A Practical Guide to Trials by 'Appointment' Under CRS § 13-3-111

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Jokes about the difficulties of scheduling a home service call by the telephone company or the cable company are an ingrained part of American culture. Most civil trial lawyers, however, would give anything to obtain something even close to that degree of certainty in trial schedules. Use of an inactive judge under CRS § 13-3-111 provides one means of being able to conduct a civil trial by "appointment." This article is intended to outline the issues associated with pursuing such an appointment as well as the means of pursuing one.

The Problem

The following is one recent example of a situation all too familiar to experienced trial lawyers. Counsel appear in court shortly before their scheduled trial date for their final pretrial conference. Because counsel have made this trip several times previously, little remains to be done. Their primary purpose is to confirm the details of their trial schedule. While each of their prior trips had resulted in a last-minute continuance, counsel are confident that they will go to trial this time. As a result of sheer staying-power, their case has seniority over most of the other pending cases. Additionally, counsel had continued the trial date for a long period after their last attempt to go to trial, in order to obtain a "first setting."

Considering the age of their case and its "first setting," counsel hold an optimistic belief in the security of their trial date. Consequently, they are both stunned when the court abruptly advises them that they are now third on its docket. They both protest loudly. The court listens with a sympathetic but unyielding ear. Counsel next explore alternatives, such as the use of a senior judge or a transfer, if any other district has an opening, but none is available.

A quick check with the counsel for the two cases ahead of them on the docket reveals the worst possible situation-unequivocal uncertainty. Both cases have ongoing settlement discussions, with settlement unlikely but still possible.

In this example, the uncertainty has more than the usual level of inconvenience for both counsel. One's client is an older woman living in California. Her life savings of approximately $500,000 has been tied up in the court registry for over two and one-half years. During this time, she

has had practically no independent financial means. The other attorney's clients had originally resided in Colorado but moved to the east coast more than a year previously. Counsel both have a number of out-of-state fact witnesses to be brought to town for the trial, as well as out-of-state expert witnesses with their own scheduling demands and cancellation fees. In short, all of the parties have a great deal to lose if counsel were to gear up for trial again, only to receive another last-minute continuance.

Counsel revisit their settlement prospects but quickly recall why their mediation had been unsuccessful. They consider a traditional private trial-effectively, binding arbitration-and quickly reject it as unsuitable for their needs. One attorney wants to preserve his right to a jury and does not believe that a private arbiter would have the authority to seat a traditional jury. The other attorney wants to preserve his right of appeal on a key legal issue, and rights of appeal from arbitration awards are severely limited. Neither attorney is sure if an appellate court would recognize a stipulation to create appellate jurisdiction beyond that provided by statute.

A Possible Solution

Both attorneys lament the frustration and waste of this recurring predicament. Another attorney mentions that she had heard that counsel could privately arrange a trial through judicial appointment and wondered if that process might be of assistance. A bit of legal research reveals CRS § 13-3-111, which provides, in relevant part, as follows:

Upon agreement of all appearing parties to a civil action that a specific retired or resigned . . judge of any . . .court be assigned to hear the action and agreement that one or more of the parties shall pay the agreed upon salary of the selected . . .judge . . ., the chief justice may assign any retired or resigned . . .judge who consents temporarily to perform judicial duties for such action.[i]

Once appointed, the judge acts with the full authority of a regular sitting judge assigned to the case.[ii]

Counsel quickly agree to proceed with a trial by an appointed judge under CRS § 13-3-111. It would resolve all of their problems. Because the case will be handled by an appointed judge with full judicial authority, rather than a private arbiter, the appointed judge would have the authority to seat a jury, and the parties would retain full appellate rights.[iii] More important, counsel could "make an appointment" with their new judge and obtain a definite and reliable trial date.

Surprisingly, effectuating the agreement is likely to be the most time-consuming aspect of the process. Relatively few have sought appointments under the statute. Thus, precedent is sparse. Moreover, there is a dearth of information about exactly what or where to file or how to go about arranging the trial.

The remainder of this article attempts to provide answers to those questions.

What to File

The filing should be in the form of a pleading signed by all of the "appearing parties." An appropriate title might be "Petition For Appointment Of Inactive Judge Pursuant To CRS § 13-3-111" (the Appendix to this article contains a sample petition and order). The pleading should be filed under the caption and case number assigned to the case by the trial court. The Supreme Court will *not* assign the case a new case number for its docket.

The petition must recite that the elements of the statute have been satisfied. Specifically, the petition should identify the appearing parties in the case, explain the departure of any parties that may no longer be "appearing," and confirm that each of the appearing parties has agreed to the appointment. The petition also must identify the inactive judge that the parties have agreed should be appointed.

That the parties have reached agreement for payment of the judge and any associated expenses also must be included in the petition. Thus, petitions should generally disclose the compensation to be paid the inactive judge, as well as the parties' agreement for paying that compensation and the other expenses of the proceeding. Although such a recitation is not technically required by the statute, the statute seems particularly concerned with insuring that the post-appointment proceedings be paid for by the parties and not the state. In fact, the statute authorizes the chief justice to require "such undertakings" as he or she deems appropriate to ensure that no expense will befall the state. Consequently, a complete disclosure of the compensation to be paid and the parties' agreement on paying expenses may be a prudent inclusion in the petition to lessen the chances that an additional "undertaking" may be required.

The inactive judge to be appointed also must consent to the appointment.[iv] Therefore, the inactive judge should sign the petition indicating his or her consent to the appointment and the terms of compensation.

The statute does not expressly require a demonstration of cause or other justification for the requested appointment and leaves to the chief justice the determination of whether the appointment is proper. An explanation of why the parties seek the appointment, however, seems an appropriate means of assisting the chief justice in the exercise of his or her discretion.

Until a 1996 amendment, an appointment under this statute could be made only after the conclusion of discovery. The amended statute, however, now permits appointment "at any time after the action is at issue."[v] Thus, an inactive judge may be appointed in the earliest stages of the case and, presumably, would handle all aspects of the case through completion. Consequently, good practice would dictate that the request for appointment should recite the procedural status of the case. Additionally, the request should advise whether the trial will be to a jury or to the court.

Finally, counsel might want to address the scope or duration of the requested appointment. The statute appears to contemplate an

appointment that would last until final judgment and enforcement or appeal. However, the statute provides no set rule and merely provides for an appointment of the inactive judge "temporarily to perform judicial duties for [the] action."[vi] Presumably, this provides the chief justice with sufficient latitude to appoint an inactive judge "temporarily" to handle a particular phase of a proceeding or to handle a case for a given period of time, possibly even for the resolution of limited issues. If counsel seeks some form of limited appointment, the request for appointment should clearly state the scope of the appointment and the parties' reasoning.

Good practice also suggests that the petition be accompanied by a proposed Order of Appointment for the chief justice to issue. It is probably sufficient for the order simply to recite that the identified inactive judge had been appointed to perform judicial duties for the action pursuant to the statute. This form of order is consistent with the language of the statute.[vii]

Where to File

The statute provides that the request should be filed with the office of the chief justice of the Colorado Supreme Court. No new case number will be assigned by the Supreme Court, and no filing fee will be required. The parties also should file a copy of the request with the trial court in which the case is pending.

How to Make it Happen

Finding a Judge

Before the parties can file their petition, they must first identify an inactive judge. The statute allows the chief justice to assign any "retired or resigned justice or retired or resigned intermediate appellate, district, probate, or juvenile court judge who consents" to preside over the case.[viii] Presumably, the statute contemplates appointment only of justices or judges that have retired or resigned from a Colorado court. Thus, the parties may approach any qualifying inactive judge individually about appointment. The parties also may seek the services of one of the growing number of business enterprises that "hire out" inactive judges.[ix]

Finding a Courtroom

A much more daunting challenge is finding a suitable courtroom in which to conduct a trial, a challenge even more significant for a jury trial. Resolving this problem requires some flexibility and creativity,[x] as well as a careful assessment of what facilities are really required for the particular case.

The first choice for courtroom facilities is the courthouse in which the case has been pending. Courts seem quite willing to allow the use of their courtrooms, *schedule permitting*. If counsel has sought an appointment of an inactive judge, however, the odds are that he or she has done so at least in part due to docket congestion. That same docket congestion will likely prevent counsel from obtaining a reliable "appointment" for use of a

courtroom.

Depending on the mobility of the case (including the need for a jury drawn from a specific district), counsel may be able to use facilities in another judicial district. A spring trial in a mountain courthouse has some appeal.

The courtrooms of the federal district court and the Tenth Circuit also are an option occasionally available. Parties also should consider trying to utilize the moot courtrooms of the law schools, but these seem to be available only rarely and are not ideal in design. Some of the commercial providers of mediation and arbitration services have large conference rooms that they can furnish as impromptu "courtrooms." One or more law firms have built their own courtrooms. One of these facilities may be an excellent option.

If the case involves a trial to the bench and the parties are not in need of the "aura" of a courtroom, a sufficiently large conference room can suffice. The parties should bear in mind that the traditional "large conference room" found in most law firms with a single long table is not particularly suitable for conducting a trial. To be practical, the conference room and furnishings should allow for separate tables for the parties as well as the judge. Preferably, a fourth table would be available for the witnesses. Room also must be available for files, parties, experts, and the court reporter. Nearby facilities must be available for witnesses that may be barred from the "courtroom" awaiting their turn to testify. Several law firms, court reporting companies, and other private companies have such facilities and will permit their use.[xi]

If the case requires a jury trial or otherwise needs a formal courtroom setting, securing proper facilities may be the single biggest challenge to conducting a private trial. Any expenses associated with facilities must be borne by the parties.

Preserving the Record

Since all experienced trial lawyers are familiar with arranging court reporters for depositions, the court reporter is one of the easiest logistical tasks in a trial by appointment. The parties should simply be certain that they clearly designate someone to complete this task, lest it be overlooked. Further, the parties should carefully select the court reporter because trial work can be more demanding for a court reporter than deposition work.

The transcript, however, comprises only one portion of the case record. Ensuring a reliable pleading record, or "court file," requires a more dedicated effort to avoid difficulties. When the parties agree to pursue a private trial, one of the issues to be resolved at the outset is how the case file will be obtained, kept, and, ultimately, transmitted back to the court clerk. Close coordination will be required between the parties, the judge, and the clerk's office to avoid potential disaster.

In one district, an informal "practice" is beginning to develop for handling the record. The judge's staff (or an expressly designated party if the judge

has no staff[xii]) coordinates directly with the court clerk to obtain a complete copy of the existing court file, at the expense of the parties. The parties then file all pleadings with both the judge's office and the clerk's office. The judge's office (or the designated party) transmits the originals of all judgments and court orders to the court clerk. At the conclusion of the trial, the judge's office (or the designated party) transmits the judge's record with any trial exhibits to the clerk's office. All involved will have to make a conscientious and disciplined effort to conclude the proceedings with a clean and complete record.

Subpoenas and Juries

Witnesses subpoenas are handled the same way as in a traditional trial.[xiii]

Seating a jury for a trial under this statute at a location remote from counsel's district courthouse involves logistical challenges that will likely make such undertakings an uncommon occurrence. Of course, if the trial is to be conducted in the courthouse, the challenges are no greater than those faced when using a senior or visiting judge. If the jury is to be impaneled for a trial elsewhere, the potential jurors need to be summoned formally from the proper district, they need to be oriented, facilities must be available for *voir dire*, facilities in and out of the "courtroom" must be available for the jurors, a jury clerk must be available to supervise their care, and the basic food and hygiene needs of the jurors must be met.

The most difficult phase is the summoning, assembling, and orienting of the potential jurors prior to *voir dire*. This process cannot be accomplished without the help of a willing and cooperative court clerk's office.

In light of the foregoing, it may well be difficult to conduct a successful jury trial under the statute away from the courthouse. If the relevant courthouse has some available space, the best approach may be to conduct *voir dire* in the courthouse and then transport the selected jury panel to the place of trial. Alternatively, the parties might be able to arrange for the summoning of potential jurors and the orientation process to take place as usual. The court clerk's office could then randomly "cut from the herd" potential jurors that would be brought to the parties' "courtroom" for *voir dire*.

Theoretically, the parties could conduct the entire jury selection process at their "remote courthouse." Summonses might be issued that direct the potential jurors to appear at the private "courthouse." An independent "jury clerk" could conduct orientation at that location, and then *voir dire* could proceed as normal. However, such a proceeding seems highly impractical.

Regardless of how the jury is impaneled, careful consideration, planning, and close coordination among the parties, the judge's office, and the court clerk's office will be essential. Further, the parties must pay the expenses of any additional process required for seating the jury.

Conclusion

Pursuing a trial under CRS § 13-3-111 involves a number of logistical challenges, as well as added expense, and is only appropriate for a small number of cases. It is hoped that this discussion has provided some useful information about the process and will be of assistance to counsel in deciding whether to pursue a private trial and to undertake such a trial if the parties choose to do so.

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[i] CRS § 13-3-111(1).

[ii] CRS § 13-3-111(4).

[iii] *See* CRS § 13-3-111(3), (4).

[iv] CRS § 13-3-111(1).

[v] CRS § 13-3-111(3).

[vi] CRS § 13-3-111(1).

[vii] *Id*.

[viii] *Id*.

[ix] For example, Judicial Arbiter Group, Inc.; Judicial Resolutions, Inc.; or JAMS/Endispute.

[x] For example, one counsel recently tried to schedule a trial in a local museum that is housed in a former courthouse and has a recently restored courtroom.

[xi] The commercial providers of mediation and arbitration services are good sources of information about such conference rooms.

[xii] If the appointed judge has no staff, the parties should seriously consider hiring an experienced temporary staff person for the judge. The cost is negligible compared with the potential problems that can develop from a poorly handled record.

[xiii] *See* CRS § 13-3-111(4).