 and Rule 10, 11 and 28 were adopted by the Court on September 7, 2006. The changes adopted for Rule 3.4 included the recommended language about showing good cause.

C.A.R. 35(f) – Publication for Concurrences or Dissents:

A proposal has been made to amend C.A.R. 35(f) which will provide the Court with more flexibility on publication votes. Judge Davidson reported that a majority of the members of the Court were in favor of adopting a change to the Rule. Two proposals have been made to amend C.A.R. 35(f). The first proposal suggests that there might be a wider application for conferring consent of publication and would permit publication of concurring opinions. The second proposal would permit publication for only one category of publication. The last 3 paragraphs of the existing Rule remain unchanged in both proposals.

The members discussed whether the first proposal tries to set a binding precedent and whether clarification is absent from the second proposal. The change will allow publication of the entire case and the reason for the dissent. The current version of the Rule only allows publication of a majority opinion. The goal of the Rule should be to give the Court as much flexibility as possible regarding what should or shouldn't be published. Questions were raised regarding whether the proposed changes provide a platform for minority opinions and whether attorneys would submit arguments just to have them published.

A motion was made to approve the first proposal, delete the word "cases" in the second sentence and insert instead "Opinions shall be published. . ." and the third sentence should be changed to "The majority opinion holding . . ."

After a brief discussion a second was made to adopt the motion as amended above. Further discussion raised the question as to whether the court will take the time to write an opinion when it is not a concurring opinion and if the wording of the second proposal might be a better choice.

The first motion was withdrawn. A motion was made and seconded to adopt the second proposal as follows:

PROPOSED MODIFICATION (ALTERNATIVE ONE)

(f) Published Opinions of Court of Appeals. A majority of all of the judges of the Court of Appeals shall determine which opinions of that court shall be designated for official publication. They shall be published in whatever official publication is designated by the Supreme Court. Those opinions designated for official publication shall be followed as precedent by the trial judges of the state of Colorado.

No opinion of the Court of Appeals shall be designated for official publication unless satisfies one or more of the following standards: (1) the opinion lays down a new rule of law, or alters or modifies an existing rule, or applies an established rule to a novel fact situation; (2) the opinion involves a legal issue of continuing public interest; (3) the **majority opinion, dissent, or special concurrence** directs attention to the shortcomings of existing common law or inadequacies in statutes; (4) the opinion resolves an apparent conflict of authority.

The motion was carried 6 to 2. Several members stated that they are in favor of any changes to the Rule that increases the number of opinions and the members, in general, are in favor of published court opinions.

C.A.R. with 41(b)(1) AND 52(b)(3) – Mandate Procedures:

Judge Davidson introduced Polly Brock, the Acting Clerk of Court for the Court of Appeals. Ms. Brock explained the proposed changes to C.A.R. 41(b)(1) and 52(b)(3). C.A.R. 41 directs the clerk of court to issue a mandate either 46 days after an opinion is

announced or the day after the period for filing a petition for rehearing expires, whichever is longer. However, C.A.R. 52 provides that any petition for writ of certiorari shall be filed in the Supreme Court within thirty days after the expiration of the time for filing a petition for rehearing in the Court of Appeals. As a result, a mandate is sometimes issued by the Court of Appeals, but the time for filing a petition for certiorari has not yet expired in the Supreme Court. Two proposals have been made to correct this discrepancy.

The members discussed whether the second proposal is more in line with judicial economy to delay the ultimate outcome of the case. In general the process seems to take a long time and there currently aren't many motions for extensions to file a petition for rehearing. However, that may change as cases become more complex and there have always been a significant number of petitions filed for an extension of time.

A straw poll was taken and the members voted 6 to 0 for the second proposal.

A motion was made and seconded to adopt the second proposal. During further discussion a suggestion was made to eliminate the comma after the words "Court of Appeals" in the first sentence. Another suggestion was made to insert the words "issuance of the" in the amended sentence as follows:

C.A.R. 529b)(3) Any petition for writ of certiorari to review a judgment of the Court of Appeals shall be filed in the Supreme Court within **46 days of the issuance of the opinion of the Court of Appeals**, if no petition for rehearing is filed, or within thirty days after the denial of a petition for rehearing by the Court of Appeals. In workers' compensation and unemployment insurance cases, the time for filing a petition for certiorari in the Supreme Court is reduced to fifteen days.

The friendly amendments were accepted by the members and the motion passed unanimously.

C.A.R. 12(a) – Fees:

The proposed amendments reflect the statutory changes in the fees. The members discussed whether the second paragraph, which is a comment, should be deleted. Ms. Brock reported that the Court of Appeals plans to distribute a notice regarding the fee change and the current telephone message already provides information with the correct fee amount.

A motion was made and seconded to substitute the specific statute wherever appropriate in the Rule. A motion was made and seconded to adopt the proposed changes. The motion was carried unanimously.

A motion was made and seconded to delete the comment sentence following Section (a) and the comment sentence following Section (e). The motion was carried unanimously.

C.A.R. 3.1(b), 3.4 (e)(g)(h)(j) and (k), 4.1(b) (d) and (f), 26(a) and (c) and 34(b) – Suggested Changes to Conform with C.R.C.P. 6(e):

The proposed amendments track the change that has already been made to calendar days and inserts the word “calendar” into several Rules. The proposed amendments will also match the changes already adopted by the Supreme Court Committee on Civil Rules of Procedure and the changes that have been made at the Federal level.

After a brief discussion the members agreed that the sentence added to C.A.R. 26 (a) and (c) should not be deleted. Wherever the Rules specify 10 days that includes holidays and weekend days.

A motion was made and seconded to adopt the proposed changes to C.A.R. 26 (a) and (c) and to delete the sentence “Unless otherwise specifically ordered, when the period of time prescribed or allowed is less than eleven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.”

During further discussion the members agreed that some of the short deadlines were not a problem and that once a deadline is imposed, then all of the Rules need to be consistent. Changing some of the deadlines to being shorter is appropriate, but the Committee for Civil Rules of Procedure has already made the necessary changes. The proposed changes will provide a consistent method for calculating deadlines.

The motion failed with 1 member in favor and 5 members opposed. The remaining proposed changes to C.A.R. 31(b), 3.4 (e)(g)(h)(j) and (k), 4.1 (b) (d) and (f) and 34(b) also failed with 1 member in favor and 5 members opposed.

C.A.R. 4(a), 25(d), 31(c), 32(a) and New Rule 30 – Electronic Filing:

A proposal has been made to amend C.A.R. 4(a), 25(d), 31(c) and 32(a) and to create a new Rule 30. The proposed changes will conform to the Rule changes that have already been adopted for the district courts to improve the electronic filing procedures. Judge Davidson reported that the Court of Appeals would like to have electronic filing capabilities by December 1, 2007. The Court of Appeals is ready to go paperless, but the Supreme Court still has some additional changes to make.

The members discussed the definitions proposed for the new Rule 30. Access to Lexis Nexis requires parties to have computers. A suggestion was made not make the changes mandatory until we find out whether the new system will work effectively. Documents under seal will operate just as they did in the paper world and an electronic ink signature is the same as a digital signature. A suggestion was made to delete the phrase “(including proposed orders)” from Section 13 of proposed Rule 30. The changes recommended in C.A.R. 4(a) will make them consistent with the Civil Rules. A suggestion was made to

add the words "or e-service" to the last sentence of C.A.R. 4(a). The proposed changes to C.A.R. 31(c) relate to the rules regarding electronic filing.

A motion was made and seconded to adopt the proposed changes to C.A.R. 4(a), 25(d), 32(a) with the suggested changes noted above. A motion was made and seconded to adopt proposed Rule 30 with the suggested changes noted above. The motions passed with 6 members in favor and one abstention.

New Rule 31(c) – Electronic Briefs:

Judge Davidson asked the members to discuss the proposed changes to C.A.R. 31(c) and for volunteers for a subcommittee to review the proposal. Currently there are judges and attorneys who would like to be allowed to submit electronic briefs instead of paper briefs. Electronic briefs would allow individuals to hyperlink to case law. Another issue has to do with the alarming rate of shrinking shelf space and storage capabilities. The subcommittee needs to develop some practical rules about what changes need to be made. The members agreed that an intermediate Rule change is needed to provide specific directions about electronic filing.

Catherine Adkisson will chair a subcommittee including Anne Gill, Joseph Goldhammer and possibly Andrew Low. Polly Brock will provide staff assistance to the subcommittee. Anyone else who would like to participate on the subcommittee should contact Judge Davidson. Judge Davidson would like a recommendation from the subcommittee by the beginning of next year.

Next Meeting – Adjournment:

The meeting adjourned at 3:50 p.m. The next meeting will be scheduled on a date not yet determined.

Respectfully submitted by Troy C. Singleton