AGENDA

COLORADO SUPREME COURT
COMMITTEE ON THE
RULES OF CIVIL PROCEDURE

Friday, June 26, 2020 1:30 p.m.
VIRTUAL MEETING VIA WEBEX—PLEASE SEE YOUR EMAIL FOR THE LINK—
PLEASE REVIEW THE EMAIL FOR THE PROTOCOLS FOR THIS MEETING

I. Call to order

II. Approval of January 31, 2020 minutes [Pages 1 to 5]

III. Announcements from the Chair

A. Transmittal Letter to Supreme Court—February 24, 2020 [Pages 6 to 11]
B. Rule Changes 2020(01), 2020(13), and 2020(20) [Pages 12 to 46]

IV. Present Business

A. C.R.C.P. 103—Amendments Needed in Light of House Bill 19-1189—(Jose Vasquez) [Pages 47 to 101]

B. Redaction of Court Filings by Parties/Counsel—5(g)—(David DeMuro) [Pages 102 to 108]

C. Colorado Rules for Magistrates—Proposed Rule Changes—(Magistrate Tims)

D. JDF 601—District Court Civil Case Cover Sheet Modification to Include Associated Cases—(Bradley Levin)

E. JDF 105—Service of Pattern Interrogatories—(Mike Hofmann)

F. C.R.C.P. 16 and 26—Proposed Corrections and Tweaks—(Richard Holme) [Pages 109 to 136]

G. County Court Subcommittee Proposed Rule Changes (307 and 341)—(Ben Vinci)

H. C.R.C.P. 4(m)—(Judge Jones)

I. Local Rules—(Richard Holme) [Pages 137 to 139]

J. C.R.C.P. 304—Time Limit for Service from Attorney Daniel Vedra—(Ben Vinci)

K. Crim. P. 55.1—Public Access to Court Records—(Judge Berger) [Pages 140 to 144]

L. C.R.C.P. 15(a)—Possible Amendments—(Judge Berger) [Pages 145 to 166]

M. C.R.C.P. 30(b)(7) —Virtual Oaths—(Lee Sternal) [Page 167]

V. Adjourn—**Next meeting is September 25, 2020 at 1:30 pm.**

Michael H. Berger, Chair
michael.berger@judicial.state.co.us
720-625-5231

Colorado Supreme Court Advisory Committee on the Rules of Civil Procedure
January 31, 2020 Minutes

A quorum being present, the Colorado Supreme Court Advisory Committee on the Rules of Civil Procedure was called to order by Judge Michael Berger at 1:30 p.m. in the Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Colorado Judicial Center. Members present at the meeting were:

Name	**Present**	**Not Present**
Judge Michael Berger, Chair	X	
Chief Judge Steven Bernard	X	
Judge Karen Brody	X	
Chief Judge (Ret.) Janice Davidson	X (phone)	
Damon Davis	X (phone)	
David R. DeMuro	X	
Judge Paul R. Dunkelman	X (phone)	
Judge J. Eric Elliff	X	
Judge Adam Espinosa	X	
Peter Goldstein		X
Lisa Hamilton-Fieldman	X	
Michael J. Hofmann	X	
Richard P. Holme	X	
Judge Jerry N. Jones	X	
Judge Thomas K. Kane	X	
Cheryl Layne	X	
John Lebsack	X	
Bradley A. Levin	X	
David C. Little		X
Professor Christopher B. Mueller	X	
Brent Owen	X	
John Palmeri	X	
Judge Sabino Romano	X (phone)	
Stephanie Scoville	X	
Lee N. Sternal		X
Magistrate Marianne Tims		X
Jose L. Vasquez	X	
Judge Juan G. Villaseñor	X (phone)	
Ben Vinci	X	
Judge John R. Webb	X	
J. Gregory Whitehair	X (phone)	
Judge Christopher Zenisek	X	
Non-voting Participants		
Justice Richard Gabriel, Liaison	X	
Jeremy Botkins	X	

I. Attachments & Handouts

- January 31, 2020 agenda packet and supplements.

II. Announcements from the Chair

- The November 22, 2019 minutes were approved as presented.
- Chair Judge Berger told the committee that he will finalize a transmittal letter and submit the committee's rule change proposals to the supreme court soon.
- The subcommittee on C.R.C.P. 56 will be disbanded.

III. Present Business

A. Federal Rules Standing Subcommittee on C.R.C.P. 121, § 1-23 + C.R.C.P. 65.1

Subcommittee chair David DeMuro explained that the subcommittee had recommended a change on this rule at the last meeting. After the committee provided guidance, the subcommittee returned today with tweaked language. The committee unanimously approved this rule change proposal.

B. JDF 601/Related Case Doctrine

Subcommittee chair Bradley Levin stated that the committee decided at the last meeting that they would like a related case doctrine in the civil rules. The subcommittee today presents proposed language that defines related cases. The subcommittee believes that the rule changes and additions are for notice purposes only and that any actions following that are up to the parties and the court.

Judge Elliff noted that the proposed definition of related cases might be overly broad. Stephanie Scoville mentioned that the Department of Law office (DOL) might be greatly impacted. She also stated that it might be difficult for the DOL to comply with the timing requirements.

The committee discussed how the subcommittee proposed defining related cases. Chief Judge Bernard stated that if you expect a rule to be complied with, it must be where prosecutors will see it. The committee then clarified that this will apply only to civil cases. Damon Davis suggested that a comment that defines questions of law and fact narrowly might narrow the definition. Judge Jones also thought that the common question of law and fact definitions need to be more specific. John Palmeri suggested that adding the word plaintiff might discourage judge or venue shopping. Professor Mueller stated that it is very difficult to come up with a better definition. Mr. DeMuro explained that the subcommittee went with how the federal rule defines these issues and decided to be more inclusive rather than less inclusive. Judge Webb asked whether the subcommittee considered excluding certain public officials. Chief Judge Bernard shared that looking solely at federal rules might not be entirely helpful, as they don't contemplate domestic cases; he also mentioned unintended consequences as a possible issue. Lisa Hamilton-Fieldman clarified that the goal here is just to give judges as much information as possible and they can do with it what they will; the rule proposal doesn't dictate that any actions are required.

Judge Berger summarized the direction that the committee provided to the subcommittee: they should make it explicit that there's no duty to go into court dockets; 2. The current language could be construed too broadly; 3. Consider excluding public officers. Judge Berger suggested that if anyone has comments to send them to Mr. Levin. Judge Berger wants to make sure this doesn't become a hidden discovery tool.

The subcommittee will take the language back for further consideration.

C. Colorado Rules for Magistrates

Judge Berger stated that this is a big project, and he hopes to get something to the supreme court this year for their consideration. Judge Kane reported that Magistrate Tims is now considering what possible structuring could look like. Judge Webb shared that there has been much discussion within the subcommittee and that there is an all or nothing dimension to this.

D. JDF 105

Mike Hoffman shared that he is the chair of the new forms subcommittee and the group will meet soon.

E. County Court Rules 307, 341, and 412

Subcommittee chair Ben Vinci stated that changes to rule 412 were abandoned because the issues will be taken care of with the soon-coming redaction rules. He further stated that proposed changes to rules 307 and 341 are forthcoming. Mr. Vinci will not be at the March meeting, but Judge Espinosa will be able to speak if the subcommittee is able to put their proposals together by that time.

F. C.R.C.P. 103

Committee chair Jose Vasquez shared that pursuant to HB 19-1189, which goes into effect October 1, 2020, the subcommittee brought changes to the rule and forms used in the garnishment process. The subcommittee was split on whether to keep examples of what is to be withheld in the forms. The subcommittee also considered whether there should be notice language whereby the debtor is apprised of the fact that he or she had to show up with documentation; there was not a consensus.

Ms. Hamilton-Fieldman is concerned that on form 26, the subcommittee took out a small section and added in a large section, which might be problematic for pro se litigants. Mr. Vasquez stated that while he understands this position, the additional language comes from the statute, and the statute directs that that language be substantially included and conspicuously labeled in the form, so it is required.

Judge Berger wants to make sure that this committee puts this before the supreme court after the next meeting to ensure plenty of time for it to be considered before the deadline in October.

The subcommittee requested guidance on whether to include examples of what is to be withheld. A few members thought that the examples might confuse the employers who

are filling out the form, but the subcommittee noted that the examples are included in the currently adopted form. The committee overwhelmingly approved of including the examples.

The subcommittee also wondered whether language should be included informing the debtor of the fact that he or she must show up with documentation. The committee overwhelmingly approved of including this language.

The subcommittee will also need to make changes to corresponding rule 403.

G. C.R.C.P. 8(c)

Subcommittee chair John Palmeri stated that the subcommittee believes the best response to amend rule 8(c) in response to *Orange Collar v. Mowery* is to remove "discharge in bankruptcy" from the list of affirmative defenses in 8(c). They believe so because this aligns Colorado's rule with federal law; preserves judicial resources by preventing a Colorado Court from adjudicating and enforcing a debt that a federal court my later declare *void ab initio*; eliminates a likely unconstitutional provision from a rule; and it removes a vestige of an earlier version of federal bankruptcy law. The subcommittee also looked at cleaning up the rule generally but did not see any necessary additional changes.

The committee voted unanimously to approve the rule change proposed by the subcommittee and to strike the language "discharge from bankruptcy" in rule 8(c).

H. C.R.C.P. 4(m)

Judge Jones, chair of the subcommittee, reported that this subcommittee was created to look at how rule 4(m), which deals with dismissal of an action of the plaintiff fails to timely serve the defendant, might be amended to clarify whether language in a standard delay reduction order can qualify as "notice" under the rule when a court considers dismissal on its own. The subcommittee considered several potential revisions and found consensus that notice of the dismissal should be expressly required by the rule.

The committee discussed how various judges use notice. Judge Webb noted that if you give people forewarning and they react, you can only have one standard. Mr. Levin said that there are many deadlines, why does there need to be added notice for this deadline?

Professor Mueller stated that the current rule isn't confusing, but Judge Jones contended that people are not following the rule properly, so the rule needs to be clarified.

Judge Kane spoke against not giving any notice. He believes giving notice is fair and appropriate. Mr. Davis voiced his opinion that more notice is better than less. A motion was made and passed 12-10 to adopt the subcommittee's proposal, along with a friendly amendment to add back in "(nine weeks)" to the proposed language.

Because the vote was so close, Judge Jones suggested that the subcommittee reconsider. He encouraged committee members to email the subcommittee with any suggestions. The subcommittee will draft another proposal.

I. Redaction of Court Filings by Parties/Counsel

Judge Jones stated that the Public Access Committee noticed that in Colorado, the burden to redact falls largely on the clerks' offices. He noted that there is a chief justice directive (cjd) that relates to this, but not everyone knows about cjds. The public access committee decided that rules might be the best way to change the onus to the attorneys from the clerks. Judge Jones included a rough draft of a possible rule. Mr. DeMuro suggested that the federal rules subcommittee might be the right group to tackle this project. Judge Berger agreed and assigned this task to that subcommittee.

Judge Jones also indicated that the criminal rules committee is in the final stages of approving a rule on public access to court records. If that rule is adopted by the supreme court, it will serve as a model for a similar civil rule.

J. C.R.C.P. 121, Section 1-24

Judge Jones brought to the committee's attention that C.R.C.P. 121, Section 1-24 states, "[Practice Standard on Setting of Deadlines being prepared.]" As the committee is not currently considering any language for that rule, the committee voted unanimously to remove that language and add "reserved" to the rule.

K. Local Rules

Passed until next meeting.

L. C.R.C.P. 304

Subcommittee chair Mr. Vinci shared that the subcommittee had a proposal that mirrored rule 4(m), so the subcommittee is waiting to see what the committee does with proposed changes to that rule.

IV. Future Meetings

March 27, 2020
June 26, 2020
September 25, 2020
November 13, 2020

The Committee adjourned at 4:04 p.m.

Court of Appeals

STATE OF COLORADO
2 EAST FOURTEENTH AVENUE
DENVER, COLORADO 80203
720-625-5000

Michael H. Berger
Judge

February 24 , 2020

Honorable Richard Gabriel

Colorado Supreme Court

Re: Recommendations of Supreme Court Civil Rules Committee

Dear Justice Gabriel:

I write to you in your capacity as the Liaison Justice to the Colorado Supreme Court Civil Rules Committee. The Civil Rules Committee respectfully submits to the Supreme Court the following recommendations for amendments to the Colorado Rules of Civil Procedure:

1. **C.R.C.P. 8 (c). Affirmative Defenses and Mitigating Circumstances**
    a. Background and purpose of amendment. Rule 8 (c) presently includes the affirmative defense of "discharge in bankruptcy". This is problematic because, in all likelihood, under federal bankruptcy law, a discharge is self-effectuating and, is not dependent upon the preservation of the discharge by the pleading of an affirmative defense in a state court. Recognizing this problem, Congress and the United States Supreme Court previously amended Fed. R. Civ. P. 8 (c) to delete discharge in bankruptcy from the federal rule. The

proposed amendment would conform our rule to both the federal procedural rule and substantive federal bankruptcy law. The proposed amendment (which consists only of striking the words "discharge in bankruptcy" from the existing rule), the subcommittee report dated January 13, 2020 further explaining the recommendations, and the court of appeals opinion in *Orange Collar, Inc. v. Mowery*, 18 CA 1223, August 1, 2019 (not published pursuant to C.A.R. 35(d)), are included in Appendix A, hereto.

b. Recommendation regarding public hearing. The Committee does not believe that a public hearing is necessary. This change probably is required by federal bankruptcy law and thus the Supremacy Clause, so there would appear to be little reason for a public hearing.

c. Recommendation regarding effective date. The Committee recommends that the amendment become effective immediately on the court's approval of the amendment. It is difficult to see how any party could be prejudiced by the amendment. To the extent a defendant has included an affirmative defense of discharge in bankruptcy, that defense becomes (if it is not already) surplusage. And, certainly, a plaintiff will not be prejudiced by eliminating discharge in bankruptcy as an affirmative defense, when a discharge is effective without regard to pleading it as an affirmative defense.

2. C.R.C.P. 16.2 (e)(10).

a. Background and purpose of proposed amendment.

This rule governs the retention of jurisdiction after the entry of a final decree or judgment to allocate material assets or liabilities that were not properly disclosed during the dissolution of marriage proceedings. In *People v. Runge*, 2018 COA 23M, 415 P. 3d 884 (Colo. App. 2018), a division of the court of appeals addressed the question of whether the trial court's jurisdiction terminates under the rule five years after the entry of the decree or continues if a motion is timely filed under the rule. The division issued three opinions. The majority opinion, written by Judge Furman, found it unnecessary to address this question. Judge Richman, concurring, expressed the view that the trial court retains jurisdiction so long as a

motion under the rule is timely filed. Judge Taubman dissented, arguing that the language of the rule mandated the conclusion that the court's jurisdiction terminated five years after the entry of the decree, regardless of whether a timely filed motion is filed. Irrespective of the merits of the differing opinions in *Runge*, the Committee is convinced that the better rule (and almost certainly the intent of the Committee and the Supreme Court in promulgating the rule) is that the trial court retains jurisdiction to decide a timely filed motion under the rule. To provide clarity on this important question, the Committee recommends that the rule be amended to state clearly that the court retains jurisdiction to decide a motion under the rule if a motion is filed within the five-year period. The text of the proposed amendment, the subcommittee reports, and the court of appeals opinion in *Runge* are attached hereto as Appendix B.

b. Recommendation regarding public hearing. Although there obviously are public policies involved with the question of when the trial court's jurisdiction terminates, the committee does not think a public hearing is necessary. In all likelihood, the amendment clarifies the intent (and in the view of the Committee, the only reasonable reading) of the present rule.

c. Recommendation regarding effective date. The Committee recommends that the amendment become effective immediately on the supreme court's approval of the amendment. There is no need for a delay in effective date because the rule change merely clarifies the most reasonable reading of the rule, does not affect the deadline for filing of motions under the rule, and addresses only the ability of the court to rule on a timely filed motion.

3. C.R.C.P. 65.1. Security; Proceedings Against Sureties; and C.R.C.P. 121, Section 1-23.

a. Background and purpose of proposed amendment. Fed. R. Civ. P. 62, on staying proceedings to enforce judgments was extensively revised in 2018. At the same time, related changes were made to Fed. R.Civ.P. 65.1. C.R.C.P. 65.1 currently governs proceedings to recover on a bond posted in a Colorado court. But all other aspects of bonds

in civil actions are governed by Section 121, Section 1-23. The Committee believes that the provision governing recovery against a bond is more logically placed in C.R.C.P. 121, Section 1-23, rather than in a stand-alone rule. The proposed amendments accomplish that move by repealing C.R.C.P. 65.1 and putting its substantive provisions into two new sections of C.R.C.P. 121, Section 1-23. Moreover, the proposed amendment includes similar amendments made to Fed. R. Civ. P. 65.1, which are useful and clarifying. The proposal also jettisons the existing provision that makes the court clerk the agent for service for the security provider and imposes mandatory obligations on the clerk that, in the Committee's view more properly are placed on the party seeking relief. The amendments retain the provision that the security provider submits to the jurisdiction of the court when the security is posted. The text of the proposed amendments and the report of the Civil Rules Committee's federal rules subcommittee, are contained in Appendix C.

b. Recommendation regarding public hearing. No change in substance would be effected by the proposed amendment and the Committee is unaware of how the substantial rights of any party could be affected by the proposed amendment. Accordingly, the Committee does not recommend a public hearing.

c. Recommendation regarding effective date. For the same reasons that a public hearing is not necessary, the Committee recommends that the proposed change be effective immediately on the Court's approval.

4. C.R.C.P. 103, 403, 509 and Judicial Bypass Rules 1, 2, and 3 and Form JDF 11.

a. Background and purpose of proposed amendments. HB 19-1172 reorganized Title 12, C.R.S. Numerous sections of Title 12 have been relocated, making certain statutory references in these rules and forms inaccurate. The proposed amendments correct the statutory references but do not change anything of substance. The proposed

amendments as well as an explanatory email from Jeremy Botkins, from the Court Services Division of SCAO are attached as Appendix D.

b. Recommendation regarding public hearing. The Committee does not believe that a public hearing is necessary.

c. Recommendation regarding effective date. The Committee recommends that the changes become effective immediately.

5. **C.R.C.P. 108 and 408. Affidavits.**

a. Background and purpose of proposed amendment. This seldom-cited rule governs the requirements for an affidavit required or permitted under various other rules of civil procedure. In 2018, the Uniform Unsworn Declarations Act (UUDA), section 13-27-101, C.R.S. 2019, became effective. The UUDA provides that an unsworn declaration made under the penalty of perjury is the full equivalent of an affidavit described by this rule. It expressly applies to court proceedings. Section 13-27-104(1). The statute brings Colorado practice into accord with federal court practice which, for years, has permitted unsworn declarations under the penalty of perjury, in lieu of affidavits. *See* 28 U.S.C. Section 1746. The Committee believes that the present rule could be misconstrued to require an affidavit, not an unsworn declaration, contrary to the UUDA. The proposed amendment would prevent that misreading. The proposed amendments are set forth on Appendix E, hereto.

b. Recommendation regarding public hearing. The Committee does not believe that a public hearing is necessary as the proposed amendment merely incorporates existing law into the rule.

c. Recommendation regarding effective date. The Committee recommends that the rule become effective immediately on the Court's approval. There is no need for any delay in effective date.

6. **C.R.C.P. 121, Section 1-24. Setting of Deadlines**

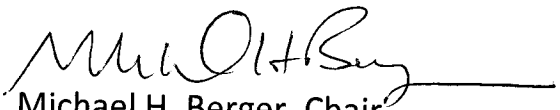
a. Background and purpose of proposed amendment. There is no text contained in existing C.R.C.P. 121, Section 1-24. Both the official and unofficial versions of the rule contain the following statement: "[Publisher's Note: Practice Standard in preparation.]" In fact, there

is no such practice standing in preparation and has not been for many years. Accordingly, the committee recommends that this rule be deleted in its entirety and replaced by the word "Reserved", consistent with numbered rules with no content. The proposed amendment is set forth on Appendix F, hereto.

b. Recommendation regarding public hearing. The Committee does not believe a public hearing is necessary.

c. Recommendation regarding effective date. The Committee recommends the amendment become effective immediately on its approval by the Court.

Respectfully submitted,



Michael H. Berger, Chair

Supreme Court Civil Rules Committee

RULE CHANGE 2020(01)
COLORADO RULES OF CIVIL PROCEDURE

Rules 8, 16.2, 65.1, 103, 108, 121, § 1-23, 121, § 1-24, 403, 408, and 509

Rule 8. General Rules of Pleading

(a) – (b) [NO CHANGES]

(c) Affirmative Defenses and Mitigating Circumstances. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, ~~discharge in bankruptcy,~~ duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. Any mitigating circumstances to reduce the amount of damage shall be affirmatively pleaded. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) – (f) [NO CHANGES]

Rule 16.2. Court Facilitated Management of Domestic Relations Cases and General Provisions Governing Duty of Disclosure

(a) – (e)(9) [NO CHANGES]

(e)(10) As set forth in this section, it is the duty of parties to an action for decree of dissolution of marriage, legal separation, or invalidity of marriage, to provide full disclosure of all material assets and liabilities. If a disclosure contains a misstatement or omission materially affecting the division of assets or liabilities, any party may file and the court shall consider and rule on a motion seeking to reallocate assets and liabilities based on such a misstatement or omission, provided that the motion is filed within 5 years of the final decree or judgment. The court shall deny any such motion that is filed under this paragraph more than 5 years after the final decree or judgment. ~~If the disclosure contains misstatements or omissions, the court shall retain jurisdiction after the entry of a final decree or judgment for a period of 5 years to allocate material assets or liabilities, the omission or non-disclosure of which materially affects the division of assets and liabilities.~~ The provisions of C.R.C.P. 60 ~~shall~~ do not bar a motion by either party to allocate such assets or liabilities pursuant to this paragraph. This paragraph ~~shall~~ does not limit other remedies that may be available to a party by law.

(f) – (j) [NO CHANGES]

COMMITTEE COMMENT [NO CHANGE]

Rule 65.1. [Reserved] ~~Security: Proceedings Against Sureties~~

~~Whenever these Rules require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.~~

Rule 103. Garnishment

This rule sets forth the exclusive process for garnishment. There shall be five (5) types of writs: (1) Writ of Continuing Garnishment, (2) Writ of Garnishment with Notice of Exemption and Pending Levy, (3) Writ of Garnishment for Support, (4) Writ of Garnishment--Judgment Debtor Other Than Natural Person, and (5) Writ of Garnishment in Aid of Writ of Attachment.

SECTION 1. WRIT OF CONTINUING GARNISHMENT (ON EARNINGS OF A NATURAL PERSON)

(a) – (j) [NO CHANGES]

(k) Answer and Tender of Payment by Garnishee.
(1) The garnishee shall file the answer to the writ of continuing garnishment with the clerk of the court and send a copy to the judgment creditor no less than 7 nor more than 14 days following the time the judgment debtor receives earnings for each pay period affected by such writ, or 42 days following the date such writ was served pursuant to section (1)(d) of this rule, whichever is less. However, if the judgment creditor is represented by an attorney, or is a collection agency licensed pursuant to section ~~12-14-101~~5-16-101, et seq., C.R.S., the garnishee shall pay any nonexempt earnings and deliver a calculation of the amount of exempt earnings to the attorney or the licensed collection agency.

(k)(2) – (k)(3) [NO CHANGES]

(l) Disbursement of Garnished Earnings.
(1) If no objection is filed by the judgment debtor within 7 days after the judgment debtor received earnings for a pay period, the garnishee shall send the nonexempt earnings to the attorney, collection agency licensed pursuant to section ~~12-14-101~~5-16-101, et seq., C.R.S., or court designated on the writ of continuing garnishment (C.R.C.P. Form 26, page 1, paragraph e). The judgment creditor shall refund to the judgment debtor any disbursement in excess of the amount necessary to satisfy the judgment.

(l)(2) – (m) [NO CHANGES]

SECTION 2. WRIT OF GARNISHMENT (ON PERSONAL PROPERTY OTHER THAN EARNINGS OF A NATURAL PERSON) WITH NOTICE OF EXEMPTION AND PENDING LEVY

(a) – (f) [NO CHANGES]

(g) Court Order on Garnishment Answer.
(1) If an answer to a writ with notice shows the garnishee is indebted to the judgment debtor, the clerk shall enter judgment in favor of the judgment debtor and against the garnishee for the use of the judgment creditor in an amount not to exceed the total amount due and owing on the judgment and if the judgment creditor is pro se, request such indebtedness paid into the registry of the court. However, if the judgment creditor is represented by an attorney or is a collection

agency licensed pursuant to ~~12-14-101~~5-16-101, et seq., C.R.S., the garnishee shall pay the funds directly to the attorney or licensed collection agency.
(g)(2) – (i) [NO CHANGES]

SECTION 3 [NO CHANGES]

SECTION 4. WRIT OF GARNISHMENT--JUDGMENT DEBTOR OTHER THAN NATURAL PERSON

(a) – (e) [NO CHANGES]

(f) Court Order on Garnishment Answer. When the judgment debtor is other than a natural person:
(1) If the answer to a writ of garnishment shows the garnishee is indebted to such judgment debtor, the clerk shall enter judgment in favor of such judgment debtor and against the garnishee for the use of the judgment creditor for the amount of the indebtedness shown in such answer and if the judgment creditor is pro se, request such indebtedness be paid into the registry of the court. However, if the judgment creditor is represented by an attorney or is a collection agency licensed pursuant to section ~~12-14-101~~5-16-101, et seq., C.R.S., the garnishee shall pay the funds directly to the attorney or licensed collection agency. In no event shall any judgment against the garnishee be more than the total amount due and owing on the judgment.

(f)(2) – (g) [NO CHANGES]

SECTION 5 [NO CHANGES]

SECTION 6. JUDGMENT DEBTOR'S OBJECTION--WRITTEN CLAIM OF EXEMPTION—HEARING

(a) – (a)(3) [NO CHANGES]

(4) The judgment debtor shall, by certified mail, return receipt requested, immediately deliver a copy of such objection to the garnishee and the judgment creditor's attorney of record, or if none, to the judgment creditor. If the garnishee has been directed to transmit the nonexempt earnings to an attorney or a collection agency licensed pursuant to section ~~12-14-101~~5-16-101, et seq., C.R.S., then upon receipt of the objection, the garnishee shall transmit the nonexempt earnings to the clerk of the court.

(a)(5) – (e) [NO CHANGES]

SECTION 7 – END [NO CHANGES]

Rule 108. Affidavits

An affidavit may be sworn to either within or without this state before any officer authorized by law to take and certify the acknowledgment of deeds conveying lands. When any rule of civil procedure requires an affidavit or other sworn declaration, an unsworn declaration under C.R.S. § 13-27-101 et seq. may be used in its place.

Rule 121. Local Rules—Statewide Practice Standards

(a) – (c) [NO CHANGE]

Section 1 – 1 to 1 – 22 [NO CHANGE]

Section 1 – 23 BONDS IN CIVIL ACTIONS

1. – 7. [NO CHANGE]

8. Proceedings against Surety or other Security Provider. When these rules require or permit the giving of a bond or other type of security, the surety or other security provider submits to the jurisdiction of the court. The liability of the surety or other security provider may be enforced on motion without the necessity of an independent action. At the time any party seeks to enforce such liability, it shall provide notice of its motion or other form of request to all parties of record and the surety or other security provider in accordance with C.R.C.P. 5(b).

9. Definition. The term "bond" as used in this rule includes any type of security provided to stay enforcement of a money judgment or any other obligation including providing security under C.R.C.P. 65.

COMMENTS [NO CHANGE]

Section 1 – 24 to 1 – 26 [NO CHANGE]

Rule 121. Local Rules—Statewide Practice Standards

(a) – (c) [NO CHANGE]

Section 1 – 1 to 1 – 23 [NO CHANGE]

Section 1 – 24 Reserved~~Setting of Deadlines~~
~~[Practice Standard on Setting of Deadlines being prepared.]~~

Section 1 – 25 to 1 – 26 [NO CHANGE]

Rule 403. Garnishment

This rule sets forth the exclusive process for garnishment. There shall be five (5) types of writs: (1) Writ of Continuing Garnishment, (2) Writ of Garnishment with Notice of Exemption and Pending Levy, (3) Writ of Garnishment for Support, (4) Writ of Garnishment--Judgment Debtor Other Than Natural Person, and (5) Writ of Garnishment in Aid of Writ of Attachment.

SECTION 1. WRIT OF CONTINUING GARNISHMENT (ON EARNINGS OF A NATURAL PERSON)

(a) – (j) [NO CHANGES]

(k) Answer and Tender of Payment by Garnishee.
(1) The garnishee shall file the answer to the writ of continuing garnishment with the clerk of the court and send a copy to the judgment creditor no less than 7 nor more than 14 days following the time the judgment debtor receives earnings for each pay period affected by such writ, or 42 days following the date such writ was served pursuant to section (1)(d) of this rule, whichever is less. However, if the judgment creditor is represented by an attorney, or is a collection agency licensed pursuant to section 5-16-101~~12-14-101~~, et seq., C.R.S., the garnishee shall pay any nonexempt earnings and deliver a calculation of the amount of exempt earnings to the attorney or the licensed collection agency.

(k)(2) – (3) [NO CHANGES]

(l) Disbursement of Garnished Earnings.
(1) If no objection is filed by the judgment debtor within 7 days after the judgment debtor received earnings for a pay period, the garnishee shall send the nonexempt earnings to the attorney, collection agency licensed pursuant to section 5-16-101~~12-14-101~~, et seq., C.R.S., or court designated on the writ of continuing garnishment (C.R.C.P. Form 26, page 1, paragraph e). The judgment creditor shall refund to the judgment debtor any disbursement in excess of the amount necessary to satisfy the judgment.

(l)(2) – (m) [NO CHANGES]

SECTION 2. WRIT OF GARNISHMENT (ON PERSONAL PROPERTY OTHER THAN EARNINGS OF A NATURAL PERSON) WITH NOTICE OF EXEMPTION AND PENDING LEVY

(a) – (f) [NO CHANGES]

(g) Court Order on Garnishment Answer.
(1) If an answer to a writ with notice shows the garnishee is indebted to the judgment debtor, the clerk shall enter judgment in favor of the judgment debtor and against the garnishee for the use of the judgment creditor in an amount not to exceed the total amount due and owing on the judgment and if the judgment creditor is pro se, request such indebtedness be paid to the registry of the court. However, if the judgment creditor is represented by an attorney or is a collection

agency licensed pursuant to 5-16-101~~12-14-101~~, et seq., C.R.S., the garnishee shall pay the funds directly to the attorney or licensed collection agency.
(g)(2) – (i) [NO CHANGES]

SECTION 3 [NO CHANGES]

SECTION 4. WRIT OF GARNISHMENT--JUDGMENT DEBTOR OTHER THAN NATURAL PERSON

(a) – (e) [NO CHANGES]

(f) Court Order on Garnishment Answer. When the judgment debtor is other than a natural person:
(1) If the answer to a writ of garnishment shows the garnishee is indebted to such judgment debtor, the clerk shall enter judgment in favor of such judgment debtor and against the garnishee for the use of the judgment creditor for the amount of the indebtedness shown in such answer and if the judgment creditor is pro se, request such indebtedness paid into the registry of the court. However, if the judgment creditor is represented by an attorney or is a collection agency licensed pursuant to 5-16-101~~12-14-101~~, et seq., C.R.S., the garnishee shall pay the funds directly to the attorney or licensed collection agency. In no event shall any judgment against the garnishee be more than the total amount due and owing on the judgment.

(f)(2) – (g) [NO CHANGES]

SECTION 5 [NO CHANGES]

SECTION 6. JUDGMENT DEBTOR'S OBJECTION--WRITTEN CLAIM OF EXEMPTION—HEARING

(a) – (a)(3) [NO CHANGES]

(4) The judgment debtor shall, by certified mail, return receipt requested, immediately deliver a copy of such objection to the garnishee and the judgment creditor's attorney of record, or if none, to the judgment creditor. If the garnishee has been directed to transmit the nonexempt earnings to an attorney or a collection agency licensed pursuant to section 5-16-101~~12-14-101~~, et seq., C.R.S., then upon receipt of the objection, the garnishee shall transmit the nonexempt earnings to the clerk of the court.

(a)(5) – (e) [NO CHANGES]

SECTION 7 – END [NO CHANGES]

Rule 408. Affidavits

An affidavit may be sworn to either within or without this state before any officer authorized by law to take and certify the acknowledgment of deeds conveying lands. When any rule of civil procedure requires an affidavit or other sworn declaration, an unsworn declaration under C.R.S. § 13-27-101 et seq. may be used in its place.

Rule 509. Parties, Representation and Intervention

(a) [NO CHANGES]

(b) Representation.

(1) Partnerships and Associations. Notwithstanding the provisions of article ~~5~~93 of title ~~12~~13, C.R.S., in the small claims court, an individual shall represent himself or herself; a partnership shall be represented by an active general partner or an authorized full-time employee; a union shall be represented by an authorized active union member or full-time employee; a for-profit corporation shall be represented by one of its full-time officers or full-time employees; an association shall be represented by one of its active members or by a full-time employee of the association; and any other kind of organization or entity shall be represented by one of its active members or full-time employees or, in the case of a nonprofit corporation, a duly elected nonattorney officer or an employee.

(b)(2) – (c) [NO CHANGES]

Rule 8. General Rules of Pleading

(a) – (b) [NO CHANGES]

(c) Affirmative Defenses and Mitigating Circumstances. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. Any mitigating circumstances to reduce the amount of damage shall be affirmatively pleaded. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) – (f) [NO CHANGES]

Rule 16.2. Court Facilitated Management of Domestic Relations Cases and General Provisions Governing Duty of Disclosure

(a) – (e)(9) [NO CHANGES]

(e)(10) As set forth in this section, it is the duty of parties to an action for decree of dissolution of marriage, legal separation, or invalidity of marriage, to provide full disclosure of all material assets and liabilities. If a disclosure contains a misstatement or omission materially affecting the division of assets or liabilities, any party may file and the court shall consider and rule on a motion seeking to reallocate assets and liabilities based on such a misstatement or omission, provided that the motion is filed within 5 years of the final decree or judgment. The court shall deny any such motion that is filed under this paragraph more than 5 years after the final decree or judgment. The provisions of C.R.C.P. 60 do not bar a motion by either party to allocate such assets or liabilities pursuant to this paragraph. This paragraph does not limit other remedies that may be available to a party by law.

(f) – (j) [NO CHANGES]

COMMITTEE COMMENT [NO CHANGE]

Rule 65.1. [Reserved]

Rule 103. Garnishment

This rule sets forth the exclusive process for garnishment. There shall be five (5) types of writs: (1) Writ of Continuing Garnishment, (2) Writ of Garnishment with Notice of Exemption and Pending Levy, (3) Writ of Garnishment for Support, (4) Writ of Garnishment--Judgment Debtor Other Than Natural Person, and (5) Writ of Garnishment in Aid of Writ of Attachment.

SECTION 1. WRIT OF CONTINUING GARNISHMENT (ON EARNINGS OF A NATURAL PERSON)

(a) – (j) [NO CHANGES]

(k) Answer and Tender of Payment by Garnishee.
(1) The garnishee shall file the answer to the writ of continuing garnishment with the clerk of the court and send a copy to the judgment creditor no less than 7 nor more than 14 days following the time the judgment debtor receives earnings for each pay period affected by such writ, or 42 days following the date such writ was served pursuant to section (1)(d) of this rule, whichever is less. However, if the judgment creditor is represented by an attorney, or is a collection agency licensed pursuant to section 5-16-101, et seq., C.R.S., the garnishee shall pay any nonexempt earnings and deliver a calculation of the amount of exempt earnings to the attorney or the licensed collection agency.

(k)(2) – (k)(3) [NO CHANGES]

(l) Disbursement of Garnished Earnings.
(1) If no objection is filed by the judgment debtor within 7 days after the judgment debtor received earnings for a pay period, the garnishee shall send the nonexempt earnings to the attorney, collection agency licensed pursuant to section 5-16-101, et seq., C.R.S., or court designated on the writ of continuing garnishment (C.R.C.P. Form 26, page 1, paragraph e). The judgment creditor shall refund to the judgment debtor any disbursement in excess of the amount necessary to satisfy the judgment.

(l)(2) – (m) [NO CHANGES]

SECTION 2. WRIT OF GARNISHMENT (ON PERSONAL PROPERTY OTHER THAN EARNINGS OF A NATURAL PERSON) WITH NOTICE OF EXEMPTION AND PENDING LEVY

(a) – (f) [NO CHANGES]

(g) Court Order on Garnishment Answer.
(1) If an answer to a writ with notice shows the garnishee is indebted to the judgment debtor, the clerk shall enter judgment in favor of the judgment debtor and against the garnishee for the use of the judgment creditor in an amount not to exceed the total amount due and owing on the judgment and if the judgment creditor is pro se, request such indebtedness paid into the registry of the court. However, if the judgment creditor is represented by an attorney or is a collection

agency licensed pursuant to 5-16-101, et seq., C.R.S., the garnishee shall pay the funds directly to the attorney or licensed collection agency.
(g)(2) – (i) [NO CHANGES]

SECTION 3 [NO CHANGES]

SECTION 4. WRIT OF GARNISHMENT--JUDGMENT DEBTOR OTHER THAN NATURAL PERSON

(a) – (e) [NO CHANGES]

(f) Court Order on Garnishment Answer. When the judgment debtor is other than a natural person:
(1) If the answer to a writ of garnishment shows the garnishee is indebted to such judgment debtor, the clerk shall enter judgment in favor of such judgment debtor and against the garnishee for the use of the judgment creditor for the amount of the indebtedness shown in such answer and if the judgment creditor is pro se, request such indebtedness be paid into the registry of the court. However, if the judgment creditor is represented by an attorney or is a collection agency licensed pursuant to section 5-16-101, et seq., C.R.S., the garnishee shall pay the funds directly to the attorney or licensed collection agency. In no event shall any judgment against the garnishee be more than the total amount due and owing on the judgment.

(f)(2) – (g) [NO CHANGES]

SECTION 5 [NO CHANGES]

SECTION 6. JUDGMENT DEBTOR'S OBJECTION--WRITTEN CLAIM OF EXEMPTION—HEARING

(a) – (a)(3) [NO CHANGES]

(4) The judgment debtor shall, by certified mail, return receipt requested, immediately deliver a copy of such objection to the garnishee and the judgment creditor's attorney of record, or if none, to the judgment creditor. If the garnishee has been directed to transmit the nonexempt earnings to an attorney or a collection agency licensed pursuant to section 5-16-101, et seq., C.R.S., then upon receipt of the objection, the garnishee shall transmit the nonexempt earnings to the clerk of the court.

(a)(5) – (e) [NO CHANGES]

SECTION 7 – END [NO CHANGES]

Rule 108. Affidavits

An affidavit may be sworn to either within or without this state before any officer authorized by law to take and certify the acknowledgment of deeds conveying lands. When any rule of civil procedure requires an affidavit or other sworn declaration, an unsworn declaration under C.R.S. § 13-27-101 et seq. may be used in its place.

Rule 121. Local Rules—Statewide Practice Standards

(a) – (c) [NO CHANGE]

Section 1 – 1 to 1 – 22 [NO CHANGE]

Section 1 – 23 BONDS IN CIVIL ACTIONS

1. – 7. [NO CHANGE]

8. Proceedings against Surety or other Security Provider. When these rules require or permit the giving of a bond or other type of security, the surety or other security provider submits to the jurisdiction of the court. The liability of the surety or other security provider may be enforced on motion without the necessity of an independent action. At the time any party seeks to enforce such liability, it shall provide notice of its motion or other form of request to all parties of record and the surety or other security provider in accordance with C.R.C.P. 5(b).

9. Definition. The term "bond" as used in this rule includes any type of security provided to stay enforcement of a money judgment or any other obligation including providing security under C.R.C.P. 65.

COMMENTS [NO CHANGE]

Section 1 – 24 to 1 – 26 [NO CHANGE]

Rule 121. Local Rules—Statewide Practice Standards

(a) – (c) [NO CHANGE]

Section 1 – 1 to 1 – 23 [NO CHANGE]

Section 1 – 24 Reserved

Section 1 – 25 to 1 – 26 [NO CHANGE]

Rule 403. Garnishment

This rule sets forth the exclusive process for garnishment. There shall be five (5) types of writs: (1) Writ of Continuing Garnishment, (2) Writ of Garnishment with Notice of Exemption and Pending Levy, (3) Writ of Garnishment for Support, (4) Writ of Garnishment--Judgment Debtor Other Than Natural Person, and (5) Writ of Garnishment in Aid of Writ of Attachment.

SECTION 1. WRIT OF CONTINUING GARNISHMENT (ON EARNINGS OF A NATURAL PERSON)

(a) – (j) [NO CHANGES]

(k) Answer and Tender of Payment by Garnishee.
(1) The garnishee shall file the answer to the writ of continuing garnishment with the clerk of the court and send a copy to the judgment creditor no less than 7 nor more than 14 days following the time the judgment debtor receives earnings for each pay period affected by such writ, or 42 days following the date such writ was served pursuant to section (1)(d) of this rule, whichever is less. However, if the judgment creditor is represented by an attorney, or is a collection agency licensed pursuant to section 5-16-101, et seq., C.R.S., the garnishee shall pay any nonexempt earnings and deliver a calculation of the amount of exempt earnings to the attorney or the licensed collection agency.

(k)(2) – (3) [NO CHANGES]

(l) Disbursement of Garnished Earnings.
(1) If no objection is filed by the judgment debtor within 7 days after the judgment debtor received earnings for a pay period, the garnishee shall send the nonexempt earnings to the attorney, collection agency licensed pursuant to section 5-16-101, et seq., C.R.S., or court designated on the writ of continuing garnishment (C.R.C.P. Form 26, page 1, paragraph e). The judgment creditor shall refund to the judgment debtor any disbursement in excess of the amount necessary to satisfy the judgment.

(l)(2) – (m) [NO CHANGES]

SECTION 2. WRIT OF GARNISHMENT (ON PERSONAL PROPERTY OTHER THAN EARNINGS OF A NATURAL PERSON) WITH NOTICE OF EXEMPTION AND PENDING LEVY

(a) – (f) [NO CHANGES]

(g) Court Order on Garnishment Answer.
(1) If an answer to a writ with notice shows the garnishee is indebted to the judgment debtor, the clerk shall enter judgment in favor of the judgment debtor and against the garnishee for the use of the judgment creditor in an amount not to exceed the total amount due and owing on the judgment and if the judgment creditor is pro se, request such indebtedness be paid to the registry of the court. However, if the judgment creditor is represented by an attorney or is a collection

agency licensed pursuant to 5-16-101, et seq., C.R.S., the garnishee shall pay the funds directly to the attorney or licensed collection agency.
(g)(2) – (i) [NO CHANGES]

SECTION 3 [NO CHANGES]

SECTION 4. WRIT OF GARNISHMENT--JUDGMENT DEBTOR OTHER THAN NATURAL PERSON

(a) – (e) [NO CHANGES]

(f) Court Order on Garnishment Answer. When the judgment debtor is other than a natural person:
(1) If the answer to a writ of garnishment shows the garnishee is indebted to such judgment debtor, the clerk shall enter judgment in favor of such judgment debtor and against the garnishee for the use of the judgment creditor for the amount of the indebtedness shown in such answer and if the judgment creditor is pro se, request such indebtedness paid into the registry of the court. However, if the judgment creditor is represented by an attorney or is a collection agency licensed pursuant to 5-16-101, et seq., C.R.S., the garnishee shall pay the funds directly to the attorney or licensed collection agency. In no event shall any judgment against the garnishee be more than the total amount due and owing on the judgment.

(f)(2) – (g) [NO CHANGES]

SECTION 5 [NO CHANGES]

SECTION 6. JUDGMENT DEBTOR'S OBJECTION--WRITTEN CLAIM OF EXEMPTION—HEARING

(a) – (a)(3) [NO CHANGES]

(4) The judgment debtor shall, by certified mail, return receipt requested, immediately deliver a copy of such objection to the garnishee and the judgment creditor's attorney of record, or if none, to the judgment creditor. If the garnishee has been directed to transmit the nonexempt earnings to an attorney or a collection agency licensed pursuant to section 5-16-101, et seq., C.R.S., then upon receipt of the objection, the garnishee shall transmit the nonexempt earnings to the clerk of the court.

(a)(5) – (e) [NO CHANGES]

SECTION 7 – END [NO CHANGES]

Rule 408. Affidavits

An affidavit may be sworn to either within or without this state before any officer authorized by law to take and certify the acknowledgment of deeds conveying lands. When any rule of civil procedure requires an affidavit or other sworn declaration, an unsworn declaration under C.R.S. § 13-27-101 et seq. may be used in its place.

Rule 509. Parties, Representation and Intervention

(a) [NO CHANGES]

(b) Representation.

(1) Partnerships and Associations. Notwithstanding the provisions of article 93 of title 13, C.R.S., in the small claims court, an individual shall represent himself or herself; a partnership shall be represented by an active general partner or an authorized full-time employee; a union shall be represented by an authorized active union member or full-time employee; a for-profit corporation shall be represented by one of its full-time officers or full-time employees; an association shall be represented by one of its active members or by a full-time employee of the association; and any other kind of organization or entity shall be represented by one of its active members or full-time employees or, in the case of a nonprofit corporation, a duly elected nonattorney officer or an employee.

(b)(2) – (c) [NO CHANGES]

Amended and Adopted by the Court, En Banc, March 5, 2020, effective immediately.

By the Court:

Richard L. Gabriel
Justice, Colorado Supreme Court

RULE CHANGE 2020(13)
COLORADO RULES OF CIVIL PROCEDURE
Rules 4, 106.5, and 304

Rule 4. Process

(a) - (g) [NO CHANGE]

(h) Manner of Proof. Proof of service shall be made as follows:
(1) If served personally, by a statement, certified by the sheriff, marshal or similar governmental official, or ~~statement duly acknowledged under oath~~a sworn or unsworn declaration by any other person completing the service as to date, place, and manner of service;
(2) Repealed eff. March 23, 2006.
(3) If served by mail, by a~~n affidavit~~ sworn or unsworn declaration showing the date of the mailing with the return receipt attached, where required;
(4) If served by publication, by ~~the affidavit of publication, together with an affidavit as to~~a sworn or unsworn declaration that includes the mailing of a copy of the process where required;
(5) If served by waiver, by ~~the~~ a sworn or unsworn declaration admitting or waiving service ~~written admission or waiver of service~~ by the person or persons served, ~~duly acknowledged,~~ or by their attorney;
(6) If served by substituted service, by a ~~duly acknowledged statement~~ sworn or unsworn declaration as to the date, place, and manner of service, ~~accompanied by an affidavit that~~ and that the process was also mailed to the party to be served by substituted service, setting forth the address(es) where the process was mailed.

(i) - (m) [NO CHANGE]

COMMENT

2020

Rule 4(h) on the manner of proving service was amended following the adoption in 2018 of the Uniform Unsworn Declarations Act. C.R.S. § 13-27-101 et seq. This Act defines a "sworn declaration," which includes an affidavit, and an "unsworn declaration," which "means a declaration in a signed record that is not given under oath, but is given under penalty of perjury." § 13-27-102 (6) and (7). An unsworn declaration which complies with the Act is sufficient to prove service under Rule 4(h).

Rule 106.5. Correctional Facility Quasi-Judicial Hearing Review

(a) - (c) [NO CHANGE]

(d) Service of Process.
(1) [NO CHANGE]
(2) If the inmate files a motion to proceed *in forma pauperis* status and that motion is granted, service of process shall be accomplished in the following manner: The clerk of the District Court shall scan the complaint and serve it by electronic means on the Attorney General, the Executive Director of the Department of Corrections, and the Warden of the Facility (or the designee of each of these officials), along with a notice indicating the fact of the inmate's filing and the date received by the Court.

Each person notified shall send a~~n acknowledgment~~ confirmation by electronic means indicating that the specified official has received the electronic notice and the scanned copy of the complaint.

(e) - (k) [NO CHANGE]

Rule 304. Service of Process

(a) - (f)

(g) Manner of Proof. Proof of service shall be made as follows:
(1) If served personally, by a statement, certified by the sheriff, marshal or similar governmental official, or ~~statement duly acknowledged under oath~~ a sworn or unsworn declaration by any other person completing the service as to date, place, and manner of service.
(2) Repealed eff. March 23, 2006.
(3) If served by mail, a~~n affidavit~~ sworn or unsworn declaration showing the date of the mailing, with the return receipt attached, where applicable.
(4) If served by publication, by ~~the affidavit of publication, together with an affidavit as to the~~ a sworn or unsworn declaration that includes the mailing of a copy of the summons, complaint and answer form where required.
(5) If served by waiver, by ~~the written admission or waiver of service by~~a sworn or unsworn declaration admitting or waiving service by the person or persons ~~to be~~ served, ~~duly acknowledged,~~ or by their attorney.
(6) If served by substituted service, by a ~~duly acknowledged statement~~ sworn or unsworn declaration as to the date, place, and manner of service, ~~accompanied by an affidavit~~ and that the process was also mailed to the party to be served by substituted service, setting forth the address(es) where the process was mailed.

(h) - (j) [NO CHANGE]

COMMENT

2020

Rule 304(g) on the manner of proving service was amended following the adoption in 2018 of the Uniform Unsworn Declarations Act. C.R.S. § 13-27-101 et seq. This Act defines a "sworn declaration," which includes an affidavit, and an "unsworn declaration," which "means a declaration in a signed record that is not given under oath, but is given under penalty of perjury." § 13-27-102 (6) and (7). An unsworn declaration which complies with the Act is sufficient to prove service under Rule 304(g).

Rule 4. Process

(a) - (g) [NO CHANGE]

(h) Manner of Proof. Proof of service shall be made as follows:
(1) If served personally, by a statement, certified by the sheriff, marshal or similar governmental official, or a sworn or unsworn declaration by any other person completing the service as to date, place, and manner of service;
(2) Repealed eff. March 23, 2006.
(3) If served by mail, by a sworn or unsworn declaration showing the date of the mailing with the return receipt attached, where required;
(4) If served by publication, by a sworn or unsworn declaration that includes the mailing of a copy of the process where required;
(5) If served by waiver, by a sworn or unsworn declaration admitting or waiving service by the person or persons served, or by their attorney;
(6) If served by substituted service, by a sworn or unsworn declaration as to the date, place, and manner of service, and that the process was also mailed to the party to be served by substituted service, setting forth the address(es) where the process was mailed.

(i) - (m) [NO CHANGE]

COMMENT

2020

Rule 4(h) on the manner of proving service was amended following the adoption in 2018 of the Uniform Unsworn Declarations Act. C.R.S. § 13-27-101 et seq. This Act defines a "sworn declaration," which includes an affidavit, and an "unsworn declaration," which "means a declaration in a signed record that is not given under oath, but is given under penalty of perjury." § 13-27-102 (6) and (7). An unsworn declaration which complies with the Act is sufficient to prove service under Rule 4(h).

Rule 106.5. Correctional Facility Quasi-Judicial Hearing Review

(a) - (c) [NO CHANGE]

(d) Service of Process.
(1) [NO CHANGE]
(2) If the inmate files a motion to proceed *in forma pauperis* status and that motion is granted, service of process shall be accomplished in the following manner: The clerk of the District Court shall scan the complaint and serve it by electronic means on the Attorney General, the Executive Director of the Department of Corrections, and the Warden of the Facility (or the designee of each of these officials), along with a notice indicating the fact of the inmate's filing and the date received by the Court.

Each person notified shall send a confirmation by electronic means indicating that the specified official has received the electronic notice and the scanned copy of the complaint.

(e) - (k) [NO CHANGE]

Rule 304. Service of Process

(a) - (f)

(g) Manner of Proof. Proof of service shall be made as follows:
(1) If served personally, by a statement, certified by the sheriff, marshal or similar governmental official, or a sworn or unsworn declaration by any other person completing the service as to date, place, and manner of service.
(2) Repealed eff. March 23, 2006.
(3) If served by mail, a sworn or unsworn declaration showing the date of the mailing, with the return receipt attached, where applicable.
(4) If served by publication, by a sworn or unsworn declaration that includes the mailing of a copy of the summons, complaint and answer form where required.
(5) If served by waiver, by a sworn or unsworn declaration admitting or waiving service by the person or persons served, or by their attorney.
(6) If served by substituted service, by a sworn or unsworn declaration as to the date, place, and manner of service, and that the process was also mailed to the party to be served by substituted service, setting forth the address(es) where the process was mailed.

(h) - (j) [NO CHANGE]

COMMENT

2020

Rule 304(g) on the manner of proving service was amended following the adoption in 2018 of the Uniform Unsworn Declarations Act. C.R.S. § 13-27-101 et seq. This Act defines a "sworn declaration," which includes an affidavit, and an "unsworn declaration," which "means a declaration in a signed record that is not given under oath, but is given under penalty of perjury." § 13-27-102 (6) and (7). An unsworn declaration which complies with the Act is sufficient to prove service under Rule 304(g).

Amended and Adopted by the Court, En Banc, April 17, 2020, effective immediately.

By the Court:

Richard L. Gabriel
Justice, Colorado Supreme Court

RULE CHANGE 2019(20)

COLORADO MUNICIPAL COURT RULES OF PROCEDURE

Rule 224. Trial Jurors

(a) [NO CHANGE]

(b) Challenge to the Array.

(1) No array or panel of any trial jury shall be quashed, nor shall any verdict in any case be set aside or averted, by reason of the fact that the court or jury commissioner has returned such jury or any of them in any informal or irregular manner, if in the opinion of the court the irregularity is unimportant and insufficient to vitiate the return of such jury. All issues of fact arising on any challenge to the array shall be tried by the court.

(2) At any time before trial, upon motion by a party or on its own motion, the court may declare a mistrial on the ground that a fair jury pool cannot be safely assembled due to a public health crisis.

(c) – (h) [NO CHANGE]

Rule 224. Trial Jurors

(a) [NO CHANGE]

(b) Challenge to the Array.

(1) No array or panel of any trial jury shall be quashed, nor shall any verdict in any case be set aside or averted, by reason of the fact that the court or jury commissioner has returned such jury or any of them in any informal or irregular manner, if in the opinion of the court the irregularity is unimportant and insufficient to vitiate the return of such jury. All issues of fact arising on any challenge to the array shall be tried by the court.

(2) At any time before trial, upon motion by a party or on its own motion, the court may declare a mistrial on the ground that a fair jury pool cannot be safely assembled due to a public health crisis.

(c) – (h) [NO CHANGE]

Amended and Adopted by the Court, En Banc, May 21, 2020, effective immediately.

By the Court:

Richard L. Gabriel
Justice, Colorado Supreme Court

Arguments in favor of version 1

Version one is drafted consistently with the statutory changes, which permits a judgment debtor in certain circumstances to be able to claim a higher reduction in the exemption amount, or the "hardship exemption." The judgment debtor has the ability to reduce the amount subject to wage garnishment, even below the new calculation amounts, if they can show they are financially unable to do so because they are unable to pay their actual and necessary living expenses. This version tracks the current versions of Rule 103 and 403, at Section 6 (a)(1), which state:

If a judgment debtor objects to the initial or a subsequent calculation of the amount of exempt earnings, the judgment debtor shall have 7 days from the receipt of the copy of the writ of garnishment **or calculation of the amount of exempt earnings for subsequent pay periods**, within which to resolve the issue of such miscalculation by agreement with the garnishee (emphasis added). C.R.C.P. 103 and 403

The proposed language permits the judgment debtor to file a claim of exemption at two different points in the collection process. The first, after he/she receives the initial writ of garnishment from their employer. Secondly the opportunity to object is afforded for any subsequent calculation of a paycheck. This is consistent with both the existing Rule 103 and 403 language which doesn't merely afford that right on the first point in the process but anytime the employer calculates how much to take out in response to the writ. The current version of the rules do not define what "calculation of the amount of exempt earnings for subsequent pay periods. Any time that money is withheld from a person's earnings, the employer has to make a calculation due to various factors, such as any differences in hours works over that pay period. Such an interpretation is completely consistent with the purpose of the wage garnishment statutory changes, which is to permit a judgment debtor to seek and obtain a reduced amount of garnishment for hardship circumstances.

Concerns about this version providing a judgment debtor to file objection after objection are without merit, since: (1) it is unlikely that debtors would file repeated objections due to the time and cost involved and (2) the court has the ability to monitor its own docket to prevent abuse of the process or frivolous filings.

While C.R.S. § 13-54.5-108(3) may provide an opportunity for a judgment debtor to object at other points in the process, this statute was intended to be more applicable in cases of excusable neglect, such as where the judgment debtor missed a deadline to file the claim of exemption. The language of that section supports this, by its use of "for good cause shown" and "upon a showing of mistake, accident, surprise, irregularity in proceedings, newly discovered evidence, events not in the control of the judgment debtor, or such other grounds as the court may allow." This statute imposes a higher standard upon a judgment debtor who faces financial hardship, who now has to show that there is good cause to claim the exemption and also to meet one of the other factors. This is not what the legislature intended.

Arguments in favor of version 2:

Version two tracks the statute, specifically, C.R.S. § 13-54.5-108(a)(1), which states:

In a case of continuing garnishment where the judgment debtor objects to the calculation of the amount of exempt earnings, **the judgment debtor shall have seven days from receipt of the copy of the writ of continuing garnishment** required by section 13-54.5-105 within which to resolve the issue of such

miscalculation, by agreement with the garnishee, during which time the garnishee shall not tender any money to the clerk of the court or judgment creditor. If such objection is not resolved within seven days and after good faith effort, the judgment debtor may file a written objection with the clerk of the court in which the judgment was entered setting forth with reasonable detail the grounds for such objection. The judgment debtor may also file a written objection with the clerk of the court in which the judgment was obtained pursuant to section 13-54-104 (2)(a)(I)(D). The judgment debtor shall, by certified mail, return receipt requested, deliver immediately a copy of such objection to the judgment creditor or his or attorney of record (emphasis added) C.R.S. § 13-54.5-108(a)(1).

This proposed rule change specifically tracks the statute, which is very clear that the deadline for the judgment debtor to object is from the receipt of the initial writ. Version 1 would permit a judgment debtor theoretically be able to file an exemption every time a garnishment is processed, which is not what was intended. If a judgment debtor were to be paid twice a month, over a 182-day time period that would amount to 13 paychecks. The legislature did not intend to allow a judgment debtor 13 different opportunities to establish the additional exemption. Further, if a judgment debtor was to request a hearing and the request was denied, then he/she could theoretically wait for the next paycheck, figure out what went wrong in the prior hearing and come up with whatever was lacking in the prior hearing until the court finally agreed.

Section 6 of Rules 103 and 403 support this position. There are two objection opportunities. One, is the initial calculation. Since there can be only one initial calculation, there can be only one objection. Two, is a subsequent calculation. A subsequent calculation means a calculation that results in a different amount of disposable income subject to garnishment. If the calculation remains the same there is no subsequent calculation that can trigger an objection. If a subsequent calculation results in less disposable income due to working less hours, reduction in pay, etc. then no judgment debtor is going to file an objection based on having a lesser amount garnished from a paycheck. On the other hand, if a subsequent calculation results in more disposable income that may be garnished due to overtime, a raise, bonus, etc. this may arguably trigger a second opportunity to file an objection where a previous objection was not filed.

Further if a judgment debtor believes that their circumstances warrant the hardship exemption, then they can file a claim under this section pursuant to C.R.S. § 13-54.5-108(3), which states:

Notwithstanding the provisions of subsection (1) of this section, a judgment debtor failing to make a written objection or claim of exemption may, at any time within one hundred eighty-two days from receipt of a copy of the writ of continuing garnishment required by section 13-54.5-105 or from service of the notice of exemption and pending levy required by section 13-54.5-106 and for good cause shown, move the court in which the judgment was entered to hear an objection or a claim of exemption as to any earnings or property levied in garnishment, the amount of which the judgment debtor claims to have been miscalculated or which the judgment debtor claims to be exempt. Such hearing may be granted upon a showing of mistake, accident, surprise, irregularity in proceedings, newly discovered evidence, events not in the control of the judgment debtor, or such other grounds as the court may allow. C.R.S. § 13-54.5-108(3).

Allowing a judgment debtor to “revisit” or “retroactively alter” withholdings after every garnishment would render C.R.S. 13-54.5-108(3) meaningless.

This document reflects changes received through December 9, 2019.

Rule 103. Garnishment.

This rule sets forth the exclusive process for garnishment. There shall be five (5) types of writs: (1) Writ of Continuing Garnishment, (2) Writ of Garnishment with Notice of Exemption and Pending Levy, (3) Writ of Garnishment for Support, (4) Writ of Garnishment -- Judgment Debtor Other Than Natural Person, and (5) Writ of Garnishment in Aid of Writ of Attachment.

SECTION 1 WRIT OF CONTINUING GARNISHMENT (ON EARNINGS OF A NATURAL PERSON)

(a) Definitions.

(1) "Continuing garnishment" means the exclusive procedure for withholding the earnings of a judgment debtor for successive pay periods for payment of a judgment debt other than a judgment for support as provided in subsection (c) of this rule.

(2) "Earnings" shall be defined in section 13-54.5-101 (2), C.R.S., as applicable.

(b) Form of Writ of Continuing Garnishment and Related Forms. A writ of continuing garnishment shall be in the form and content of Appendix to Chapters 1 to 17A, Form 26, C.R.C.P. It shall also include at least one (1) "Calculation of Amount of Exempt Earnings" form to be in the form and content of Appendix to Chapters 1 to 17A, Form 27, C.R.C.P. Objection to the calculation of exempt earnings shall be in the form and content of Appendix to Chapters 1 to 17A, Form 28, C.R.C.P.

(c) When Writ of Continuing Garnishment Issues. After entry of judgment when a writ of execution can issue, a writ of continuing garnishment against earnings shall be issued by the clerk of the court upon request of the judgment creditor. Under a writ of continuing garnishment, a judgment creditor may garnish earnings except to the extent such earnings are exempt under law. Issuance of a writ of execution shall not be required.

(d) Service of Writ of Continuing Garnishment. A judgment creditor shall serve two (2) copies of the writ of continuing garnishment, together with a blank copy of C.R.C.P. Form 28, "Objection to the Calculation of the Amount of Exempt Earnings" (Appendix to Chapters 1 to 17A, Form 28, C.R.C.P.), upon the garnishee, one copy of which the garnishee shall deliver to the judgment debtor as provided in subsection (h)(1) of this rule. Service of the writ shall be in accordance with *C.R.C.P. 4*, and the person who serves the writ shall note the date and time of such service on the return service. In any civil action, a judgment creditor shall serve no more than one writ of continuing garnishment upon any one garnishee for the same judgment debtor during the Effective Garnishment Period. This restriction shall not preclude the issuance of a subsequent writ within the Effective Garnishment Period.

(e) Jurisdiction. Service of a writ of continuing garnishment upon the garnishee shall give the court jurisdiction over the garnishee and any earnings of the judgment debtor within the control of the garnishee.

(f) Effective Garnishment Period.

(1) A writ of continuing garnishment shall be a lien and continuing levy against the nonexempt earnings of the judgment debtor until such time as earnings are no longer due, the underlying

judgment is vacated, modified or satisfied in full, the writ is dismissed, or for 91 days (13 weeks) following service of the writ, if the judgment was entered prior to August 8, 2001, and 182 days (26 weeks) following service of the writ if the judgment was entered on or after August 8, 2001, except when such writ is suspended pursuant to subsection (j) of this rule.

(2) When a writ of continuing garnishment is served upon a garnishee during the Effective Garnishment Period of a prior writ, it shall be effective for the Effective Garnishment Period following the Effective Garnishment Period of any prior writ.

(3) If a writ of garnishment for support pursuant to *C.R.S. 14-14-105* is served during the effective period of a writ of continuing garnishment, the Effective Garnishment Period shall be tolled and all priorities preserved until the termination of the writ of garnishment for support.

(g) Exemptions. A garnishee shall not be required to deduct, set up or plead any exemption for or on behalf of a judgment debtor excepting as set forth in the Exemption Chart contained in the writ.

(h) Delivery of Copy to Judgment Debtor.

(1) The garnishee shall deliver a copy of the writ of continuing garnishment, together with the calculation of the amount of exempt earnings that is based on the judgment debtor's last paycheck prior to delivery of the writ of continuing garnishment to the judgment debtor and the blank copy of C.R.C.P. Form 28, "Objection to the Calculation of the Amount of Exempt Earnings or For Reduction of Withholding Pursuant to Section 13-54-104(2)(a)(I)(D)" (Appendix to Chapters 1 to 17A, Form 28, C.R.C.P.), to the judgment debtor not later than 7 days after the garnishee is served with the writ of continuing garnishment~~at the time the judgment debtor receives earnings for the first pay period affected by such writ~~.

(2) For all pay periods affected by the writ, the garnishee shall deliver a copy of the calculation of the amount of exempt earnings and the "Judgment Debtor's Objection to the Calculation of Amount of Exempt Earnings" to the judgment debtor at the time the judgment debtor receives earnings for that pay period.

(i) Objection to Calculation of Amount of Exempt Earnings. A judgment debtor may object to the calculation of exempt earnings or object and request an exemption of earnings pursuant to section 13-54-104(2)(a)(I)(D), C.R.S.~~.~~ A judgment debtor's objection to calculation of exempt earnings or objection and request for an exemption of earnings pursuant to section 13-54-104(2)(a)(I)(D), C.R.S., shall be in accordance with Section 6 of this rule.

(j) Suspension. A writ of continuing garnishment may be suspended for a specified period of time by the judgment creditor upon agreement with the judgment debtor, which agreement shall be in writing and filed by the judgment creditor with the clerk of the court in which judgment was entered and a copy shall be delivered by the judgment creditor to the garnishee. No suspension shall extend the running of the Effective Garnishment Period nor affect priorities.

(k) Answer and Tender of Payment by Garnishee.

(1) The garnishee shall file ~~the answer to the writ of continuing garnishment~~ with the clerk of the court and send a copy to the judgment creditor no less than 7 ~~nor more than 14~~ days after the garnishee is served with the writ of continuing garnishment a response to the writ of continuing garnishment pursuant to section 13-54.5-105(5), C.R.S.~~following the time the judgment debtor receives earnings for each pay period affected by such writ, or 42 days following the date such writ was served pursuant to section (1)(d) of this rule, whichever is less~~. However, if the judgment creditor is represented by an attorney, or is a collection agency licensed pursuant to section 12-14-101, et seq., C.R.S., the garnishee shall send such response to the attorney or licensed collection agency~~pay any nonexempt earnings and deliver a calculation of the amount of exempt earnings to the attorney or the licensed collection agency~~.

(2) In the event the response required by Section 1(k)(1) of this rule is filed and served pursuant to section 13-54.5-105(5)(b), C.R.S., the garnishee shall begin garnishment of the disposable

earnings of the judgment debtor on the first payday of the judgment debtor that occurs at least 21 days after the garnishee was served with the writ of continuing garnishment or the first payday after the expiration date of any prior effective writ of continuing garnishment that is at least 21 days after the garnishee was served with the writ of continuing garnishment.

(32) Unless payment is made to an attorney or licensed collection agency as provided in paragraph (k)(1), the garnishee shall pay any nonexempt earnings and deliver a calculation of the amount of exempt earnings to the clerk of the court which issued such writ no less than 7 nor more than 14 days following the time the judgment debtor receives earnings affected by such writ. However, if the answer and subsequent calculations are mailed to an attorney or licensed collection agency under subsection (k)(1), the payment shall accompany the answer.

(43) Any writ of continuing garnishment served upon the garnishee while any previous writ is still in effect shall be answered by the garnishee with a statement that the garnishee has been previously served with one or more writs of continuing garnishment and/or writs of garnishment for support and specify the date on which such previously served writs are expected to terminate.

(l) Disbursement of Garnished Earnings.

(1) If no objection to the calculation of exempt earnings or objection and request for exemption of earnings pursuant to section 13-54-104(2)(a)(I)(D), C.R.S., is filed by the judgment debtor within 217 days after the garnishee was served with the writ of continuing garnishment~~judgment debtor received earnings for a pay period~~, the garnishee shall send the nonexempt earnings to the attorney, collection agency licensed pursuant to section 12-14-101, et seq., C.R.S., or court designated on the writ of continuing garnishment (C.R.C.P. Form 26, page 1, paragraph e). The judgment creditor shall refund to the judgment debtor any disbursement in excess of the amount necessary to satisfy the judgment.

(2) If a written objection to the calculation of exempt earnings is filed with the clerk of the court and a copy is delivered to the garnishee, the garnishee shall send the garnished nonexempt earnings to the clerk of the court. The garnished nonexempt earnings shall be placed in the registry of the court pending further order of the court.

(m) Request for accounting of garnished funds by judgment debtor. Upon reasonable written request by a judgment debtor, the judgment creditor shall provide an accounting in writing of all funds received to the date of the request, including the balance due at the date of the request.

SECTION 2 WRIT OF GARNISHMENT (ON PERSONAL PROPERTY OTHER THAN EARNINGS OF A NATURAL PERSON) WITH NOTICE OF EXEMPTION AND PENDING LEVY

(a) Definition. "Writ of garnishment with notice of exemption and pending levy" means the exclusive procedure through which the personal property of any kind (other than earnings of a natural person) in the possession or control of a garnishee including the credits, debts, choses in action, or money owed to the judgment debtor, whether they are due at the time of the service of the writ or are to become due thereafter, is required to be held for payment of a judgment debt. For the purposes of this rule such writ is designated "writ with notice."

(b) Form of Writ With Notice and Claim of Exemption. A writ with notice shall be in the form and content of Appendix to Chapters 1 to 17A, Form 29, C.R.C.P. A judgment debtor's written claim of exemption shall be in the form and content of Appendix to Chapters 1 to 17A, Form 30, C.R.C.P.

(c) When Writ With Notice Issues. After entry of a judgment when a writ of execution may issue, a writ with notice shall be issued by the clerk of the court upon request. Under such writ any indebtedness, intangible personal property, or tangible personal property capable of manual delivery, other than earnings of a natural person, owed to, or owned by, the judgment debtor, and in the possession or control of the garnishee at the time of service of such writ upon the garnishee, shall be subject to the process of garnishment. Issuance of a writ of execution shall not be required before the issuance of a writ with notice.

(d) Service of Writ With Notice.

(1) Service of a writ with notice shall be made in accordance with *C.R.C.P. 4*.

(2) Following service of the writ with notice on the garnishee, a copy of the writ with notice, together with a blank copy of C.R.C.P. Form 30 "Claim of Exemption to Writ of Garnishment with Notice" (Appendix to Chapters 1 to 17A, Form 30, C.R.C.P.), shall be served upon each judgment debtor whose property is subject to garnishment by such writ as soon thereafter as practicable. Such service shall be in accordance with *C.R.S. 13-54.5-107 (2)*.

(e) Jurisdiction. Service of a writ with notice upon the garnishee shall give the court jurisdiction over the garnishee and any personal property of any description, owned by, or owed to the judgment debtor in the possession or control of the garnishee.

(f) Claim of Exemption. A judgment debtor's claim of exemption shall be in accordance with Section 6 of this rule.

(g) Court Order on Garnishment Answer.

(1) If an answer to a writ with notice shows the garnishee is indebted to the judgment debtor, the clerk shall enter judgment in favor of the judgment debtor and against the garnishee for the use of the judgment creditor in an amount not to exceed the total amount due and owing on the judgment and if the judgment creditor is pro se, request such indebtedness paid into the registry of the court. However, if the judgment creditor is represented by an attorney or is a collection agency licensed pursuant to 12-14-101, et seq., C.R.S., the garnishee shall pay the funds directly to the attorney or licensed collection agency.

(2) No such judgment and request shall enter until the judgment creditor has made a proper showing that: (A) a copy of the writ with notice was properly served upon the judgment debtor, and (B) no written claim of exemption was filed within 14 days after such service or a written claim of exemption was properly filed and the same was disallowed.

(3) If an answer to a writ with notice shows the garnishee to possess or control intangible personal property or personal property capable of manual delivery owned by the judgment debtor, the court shall order the garnishee to deliver such property to the sheriff to be sold as upon execution and the court may enter any order necessary to protect the interests of the parties. Any proceeds received by the sheriff upon such sale shall be paid to the registry of the court to be applied to the judgment debt, but any surplus of property or proceeds shall be delivered to the judgment debtor.

(4) No such order shall enter until the judgment creditor has made a proper showing that: (A) a copy of the writ with notice was properly served upon the judgment debtor, and (B) no written claim of exemption was filed within 14 days after such service or a written claim of exemption was properly filed with the court and the same was disallowed.

(h) Disbursement by Clerk of Court. The clerk of the court shall disburse funds to the judgment creditor without further application or order and enter the disbursement in the court records. The judgment creditor shall refund to the clerk of the court any disbursement in excess of the amount necessary to satisfy the judgment.

(i) Automatic Release of Garnishee. If a garnishee answers a writ with notice that the garnishee is indebted to the judgment debtor in an amount less than $50.00 and no traverse has been filed, the garnishee shall automatically be released from said writ if the garnishee shall not have been ordered to pay the indebtedness to the clerk of the court within 182 days from the date of service of such writ.

SECTION 3 WRIT OF GARNISHMENT FOR SUPPORT

(a) Definitions.

(1) "Writ of garnishment for support" means the exclusive procedure for withholding the earnings of a judgment debtor for payment of a judgment debt for child support arrearages, maintenance when combined with child support, or child support debts, or maintenance.

(2) "Earnings" shall be as defined in Section 13-54.5-101 (2), C.R.S., as applicable.

(b) Form of Writ of Garnishment for Support. A writ of garnishment for support shall be in the form and content of Appendix to Chapters 1 to 17A, Form 31, C.R.C.P. and shall include at least four (4) "Calculation of Amount of Exempt Earnings" forms which shall be in the form and content of Appendix to Chapters 1 to 17A, Form 27, C.R.C.P.

(c) When Writ of Garnishment for Support Issues. Upon compliance with *C.R.S. 14-10-122 (1)(c)*, a writ of garnishment for support shall be issued by the clerk of the court upon request. Under such writ a judgment creditor may garnish earnings except to the extent such are exempt under law. Issuance of a writ of execution shall not be required.

(d) Service of Writ of Garnishment for Support. Service of a writ of garnishment for support shall be in accordance with *C.R.C.P. 4*.

(e) Jurisdiction. Service of a writ of garnishment for support upon the garnishee shall give the court jurisdiction over the garnishee and any earnings of the judgment debtor within the control of the garnishee.

(f) Effective Garnishment Period and Priority.

(1) A writ of garnishment for support shall be continuing and shall require the garnishee to withhold, pursuant to law, the portion of earnings subject to garnishment at each succeeding earnings disbursement interval until the judgment is satisfied or the garnishment released by the court or released in writing by the judgment creditor.

(2) A writ of garnishment for support shall have priority over any writ of continuing garnishment notwithstanding the fact such other writ may have been served upon the garnishee previously.

(g) Answer and Tender of Payment by Garnishee.

(1) The garnishee shall answer the writ of garnishment for support no less than 7 nor more than 14 days following the time the judgment debtor receives earnings for the first pay period affected by such writ. If the judgment debtor is not employed by the garnishee at the time the writ is served, the garnishee shall answer the writ within 14 days from the service thereof.

(2) The garnishee shall pay any nonexempt earnings and deliver a calculation of the amount of exempt earnings, as directed in the writ of garnishment for support, to the family support registry, the clerk of the court which issued such writ, or to the judgment creditor no less than 7 nor more than 14 days following the time the judgment debtor receives earnings during the Effective Garnishment Period of such writ.

(h) Disbursement of Garnished Earnings. The family support registry or the clerk of the court shall disburse nonexempt earnings to the judgment creditor without further application or order and enter such disbursement in the court records. The judgment creditor shall refund to the clerk of the court any disbursement in excess of the amount necessary to satisfy the judgment.

SECTION 4 WRIT OF GARNISHMENT -- JUDGMENT DEBTOR OTHER THAN NATURAL PERSON

(a) Definition. "Writ of garnishment -- judgment debtor other than natural person" means the exclusive procedure through which personal property of any kind of a judgment debtor other than a natural person in the possession or control of the garnishee including the credits, debts, choses in action, or money owed to the judgment debtor, whether they are due at the time of the service of the writ or are to become due thereafter is required to be held by a garnishee for payment of a judgment debt. For purposes of this rule, such writ is designated "writ of garnishment -- other than natural person."

(b) Form of Writ of Garnishment -- Other Than Natural Person. A writ of garnishment under this Section shall be in the form and content of Appendix to Chapters 1 to 17A, Form 32, C.R.C.P.

(c) When Writ of Garnishment -- Other Than Natural Person Issues. When the judgment debtor is other than a natural person, after entry of a judgment, and when a writ of execution may issue, a writ of garnishment shall be issued by the clerk of the court upon request. Under such writ of garnishment, the judgment creditor may garnish personal property of any description owned by, or owed to, such judgment debtor and in the possession or control of the garnishee. Issuance of a writ of execution shall not be required.

(d) Service of Writ of Garnishment -- Other Than Natural Person. Service of the writ of garnishment -- other than natural person shall be made in accordance with *C.R.C.P. 4*. No service of the writ or other notice of levy need be made on the judgment debtor.

(e) Jurisdiction. Service of the writ of garnishment -- other than natural person shall give the court jurisdiction over the garnishee and personal property of any description, owned by, or owed to, a judgment debtor who is other than a natural person, in the possession or control of the garnishee.

(f) Court Order on Garnishment Answer. When the judgment debtor is other than a natural person:

(1) If the answer to a writ of garnishment shows the garnishee is indebted to such judgment debtor, the clerk shall enter judgment in favor of such judgment debtor and against the garnishee for the use of the judgment creditor for the amount of the indebtedness shown in such answer and if the judgment creditor is pro se, request such indebtedness be paid into the registry of the court. However, if the judgment creditor is represented by an attorney or is a collection agency licensed pursuant to 12-14-101, et seq., C.R.S., the garnishee shall pay the funds directly to the attorney or licensed collection agency. In no event shall any judgment against the garnishee be more than the total amount due and owing on the judgment.

(2) If the answer to a writ of garnishment shows the garnishee to possess or control personal property of any description, owned by, or owed to, such judgment debtor, the court shall order the garnishee to deliver such property to the sheriff to be sold as upon execution and the court may enter any order necessary to protect the interests of the parties. Any proceeds received by the sheriff upon such sale shall be paid to the registry of the court to be applied to the judgment debt, but any surplus of property or proceeds shall be delivered to the judgment debtor.

(g) Disbursement by Clerk of Court. The clerk of the court shall disburse any funds in the registry of court to the judgment creditor without further application or order and enter such disbursement in the court records. The judgment creditor shall refund to the clerk of the court any disbursement in excess of the amount necessary to satisfy the judgment.

SECTION 5 WRIT OF GARNISHMENT IN AID OF WRIT OF ATTACHMENT

(a) Definition. "Writ of garnishment in aid of writ of attachment" means the exclusive procedure through which personal property of any kind of a defendant in an attachment action (other than earnings of a natural person) in the possession or control of the garnishee including the credits, debts, choses in action, or money owed to the judgment debtor, whether they are due at the time of the service of the writ or are to become due thereafter, is required to be held by a garnishee. For purposes of this rule, such writ is designated "writ of garnishment in aid of attachment."

(b) Form of Writ of Garnishment in Aid of Attachment and Form of Notice of Levy. A writ of garnishment in aid of attachment shall be in the form and content of Appendix to Chapters 1 to 17A, Form 33, C.R.C.P. A Notice of Levy shall be in the form and content of Appendix to Chapters 1 to 17A, Form 34, C.R.C.P.

(c) When Writ of Garnishment in Aid of Attachment Issues. At any time after the issuance of a writ of attachment in accordance with *C.R.C.P. 102*, a writ of garnishment shall be issued by the clerk of the court upon request. Under such writ of garnishment the plaintiff in attachment may garnish personal property of any description, except earnings of a natural person, owed to, or owned by, such defendant in attachment and in the possession or control of the garnishee.

(d) Service of Writ of Garnishment in Aid of Attachment. Service of the writ of garnishment in aid of attachment shall be made in accordance with *C.R.C.P. 4*. If the defendant in attachment is a natural person, service of a notice of levy shall be made as required by *C.R.S. 13-55-102*. If the defendant in attachment is other than a natural person, a notice of levy need not be served on the defendant in attachment.

(e) Jurisdiction. Service of the writ of garnishment in aid of attachment shall give the court jurisdiction over the garnishee and personal property of any description (except earnings of a natural person), owned by, or owed to, a defendant in attachment in the possession or control of the garnishee.

(f) Court Order on Garnishment Answer.

(1) When the defendant in attachment is an entity other than a natural person:

(A) If the answer to a writ of garnishment in aid of attachment shows the garnishee is indebted to such defendant in attachment, the clerk shall enter judgment in favor of such defendant in attachment and against the garnishee for the use of the plaintiff in attachment for the amount of the indebtedness shown in such answer and order such amount paid into the registry of the court. In no event shall any judgment against the garnishee be more than the total amount due and owing nor shall such judgment enter for the benefit of a plaintiff in attachment until a judgment has been entered by the court against such defendant in attachment.

(B) If the answer to a writ of garnishment in aid of attachment shows the garnishee to possess or control personal property of any description, owned by, or owed to, such defendant in attachment, at any time after judgment has entered against such defendant in attachment, the court shall order the garnishee to deliver such property to the sheriff to be sold as upon execution and the court may enter any order necessary to protect the interests of the parties. Any proceeds received by the sheriff upon such sale shall be paid to the registry of the court to be applied to the judgment debt, but any surplus of property or proceeds shall be delivered to the judgment debtor/defendant in attachment.

(2) When the defendant in attachment is a natural person:

(A) If the answer to a writ of garnishment in aid of attachment shows the garnishee is indebted to such defendant in attachment, after judgment has entered against such defendant in attachment/judgment debtor upon a showing that such defendant in attachment has been served with a notice of levy as required by *C.R.S. 13-55-102*, the court shall enter judgment in favor of the defendant in attachment/judgment debtor and against the garnishee for the use of the plaintiff in attachment/judgment creditor for the amount of the indebtedness shown in such answer and order such amount paid into the registry of the court. In no event shall any judgment against the garnishee be more than the amount of the judgment against the defendant in attachment/judgment debtor.

(B) If the answer to a writ of garnishment in aid of attachment shows the garnishee to possess or control personal property owned by, or owed to, such defendant in attachment, after judgment has entered against such defendant in attachment/judgment debtor and upon a showing that such defendant in attachment has been served with a notice of levy as required by *C.R.S. 13-55-102*, the court shall order the garnishee to deliver the property to the sheriff to be sold as upon execution and the court may enter any order necessary to protect the interests of the parties. Any proceeds received by the sheriff upon such sale shall be paid to the registry of the court to be applied to the judgment debt but any surplus of property or proceeds shall be delivered to the defendant in attachment/judgment debtor.

(g) Disbursement by Clerk of Court. The clerk of the court shall disburse any funds in the registry of the court to the judgment creditor without further application or order and enter such disbursement in the court records. The judgment creditor shall refund to the clerk of the court any disbursement in excess of the amount necessary to satisfy the judgment.

SECTION 6 JUDGMENT DEBTOR'S OBJECTION -- WRITTEN CLAIM OF EXEMPTION -- HEARING

(a) Judgment Debtor's Objection to Calculation of Exempt Earnings or Objection and Request for Exemption of Earnings Pursuant to Section 13-54-104(2)(a)(I)(D), C.R.S., Under Writ of Continuing Garnishment.

(1) If a judgment debtor objects to the initial or a subsequent calculation of the amount of exempt earnings, the judgment debtor shall have 7 days from the receipt of the copy of the writ of garnishment or calculation of the amount of exempt earnings for subsequent pay periods, within which to resolve the issue of such miscalculation by agreement with the garnishee.

(2) If the judgment debtor's objection to the calculation of exempt earnings is not resolved with the garnishee within 7 days upon good faith effort, the judgment debtor may file a written objection setting forth, with reasonable detail, the grounds for such objection. Such objection must be filed within 14 days from receipt of the copy of writ of garnishment or calculation of the amount of exempt earnings for subsequent pay periods.

(3) If the judgment debtor objects and requests an exemption of earnings pursuant to section 13-54-104(2)(a)(I)(D), C.R.S., the judgment debtor shall have no obligation to attempt to resolve the issue with the garnishee.

(4) If the judgment debtor objects and requests an exemption of earnings pursuant to section13-54-104(2)(a)(I)(D), C.R.S., the judgment debtor shall file such objection and request in writing, setting out the grounds for such exemption and request. Such objection and request must be filed within 14 days after receipt by the judgment debtor of a copy of the writ of continuing garnishment **or receipt of the calculation of exempt earnings for any pay period subsequent to the first pay period when the judgment debtor's earnings were subject to garnishment.**

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(53) The written objection made under Section 6(a)(2) or Section 6(a)(4) of this rule shall be filed with the clerk of the court by the judgment debtor in the form and content of Appendix to Chapters 1 to 17A, Form 28, C.R.C.P.

(64) The judgment debtor shall, by certified mail, return receipt requested, immediately deliver a copy of such objection to the garnishee and the judgment creditor's attorney of record, or if none, to the judgment creditor. If the garnishee has been directed to transmit the nonexempt earnings to an attorney or a collection agency licensed pursuant to section 12-14-101, et seq., C.R.S., then upon receipt of the objection, the garnishee shall transmit the nonexempt earnings to the clerk of the court.

(75) Upon the filing of a written objection, all proceedings with relation to the earnings of the judgment debtor in possession and control of the garnishee, the judgment creditor, the attorney for the judgment creditor, or in the registry of the court shall be stayed until the written objection is determined by the court.

(b) Judgment Debtor's Claim of Exemption Under a Writ With Notice.

(1) When a garnishee, pursuant to a writ with notice, holds any personal property of the judgment debtor, other than earnings, which the judgment debtor claims to be exempt, the judgment debtor, within 14 days after being served a copy of such writ as required by Section 2 (d)(2) of this rule, shall make and file a written claim of exemption with the clerk of the court in which the judgment was entered.

(2) The claim of exemption to the writ of garnishment with notice shall be in the form and content of Appendix to Chapters 1 to 17A, Form 30, C.R.C.P.

(3) The judgment debtor shall, by certified mail, return receipt requested, deliver a copy of the claim of exemption to the garnishee and the judgment creditor's attorney of record, or if none, to the judgment creditor.

(4) Upon the filing of a claim of exemption to a writ with notice, all proceedings with relation to property in the possession or control of the garnishee shall be stayed until such claim is determined by the court.

(c) Hearing on Objection or Claim of Exemption.

(1) Upon the filing of an objection pursuant to Section 6 (a) of this rule or the filing of a claim of exemption pursuant to Section 6 (b) of this rule, the court in which the judgment was entered shall set a time for hearing of such objection or claim of exemption which hearing shall not be more than 14 days after the filing of such objection or claim of exemption.

(2) When an objection or claim of exemption is filed, the clerk of the court shall immediately inform the judgment creditor, the judgment debtor and the garnishee, or their attorneys of record, by telephone, by mail, or in person, of the date and time of such hearing.

(3) The clerk of the court shall document in the court record that notice of the hearing has been given in the manner required by this rule. Said documentation in the court record shall constitute a sufficient return and prima facie evidence of such notice.

(4) The court in which judgment was entered shall conduct a hearing at which all interested parties may testify, and shall determine the validity of the objection or claim of exemption filed by the judgment debtor and shall enter a judgment in favor of the judgment debtor to the extent of the validity of the objection or claim of exemption, which judgment shall be a final judgment for the purpose of appellate review.

(5) If the court shall find the amount of exempt earnings to have been miscalculated or if said property is found to be exempt, the court shall order the clerk of the court to remit the amount of over-garnished earnings, or the garnishee to remit such exempt property to the clerk of the court for the use and benefit of the judgment debtor within three (3) business days.

(d) Objection or Claim of Exemption Within 182 days.

(1) Notwithstanding the provisions of Section 6 (a)(2), Section 6(a)(4) and Section 6 (b)(1) of this rule, a judgment debtor failing to make and file a written objection or claim of exemption within the time therein provided, may, at any time within 182 days from receipt of the copy of the writ with notice or a copy of the writ of continuing garnishment or the calculation of the amount of exempt earnings, move the court in which the judgment was entered to hear an objection or claim of exemption as to any earnings of property levied in garnishment which the judgment debtor claims to have been miscalculated or which the judgment debtor claims to be exempt.

(2) A hearing pursuant to this subsection shall be held only upon a verified showing, under oath, of good cause which shall include: mistake, accident, surprise, irregularity in proceedings, newly discovered evidence, events not in the control of the judgment debtor, or such other grounds as the court may allow, but in no event shall a hearing be held pursuant to this subsection on grounds available to the judgment debtor as the basis of an objection or claim of exemption within the time periods provided in Section 6 (a)(2) and Section 6 (b)(1).

(3) At such hearing, if the judgment giving rise to such claim has been satisfied against property or earnings of the judgment debtor, the court shall hear and summarily try and determine whether the amount of the judgment debtor's earnings paid to the judgment creditor was correctly calculated and whether the judgment debtor's property sold as upon execution was exempt. If the court finds earnings to have been miscalculated of if property is found to be exempt, the court shall enter judgment in favor of the judgment debtor for the amount of the over-garnished earnings or such exempt property or the value thereof which judgment shall be satisfied by payment to the clerk of the court or the return of exempt property to the judgment debtor within three (3) business days.

(e) Reinstatement of Judgment Debt. If at any time the court orders a return of over-garnished earnings or exempt property or the value of such exempt property pursuant to Sections 6 (c)(5) and 6

(d)(3) of this rule, the court shall thereupon reinstate the judgment to the extent of the amount of such order.

SECTION 7 FAILURE OF GARNISHEE TO ANSWER (ALL FORMS OF GARNISHMENT)

(a) Default Entered by Clerk of Court.

(1) If a garnishee, having been served with any form of writ provided for by this rule, fails to answer or pay any nonexempt earnings as directed within the time required, the clerk of the court shall enter a default against such garnishee upon request.

(2) No default shall be entered in an attachment action against the garnishee until the expiration of 42 days after service of a writ of garnishment upon the garnishee.

(b) Procedure After Default of Garnishee Entered.

(1) After a default is entered, the judgment creditor, plaintiff in attachment or any intervenor in attachment, may proceed before the court to prove the liability of the garnishee to the judgment debtor or defendant in attachment.

(2) If a garnishee is under subpoena to appear before the court for a hearing to prove such liability and such subpoena shall have been issued and served in accordance with *C.R.C.P. 45* and shall fail to appear, the court shall thereupon enter such sanctions as are just, including, but not limited to, contempt of court, issuance of a bench warrant, reasonable attorney fees and the cost and expense of the judgment creditor, plaintiff in attachment or intervenor in attachment.

(3) Upon hearing, if the court finds the garnishee liable to the judgment debtor or defendant in attachment or in the possession or control of personal property of the judgment debtor or defendant in attachment at the time of service of the writ:

(A) The court shall enter judgment in favor of the judgment debtor or defendant in attachment against the garnishee for the use and benefit of the judgment creditor, plaintiff in attachment or intervenor in attachment, if the garnishee was liable to the judgment debtor or defendant in attachment;

(B) The court shall order the garnishee to deliver the personal property to the sheriff to be sold as upon execution in the same manner as section 4 (f)(2) of this rule, if the garnishee was in the possession or control of personal property of the judgment debtor or defendant in attachment and may enter any order necessary to protect the interests of the parties. Provided, however, in the event that the garnishee no longer has possession or control over the personal property, the court may either enter a judgment for the value of such property at the time of the service of the writ or enter any order necessary to protect the interests of the parties or both.

(4) At any hearing the court shall make such orders as to reasonable attorney's fees, costs and expense of the parties to such hearing, as are just.

SECTION 8 TRAVERSE OF ANSWER (ALL FORMS OF GARNISHMENT)

(a) Time for Filing of Traverse. The judgment creditor, plaintiff in attachment or intervenor in attachment, may file a traverse of an answer to any form of writ provided by this rule provided such traverse is filed within the greater time period of 21 days from the date such answer should have been filed with the court or 21 days after such answer was filed with the court. The failure to timely file a traverse shall be deemed an acceptance of the answer as true.

(b) Procedure.

(1) Within the time provided, the judgment creditor, plaintiff in attachment, or intervenor in attachment, shall state, in verified form, the grounds of traverse and shall mail a copy of the same to the garnishee in accordance with *C.R.C.P. 5*.

(2) Upon application of the judgment creditor, plaintiff in attachment, or intervenor in attachment, the traverse shall be set for hearing before the court at which hearing the statements in the traverse shall be deemed admitted or denied.

(3) Upon hearing of the traverse, if the court finds the garnishee liable to the judgment debtor or defendant in the attachment or in the possession or control of personal property of the judgment debtor or defendant in attachment at the time of service of the writ:

(A) The court shall enter judgment in favor of the judgment debtor or defendant in attachment against the garnishee for the use and benefit of the judgment creditor, plaintiff in attachment or intervenor in attachment, if the garnishee was liable to the judgment debtor or defendant in attachment;

(B) The court shall order the garnishee to deliver the personal property to the sheriff to be sold as upon execution in the same manner as section 4 (f)(2) of this rule, if the garnishee was in the possession or control of personal property of the judgment debtor or defendant in attachment and may enter any order necessary to protect the interests of the parties. Provided, however, in the event that the garnishee no longer has possession or control over the personal property, the court may either enter a judgment for the value of such property at the time of the service of the writ or enter any order necessary to protect the interests of the parties or both.

(4) If a garnishee is under subpoena to appear for a hearing upon a traverse and such subpoena shall have been issued and served in accordance with *C.R.C.P. 45*, and shall fail to appear, the court shall thereupon enter such sanctions as are just, including, but not limited to, contempt of court, issuance of a bench warrant, reasonable attorney fees and the cost and expense of the judgment creditor, plaintiff in attachment or intervenor in attachment.

(5) At any hearing upon a traverse, the court shall make such orders as to reasonable attorney fees, costs and expense of the parties to such hearing as are just.

SECTION 9 INTERVENTION (ALL FORMS OF GARNISHMENT)

Any person who claims an interest in any personal property of any description of a judgment debtor or defendant in attachment which property is the subject of any answer made by a garnishee, may intervene as provided in *C.R.C.P. 24* at any time prior to entry of judgment against the garnishee.

SECTION 10 SET-OFF BY GARNISHEE (ALL FORMS OF GARNISHMENT)

Every garnishee shall be allowed to claim as a set-off and retain or deduct all demands or claims on the part of the garnishee against any party to the garnishment proceedings, which the garnishee might have claimed if not summoned as a garnishee, whether such are payable or not at the time of service of any form or writ provided for by this rule.

SECTION 11 GARNISHEE NOT REQUIRED TO DEFEND CLAIMS OF THIRD PERSONS (ALL FORMS OF GARNISHMENT)

(a) Garnishee With Notice. A garnishee with notice of the claim of a third person in any property of any description of a judgment debtor or defendant in attachment which is the subject of any answer made by the garnishee in response to any form of writ provided for by this rule shall not be required to defend on account of such claim, but shall state in such answer that the garnishee is informed of such claim of a third person.

(b) Court to Issue Summons. When such an answer has been filed, the clerk of the court, upon application, shall issue a summons requiring such third person to appear within the time specified in *C.R.C.P. 12* to answer, set up, and assert a claim or be barred thereafter.

(c) Delivery of Property by Garnishee.

(1) If the answer states that the garnishee is informed of the claim of a third person, the garnishee may at any time pay to the clerk of the court any garnished amount payable at the time of the

service of any writ provided for by this rule, or deliver to the sheriff any property the garnishee is required to hold pursuant to any form of writ provided for in this rule.

(2) Upon service of the summons upon such third person pursuant to *C.R.C.P. 4*, the garnishee shall thereupon be released and discharged of any liability to any person on account of such indebtedness to the extent of any amount paid to the clerk of the court or any property delivered to the sheriff.

SECTION 12 RELEASE AND DISCHARGE OF GARNISHEE (ALL FORMS OF GARNISHMENT)

(a) Effect of Judgment. A judgment against a garnishee shall release and discharge such garnishee from all claims or demands of the judgment debtor or defendant in attachment to the extent of all sums paid or property delivered by the garnishee pursuant to such judgment.

(b) Effect of Payment. Payment by a garnishee of any sums required to be remitted by such garnishee pursuant to Sections 1 (k)(2) or 3 (g)(2) of this rule shall release and discharge such garnishee from all claims or demands of the judgment debtor to the extent of all such sums paid.

(c) Release by Judgment Creditor or Plaintiff in Attachment. A judgment creditor or plaintiff in attachment may issue a written release of any writ provided by this rule. Such release shall state the effective date of the release and shall be promptly filed with the clerk of the court.

EFFECTIVE DATE OF THIS RULE AND AMENDMENTS TO THIS RULE

SECTION 13

GARNISHMENT OF PUBLIC BODY (ALL FORMS OF GARNISHMENT)

Any writ provided for in this rule wherein a public body is designated as the garnishee, shall be served upon the officer of such body whose duty it is to issue warrants, checks or money to the judgment debtor or defendant in attachment, or, such officer as the public body may have designated to accept service. Such officer need not include in any answer to such writ, as money owing, the amount of any warrant or check drawn and signed prior to the time of service of such writ.

Repealed October 31, 1991, effective November 1, 1991.

History

Source: Section 1(a)(2) and section 3(a)(2) amended, section 3(a)(2) committee comment added, and effective date repealed October 31, 1991, effective November 1, 1991; section 1(k)(1), (k)(2) and (l) amended and (m) added, section 6(a)(3), (a)(4), and (a)(5) amended, section 7(a)(1) amended, and section 12(b) amended and adopted October 30, 1997, effective January 1, 1998; entire section amended and adopted June 28, 2001, effective August 8, 2001; section 3(g) and (h) amended and adopted January 13, 2005, effective February 1, 2005; section 1(k)(1) and (k)(2) amended and effective November 18, 2010; section 1(f)(1), (k)(1), (k)(2), and (l)(1), section 2(g)(2) and (g)(4), section 3(g), section 6(a)(1), (a)(2), (b)(1), and (c)(1), section 7(a)(2), and section 8(a) amended and adopted December 14, 2011, effective July 1, 2012; section 2(g)(2) and (g)(4) corrected June 15, 2012, nunc pro tunc, December 14, 2011, effective July 1, 2012; section 2(g)(1) amended and effective June 7, 2013; section 4(f) amended and adopted January 29, 2016, effective March 1, 2016; section 1(b), (c), (g), (h)(1), (h)(2), (k)(1), (k)(2), (l)(1), and (l)(2), section 2(i), section 6 IP(d), (d)(1), and section 7(a)(2) amended and adopted January 12, 2017, effective March 1, 2017.

Annotations

Notes

Cross references:

For the minimum amount upon which garnishment shall issue, see § 13-52-108, C.R.S.; for group life insurance policy being exempt from garnishment, see § 10-7-205, C.R.S.; for provisions concerning service of process, see *C.R.C.P. 4(e)*; for presentation of defenses, see *C.R.C.P. 12*; for intervention, see *C.R.C.P. 24*.

Case Notes

I. General Consideration.
II. Provisions Applicable to All Forms of Garnishment.
III. Specific Forms of Garnishment.
Law reviews.
Garnishment is a deprivation of defendant's property,
The whole object of garnishment is to reach effects or credits in the garnishee's hands,
Garnishment is strictly a statutory remedy.
Garnishment proceedings cannot be sustained if they go beyond statute.
Garnishment proceedings fall under the equity arm of a court,
Writ of garnishment must be specific as to debtor.
When garnishment proceeding considered "determined".
This rule has no provision for release of cash.
Attorneys' fees not permitted in garnishment.
This rule creates an exception to the American rule in garnishment actions;
This rule is not applicable to spendthrift provisions of a will.
The intent of congress that social security benefits be exempt from seizure is not undercut or in any way compromised by this rule.
Amendment of answer.
Pending appellate review does not convert a judgment to a contingent liability or to a debt owing in the future.
Stay of further garnishment proceedings until garnished judgments were no longer subject to stays of execution is the proper procedure
A liability is not contingent
Unless a notice of garnishment properly runs with an accurate and sufficiently specific description against the individual to whom the garnishee may be indebted,
II. PROVISIONS APPLICABLE TO ALL FORMS OF GARNISHMENTS.
Annotator's note.
Before the turn of the century it was impossible to seize a debt owed by a nonresident garnishee
Under the present rule for garnishment, a court has jurisdiction for garnishment of a debt
Writ of garnishment can only be issued after issuance of a writ of attachment.
However, a proceeding by garnishment, though an independent suit, is auxiliary
A judgment is hypothetical when taken in advance
The issuance of a post-judgment writ of garnishment without a writ of execution is one alternative
When the principal judgment has been obtained, the validity of the judgment against the garnishee depends upon the validity of the judgment against the defendant.
Without jurisdiction of the defendant and a judgment against him, a judgment against the garnishee is void,
Garnishment is proper only after a valid judgment has been entered.
In the absence of statute, if the assessment or demand has not been previously made
Garnishee cannot be placed in a worse position than if defendant enforced his own claim.
Writ of garnishment impounds all moneys held by garnishee
A sheriff is not required to make diligent search for other property of defendant before writ may issue.

An indebtedness only can be made the subject of garnishment,
Garnishment applies only to contracts and not to tort actions.
A court should dismiss the action when it appears beyond question that the action sounds in tort.
A tort claim cannot be adjudicated in a garnishment procedure,
Since there is nothing in an insurance policy, either expressly or impliedly, making a garnisher privity in contract with an insured,
Where one, for a valuable consideration, has assumed the obligation of another, he may be held liable as garnishee,
A widow's allowance is subject to garnishment.
A plaintiff in garnishment does not stand in the position of a purchaser in good faith
A garnishment proceeding cannot displace prior valid and bona fide existing right
For example, an attorney's lien is prior and superior to any right
Garnishment under executions is properly subordinated to garnishment under writs of attachment theretofore served
A creditor accepting provisions of assignment cannot reach funds of sale through garnishment.
Contingent liabilities are not garnishable.
Annotator's note.
Creditor must proceed in state where employment services rendered.
The fact that the employer is a railroad company operating a line through different states does not change this rule.
Where an order for a widow's allowance and service of garnishment summons affecting the same are made on the same day,
Content of summons not prescribed.
Writ of garnishment served upon garnishee is insufficient
A writ of garnishment pursuant to this rule and *C.R.C.P. 403* provides a judgment creditor with an efficient mechanism for garnishing property to satisfy a proper judgment,
Garnishment cannot be extended by construction to cases which are not within both its letter and spirit,
Where a garnishee is doing business within Colorado, service of a writ of garnishment upon it at its place of business properly brings it within the jurisdiction
Where it is claimed that the court does not have jurisdiction, but there was a judgment and execution in the main cause,
A garnishment can reach only such property as belongs to the debtor.
This rule shows an intent that every sort of interest of the debtor might be garnished.
The assertion by a garnishee of a jurisdictional defense
Dormancy of judgment in foreign state does not defeat rights of creditor under this rule.
Law reviews.
Absence of a creditor-debtor relationship between judgment debtor and garnishee
Garnishee is entitled to an evidentiary hearing concerning the validity of the garnished debt
Failure to comply with a court order does not supercede requirement to set a hearing.
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A garnishee's answer is made with reference to the facts existing
If, at that time, the garnishee owes the defendant a debt,
If, at that time, he is not indebted
Garnishee is not answerable for effects of the defendant coming into his hands, or indebtedness accruing from him to the defendant, after the garnishment.
It is only where the answer of a garnishee shows that he is indebted
In order to charge him upon his answer,
Where his answer is a substantial denial of indebtedness,
A delivery by the garnishee to the sheriff can be ordered only where
"Supplemental answer" held no answer at all where time to answer exhausted.
Note properly turned over to sheriff.
A contingent liability is not garnishable.
Payment to creditor's attorneys is payment to creditor.
Default for failure of garnishee "to answer or pay"

Annotator's note.
Previously, an order denying a motion to discharge a garnishee for failure of plaintiff to traverse answer of garnishee within required period was not appealable
Still garnishee cannot take advantage of his own delay.
A traverse stating only conclusions of law and not facts is insufficient.
The answer of the garnishee and the traverse of the plaintiffs are the only pleadings provided by this rule, and make up the issues in garnishment proceedings.
Any new matter pleaded in the traverse is deemed to be denied or avoided.
Where the garnishee has no opportunity to plead to a reply
A partner may set up nonjoinder of copartner as a defense.
Subsection 8(b)
An award of attorney fees
An award of attorney fees, costs, and expenses under section 8(b)
Annotator's note.
This section 9 is not mandatory,
In garnishment proceedings, intervention is governed by this rule
Allegations of the petition in intervention held sufficient to make out a prima facie case for intervening assignee.
With denial of right of intervention constituting reversible error.
Where in due time.
It is error for a trial court to quash a garnishment where
An intervention by definition involves third parties,
Law reviews.
Annotator's note.
By this section a garnishee is allowed to retain or deduct
Garnishee may plead as a defense or set-off
Garnishee is not to be placed in a worse position.
Bank receiver was entitled to set-off compensation due him.
A garnisheed bank may apply the amount on deposit to the credit of a debtor
Agreement after service of writ would be void.
Garnishee bank is entitled to claim set-off
Landlord's lien.
The rights and liabilities of a garnishee are to be determined as of the date of the garnishment
It is unreasonable to require a garnishee to claim a set-off immediately upon service of the writ of garnishment;
It is the responsibility of the trial court to determine the amounts and reasonableness of set-offs,
Law firm had statutory charging lien on settlement proceeds.
Annotator's note.
This section puts burden on claimant
When a garnishee in his answer states that a third party claims property in his possession
However, this rule refers to answers in good faith,
Payment to one other than judgment debtor held improper.
It is not essential that notice of an assignment be given in advance to a garnishee,
If, during the pendency of garnishment proceedings, it is established that an assignment of the subject-matter antedating the garnishment was actually executed,
A creditor is entitled to a fund owing defendant by his employer as against the claims of another creditor of which he had no notice
Once a third-party claimant has conceded that the disputed property may be garnished by a creditor,
A judgment in the principal proceeding is presumptively valid
Such judgment when not superseded by virtue of a failure to furnish the required bond
The reversal of a judgment upon which a garnishment is based leaves nothing
If the original judgment is reversed, a judgment in garnishment is deprived of a basis
The existence of a valid judgment is a jurisdictional prerequisite
Where the judgment in the main case has been reversed,
Since garnishee's liability is not established.

Court approval not required.
Law reviews.
Past-due child support payments in themselves constitute debt.
Amount defendant admittedly owed for past-due child support may be garnished by bank
Foreclosure sale excess proceeds
Law firm had statutory charging lien on settlement proceeds.
C. R.C.P. 102, this rule, and § 4-8-112 may be harmonized

ANNOTATION

I. General Consideration.

II. Provisions Applicable to All Forms of Garnishment.

A. When Writ Issues.

B. Service of Writ.

C. Jurisdiction.

D. Objection of Judgment Debtor - Exemptions.

E. Answer.

F. Traverse of Answer.

G. Intervention.

H. Set-off.

I. Claims of Third Persons.

J. Release and Discharge.

K. Disbursement of Funds.

III. Specific Forms of Garnishment.

Law reviews.

For article, "Seizure of Person or Property: Rules 101-104", see 23 Rocky Mt. L. Rev. 603 (1951). For article, "One Year Review of Civil Procedure and Appeals", see 39 Dicta 133 (1962).

Garnishment is a deprivation of defendant's property,

or right to the use of his property. *Bernhardt v. Commodity Option Co., 187 Colo. 89, 528 P.2d 919 (1974),* cert. denied, *421 U.S. 1004, 95 S. Ct. 2406, 44 L. Ed. 2d 673 (1975).*

The whole object of garnishment is to reach effects or credits in the garnishee's hands,

and to subject them to the payment of such judgment as the plaintiff may recover against the defendant. It results necessarily that there can be no judgment against the garnishee until judgment against the defendant shall have been recovered. McPhee v. Gomer, 6 Colo. App. 461, 41 P. 836 (1895).

Garnishment is strictly a statutory remedy.

Troy Laundry & Mach. Co. v. City & County of Denver, 11 Colo. App. 368, 53 P. 256 (1898);*Black v. Plumb, 94 Colo. 318, 29 P.2d 708,* 91 A.L.R. 133 (1934).

The remedy of garnishment was unknown at common law and exists only by reason of statute or rules of procedure enacted pursuant to statutory authority. *Worchester v. State Farm Mut. Auto. Ins. Co., 172 Colo. 352, 473 P.2d 711 (1970).*

Garnishment proceedings cannot be sustained if they go beyond statute.

State v. Elkins, 84 Colo. 409, 270 P. 875 (1928).

Garnishment proceedings fall under the equity arm of a court,

the purpose being to summarily reach ordinarily nonleviable evidences of debt, to prevent the loss or dissipation of such assets, to determine the ownership of such funds, and to provide for the equitable distribution thereof, such being triable by the court and not by a jury. *Worchester v. State Farm Mut. Auto. Ins. Co., 172 Colo. 352, 473 P.2d 711 (1970);Great Neck Plaza, L.P. v. Le Peep Restaurants, LLC, 37 P.3d 485 (Colo. App. 2001).*

Writ of garnishment must be specific as to debtor.

Berns, Clancy & *Associates v. Bank of Boulder, 717 P.2d 1022 (Colo. App. 1986).*

When garnishment proceeding considered "determined".

A garnishment proceeding may not be considered "determined" until decisions regarding the rights of parties to the action can be made, and nothing but ministerial functions remain to be done. *Nolan v. District Court, 195 Colo. 6, 575 P.2d 9 (1978);*In re Seay, 97 Bankr. 41 (Bankr. D. Colo. 1989).

Until the time for filing an exemption under § 13-54-106 expires, the garnishment proceedings are not determined. *Nolan v. District Court, 195 Colo. 6, 575 P.2d 9 (1978);*In re Seay, 97 Bankr. 41 (Bankr. D. Colo. 1989).

This rule has no provision for release of cash.

This rule relates to garnishment and has no provision similar to *C.R.C.P. 102* for release of cash in the hands of a garnishee. *Phoenix Assurance Co. v. Hughes, 367 F.2d 526 (10th Cir. 1966).*

Attorneys' fees not permitted in garnishment.

Neither this rule nor any other section or rule permits award of attorneys' fees for the garnishee in a garnishment. *Commercial Claims, Ltd. v. First Nat'l Bank, 649 P.2d 736 (Colo. App. 1982).*

This rule creates an exception to the American rule in garnishment actions;

hence, the trial court was authorized to make an award of attorney fees. *Hoang v. Monterra Homes (Powderhorn) LLC, 129 P.3d 1028 (Colo. App. 2005),* rev'd on other grounds sub nom. *Hoang v. Assurance Co. of Am., 149 P.3d 798 (Colo. 2007).*

This rule is not applicable to spendthrift provisions of a will.

Brasser v. Hutchison, 37 Colo. App. 528, 549 P.2d 801 (1976).

Funds under the control of a trustee subject to spendthrift provisions cannot be garnisheed. *Brasser v. Hutchison, 37 Colo. App. 528, 549 P.2d 801 (1976).*

The intent of congress that social security benefits be exempt from seizure is not undercut or in any way compromised by this rule.

Ortiz v. Valdez, 971 P.2d 1076 (Colo. App. 1998).

Amendment of answer.

Although this section is silent as to whether answers filed to a writ of garnishment may be amended, the guiding principle is that where the adverse party has not changed his position based on the original answer, the court, in its discretion should freely grant amendments. *Brown v. Schumann, 40 Colo. App. 336, 575 P.2d 443 (1978).*

Where the inability to amend would entirely foreclose the requesting party's case, and where the opposing party could show no prejudice to his case from the proposed amendment (other than the "prejudice" of having the garnishment determined on its merits), and where no prejudice to the court itself was evident from the record, the trial court abuses its discretion in ignoring the garnishee's amended answer. *Brown v. Schumann, 40 Colo. App. 336, 575 P.2d 443 (1978).*

Pending appellate review does not convert a judgment to a contingent liability or to a debt owing in the future.

Shawn v. 1776 Corp., 787 P.2d 183 (Colo. App. 1989).

Stay of further garnishment proceedings until garnished judgments were no longer subject to stays of execution is the proper procedure

and fully protects the interests of both garnishee and garnishor. Shawn v. 1776 Corp., 787 P.2d 183 (Colo. App. 1989).

A liability is not contingent

merely because the garnishee disputes whether it breached its contract with the debtor. *Walk-In Med. Centers, Inc. v. Breuer Capital Corp., 778 F. Supp. 1116 (D. Colo. 1991).*

Unless a notice of garnishment properly runs with an accurate and sufficiently specific description against the individual to whom the garnishee may be indebted,

a garnishee is totally unaffected by the notice served upon him. *Anderson Boneless Beef v. Sunshine Health Care Center, Inc., 852 P.2d 1340 (Colo. App. 1993).*

Applied in *Stone v. Chapels for Meditation, Inc., 33 Colo. App. 346, 519 P.2d 1233 (1974).*

II. PROVISIONS APPLICABLE TO ALL FORMS OF GARNISHMENTS.

Annotator's note.

Since section (b) of this rule was similar to § 129 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Before the turn of the century it was impossible to seize a debt owed by a nonresident garnishee

to a principal defendant where the court had no jurisdiction over the situs of the debt. *Garrett v. Garrett, 30 Colo. App. 167, 490 P.2d 313 (1971).*

Under the present rule for garnishment, a court has jurisdiction for garnishment of a debt

upon obtaining jurisdiction over the garnishee. *Garrett v. Garrett, 30 Colo. App. 167, 490 P.2d 313 (1971).*

Writ of garnishment can only be issued after issuance of a writ of attachment.

Bernhardt v. Commodity Option Co., 187 Colo. 89, 528 P.2d 919 (1974), cert. denied, *421 U.S. 1004, 95 S. Ct. 2406, 44 L. Ed. 2d 673 (1975).*

However, a proceeding by garnishment, though an independent suit, is auxiliary

to the main suit. McPhee v. Gomer, 6 Colo. App. 461, 41 P. 836 (1895).

A judgment is hypothetical when taken in advance

of a judgment in the main suit, as it is dependent upon a judgment subsequently obtained. McPhee v. Gomer, 6 Colo. App. 461, 41 P. 836 (1895).

The issuance of a post-judgment writ of garnishment without a writ of execution is one alternative

authorized by *C.R.C.P. 69(a)*. Warner/Elektra/Atlantic Corp. v. B & R Record & *Tape Merchandisers, Inc., 40 Colo. App. 179, 570 P.2d 1320 (1977).*

When the creditor and debtor have already participated in a complete hearing on the merits of the debt, as is the case with post-judgment garnishment, there is no due process advantage to be gained by forcing the garnishor to file an additional writ. Warner/Elektra/Atlantic Corp. v. B & R Record & *Tape Merchandisers, Inc., 40 Colo. App. 179, 570 P.2d 1320 (1977).*

When the principal judgment has been obtained, the validity of the judgment against the garnishee depends upon the validity of the judgment against the defendant.

McPhee v. Gomer, 6 Colo. App. 461, 41 P. 836 (1895).

Without jurisdiction of the defendant and a judgment against him, a judgment against the garnishee is void,

and its payment will not protect the garnishee. McPhee v. Gomer, 6 Colo. App. 461, 41 P. 836 (1895).

Garnishment is proper only after a valid judgment has been entered.

W. Med. Prop. Corp. v. Denver Opportunity, Inc., 482 F. Supp. 1205 (D. Colo. 1980).

If the debtor could bring an immediate action to recover the debt from the garnishee, then the debt is due and payable within the meaning of the rule. *Martinez v. Dixon, 710 P.2d 498 (Colo. App. 1985);* Flanders Elec. v. Davall Controls & *Eng., 831 P.2d 492 (Colo. App. 1992).*

In the absence of statute, if the assessment or demand has not been previously made

in accordance with law, the garnishee is not liable. *Universal Fire Ins. Co. v. Tabor, 16 Colo. 531, 27 P. 890 (1891).*

Garnishee cannot be placed in a worse position than if defendant enforced his own claim.

In the absence of fraud between defendant and a garnishee, the latter cannot be placed, through garnishment proceedings, in a worse position than if defendant's claim were enforced by defendant himself. *Universal Fire Ins. Co. v. Tabor, 16 Colo. 531, 27 P. 890 (1891).*

Writ of garnishment impounds all moneys held by garnishee

and owing to the judgment debtor as of the date the writ is served. *Graybar Elec. Co. v. Watkins Elec. Co., 626 P.2d 1157 (Colo. App. 1980),* rev'd on other grounds, *662 P.2d 1064 (Colo. 1983).*

The trial court obtains jurisdiction over all the monies held by garnishee which are owing to the judgment debtor on the date of the service of the writ of garnishment. *Martinez v. Dixon, 710 P.2d 498 (Colo. App. 1985).*

A sheriff is not required to make diligent search for other property of defendant before writ may issue.

E. I. Du Pont De Nemours & *Co. v. Lednum, 82 Colo. 472, 260 P. 1017 (1927).*

An indebtedness only can be made the subject of garnishment,

and, in order that a liability may be an indebtedness within the meaning of the law, it must arise out of contract. Lewis v. City & County of Denver, 9 Colo. App. 328, 48 P. 317 (1897).

Garnishment applies only to contracts and not to tort actions.

The controlling characteristic of the remedy by garnishment is that the liability of the garnishee must originate in, and be dependent on, contract. A right of action for a tort is not, therefore, the subject of garnishment in most jurisdictions. A claim in tort, not reduced to judgment, is not a debt within the meaning of the statutes in reference to garnishment. And the rule is the same where as between the tortfeasor and the person to whom the wrong was done the latter might at his option either hold the tortfeasor to his liability in tort, or, waiving the tort, treat him as his debtor, since the creditor of the wronged person is not at liberty to exercise this option in his place and so evade the general rule as to garnishment of claims in tort by substituting therefor a liquidated claim "quasi ex contractu". *Black v. Plumb, 94 Colo. 318, 29 P.2d 708 (1934).*

A court should dismiss the action when it appears beyond question that the action sounds in tort.

Donald Co. v. Dubinsky, 74 Colo. 128, 219 P. 209 (1923);Black v. Plumb, 94 Colo. 318, 29 P.2d 708 (1934).

A tort claim cannot be adjudicated in a garnishment procedure,

for to do so compels the garnishee to enter into combat with an adversary other than its own and do battle with one who had never had any contract relation with him. Steen v. Aetna Cas. & *Sur. Co., 157 Colo. 99, 401 P.2d 254 (1965).*

Since there is nothing in an insurance policy, either expressly or impliedly, making a garnisher privity in contract with an insured,

a stranger to the insurance policy involved, as a garnisher, can have no claim against the company, as garnishee, unless and until such transpires. Steen v. Aetna Cas. & *Sur. Co., 157 Colo. 99, 401 P.2d 254 (1965).*

Where one, for a valuable consideration, has assumed the obligation of another, he may be held liable as garnishee,

and it is not necessary that the garnishee hold tangible real or personal property of the debtor, for the assumption of the debts of another when in proper form is a right, credit, or chose in action required to be reported in garnishment proceedings. *Field Family Constr. Co. v. Ryan, 145 Colo. 598, 360 P.2d 110 (1961).*

A widow's allowance is subject to garnishment.

Isbell-Kent-Oakes Dry Goods Co. v. Larimer County Bank & *Trust Co., 75 Colo. 451, 226 P. 293 (1924).*

A plaintiff in garnishment does not stand in the position of a purchaser in good faith

and for value, but is in no better position than a purchaser or assignee with notice. *Collins v. Thuringer, 92 Colo. 433, 21 P.2d 709 (1933).*

A garnishment proceeding cannot displace prior valid and bona fide existing right

and claims against the debt or property involved. *Collins v. Thuringer, 92 Colo. 433, 21 P.2d 709 (1933).*

For example, an attorney's lien is prior and superior to any right

acquired by a plaintiff in such proceedings. *Collins v. Thuringer, 92 Colo. 433, 21 P.2d 709 (1933).*

Garnishment under executions is properly subordinated to garnishment under writs of attachment theretofore served

on the same creditor, although the latter are, as a precautionary measure, again served on the same date as that issued under the writ of execution. Larimer County Bank & *Trust Co. v. Colo. Rubber Co., 79 Colo. 4, 243 P. 622 (1926).*

A creditor accepting provisions of assignment cannot reach funds of sale through garnishment.

If a creditor accepts, and acts under, the provisions of an assignment for the benefit of creditors, he may not thereafter repudiate his acceptance and claim property in the hands of the trustee for the satisfaction of his debt or reach funds derived from the sale thereof by proceedings in garnishment. *McMullin v. Keogh-Doyle Meat Co., 96 Colo. 298, 42 P.2d 463 (1935).*

Contingent liabilities are not garnishable.

Flanders Elec. v. Davall Controls & *Eng., 831 P.2d 492 (Colo. App. 1992).*

Annotator's note.

Since section (c) of the prior version of this rule was similar to § 130 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Creditor must proceed in state where employment services rendered.

The state in which services were rendered and in which the employer and employee reside is the situs of a chose and action for wages, and a creditor of the employee, who would reach the fund by garnishment, must proceed in that state. Atchison, T. & S. F. R. R. v. Maggard, 6 Colo. App. 85, 39 P. 985 (1895).

The fact that the employer is a railroad company operating a line through different states does not change this rule.

Atchison, T. & S. F. R. R. v. Maggard, 6 Colo. App. 85, 39 P. 985 (1895).

Where an order for a widow's allowance and service of garnishment summons affecting the same are made on the same day,

they are presumptively at the same time. Isbell-Kent-Oakes Dry Goods Co. v. Larimer County Bank & *Trust Co., 75 Colo. 451, 226 P. 293 (1924).*

Content of summons not prescribed.

This section contains no provision that the court set forth any particular matters in the summons. *Security State Bank v. Weingardt, 42 Colo. App. 219, 597 P.2d 1045 (1979).*

Writ of garnishment served upon garnishee is insufficient

if it fails to provide due process notice that a judgment could be entered against the garnishee based solely upon amount of judgment previously entered if garnishee fails to respond. *Don J. Best Trust v. Cherry Creek Nat. Bank, 792 P.2d 303 (Colo. App. 1990).*

A writ of garnishment pursuant to this rule and *C.R.C.P. 403* provides a judgment creditor with an efficient mechanism for garnishing property to satisfy a proper judgment,

provides the judgment debtor with an expedited procedure to protect his or her exempt property, and affords the judgment debtor significantly more process than is required by the *United States and Colorado Constitutions. Ortiz v. Valdez, 971 P.2d 1076 (Colo. App. 1998).*

Garnishment cannot be extended by construction to cases which are not within both its letter and spirit,

although it is true that the garnishment statutes of Colorado specifically require that they shall be liberally construed so as to promote their objects. This applies, however, only to the enforcement of the remedy after jurisdiction has attached; it does not permit courts to enlarge or extend by implication the scope of the statutes, so as to bring within their jurisdiction any cases except those to which the statutes manifestly and clearly apply. As to this, the rule of strict construction prevails, the statutes being in derogation of the common law. Troy Laundry & Mach. Co. v. City & County of Denver, 11 Colo. App. 368, 53 P. 256 (1898);*Black v. Plumb, 94 Colo. 318, 29 P.2d 708 (1934).*

Where a garnishee is doing business within Colorado, service of a writ of garnishment upon it at its place of business properly brings it within the jurisdiction

of the court in a garnishment proceeding. *Garrett v. Garrett, 30 Colo. App. 167, 490 P.2d 313 (1971).*

Where it is claimed that the court does not have jurisdiction, but there was a judgment and execution in the main cause,

regularly obtained, a return of the writ of garnishment, showing due service, gives the court jurisdiction over the garnishee. E.I. Du Pont De Nemours & *Co. v. Lednum, 82 Colo. 472, 260 P. 1017 (1927)* (decided under § 135 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

A garnishment can reach only such property as belongs to the debtor.

Denver Joint Stock Land Bank v. Moore, 93 Colo. 151, 25 P.2d 180 (1933);People ex rel. J.W., 174 P.3d 315 (Colo. App. 2007).

This rule shows an intent that every sort of interest of the debtor might be garnished.

Bank of Grand Junction v. Bank of Vernal, 81 Colo. 483, 256 P. 660 (1927).

The assertion by a garnishee of a jurisdictional defense

to a judgment for which he is sought to be held is not a collateral but a direct attack upon the judgment. *Tabor v. Bank of Leadville, 35 Colo. 1, 83 P. 1060 (1905).*

Dormancy of judgment in foreign state does not defeat rights of creditor under this rule.

Ryan v. Duffield, 899 P.2d 378 (Colo. App. 1995).

Rather than reviving a judgment lien obtained in a foreign state and subsequently recorded in Colorado, garnishments created new and separate liens against the estate of the judgment debtor. Further, the garnishments were not an effort by the judgment creditor to maintain an action in Colorado that could not be maintained in the foreign state, but instead were ancillary to the judgment previously obtained. *Ryan v. Duffield, 899 P.2d 378 (Colo. App. 1995).*

Law reviews.

For note, "A Discussion of Garnishment and Its Exemptions", see 27 Dicta 453 (1950).

Absence of a creditor-debtor relationship between judgment debtor and garnishee

and the existence of an agreement between such parties which specifically negated garnishee's assumption of any of judgment debtor's liability precluded judgment creditors' proceeding against garnishee. *Coin Serv. Investors, Inc. v. Grooms, 743 P.2d 42 (Colo. App. 1987).*

Garnishee is entitled to an evidentiary hearing concerning the validity of the garnished debt

in order to afford due process to the garnishee. *Maddalone v. C.D.C., Inc., 765 P.2d 1047 (Colo. App. 1988).*

Failure to comply with a court order does not supercede requirement to set a hearing.

The court may not sanction a party for his or her failure to comply with a court order by refusing to set a hearing on an objection or claim of exemption. The setting of a hearing is mandatory, not discretionary. *Borrayo v. Lefever, 159 P.3d 657 (Colo. App. 2006).*

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where trial court conducted a timely and thorough hearing at which it heard argument and received evidence in the form of exhibits from the interested parties and at which the husband's counsel neither requested the opportunity to call witnesses nor objected to the proceeding. *In re Gedgaudas, 978 P.2d 677 (Colo. App. 1999).*

A garnishee's answer is made with reference to the facts existing

at the time of the service of a writ of garnishment. Bragdon v. Bradt, 16 Colo. App. 65, 64 P. 248 (1901).

If, at that time, the garnishee owes the defendant a debt,

or has personal property of the defendant in his possession or under his control, he must so answer and abide the judgment of a court. Bragdon v. Bradt, 16 Colo. App. 65, 64 P. 248 (1901).

If, at that time, he is not indebted

to the defendant, or has not in his possession or under his control, any property of the defendant, he is entitled to a discharge. Bragdon v. Bradt, 16 Colo. App. 65, 64 P. 248 (1901).

Garnishee is not answerable for effects of the defendant coming into his hands, or indebtedness accruing from him to the defendant, after the garnishment.

Bragdon v. Bradt, 16 Colo. App. 65, 64 P. 248 (1901).

It is only where the answer of a garnishee shows that he is indebted

to the defendant, has personal property in his possession or under his control belonging to the defendant, or where his answer denying indebtedness to the defendant or possession of his property is successfully controverted that a judgment against him is lawful. Bragdon v. Bradt, 16 Colo. App. 65, 64 P. 248 (1901).

In order to charge him upon his answer,

it must contain a clear admission of a debt due to, or the possession of attachable property of the defendant. Bragdon v. Bradt, 16 Colo. App. 65, 64 P. 248 (1901).

Where his answer is a substantial denial of indebtedness,

or possession of attachable property belonging to the defendant, he is entitled to a judgment of discharge, unless the force of the denial is overcome by other statements in the answer or unless the answer is shown to be untrue. Bragdon v. Bradt, 16 Colo. App. 65, 64 P. 248 (1901).

A delivery by the garnishee to the sheriff can be ordered only where

the answer admits possession in the garnishee of property belonging to the defendant or where, upon a trial of issue joined upon the answer, such possession is found. Bragdon v. Bradt, 16 Colo. App. 65, 64 P. 248 (1901).

"Supplemental answer" held no answer at all where time to answer exhausted.

Bragdon v. Bradt, 16 Colo. App. 65, 64 P. 248 (1901).

Note properly turned over to sheriff.

Where a note in the hands of a garnishee is held pending the result of litigation on final determination of which the note inures to the benefit of the judgment creditor, it is properly turned over to the sheriff with the order that he make disposition of it in the manner required by law. *Union Deposit Co. v. Driscoll, 95 Colo. 140, 33 P.2d 251 (1934).*

A contingent liability is not garnishable.

When a garnishee alleges a contingent liability in his answer to the writ of garnishment, the proper procedure is to allow the garnishor to traverse the garnishee's answer, followed by a trial on the issues framed. *Haselden Langley Constructors, Inc. v. Graybar Elec. Co., 662 P.2d 1064 (Colo. 1983).*

Payment to creditor's attorneys is payment to creditor.

Where money is deposited in court by the garnishee in garnishment proceedings, payment of the fund to attorneys for the garnisheeing creditor is payment to the creditor, and an order to repay part of the fund is proper. *Hahnewald v. Schlapfer, 82 Colo. 313, 260 P. 105 (1927).*

Default for failure of garnishee "to answer or pay"

only applies if guarnishee fails to answer or pay any nonexempt earnings. *People ex rel. J.W., 174 P.3d 315 (Colo. App. 2007).*

Annotator's note.

Since sections (m) and (n) of the prior version of this rule were similar to §§144 and 145 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

Previously, an order denying a motion to discharge a garnishee for failure of plaintiff to traverse answer of garnishee within required period was not appealable

as a "final judgment, decree or order" where no final judgment was entered and garnishee specifically saved right to further challenge court's jurisdiction and nothing in record indicated that court had passed on garnishee's answer. *Steel v. Revielle, 102 Colo. 271, 78 P.2d 980 (1938).*

Still garnishee cannot take advantage of his own delay.

A garnishee, by its own delay having made it impossible for the plaintiff to file the traverse within the time allowed by this section, is in no position to complain, since he cannot take advantage of a situation brought about by his own neglect. *Stollins v. Shideler, 91 Colo. 40, 11 P.2d 562 (1932).*

A traverse stating only conclusions of law and not facts is insufficient.

Day v. Bank of Del Norte, 76 Colo. 223, 230 P. 785 (1924).

The answer of the garnishee and the traverse of the plaintiffs are the only pleadings provided by this rule, and make up the issues in garnishment proceedings.

General Accident Fire & *Life Assurance Corp. v. Mitchell, 120 Colo. 531, 211 P.2d 551 (1949).*

Any new matter pleaded in the traverse is deemed to be denied or avoided.

General Accident Fire & *Life Assurance Corp. v. Mitchell, 120 Colo. 531, 211 P.2d 551 (1949).*

Where the garnishee has no opportunity to plead to a reply

without further pleading, he can avail himself of any defense he might have to the new matter set up in the affidavit. *Jones v. Langhorne, 19 Colo. 206, 34 P. 997 (1893).*

A partner may set up nonjoinder of copartner as a defense.

Where a partner is sued individually for a firm debt he is usually required to plead the nonjoinder of his copartners in order that he may avail himself of this defense, but this general rule has no application to garnishment proceedings under this rule. *Jones v. Langhorne, 19 Colo. 206, 34 P. 997 (1893).*

Subsection 8(b)

making § 13-17-101 et seq. inapplicable. *United Bank v. State Treasurer, 797 P.2d 851 (Colo. App. 1990).*

An award of attorney fees

under this rule is at the trial court's discretion. *United Guar. Residential Ins. Co. v. Dimmick, 916 P.2d 638 (Colo. App. 1996).*

An award of attorney fees, costs, and expenses under section 8(b)

to those fees, costs, and expenses incurred to prepare and file the traverse and prosecute the traverse proceeding. L & *R Exploration Venture v. CCG, LLC, 2015 COA 49, 351 P.3d 569.*

Annotator's note.

Since section 9 of this rule is similar to § 146 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

This section 9 is not mandatory,

and thus, one asserting rights to property which is the subject of garnishment proceedings is free to ignore those garnishment proceedings and file an independent action to enforce those rights. El Paso County Bank v. Charles R. Milisen & *Co., 622 P.2d 594 (Colo. App. 1980).*

In garnishment proceedings, intervention is governed by this rule

which provides that a party shall proceed in accordance with *C.R.C.P. 24*. *Capitol Indus. Bank v. Strain, 166 Colo. 55, 442 P.2d 187 (1968).*

Allegations of the petition in intervention held sufficient to make out a prima facie case for intervening assignee.

Denver Joint Stock Land Bank v. Moore, 93 Colo. 151, 25 P.2d 180 (1933).

With denial of right of intervention constituting reversible error.

Where, in a garnishment proceeding, a third party files a petition in intervention claiming the property involved, he is entitled to have his claim tried and determined, and a denial of that right constitutes reversible error. *Burnett v. Jeffers, 88 Colo. 613, 299 P. 18 (1931).*

Where in due time.

Where the intervention is before the judgment against the garnishee and it cannot be said that the garnishment proceedings have then been determined, the intervention, therefore, is in due time. *Hahnewald v. Schlapfer, 82 Colo. 313, 260 P. 105 (1927).*

It is error for a trial court to quash a garnishment where

the writ of garnishment is issued in accordance with this rule and the answer and return of the garnishee are made within the time prescribed by rule when the regularity of the garnishment proceeding is not attacked and a motion to quash is based wholly upon a claimed right to intervene; but the intervenor tacitly recognizes the validity of the proceedings by having filed its motion to intervene therein. *Capitol Indus. Bank v. Strain, 166 Colo. 55, 442 P.2d 187 (1968).*

An intervention by definition involves third parties,

and such strangers to the original garnishment proceeding, by asserting ownership of the disputed property, necessarily put their ownership status, and all related questions, at issue. *Great Neck Plaza, L.P. v. Le Peep Restaurants, 37 P.3d 485 (Colo. App. 2001).*

Applied in *Susman v. Exchange Nat'l Bank, 117 Colo. 12, 183 P.2d 571 (1947).*

Law reviews.

For article, "Setoff and Security Interests In Deposit Accounts", see 17 Colo. Law. 2108 (1988).

Annotator's note.

Since section (p) of the prior version of this rule was similar to § 147 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

By this section a garnishee is allowed to retain or deduct

out of the property or credits of the defendant in his hands all demands against the defendant of which he could have availed himself had he not been summoned as garnishee. *Tabor v. Bank of Leadville, 35 Colo. 1, 83 P. 1060 (1905).*

Garnishee may plead as a defense or set-off

whatever he might have pleaded were the suit directly against him by his own creditor. *Sauer v. Town of Nevadaville, 14 Colo. 54, 23 P. 87 (1890);Tabor v. Bank of Leadville, 35 Colo. 1, 83 P. 1060 (1905).*

Garnishee is not to be placed in a worse position.

Under no circumstances shall a garnishee, by the operation of the proceedings against him, be placed in any worse condition than he would be if the defendant's claim against him were enforced by the defendant himself. *Tabor v. Bank of Leadville, 35 Colo. 1, 83 P. 1060 (1905);Day v. Bank of Del Norte, 76 Colo. 223, 230 P. 785 (1924).*

Bank receiver was entitled to set-off compensation due him.

Where an attempt is made in a garnishment proceeding to make a bank receiver liable for a judgment against the bank, such receiver is entitled to plead as a defense or set-off the compensation due him by the bank even though his appointment as such was void. *Tabor v. Bank of Leadville, 35 Colo. 1, 83 P. 1060 (1905).*

A garnisheed bank may apply the amount on deposit to the credit of a debtor

to the payment of his note to it although not due. *Day v. Bank of Del Norte, 76 Colo. 223, 230 P. 785 (1924).*

Agreement after service of writ would be void.

An agreement by a garnishee to apply upon or deduct from credits of the defendant in his possession, a loan made by him to the defendant after service of the writ would be void and could not be enforced by any party thereto. *Day v. Bank of Del Norte, 76 Colo. 223, 230 P. 785 (1924).*

Garnishee bank is entitled to claim set-off

against debtor's account for moneys owed to bank even though moneys were not due at time of service of writ of garnishment. Colo. Nat. Bank - *Arvada v. Greaney, 720 P.2d 611 (Colo. App. 1986).*

Landlord's lien.

A lease may create a valid landlord's lien, enforceable under section 8 of this rule as a set-off. *Beneficial Fin. Co. v. Bach, 665 P.2d 1034 (Colo. App. 1983).*

The rights and liabilities of a garnishee are to be determined as of the date of the garnishment

and not upon a state of facts that existed theretofore or thereafter. *Day v. Bank of Del Norte, 76 Colo. 223, 230 P. 785 (1924).*

It is unreasonable to require a garnishee to claim a set-off immediately upon service of the writ of garnishment;

the more reasonable approach allows a garnishee the same time period to claim set-off as allowed to file its answers to the garnishment interrogatories. Colo. Nat. Bank - *Arvada v. Greaney, 720 P.2d 611 (Colo. App. 1986);* Flanders Elec. v. Davall Controls & *Eng., 831 P.2d 492 (Colo. App. 1992).*

It is the responsibility of the trial court to determine the amounts and reasonableness of set-offs,

and, absent an abuse of discretion, its decision will not be overturned. Flanders Elec. v. Davall Controls & *Eng., 831 P.2d 492 (Colo. App. 1992).*

Law firm had statutory charging lien on settlement proceeds.

State's lien for child support did not have priority over charging lien. State was entitled to net settlement proceeds after deduction of attorney fees. A garnishment can only reach property that belongs to the debtor. *People ex rel. J.W., 174 P.3d 315 (Colo. App. 2007).*

Annotator's note.

Since section (i) and (j) of the prior version of this rule were similar to §§138 and 141 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing these sections have been included in the annotations to this rule.

This section puts burden on claimant

not only to assert an interest in the property but also to establish the extent of his interest. *Security State Bank v. Weingardt, 42 Colo. App. 219, 597 P.2d 1045 (1979).*

When a garnishee in his answer states that a third party claims property in his possession

belonging to the debtor, it is the duty of the court to issue a citation or summons to said party requiring him to appear and set up his claim. *Burnett v. Jeffers, 88 Colo. 613, 299 P. 18 (1931).*

However, this rule refers to answers in good faith,

so if a garnishee knows the truth he must tell it and if he tells a falsehood, at least if he tells it for a fraudulent purpose, he must pay damages. International State Bank v. Trinidad Bean & *Elevator Co., 79 Colo. 286, 245 P. 489 (1926).*

Payment to one other than judgment debtor held improper.

Where garnishee-defendant, after answering writ of garnishment, discovers that a contract between it and judgment debtor requires that payments be made jointly to debtor and another, the garnishee-defendant then pays the latter part of the sum which it admitted in its answer was due and owing the judgment debtor, and he files an amended answer to that effect, such payment is improper without a release of garnishment or order of court. *Welbourne Dev. Co. v. Affiliated Clearance Corp., 28 Colo. App. 313, 472 P.2d 684 (1970).*

It is not essential that notice of an assignment be given in advance to a garnishee,

although in the absence of knowledge or notice the latter would be protected against double payment. *Denver Joint Stock Land Bank v. Moore, 93 Colo. 151, 25 P.2d 180 (1933).*

If, during the pendency of garnishment proceedings, it is established that an assignment of the subject-matter antedating the garnishment was actually executed,

the absence of previous notice to the garnishee would be immaterial, and a judgment creditor would not be entitled to notice as such. *Denver Joint Stock Land Bank v. Moore, 93 Colo. 151, 25 P.2d 180 (1933).*

A creditor is entitled to a fund owing defendant by his employer as against the claims of another creditor of which he had no notice

where the claims of which said other creditor are not based on a contract sufficient to bind the fund. This being determined, then the only further action within the jurisdiction of the trial court is, on application, to order a judgment

against the employer in favor of the defendant for the use of the plaintiff pursuant to the terms of this section. *Meyer v. Delta Market, 98 Colo. 421, 57 P.2d 3 (1936).*

Once a third-party claimant has conceded that the disputed property may be garnished by a creditor,

the claimant is thereafter estopped from claiming the proceeds of the garnishment unless there is an agreement otherwise. *Securities Investor Protection Corp. v. Goldberg, 893 F.2d 1139 (10th Cir. 1990).*

Applied in *Susman v. Exchange Nat'l Bank, 117 Colo. 12, 183 P.2d 571 (1947).*

A judgment in the principal proceeding is presumptively valid

while lodged in an appellate court for review. *Zurich Ins. Co. v. Bonebrake, 137 Colo. 37, 320 P.2d 975 (1958).*

Such judgment when not superseded by virtue of a failure to furnish the required bond

leaves a judgment creditor in the position to take usual steps to enforce collection of his judgment, precisely as if supersedeas has not been granted. *Zurich Ins. Co. v. Bonebrake, 137 Colo. 37, 320 P.2d 975 (1958).*

The reversal of a judgment upon which a garnishment is based leaves nothing

to sustain the judgment against the garnishee. *Zurich Ins. Co. v. Bonebrake, 137 Colo. 37, 320 P.2d 975 (1958).*

If the original judgment is reversed, a judgment in garnishment is deprived of a basis

and falls with it. *Zurich Ins. Co. v. Bonebrake, 137 Colo. 37, 320 P.2d 975 (1958).*

The existence of a valid judgment is a jurisdictional prerequisite

to garnishment relief. *Zurich Ins. Co. v. Bonebrake, 137 Colo. 37, 320 P.2d 975 (1958).*

Where the judgment in the main case has been reversed,

then, if it is made the basis of a garnishment, it must follow that a judgment in the garnishment proceeding cannot stand alone and must be reversed. *Zurich Ins. Co. v. Bonebrake, 137 Colo. 37, 320 P.2d 975 (1958).*

Since garnishee's liability is not established.

Where the case which found garnishee's liability is reversed and remanded for new trial, the garnishee's liability is not established, and garnishment should be vacated. *Mitchell v. Am. Family Mut. Ins. Co., 179 Colo. 372, 502 P.2d 79 (1972).*

Applied in E.I. Du Pont De NeMours & *Co. v. Lednum, 82 Colo. 472, 260 P. 1017 (1927).*

Court approval not required.

Subsection 2(h) requires the clerk to disburse funds to the judgment creditor without further application or order. The fact that the judgment debtor had applied for a stay had no effect on the clerk's authority to release the garnished funds. *Ryan v. Duffield, 899 P.2d 378 (Colo. App. 1995).*

Law reviews.

For article, "The Nuts and Bolts of Collecting Support", see 19 Colo. Law. 1595 (1990).

Past-due child support payments in themselves constitute debt.

Colo. State Bank v. Utt, 622 P.2d 584 (Colo. App. 1980).

Amount defendant admittedly owed for past-due child support may be garnished by bank

which held judgment against former wife. *Colo. State Bank v. Utt, 622 P.2d 584 (Colo. App. 1980).*

Foreclosure sale excess proceeds

may be garnished. *TCF Equip. Fin. v. Pub. Trustee, 2013 COA 8, 297 P.3d 1048.*

Law firm had statutory charging lien on settlement proceeds.

State's lien for child support did not have priority over charging lien. State was entitled to net settlement proceeds after deduction of attorney fees. A garnishment can only reach property that belongs to the debtor. *People ex rel. J.W., 174 P.3d 315 (Colo. App. 2007).*

C. R.C.P. 102, this rule, and § 4-8-112 may be harmonized

so that stock certificates may be reached by a creditor either by actual physical seizure, by a writ of attachment, if actually seized, or by serving the person who possesses the certificate with a writ of garnishment. *Moreland v. Alpert, 124 P.3d 896 (Colo. App. 2005).*

End of Document

This document reflects changes received through December 9, 2019.

Rule 403. Garnishment.

NOTE: County Court Rule 403 is identical to *C.R.C.P. 103* except for cross references within the County Court Rule to other County Court Rules. Forms used with the County Court are identical to those used with *C.R.C.P. 103*, and because County Court Rule 403 cites to and incorporates C.R.C.P. Forms 26 through 34, they need not be duplicated in the County Court Forms Section.

This rule sets forth the exclusive process for garnishment. There shall be five (5) types of writs: (1) Writ of Continuing Garnishment, (2) Writ of Garnishment with Notice of Exemption and Pending Levy, (3) Writ of Garnishment for Support, (4) Writ of Garnishment -- Judgment Debtor Other Than Natural Person, and (5) Writ of Garnishment in Aid of Writ of Attachment.

SECTION 1 WRIT OF CONTINUING GARNISHMENT (ON EARNINGS OF A NATURAL PERSON)

(a) Definitions.

(1) "Continuing garnishment" means the exclusive procedure for withholding the earnings of a judgment debtor for successive pay periods for payment of a judgment debt other than a judgment for support as provided in subsection (c) of this rule.

(2) "Earnings" shall be defined in Section 13-54.5-101 (2), C.R.S., as applicable.

(b) Form of Writ of Continuing Garnishment and Related Forms. A writ of continuing garnishment shall be in the form and content of Appendix to Chapters 1 to 17A, Form 26, C.R.C.P. It shall also include at least one (1) "Calculation of Amount of Exempt Earnings" form to be in the form and content of Appendix to Chapters 1 to 17A, Form 27, C.R.C.P. Objection to the calculation of exempt earnings shall be in the form and content of Appendix to Chapters 1 to 17A, Form 28, C.R.C.P.

(c) When Writ of Continuing Garnishment Issues. After entry of judgment when a writ of execution can issue, a writ of continuing garnishment against earnings shall be issued by the clerk of the court upon request of the judgment creditor. Under a writ of continuing garnishment, a judgment creditor may garnish earnings except to the extent such earnings are exempt under law. Issuance of a writ of execution shall not be required.

(d) Service of Writ of Continuing Garnishment. A judgment creditor shall serve two (2) copies of the writ of continuing garnishment, together with a blank copy of C.R.C.P. Form 28, "Objection to the Calculation of the Amount of Exempt Earnings" (Appendix to Chapters 1 to 17A, Form 28, C.R.C.P.), upon the garnishee, one copy of which the garnishee shall deliver to the judgment debtor as provided in subsection (h)(1) of this rule. Service of the writ shall be in accordance with *C.R.C.P. 304*, and the person who serves the writ shall note the date and time of such service on the return service. In any civil action, a judgment creditor shall serve no more than one writ of continuing garnishment upon any one garnishee for the same judgment debtor during the Effective Garnishment Period. This restriction shall not preclude the issuance of a subsequent writ within the Effective Garnishment Period.

(e) Jurisdiction. Service of a writ of continuing garnishment upon the garnishee shall give the court jurisdiction over the garnishee and any earnings of the judgment debtor within the control of the garnishee.

(f) Effective Garnishment Period.

(1) A writ of continuing garnishment shall be a lien and continuing levy against the nonexempt earnings of the judgment debtor until such time as earnings are no longer due, the underlying judgment is vacated, modified or satisfied in full, the writ is dismissed, or for 91 days (13 weeks) following service of the writ, if the judgment was entered prior to August 8, 2001, and 182 days (26 weeks) following service of the writ if the judgment was entered on or after August 8, 2001, except when such writ is suspended pursuant to subsection (j) of this rule.

(2) When a writ of continuing garnishment is served upon a garnishee during the Effective Garnishment Period of a prior writ, it shall be effective for the Effective Garnishment Period following the Effective Garnishment Period of any prior writ.

(3) If a writ of garnishment for support pursuant to *C.R.S. 14-14-105* is served during the effective period of a writ of continuing garnishment, the Effective Garnishment Period shall be tolled and all priorities preserved until the termination of the writ of garnishment for support.

(g) Exemptions. A garnishee shall not be required to deduct, set up or plead any exemption for or on behalf of a judgment debtor excepting as set forth in the Exemption Chart contained in the writ.

(h) Delivery of Copy to Judgment Debtor.

(1) The garnishee shall deliver a copy of the writ of continuing garnishment, together with the calculation of the amount of exempt earnings that is based on the judgment debtor's last paycheck prior to delivery of the writ of continuing garnishment to the judgment debtor and the blank copy of C.R.C.P. Form 28, "Objection to the Calculation of the Amount of Exempt Earnings or For Reduction of Withholding Pursuant to Section 13-54-(2)(a)(I)(D)" (Appendix to Chapters 1 to 17AA, Form 28, C.R.C.P.), to the judgment debtor not later than 7 days after the garnishee is served with the writ of continuing garnishment ~~at the time the judgment debtor receives earnings for the first pay period affected by such writ~~.

(2) For all pay periods affected by the writ, the garnishee shall deliver a copy of the calculation of the amount of exempt earnings and the "Judgment Debtor's Objection to the Calculation of the Amount of Exempt Earnings" to the judgment debtor at the time the judgment debtor receives earnings for that pay period.

(i) Objection to Calculation of Amount of Exempt Earnings. A judgment debtor may object to the calculation of exempt earnings or object and request an exemption of earnings pursuant to section 13-54-104(2)(a)(I)(D), C.R.S. A judgment debtor's objection to calculation of exempt earnings or objection and request for an exemption of earnings pursuant to section 13-54-104(2)(a)(I)(D), C.R.S., shall be in accordance with Section 6 of this rule.

(j) Suspension. A writ of continuing garnishment may be suspended for a specified period of time by the judgment creditor upon agreement with the judgment debtor, which agreement shall be in writing and filed by the judgment creditor with the clerk of the court in which judgment was entered and a copy shall be delivered by the judgment creditor to the garnishee. No suspension shall extend the running of the Effective Garnishment Period nor affect priorities.

(k) Answer and Tender of Payment by Garnishee.

(1) The garnishee shall file ~~the answer to the writ of continuing garnishment~~ with the clerk of the court and send a copy to the judgment creditor no less than 7 ~~nor more than 14~~ days after the garnishee is served with the writ of continuing garnishment a response to the writ of continuing garnishment pursuant to section 13-54.5-105(5), C.R.S.~~following the time the judgment debtor receives earnings for each pay period affected by such writ, or 42 days following the date such writ~~

was served pursuant to section (1)(d) of this rule, whichever is less. However, if the judgment creditor is represented by an attorney, or is a collection agency licensed pursuant to section 12-14-101, et seq., C.R.S., the garnishee shall send such response to the attorney or licensed collection agencypay any nonexempt earnings and deliver a calculation of the amount of exempt earnings to the attorney or the licensed collection agency.

(2) In the event the response required by Section 1(k)(1) of this rule is filed and served pursuant to section 13-54.5-105(5)(b), C.R.S., the garnishee shall begin garnishment of the disposable earnings of the judgment debtor on the first payday of the judgment debtor that occurs at least 21 days after the garnishee was served with the writ of continuing garnishment or the first payday after the expiration date of any prior effective writ of garnishment that is at least 21 days after the garnishee was served with the writ of continuing garnishment.

(32) Unless payment is made to an attorney or licensed collection agency as provided in paragraph (k)(1), the garnishee shall pay any nonexempt earnings and deliver a calculation of the amount of exempt earnings to the clerk of the court which issued such writ no less than 7 nor more than 14 days following the time the judgment debtor receives earnings affected by such writ. However, if the answer and subsequent calculations are mailed to an attorney or licensed collection agency under subsection (k)(1), the payment shall accompany the answer.

(43) Any writ of continuing garnishment served upon the garnishee while any previous writ is still in effect shall be answered by the garnishee with a statement that the garnishee has been previously served with one or more writs of continuing garnishment and/or writs of garnishment for support and specify the date on which such previously served writs are expected to terminate.

(l) Disbursement of Garnished Earnings.

(1) If no objection to the calculation of exempt earnings or objection and request for exemption of earnings pursuant to section 13-54-104(2)(a)(I)(D), C.R.S., is filed by the judgment debtor within 21 days7 days after the garnishee was served with the writ of continuing garnishment judgment debtor received earnings for a pay period, the garnishee shall send the nonexempt earnings to the attorney, collection agency licensed pursuant to section 12-14-101, et seq., C.R.S., or court designated on the writ of continuing garnishment (C.R.C.P. Form 26, page 1, paragraph e). The judgment creditor shall refund to the judgment debtor any disbursement in excess of the amount necessary to satisfy the judgment.

(2) If a written objection to the calculation of exempt earnings is filed with the clerk of the court and a copy is delivered to the garnishee, the garnishee shall send the garnished nonexempt earnings to the clerk of the court. The garnished nonexempt earnings shall be placed in the registry of the court pending further order of the court.

(m) Request for accounting of garnished funds by judgment debtor. Upon reasonable written request by a judgment debtor, the judgment creditor shall provide an accounting in writing of all funds received to the date of the request, including the balance due at the date of the request.

SECTION 2 WRIT OF GARNISHMENT (ON PERSONAL PROPERTY OTHER THAN EARNINGS OF A NATURAL PERSON) WITH NOTICE OF EXEMPTION AND PENDING LEVY

(a) Definition. "Writ of garnishment with notice of exemption and pending levy" means the exclusive procedure through which the personal property of any kind (other than earnings of a natural person) in the possession or control of a garnishee including the credits, debts, choses in action, or money owed to the judgment debtor, whether they are due at the time of the service of the writ or are to become due thereafter, is required to be held for payment of a judgment debt. For the purposes of this rule such writ is designated "writ with notice."

(b) Form of Writ With Notice and Claim of Exemption. A writ with notice shall be in the form and content of Appendix to Chapters 1 to 17A, Form 29, C.R.C.P. A judgment debtor's written claim of exemption shall be in the form and content of Appendix to Chapters 1 to 17A, Form 30, C.R.C.P.

(c) When Writ With Notice Issues. After entry of a judgment when a writ of execution may issue, a writ with notice shall be issued by the clerk of the court upon request. Under such writ any indebtedness, intangible personal property, or tangible personal property capable of manual delivery, other than earnings of a natural person, owed to, or owned by, the judgment debtor, and in the possession or control of the garnishee at the time of service of such writ upon the garnishee, shall be subject to the process of garnishment. Issuance of a writ of execution shall not be required before the issuance of a writ with notice.

(d) Service of Writ With Notice.

(1) Service of a writ with notice shall be made in accordance with *C.R.C.P. 304*.

(2) Following service of the writ with notice on the garnishee, a copy of the writ with notice, together with a blank copy of C.R.C.P. Form 30 "Claim of Exemption to Writ of Garnishment with Notice" (Appendix to Chapters 1 to 17A, Form 30, C.R.C.P.), shall be served upon each judgment debtor whose property is subject to garnishment by such writ as soon thereafter as practicable. Such service shall be in accordance with *C.R.S. 13-54.5-107 (2)*.

(e) Jurisdiction. Service of a writ with notice upon the garnishee shall give the court jurisdiction over the garnishee and any personal property of any description, owned by, or owed to the judgment debtor in the possession or control of the garnishee.

(f) Claim of Exemption. A judgment debtor's claim of exemption shall be in accordance with Section 6 of this rule.

(g) Court Order on Garnishment Answer.

(1) If an answer to a writ with notice shows the garnishee is indebted to the judgment debtor, the clerk shall enter judgment in favor of the judgment debtor and against the garnishee for the use of the judgment creditor in an amount not to exceed the total amount due and owing on the judgment and if the judgment creditor is pro se, request such indebtedness be paid to the registry of the court. However, if the judgment creditor is represented by an attorney or is a collection agency licensed pursuant to 12-14-101, et seq., C.R.S., the garnishee shall pay the funds directly to the attorney or licensed collection agency.

(2) No such judgment and request shall enter until the judgment creditor has made a proper showing that: (A) a copy of the writ with notice was properly served upon the judgment debtor, and (B) no written claim of exemption was filed within 14 days after such service or a written claim of exemption was properly filed and the same was disallowed.

(3) If an answer to a writ with notice shows the garnishee to possess or control intangible personal property or personal property capable of manual delivery owned by the judgment debtor, the court shall order the garnishee to deliver such property to the sheriff to be sold as upon execution and the court may enter any order necessary to protect the interests of the parties. Any proceeds received by the sheriff upon such sale shall be paid to the registry of the court to be applied to the judgment debt, but any surplus of property or proceeds shall be delivered to the judgment debtor.

(4) No such order shall enter until the judgment creditor has made a proper showing that: (A) a copy of the writ with notice was properly served upon the judgment debtor, and (B) no written claim of exemption was filed within 14 days after such service or a written claim of exemption was properly filed with the court and the same was disallowed.

(h) Disbursement by Clerk of Court. The clerk of the court shall disburse funds to the judgment creditor without further application or order and enter the disbursement in the court records. The judgment creditor shall refund to the clerk of the court any disbursement in excess of the amount necessary to satisfy the judgment.

(i) Automatic Release of Garnishee. If a garnishee answers a writ with notice that the garnishee is indebted to the judgment debtor in an amount less than $50.00 and no traverse has been filed, the

garnishee shall automatically be released from said writ if the garnishee shall not have been ordered to pay the indebtedness to the clerk of the court within 182 days from the date of service of such writ.

SECTION 3 WRIT OF GARNISHMENT FOR SUPPORT

(a) Definitions.

(1) "Writ of garnishment for support" means the exclusive procedure for withholding the earnings of a judgment debtor for payment of a judgment debt for child support arrearages, maintenance when combined with child support, or child support debts, or maintenance.

(2) "Earnings" shall be as defined in Section 13-54.5-101 (2), C.R.S., as applicable.

(b) Form of Writ of Garnishment for Support. A writ of garnishment for support shall be in the form and content of Appendix to Chapters 1 to 17A, Form 31, C.R.C.P. and shall include at least four (4) "Calculation of Amount of Exempt Earnings" forms which shall be in the form and content of Appendix to Chapters 1 to 17A, Form 27, C.R.C.P.

(c) When Writ of Garnishment for Support Issues. Upon compliance with *C.R.S. 14-10-122 (1)(c)*, a writ of garnishment for support shall be issued by the clerk of the court upon request. Under such writ a judgment creditor may garnish earnings except to the extent such are exempt under law. Issuance of a writ of execution shall not be required.

(d) Service of Writ of Garnishment for Support. Service of a writ of garnishment for support shall be in accordance with *C.R.C.P. 304*.

(e) Jurisdiction. Service of a writ of garnishment for support upon the garnishee shall give the court jurisdiction over the garnishee and any earnings of the judgment debtor within the control of the garnishee.

(f) Effective Garnishment Period and Priority.

(1) A writ of garnishment for support shall be continuing and shall require the garnishee to withhold, pursuant to law, the portion of earnings subject to garnishment at each succeeding earnings disbursement interval until the judgment is satisfied or the garnishment released by the court or released in writing by the judgment creditor.

(2) A writ of garnishment for support shall have priority over any writ of continuing garnishment notwithstanding the fact such other writ may have been served upon the garnishee previously.

(g) Answer and Tender of Payment by Garnishee.

(1) The garnishee shall answer the writ of garnishment for support no less than 7 nor more than 14 days following the time the judgment debtor receives earnings for the first pay period affected by such writ. If the judgment debtor is not employed by the garnishee at the time the writ is served, the garnishee shall answer the writ within 14 days from the service thereof.

(2) The garnishee shall pay any nonexempt earnings and deliver a calculation of the amount of exempt earnings, to the clerk of the court which issued such writ no less than 7 nor more than 14 days following the time the judgment debtor receives earnings during the Effective Garnishment Period to such writ.

(h) Disbursement of Garnished Earnings. The clerk of the court shall disburse nonexempt earnings to the judgment creditor without further application or order and enter such disbursement in the court records. The judgment creditor shall refund to the clerk of the court any disbursement in excess of the amount necessary to satisfy the judgment.

SECTION 4 WRIT OF GARNISHMENT -- JUDGMENT DEBTOR OTHER THAN NATURAL PERSON

(a) Definition. "Writ of garnishment -- judgment debtor other than natural person" means the exclusive procedure through which personal property of any kind of a judgment debtor other than a natural person in the possession or control of the garnishee including the credits, debts, choses in action, or

money owed to the judgment debtor, whether they are due at the time of the service of the writ or are to become due thereafter is required to be held by the garnishee for payment of a judgment debt. For purposes of this rule, such writ is designated "writ of garnishment -- other than natural person."

(b) Form of Writ of Garnishment -- Other Than Natural Person. A writ of garnishment under this Section shall be in the form and content of Appendix to Chapters 1 to 17A, Form 32, C.R.C.P.

(c) When Writ of Garnishment -- Other Than Natural Person Issues. When the judgment debtor is other than a natural person, after entry of a judgment, and when a writ of execution may issue, a writ of garnishment shall be issued by the clerk of the court upon request. Under such writ of garnishment, the judgment creditor may garnish personal property of any description owned by, or owed to, such judgment debtor and in the possession or control of the garnishee. Issuance of a writ of execution shall not be required.

(d) Service of Writ of Garnishment -- Other Than Natural Person. Service of the writ of garnishment -- other than natural person shall be made in accordance with *C.R.C.P. 304*. No service of the writ or other notice of levy need be made on the judgment debtor.

(e) Jurisdiction. Service of the writ of garnishment -- other than natural person shall give the court jurisdiction over the garnishee and personal property of any description, owned by, or owed to, a judgment debtor who is other than a natural person, in the possession or control of the garnishee.

(f) Court Order on Garnishment Answer. When the judgment debtor is other than a natural person:

(1) If the answer to a writ of garnishment shows the garnishee is indebted to such judgment debtor, the clerk shall enter judgment in favor of such judgment debtor and against the garnishee for the use of the judgment creditor for the amount of the indebtedness shown in such answer and if the judgment creditor is pro se, request such indebtedness paid into the registry of the court. However, if the judgment creditor is represented by an attorney or is a collection agency licensed pursuant to 12-14-101, et seq., C.R.S., the garnishee shall pay the funds directly to the attorney or licensed collection agency. In no event shall any judgment against the garnishee be more than the total amount due and owing on the judgment.

(2) If the answer to a writ of garnishment shows the garnishee to possess or control personal property of any description, owned by, or owed to, such judgment debtor, the court shall order the garnishee to deliver such property to the sheriff to be sold as upon execution and the court may enter any order necessary to protect the interests of the parties. Any proceeds received by the sheriff upon such sale shall be paid to the registry of the court to be applied to the judgment debt, but any surplus of property or proceeds shall be delivered to the judgment debtor.

(g) Disbursement by Clerk of Court. The clerk of the court shall disburse any funds in the registry of court to the judgment creditor without further application or order and enter such disbursement in the court records. The judgment creditor shall refund to the clerk of the court any disbursement in excess of the amount necessary to satisfy the judgment.

SECTION 5 WRIT OF GARNISHMENT IN AID OF WRIT OF ATTACHMENT

(a) Definition. "Writ of garnishment in aid of writ of attachment" means the exclusive procedure through which the personal property of any kind of a defendant in an attachment action (other than earnings of a natural person) in the possession or control of the garnishee including the credits, debts, choses in action, or money owed to the judgment debtor, whether they are due at the time of the service of the writ or are to become due thereafter, is required to be held by a garnishee. For the purposes of this rule such writ is designated "writ of garnishment in aid of attachment."

(b) Form of Writ of Garnishment in Aid of Attachment and Form of Notice of Levy. A writ of garnishment in aid of attachment shall be in the form and content of Appendix to Chapters 1 to 17A, Form 33, C.R.C.P. A Notice of Levy shall be in the form and content of Appendix to Chapters 1 to 17A, Form 34, C.R.C.P.

(c) When Writ of Garnishment in Aid of Attachment Issues. At any time after the issuance of a writ of attachment in accordance with *C.R.C.P. 402*, a writ of garnishment shall be issued by the clerk of the court upon request. Under such writ of garnishment the plaintiff in attachment may garnish personal property of any description, except earnings of a natural person, owed to, or owned by, such defendant in attachment and in the possession or control of the garnishee.

(d) Service of Writ of Garnishment in Aid of Attachment. Service of the writ of garnishment in aid of attachment shall be made in accordance with *C.R.C.P. 304*. If the defendant in attachment is a natural person, service of a notice of levy shall be made as required by *C.R.S. 13-55-102*. If the defendant in attachment is other than a natural person, a notice of levy need not be served on the defendant in attachment.

(e) Jurisdiction. Service of the writ of garnishment in aid of attachment shall give the court jurisdiction over the garnishee and personal property of any description (except earnings of a natural person), owned by, or owed to, a defendant in attachment in the possession or control of the garnishee.

(f) Court Order on Garnishment Answer.

(1) When the defendant in attachment is an entity other than a natural person:

(A) If the answer to a writ of garnishment in aid of attachment shows the garnishee is indebted to such defendant in attachment, the clerk shall enter judgment in favor of such defendant in attachment and against the garnishee for the use of the plaintiff in attachment for the amount of the indebtedness shown in such answer and order such amount paid into the registry of the court. In no event shall any judgment against the garnishee be more than the total amount due and owing nor shall such judgment enter for the benefit of a plaintiff in attachment until a judgment has been entered by the court against such defendant in attachment.

(B) If the answer to a writ of garnishment in aid of attachment shows the garnishee to possess or control personal property of any description, owned by, or owed to, such defendant in attachment, at any time after judgment has entered against such defendant in attachment, the court shall order the garnishee to deliver such property to the sheriff to be sold as upon execution and the court may enter any order necessary to protect the interests of the parties. Any proceeds received by the sheriff upon such sale shall be paid to the registry of the court to be applied to the judgment debt, but any surplus of property or proceeds shall be delivered to the judgment debtor/defendant in attachment.

(2) When the defendant in attachment is a natural person:

(A) If the answer to a writ of garnishment in aid of attachment shows the garnishee is indebted to such defendant in attachment, after judgment has entered against such defendant in attachment/judgment debtor upon a showing that such defendant in attachment has been served with a notice of levy as required by *C.R.S. 13-55-102*, the court shall enter judgment in favor of the defendant in attachment/judgment debtor and against the garnishee for the use of the plaintiff in attachment/judgment creditor for the amount of the indebtedness shown in such answer and order such amount paid into the registry of the court. In no event shall any judgment against the garnishee be more than the amount of the judgment against the defendant in attachment/judgment debtor.

(B) If the answer to a writ of garnishment in aid of attachment shows the garnishee to possess or control personal property owned by, or owed to, such defendant in attachment, after judgment has entered against such defendant in attachment/judgment debtor and upon a showing that such defendant in attachment has been served with a notice of levy as required by *C.R.S. 13-55-102*, the court shall order the garnishee to deliver the property to the sheriff to be sold as upon execution and the court may enter any order necessary to protect the interests of the parties. Any proceeds received by the sheriff upon such sale shall be paid to the registry of the court to be applied to the judgment debt but any surplus of property or proceeds shall be delivered to the defendant in attachment/judgment debtor.

(g) Disbursement by Clerk of Court. The clerk of the court shall disburse any funds in the registry of the court to the judgment creditor without further application or order and enter such disbursement in the court records. The judgment creditor shall refund to the clerk of the court any disbursement in excess of the amount necessary to satisfy the judgment.

SECTION 6 JUDGMENT DEBTOR'S OBJECTION -- WRITTEN CLAIM OF EXEMPTION -- HEARING

(a) Judgment Debtor's Objection to Calculation of Exempt Earnings or Objection and Request for Exemption of Earnings Pursuant to Section 13-54-104(2)(a)(I)(D), C.R.S,, Under Writ of Continuing Garnishment.

(1) If a judgment debtor objects to the initial or a subsequent calculation of the amount of exempt earnings, the judgment debtor shall have 7 days from the receipt of the copy of the writ of garnishment or calculation of the amount of exempt earnings for subsequent pay periods, within which to resolve the issue of such miscalculation by agreement with the garnishee.

(2) If the judgment debtor's objection to the calculation of exempt earnings is not resolved with the garnishee within 7 days upon good faith effort, the judgment debtor may file a written objection setting forth, with reasonable detail, the grounds for such objection. Such objection must be filed within 14 days from receipt of the copy of writ of garnishment or calculation of the amount of exempt earnings for subsequent pay periods.

(3) If the judgment debtor objects and requests an exemption of earnings pursuant to section13-54-104(2)(a)(I)(D), C.R.S., the judgment debtor shall have no obligation to attempt to resolve the issue with the garnishee.

(4) If the judgment debtor objects and requests an exemption of earnings pursuant to section 13-54-104(2)(a)(I)(D), C.R.S., the judgment debtor shall file such objection and request in writing, setting out the grounds for such exemption and request. Such objection and request must be filed within 14 days after receipt by the judgment debtor of a copy of the writ of continuing garnishment **or receipt of the calculation of exempt earnings for any pay period subsequent to the first pay period when the judgment debtor's earnings were subject to garnishment.**

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(53) The written objection made under Section 6(a)(2) or Section 6(a)(4) of this rule shall be filed with the clerk of the court by the judgment debtor in the form and content of Appendix to Chapters 1 to 17A, Form 28, C.R.C.P.

(64) The judgment debtor shall, by certified mail, return receipt requested, immediately deliver a copy of such objection to the garnishee and the judgment creditor's attorney of record, or if none, to the judgment creditor. If the garnishee has been directed to transmit the nonexempt earnings to an attorney or a collection agency licensed pursuant to section 12-14-101, et seq, C.R.S., then upon receipt of the objection, the garnishee shall transmit the nonexempt earnings to the clerk of the court.

(75) Upon the filing of a written objection, all proceedings with relation to the earnings of the judgment debtor in possession and control of the garnishee, the judgment creditor, the attorney for the judgment creditor, or in the registry of the court shall be stayed until the written objection is determined by the court.

(b) Judgment Debtor's Claim of Exemption Under a Writ With Notice.

(1) When a garnishee, pursuant to a writ with notice, holds any personal property of the judgment debtor, other than earnings, which the judgment debtor claims to be exempt, the judgment debtor, within 14 days after being served a copy of such writ as required by Section 2 (d)(2) of this rule, shall make and file a written claim of exemption with the clerk of the court in which the judgment was entered.

(2) The claim of exemption to the writ of garnishment with notice shall be in the form and content of Appendix to Chapters 1 to 17A, Form 30, C.R.C.P.

(3) The judgment debtor shall, by certified mail, return receipt requested, deliver a copy of the claim of exemption to the garnishee and the judgment creditor's attorney of record, or if none, to the judgment creditor.

(4) Upon the filing of a claim of exemption to a writ with notice, all proceedings with relation to property in the possession or control of the garnishee shall be stayed until such claim is determined by the court.

(c) Hearing on Objection or Claim of Exemption.

(1) Upon the filing of an objection pursuant to Section 6 (a) of this rule or the filing of a claim of exemption pursuant to Section 6 (b) of this rule, the court in which the judgment was entered shall set a time for hearing of such objection or claim of exemption which hearing shall not be more than 14 days after the filing of such objection or claim of exemption.

(2) When an objection or claim of exemption is filed, the clerk of the court shall immediately inform the judgment creditor, the judgment debtor and the garnishee, or their attorneys of record, by telephone, by mail, or in person, of the date and time of such hearing.

(3) The clerk of the court shall document in the court record that notice of the hearing has been given in the manner required by this rule. Said documentation in the court record shall constitute a sufficient return and prima facie evidence of such notice.

(4) The court in which judgment was entered shall conduct a hearing at which all interested parties may testify, and shall determine the validity of the objection or claim of exemption filed by the judgment debtor and shall enter a judgment in favor of the judgment debtor to the extent of the validity of the objection or claim of exemption, which judgment shall be a final judgment for the purpose of appellate review.

(5) If the court shall find the amount of exempt earnings to have been miscalculated or if said property is found to be exempt, the court shall order the clerk of the court to remit the amount of over-garnished earnings, or the garnishee to remit such exempt property to the clerk of the court for the use and benefit of the judgment debtor within three (3) business days.

(d) Objection or Claim of Exemption Within 182 days.

(1) Notwithstanding the provisions of Section 6 (a)(2), Section 6(a)(4) and Section 6 (b)(1) of this rule, a judgment debtor failing to make and file a written objection or claim of exemption within the time therein provided, may, at any time within 182 days from receipt of the copy of the writ with notice or a copy of the writ of continuing garnishment or the calculation of the amount of exempt earnings, move the court in which the judgment was entered to hear an objection or claim of exemption as to any earnings or property levied in garnishment which the judgment debtor claims to have been miscalculated or which the judgment debtor claims to be exempt.

(2) A hearing pursuant to this subsection shall be held only upon a verified showing, under oath, of good cause which shall include: mistake, accident, surprise, irregularity in proceedings, newly discovered evidence, events not in the control of the judgment debtor, or such other grounds as the court may allow, but in no event shall a hearing be held pursuant to this subsection on grounds available to the judgment debtor as the basis of an objection or claim of exemption within the time periods provided in Section 6 (a)(2) and Section 6 (b)(1).

(3) At such hearing, if the judgment giving rise to such claim has been satisfied against property or earnings of the judgment debtor, the court shall hear and summarily try and determine whether the amount of the judgment debtor's earnings paid to the judgment creditor was correctly calculated and whether the judgment debtor's property sold as upon execution was exempt. If the court finds earnings to have been miscalculated of if property is found to be exempt, the court shall enter judgment in favor of the judgment debtor for the amount of the over-garnished earnings or such exempt property or the value thereof which judgment shall be satisfied by payment to the clerk of the court or the return of exempt property to the judgment debtor within three (3) business days.

(e) Reinstatement of Judgment Debt. If at any time the court orders a return of over-garnished earnings or exempt property or the value of such exempt property pursuant to Sections 6 (c)(5) and 6 (d)(3) of this rule, the court shall thereupon reinstate the judgment to the extent of the amount of such order.

SECTION 7 FAILURE OF GARNISHEE TO ANSWER (ALL FORMS OF GARNISHMENT)

(a) Default Entered by Clerk of Court.

(1) If a garnishee, having been served with any form of writ provided for by this rule, fails to answer or pay any nonexempt earnings as directed within the time required, the clerk of the court shall enter a default against such garnishee upon request.

(2) No default shall be entered in an attachment action against the garnishee until the expiration of 42 days after service of a writ of garnishment upon the garnishee.

(b) Procedure After Default of Garnishee Entered.

(1) After a default is entered, the judgment creditor, plaintiff in attachment or any intervenor in attachment, may proceed before the court to prove the liability of the garnishee to the judgment debtor or defendant in attachment.

(2) If a garnishee is under subpoena to appear before the court for a hearing to prove such liability and such subpoena shall have been issued and served in accordance with *C.R.C.P. 345* and shall fail to appear, the court shall thereupon enter such sanctions as are just, including, but not limited to, contempt of court, issuance of a bench warrant, reasonable attorney fees and the cost and expense of the judgment creditor, plaintiff in attachment or intervenor in attachment.

(3) Upon hearing, if the court finds the garnishee liable to the judgment debtor or defendant in attachment or in the possession or control of personal property of the judgment debtor or defendant in attachment at the time of service of the writ:

(A) The court shall enter judgment in favor of the judgment debtor or defendant in attachment against the garnishee for the use and benefit of the judgment creditor, plaintiff in attachment or intervenor in attachment, if the garnishee was liable to the judgment debtor or defendant in attachment;

(B) The court shall order the garnishee to deliver the personal property to the sheriff to be sold as upon execution in the same manner as section 4 (f)(2) of this rule, if the garnishee was in the possession or control of personal property of the judgment debtor or defendant in attachment and may enter any order necessary to protect the interests of the parties. Provided, however, in the event that the garnishee no longer has possession or control over the personal property, the court may either enter a judgment for the value of such property at the time of the service of the writ or enter any order necessary to protect the interests of the parties or both.

(4) At any hearing the court shall make such orders as to reasonable attorney's fees, costs and expense of the parties to such hearing, as are just.

SECTION 8 TRAVERSE OF ANSWER (ALL FORMS OF GARNISHMENT)

(a) Time for Filing of Traverse. The judgment creditor, plaintiff in attachment or intervenor in attachment, may file a traverse of an answer to any form of writ provided by this rule provided such traverse is filed within the greater time period of 21 days from the date such answer should have been filed with the court or 21 days after such answer was filed with the court. The failure to timely file a traverse shall be deemed an acceptance of the answer as true.

(b) Procedure.

(1) Within the time provided, the judgment creditor, plaintiff in attachment, or intervenor in attachment, shall state, in verified form, the grounds of traverse and shall mail a copy of the same to the garnishee in accordance with *C.R.C.P. 305*.

(2) Upon application of the judgment creditor, plaintiff in attachment, or intervenor in attachment, the traverse shall be set for hearing before the court at which hearing the statements in the traverse shall be deemed admitted or denied.

(3) Upon hearing of the traverse, if the court finds the garnishee liable to the judgment debtor or defendant in the attachment or in the possession or control of personal property of the judgment debtor or defendant in attachment at the time of service of the writ:

(A) The court shall enter judgment in favor of the judgment debtor or defendant in attachment against the garnishee for the use and benefit of the judgment creditor, plaintiff in attachment of intervenor in attachment, if the garnishee was liable to the judgment debtor or defendant in attachment;

(B) The court shall order the garnishee to deliver the personal property to the sheriff to be sold as upon execution in the same manner as section 4 (f)(2) of this rule, if the garnishee was in the possession or control of personal property of the judgment debtor or defendant in attachment and may enter any order necessary to protect the interests of the parties. Provided, however, in the event that the garnishee no longer has possession or control over the personal property, the court may either enter a judgment for the value of such property at the time of the service of the writ or enter any order necessary to protect the interests of the parties or both.

(4) If a garnishee is under subpoena to appear for a hearing upon a traverse and such subpoena shall have been issued and served in accordance with *C.R.C.P. 345*, and shall fail to appear, the court shall thereupon enter such sanctions as are just, including, but not limited to, contempt of court, issuance of a bench warrant, reasonable attorney fees and the cost and expense of the judgment creditor, plaintiff in attachment or intervenor in attachment.

(5) At any hearing upon a traverse, the court shall make such orders as to reasonable attorney fees, costs and expense of the parties to such hearing as are just.

SECTION 9 INTERVENTION (ALL FORMS OF GARNISHMENT) Any person who claims an interest in any personal property of any description of a judgment debtor or defendant in attachment which property is the subject of any answer made by a garnishee, may intervene as provided in *C.R.C.P. 324* at any time prior to entry of judgment against the garnishee.

SECTION 10 SET-OFF BY GARNISHEE (ALL FORMS OF GARNISHMENT) Every garnishee shall be allowed to claim as a set-off and retain or deduct all demands or claims on the part of the garnishee against any party to the garnishment proceedings, which the garnishee might have claimed if not summoned as a garnishee, whether such are payable or not at the time of service of any form or writ provided for by this rule.

SECTION 11 GARNISHEE NOT REQUIRED TO DEFEND CLAIMS OF THIRD PERSONS (ALL FORMS OF GARNISHMENT)

(a) Garnishee With Notice. A garnishee with notice of the claim of a third person in any property of any description of a judgment debtor or defendant in attachment which is the subject of any answer made by the garnishee in response to any form of writ provided for by this rule shall not be required to defend on account of such claim, but shall state in such answer that the garnishee is informed of such claim of a third person.

(b) Court to Issue Summons. When such an answer has been filed, the clerk of the court, upon application, shall issue a summons requiring such third person to appear within the time specified in *C.R.C.P. 312* to answer, set up, and assert a claim or be barred thereafter.

(c) Delivery of Property by Garnishee.

(1) If the answer states that the garnishee is informed of the claim of a third person, the garnishee may at any time pay to the clerk of the court any garnished amount payable at the time of the service of any writ provided for by this rule, or deliver to the sheriff any property the garnishee is required to hold pursuant to any form of writ provided for in this rule.

(2) Upon service of the summons upon such third person pursuant to *C.R.C.P. 304*, the garnishee shall thereupon be released and discharged of any liability to any person on account of such indebtedness to the extent of any amount paid to the clerk of the court or any property delivered to the sheriff.

SECTION 12 RELEASE AND DISCHARGE OF GARNISHEE (ALL FORMS OF GARNISHMENT)

(a) Effect of Judgment. A judgment against a garnishee shall release and discharge such garnishee from all claims or demands of the judgment debtor or defendant in attachment to the extent of all sums paid or property delivered by the garnishee pursuant to such judgment.

(b) Effect of Payment. Payment by a garnishee of any sums required to be remitted by such garnishee pursuant to Sections 1 (k)(2) or 3 (g)(2) of this rule shall release and discharge such garnishee from all claims or demands of the judgment debtor to the extent of all such sums paid.

(c) Release by Judgment Creditor or Plaintiff in Attachment. A judgment creditor or plaintiff in attachment may issue a written release of any writ provided by this rule. Such release shall state the effective date of the release and shall be promptly filed with the clerk of the court.

SECTION 13 GARNISHMENT OF PUBLIC BODY (ALL FORMS OF GARNISHMENT)

Any writ provided for in this rule wherein a public body is designated as the garnishee, shall be served upon the officer of such body whose duty it is to issue warrants, checks or money to the judgment debtor or defendant in attachment, or, such officer as the public body may have designated to accept service. Such officer need not include in any answer to such writ, as money owing, the amount of any warrant or check drawn and signed prior to the time of service of such writ.

EFFECTIVE DATE OF RULE AND AMENDMENTS OF THIS RULE

Repealed October 31, 1991, effective November 1, 1991.

History

Source: Repealed and readopted November 5, 1984, effective January 1, 1985; section 1(d), (f)(1), (f)(2), and (h)(1), section 2(a), (d)(2), and (e), section 3(a)(1) and (c), section 4(a) and (d), section 5(a) and (d), section 7(a)(1), (b)(3), and (b)(4), section 8(b)(3), section 12, and effective date amended February 16, 1989, effective July 1, 1989; section 1(a)(2) and section 3(a)(2) amended, section 3(a)(2) committee comment added, and effective date repealed October 31, 1991, effective November 1, 1991; section 1(k)(1), (k)(2) and (l) amended and (m) added, section 6(a)(3), (a)(4), and (a)(5) amended, section 7(a)(1) amended, and section 12(b) amended and adopted October 30, 1997, effective January 1, 1998; section 1(d), (f), and (j) and section 3(f) and (g)(2) amended and adopted June 28, 2001, effective August 8, 2001; section 1(k)(1) and (k)(2) amended and effective November 18, 2010; section 1(f)(1), (k)(1), (k)(2), and (l)(1), section 2(g)(2) and (g)(4), section 3(g), section 6(a)(1), (a)(2), (b)(1), and (c)(1), section 7(a)(2), and section 8(a) amended and adopted December 14, 2011, effective July 1, 2012; section 2(g)(2) and (g)(4) corrected June 15, 2012, nunc pro tunc, December 14, 2011, effective July 1, 2012; section 2(g)(1) amended and effective June 7, 2013; section 4(f)(1) amended and adopted January 29, 2016, effective March 1, 2016; section 1(b), (c), (g), (h)(1), (h)(2), (k)(1), (k)(2), (l)(1), and (l)(2), section 2(i), section 6 IP(d), (d)(1), and section 7(a)(2) amended and adopted January 12, 2017, effective March 1, 2017.

Annotations

Notes

COMMITTEE COMMENT

The Colorado Legislature amended Section 13-54-104 and 13-54.5-101, C.R.S. (Section 7 of Chapter 65, Session Laws of Colorado 1991), which changed the definition of "earnings" applicable only to actions commenced on or after May 1, 1991. The amendment impacts the ability to garnish certain forms of income, depending upon when the original action was commenced. Sections 1 and 3 of the Rule and Forms 26 and 31 have been revised to deal with this legislative amendment.

End of Document

❑County Court ❑District Court _____ County, Colorado Court Address: Plaintiff(s)/Petitioner(s): v. Defendant(s)/Respondent(s):	▲ **COURT USE ONLY** ▲
Judgment Creditor's Attorney or Judgment Creditor (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

WRIT OF CONTINUING GARNISHMENT

READ THIS WHOLE DOCUMENT

Judgment Debtor's name, last known physical and mailing addresses or a statement that Judgment Debtor's physical and mailing addresses are not known, and other identifying information: _____
_____
_____

1. Original or Revived Amount of Judgment Entered on _____ (date) for $_____

a. Effective Garnishment Period
- ❑91 days (Judgment entered prior to August 8, 2001)
- ❑182 days (Judgment entered on or after August 8, 2001)

2. Plus any Interest Due on Judgment (currently_____% per annum) $_____

3. Taxable Costs (including estimated cost of service of this Writ) $_____

4. Less any Amount Paid $_____

5. Principal Balance/Total Amount Due and Owing $_____

I affirm under penalty of perjury that I am authorized to act for the Judgment Creditor and this is a correct statement as of _____ (date).

❑ By checking this box, I am acknowledging I am filling in the blanks and not changing anything else on the form.

❑ By checking this box, I am acknowledging that I have made a change to the original content of this form.

_____
Print Judgment Creditor's Name

Address: _____
_____

By: _____
Signature (Type Name, Title, Address and Phone)

WRIT OF CONTINUING GARNISHMENT

THE PEOPLE OF THE STATE OF COLORADO to the Sheriff of any Colorado County or to any person 18 years or older and who is not a party to this action:

You are directed to serve ~~**TWO COPIES** of~~ this Writ of Continuing Garnishment upon _____, Garnishee, with proper return of service to be made to the Court.

TO THE GARNISHEE: YOU ARE SUMMONED AS GARNISHEE IN THIS ACTION AND ORDERED:

a. To answer the following questions under oath and file your answers with the Clerk of Court AND mail a completed copy with your answers to the Judgment Creditor or attorney no later than 7 days after you have been served with this writ. ~~nor more than 14 days following the time you pay the Judgment Debtor for the first time following service of this Writ, or 42 days following service of this Writ upon you, whichever is less.~~ **YOUR FAILURE TO ANSWER THIS WRIT OF CONTINUING GARNISHMENT MAY RESULT IN THE ENTRY OF A DEFAULT AGAINST YOU.**

b. To pay any nonexempt earnings to the party designated in "e" below no less than 7 nor more than 14 days following each time you pay the Judgment Debtor during the effective Garnishment Period of this Writ and attach a copy of the Calculation of the Amount of Exempt Earnings used (the Calculation under "Questions to be Answered by Garnishee" should be used for the first pay period, and one of the multiple Calculation forms included with this Writ should be used for all subsequent pay periods).

c. To deliver a copy of this Writ, together with the Calculation of the Amount of Exempt Earnings, and a blank Objection to Calculation of the Amount of Exempt Earnings form, and an Explanation Of Wage Garnishment In Colorado to Judgment Debtor on the same day the copy of this Writ and Calculation of the Amount of Exempt Earnings are sent to Judgment Creditor ~~the first time you pay the Judgment Debtor~~.

d. To deliver to the Judgment Debtor a copy of each subsequent Calculation of the Amount of Exempt Earnings each time you pay the Judgment Debtor for earnings subject to this Writ.

e. **MAKE CHECKS PAYABLE AND MAIL TO:** ❑Judgment Creditor named above (only if the Judgment Creditor is a licensed collection agency pursuant to 12-14-101, et. seq., C.R.S.); ❑Judgment Creditor's Attorney (if applicable); or to the ❑ Clerk of the ❑County Court or ❑District Court in _____ (city), Colorado (Must select if the Judgment Creditor is not represented by an attorney AND is not a licensed collection agency pursuant to 12-14-101, et. seq., C.R.S.)

Name: _____
Address: _____
PLEASE PUT THE CASE NUMBER (shown above) ON THE FRONT OF THE CHECK.

CLERK OF THE COURT **By Deputy Clerk:** _____
Date: _____

NOTICE TO GARNISHEE

a. This Writ applies to all nonexempt earnings owed or owing during the Effective Garnishment Period shown on Line 1a on the front of this Writ or until you have paid to the party, designated in paragraph "e" on the front of this Writ, the amount shown on Line 5 on the front of this Writ, whichever occurs first. **However, if you have already been served with a Writ of Continuing Garnishment for Child Support, this new Writ is effective for the Effective Garnishment Period after any prior Writ terminates.**

b. "**Earnings" includes all forms of compensation for Personal Services.** Also read "Notice to Judgment Debtor" below.

c. In no case may you withhold any amount greater than the amount on Line 5 on the front of this Writ.

d. **If you determine that the judgment debtor is your employee and the Writ of Continuing Garnishment contains all required information, you are required to send the judgment debtor this Writ of Continuing Garnishment and the document attached to it titled "EXPLANATION OF WAGE GARNISHMENT IN COLORADO" on the same day that you send your answer to this Writ of Continuing Garnishment to the judgment creditor.**

QUESTIONS TO BE ANSWERED BY GARNISHEE

Judgment Debtor's Name: _____ **Case Number:** _____

The following questions MUST be answered by you under oath:

a. Is the judgement debtor your employee?
1. ❑Yes
2. ❑No

b. Does the Writ of Continuing Garnishment contain: the name of the Judgment Debtor, the last-known physical and mailing addresses of the Judgment Debtor or a statement that the information is not known, the amount of the Judgment, information

sufficient to identify the judgment on which the continuing garnishment is based, an Explanation of Wage Garnishment in Colorado?

1. ❑Yes
2. ❑No

c. On the date and time this Writ of Continuing Garnishment was served upon you, did you owe or do you anticipate owing any of the following to the Judgment Debtor within the Effective Garnishment Period shown on Line 1a on the front of this Writ? (Mark appropriate box(es)):

1. ❑WAGES/SALARY/COMMISSIONS/BONUS/OTHER COMPENSATION FOR PERSONAL SERVICES NOT INCLUDING TIPS (Earnings)

2. ❑Health, Accident or Disability Insurance Funds or Payments

3. ❑Pension or Retirement Benefits (for suits commenced prior to 5/1/91 ONLY - check front of Writ for date)

4. ❑Health insurance coverage provided by you and withheld from the individual's earnings

If you marked any box above, indicate how the Judgment debtor is paid: ❑weekly ❑bi-weekly ❑semi-monthly ❑monthly ❑other

The Judgment Debtor will be paid on the following dates during the Effective Garnishment Period shown on Line1a (front of this Writ), starting at least twenty-one days after you were served with this Writ of Garnishment:_____
_____

d. ~~Are you under one or more of the following writs of garnishment? (Mark appropriate box(es)):~~ Are the Judgment Debtor's earnings subject to deductions other than withholding for local, state, and federal income taxes and pursuant to the "Federal Insurance Contributions Act", 26 U.S.C. sec. 3101 et seq., as amended? If so mark the appropriate boxes and list the nature, number, and amounts of these deductions and the relative priority of this Writ of Garnishment (Mark appropriate box(es)):

~~❑Writ of Continuing Garnishment (Expected Termination Date: _____)~~

5. ❑Writ of Garnishment for Support (Expected Termination Date: _____)

6. ❑Writ of Continuing Garnishment (Expected Termination Date: _____)

7. ❑Any additional deductions (Expected Termination Date: _____)

e. If in paragraph c. above you marked Box 1 and you did NOT mark either Box ~~4 or 5~~5, 6, or 7, complete the Calculation below for each pay period following receipt of this Writ. If you marked either Box 4 or 5, you must complete Calculations beginning with the first pay period following termination of the prior writ(s).

f. If in paragraph c. above you marked Box ~~2 or 3~~ , 2, 3, or 4 and you did NOT mark either Box ~~4 or 5~~5, 6, or 7, complete the Calculation below for each pay period following receipt of this Writ. If you marked either box ~~4 or 5~~5, 6, or 7, you must complete Calculations beginning with the first pay period following termination of the prior writ(s) that is at least twenty-one days after service of this writ on you. However, there are a number of total exemptions, and you should seek legal advice about such exemptions. **If the earnings are totally exempt, please mark box ~~6~~8 below:**

8. ❑The earnings are totally exempt because:_____

CALCULATION OF THE AMOUNT OF EXEMPT EARNINGS (Each Pay Period)

Gross Earnings for the pay period from _____ thru _____	$ _____
Less Deductions Required by Law (For Example, Withholding Taxes , FICA, Costs for Employer-Provided Health Insurance Withheld From Earnings)	- $ _____
Disposable Earnings (Gross Earnings less Deductions)	= $ _____
Less Statutory Exemption (Use Exemption Chart Below)	- $ _____
Net Amount Subject to Garnishment	= $ _____
Less Wage/Income Assignment(s) During Pay Period (If Any)	- $ _____
Amount to be withheld and paid	= $ _____

EXEMPTION CHART ("Minimum Hourly Wage" means state or federal minimum wage, whichever is greater.)	PAY PERIOD	AMOUNT EXEMPT IS THE GREATER OF:
	Weekly	40 x Minimum Hourly Wage or 80% of Disposable Earnings
	Bi-weekly	80 x Minimum Hourly Wage or 80% of Disposable Earnings
	Semi-monthly	86.67 x Minimum Hourly Wage or 80% of Disposable Earnings
	Monthly	173.3 x Minimum Hourly Wage or 80% of Disposable Earnings

I certify that I am authorized to act for the Garnishee; that the above answers are true and correct; and that I have delivered a copy of this Writ, together with the Calculation of the Amount of Exempt Earnings ~~and an~~, a blank Objection to Calculation of the Amount of Exempt Earnings form, and an EXPLANATION OF WAGE GARNISHMENT IN COLORADO form to the Judgment Debtor~~, at the time earnings were paid for each pay period (if earnings were paid)~~.

Name of Garnishee (Print) _____
Address _____
Phone Number _____

_____
Name of Person Answering (Print)

_____
Signature of Person Answering

~~NOTICE TO JUDGMENT DEBTOR~~

~~**a.** The Garnishee may only withhold nonexempt earnings from the amount due you, but in no event more than the amount on Line 5 on the front of this Writ, UNLESS YOUR EARNINGS ARE TOTALLY EXEMPT, in which case NO EARNINGS CAN BE WITHHELD. You may wish to contact a lawyer who can explain your rights.~~

~~**b.** If you disagree with the amount withheld, you must talk with the Garnishee within 7 days after being paid.~~

~~**c.** If you cannot settle the disagreement with the Garnishee, you may complete and file the attached Objection with the Clerk of the Court issuing this Writ within 14 days after being paid. YOU MUST USE THE FORM ATTACHED or a copy of it.~~

~~**d.** You are entitled to a court hearing on your written objection.~~

~~**e.** Your employer cannot fire you because your earnings have been garnished. If your employer discharges you in violation of your legal rights, you may, within 91 days, bring a civil action for the recovery of wages lost because you were fired and for an order requiring that you be reinstated. Damages will not exceed 6 weeks' wages and attorney fees.~~

EXPLANATION OF WAGE GARNISHMENT IN COLORADO

NOTICE OF GARNISHMENT TO JUDGMENT DEBTOR

MONEY WILL BE TAKEN FROM YOUR PAY IF YOU FAIL TO ACT

1. Why am I getting this notice?

You are getting this notice because a court has ruled that you owe the judgment creditor, who is called "Creditor" in this notice, money. Creditor has started a legal process called a "garnishment". The process requires that money be taken from your pay and given to Creditor to pay what you owe. The person who pays you does not keep the money.

Creditor filled out this form. The law requires the person who pays you to give you this notice. Creditor may not be the person or company to which you originally owed money. You may request that Creditor provide the name and address of the person or company to which you originally owed money. If you want this information, you must write Creditor or Creditor's lawyer at the address at the very beginning of this form. You must do this within 14 days after receiving this notice. Creditor will send you this information at the address you give Creditor. Creditor must send you this information within 7 days after receiving your request. Knowing the name of the original creditor might help you understand why the money will be taken from your pay.

2. How much do I owe?

The amount the court has ruled that you currently owe is listed at the top of the writ of garnishment. The amount could go up if there are more court costs or additional interest. The interest rate on the amount you owe is listed at the top of the Writ of Garnishment. The amount could also go down if you make payments to Creditor.

Formatted: Indent: First line: 0.5"

3. How will the amount I owe be paid?

The person who pays you will start taking money from your paycheck on the first payday that is at least 14 days after the day the person who pays you sends you this notice. Money will continue to be taken from your pay for up to 6 months. If the debt is not paid off or not likely to be paid off by that time, Creditor may serve another garnishment.

The rules about how much of your pay can be taken are explained in the notice of Colorado Rules About Garnishment that you received with this notice. This notice also contains an estimate of how much of your pay will likely be withheld each paycheck.

At any time, you can get a report that shows how the amount taken from your pay was calculated. To receive this report, you must write or e-mail the person who pays you.

4. Do I have options?

Yes, you have several options, here are three of them:

A. You can talk with a lawyer: A lawyer can explain the situations to you and help you decide what to do. The self-help desk of the court where the garnishment action is pending can provide you help with resources to find a lawyer.

B. You can contact Creditor: If you can work something out with Creditor, money might not have to be taken from your pay. The Creditor's contact information is on the first page of the writ of garnishment.

C. You can request a court hearing: A hearing could be helpful if there are disagreements about the garnishment, the amount the court has ruled that you owe, whether the amount of money being withheld from your paycheck is correct, or whether the amount being withheld should be reduced to help you support your family and yourself. If you disagree with the estimate of the amount of money that will be withheld from your paycheck, you must attempt to work this out with the person who pays you before going to court. You must do this within 7 days after receiving this notice. If you cannot work it out with the person who pays you, you may seek a hearing in court. If you want a court hearing, you must request one. If you think that you need more money to support your family and yourself, you may seek a court hearing without consulting the person who pays you. For help requesting a hearing, contact the self-help desk of the court where the garnishment action is pending.

5. What if I don't do anything?

If you don't do anything, the law requires that money be taken out of your paycheck beginning with the first payday that is at least 14 days after the day the person who pays you sends you this notice. The money will be given to Creditor. This process will continue for 6 months unless your debt is paid off before that.

6. How does garnishment work in Colorado?

Only a portion of your pay can be garnished. The amount that can be withheld from your pay depends on something called "disposable earnings". Your disposable earnings are what is left after deductions from your gross pay for taxes and certain health insurance costs. Your paycheck stub should tell what your disposable earnings are.

The amount of your disposable earnings that can be garnished is determined by comparing two numbers: (1) 20% of your disposable earnings and (2) the amount by which your disposable earnings exceed 40 times the minimum wage. The smaller of these two amounts will be deducted from your pay.

If you think that your earnings after garnishment are not enough to support yourself and any members of your family that you support, you can try to have the amount of your disposable earnings that are garnished further reduced. This is discussed earlier in this notice under **4. Do I have options?**

Your employer cannot fire you because your earnings have been garnished. If your employer does this in violation of your legal rights, you may file a lawsuit within 91 days of your firing to recover wages you lost because you were fired. You can also seek to be reinstated to your job. If you are successful with this lawsuit, you cannot recover more than 6 weeks wages and attorney fees.

Based on your most recent paycheck, the person who pays you estimates that $ _____ will be withheld from each paycheck that is subject to garnishment.

_____COURT, _____COUNTY _____,

COLORADO

CASE NO. _____ DIV./CT .RM. _____ JUDGMENT DEBTOR'S NAME

_____

CALCULATION OF THE AMOUNT OF EXEMPT EARNINGS WORKSHEET

PLAINTIFF(S):	DEFENDANT(S):

Gross Pay for _____ thru _____		$_____
Less Deductions Required by Law (For Example, Withholding Taxes ,FICA, Costs for Employer-Provided Health Insurance Withheld From Earnings -		$_____
Disposable Earnings (gross earnings less deductions)	=	$_____
Less Statutory Exemption (Use Exemption Chart Below)	-	$_____
Net Amount Subject to Garnishment	=	$_____
Less Wage/Income Assignment (If Any)	-	$_____
AMOUNT PAID	=	$_____

EXEMPTION CHART ("Minimum Hourly Wage" means state or federal minimum wage, whichever is greater.)	**PAY PERIOD**	**AMOUNT EXEMPT IS THE GREATER OF:**
	Weekly	40 x Minimum Hourly Wage or 80% of Disposable Earnings
	Bi-weekly	80 x Minimum Hourly Wage or 80% of Disposable Earnings
	Semi-monthly	86.67 x Minimum Hourly Wage or 80% of Disposable Earnings
	Monthly	173.3 x Minimum Hourly Wage or 80% of Disposable Earnings

I affirm that I am authorized to act for the Garnishee, the above Calculation is true and correct, and I have delivered a copy of this Calculation to the Judgment Debtor at the time earnings were paid for the above period.

Date: _____ Signature: _____

CUT ALONG THE DOTTED LINE AND MAIL WITH EACH CHECK TO THE PARTY DESIGNATED IN PARAGRPH "e" ON FRONT OF WRIT OF CONTINUING GARNISHMENT.

.....

_____COURT, _____COUNTY _____,

COLORADO

CASE NO. _____ DIV./CT .RM. _____ JUDGMENT DEBTOR'S NAME

_____

CALCULATION OF THE AMOUNT OF EXEMPT EARNINGS WORKSHEET

PLAINTIFF(S):	DEFENDANT(S):

Gross Pay for _____ thru _____		$_____
Less Deductions Required by Law (For Example, Withholding Taxes , FICA, Costs for Employer-Provided Health Insurance Withheld From Earnings) -		$_____
Disposable Earnings (gross earnings less deductions)	=	$_____
Less Statutory Exemption (Use Exemption Chart Below)	-	$_____
Net Amount Subject to Garnishment	=	$_____
Less Wage/Income Assignment (If Any)	-	$_____
AMOUNT PAID	=	$_____

EXEMPTION CHART ("Minimum Hourly Wage" means state or federal minimum wage, whichever is greater.)	**PAY PERIOD**	**AMOUNT EXEMPT IS THE GREATER OF:**
	Weekly	40 x Minimum Hourly Wage or 80% of Disposable Earnings
	Bi-weekly	80 x Minimum Hourly Wage or 80% of Disposable Earnings
	Semi-monthly	86.67 x Minimum Hourly Wage or 80% of Disposable Earnings
	Monthly	173.3 x Minimum Hourly Wage or 80% of Disposable Earnings

I affirm that I am authorized to act for the Garnishee, the above Calculation is true and correct, and I have delivered a copy of this Calculation to the Judgment Debtor at the time earnings were paid for the above period.

Date: _____ Signature: _____

CUT ALONG THE DOTTED LINE AND MAIL WITH EACH CHECK TO THE PARTY DESIGNATED IN PARAGRPH "e" ON FRONT OF WRIT OF CONTINUING GARNISHMENT.

_____COURT, _____COUNTY _____,

COLORADO

CASE NO. _____ DIV./CT .RM. _____ JUDGMENT DEBTOR'S NAME

_____

CALCULATION OF THE AMOUNT OF EXEMPT EARNINGS WORKSHEET

PLAINTIFF(S):	DEFENDANT(S):

Gross Pay for _____ thru _____		$_____
Less Deductions Required by Law (For Example, Withholding Taxes ,FICA, Costs for Employer-Provided Health Insurance Withheld From Earnings)	-	$_____
Disposable Earnings (gross earnings less deductions)	=	$_____
Less Statutory Exemption (Use Exemption Chart Below)	-	$_____
Net Amount Subject to Garnishment	=	$_____
Less Wage/Income Assignment (If Any)	-	$_____
AMOUNT PAID	=	$_____

EXEMPTION CHART ("Minimum Hourly Wage" means state or federal minimum wage, whichever is greater.)	**PAY PERIOD**	**AMOUNT EXEMPT IS THE GREATER OF:**
	Weekly	40 x Minimum Hourly Wage or 80% of Disposable Earnings
	Bi-weekly	80 x Minimum Hourly Wage or 80% of Disposable Earnings
	Semi-monthly	86.67 x Minimum Hourly Wage or 80% of Disposable Earnings
	Monthly	173.3 x Minimum Hourly Wage or 80% of Disposable Earnings

I affirm that I am authorized to act for the Garnishee, the above Calculation is true and correct, and I have delivered a copy of this Calculation to the Judgment Debtor at the time earnings were paid for the above period.

Date: _____ Signature: _____

CUT ALONG THE DOTTED LINE AND MAIL WITH EACH CHECK TO THE PARTY DESIGNATED IN PARAGRPH "e" ON FRONT OF WRIT OF CONTINUING GARNISHMENT.

.....

_____COURT, _____COUNTY _____,

COLORADO

CASE NO. _____ DIV./CT .RM. _____ JUDGMENT DEBTOR'S NAME

_____

CALCULATION OF THE AMOUNT OF EXEMPT EARNINGS WORKSHEET

PLAINTIFF(S):	DEFENDANT(S):

Gross Pay for _____ thru _____		$_____
Less Deductions Required by Law (For Example, Withholding Taxes ,FICA, Costs for Employer-Provided Health Insurance Withheld From Earnings)	-	$_____
Disposable Earnings (gross earnings less deductions)	=	$_____
Less Statutory Exemption (Use Exemption Chart Below)	-	$_____
Net Amount Subject to Garnishment	=	$_____
Less Wage/Income Assignment (If Any)	-	$_____
AMOUNT PAID	=	$_____

EXEMPTION CHART ("Minimum Hourly Wage" means state or federal minimum wage, whichever is greater.)	**PAY PERIOD**	**AMOUNT EXEMPT IS THE GREATER OF:**
	Weekly	40 x Minimum Hourly Wage or 80% of Disposable Earnings
	Bi-weekly	80 x Minimum Hourly Wage or 80% of Disposable Earnings
	Semi-monthly	86.67 x Minimum Hourly Wage or 80% of Disposable Earnings
	Monthly	173.3 x Minimum Hourly Wage or 80% of Disposable Earnings

I affirm that I am authorized to act for the Garnishee, the above Calculation is true and correct, and I have delivered a copy of this Calculation to the Judgment Debtor at the time earnings were paid for the above period.

Date: _____ Signature: _____

CUT ALONG THE DOTTED LINE AND MAIL WITH EACH CHECK TO THE PARTY DESIGNATED IN PARAGRPH "e" ON FRONT OF WRIT OF CONTINUING GARNISHMENT.

❑ County Court ❑ District Court _____County, Colorado Court address: _____ Plaintiff(s): v. Defendant(s):	**COURT USE ONLY**
Judgment Debtor's Attorney or Judgment Debtor (Name and Address): Phone Number: E-mail: FAX Number: Atty.Reg. #:	Case Number: Division Courtroom
OBJECTION TO CALCULATION OF THE AMOUNT OF EXEMPT EARNINGS OR FOR REDUCTION OF WITHOLDING PURSUANT TO SUBSECTION 13-54-104(2)(a)(i)(D)	

Instructions to Judgment Debtor: Use this form to object to the calculations of your exempt earnings.

Name: _____Phone Number: _____

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____

EXEMPTION CHART ("Minimum Hourly Wage" means state or federal minimum wage, whichever is greater.)	**PAY PERIOD**	**AMOUNT EXEMPT IS THE GREATER OF:**
	Weekly Bi-Weekly Semi-monthly Monthly	~~30~~ 40 x Minimum Hourly Wage or ~~75~~80% of Disposable Earnings ~~60~~ 80 x Minimum Hourly Wage or ~~75~~80% of Disposable Earnings ~~65~~ 86.67 x Minimum Hourly Wage or ~~75~~80% of Disposable Earnings ~~130~~ 173.3 x Minimum Hourly Wage or ~~75~~80% of Disposable Earnings

1. Judgment Debtor's objection to the Garnishee's Calculation of the Amount of Exempt Earnings because I believe that the correct calculation is:

Gross Earnings for My Pay Period from _____thru _____	$ _____
Less Deductions Required by Law	
(For Example, Withholding Taxes, FICA, Costs for Employer-Provided Health Insurance Withheld From Earnings	
_____	- $ _____
Disposable Earnings (Gross Earnings Less Deductions)	= $ _____
Less Statutory Exemption (Use Exemption Chart on Writ)	- $ _____
Net Amount Subject to Garnishment	= $ _____
Less Wage/Income Assignment(s) During Pay Period (If Any)	- $ _____
Amount which should be withheld	= $ _____

OR

2. The earnings garnished are pension or retirement benefits/deferred compensation/health, accident or disability insurance **and they are totally exempt because**:

I understand that I must make a good faith effort to resolve my dispute with the Garnishee.

I ❑ **have** ❑ **have not** attempted to resolve this dispute with the Garnishee.

Name of Person I Talked to: _____

Position: _____ Phone Number: _____

OR

3. A greater portion of my disposable earnings should be exempt from garnishment for the support of me or my family that is supported in whole or in part by me. I request a court hearing to determine whether my earnings subject to garnishment, together with any other income received by my family, are insufficient to pay the actual and necessary living expenses of me and/or my family based upon proof of such expenses incurred during the 60 days prior to the hearing. In support of this I state the following:*

Gross Monthly Income		**Monthly Expenses**	
Self (wages, salary, commission)	$	Rent or Mortgage	$
Spouse/Partner, Other Household Members	$	Groceries	$
Parents (if same household)	$	Utilities	$
Unemployment Benefits	$	Clothing	$
Social Security/Retirement Funds	$	Maintenance/Alimony and/or Child Support	$
Maintenance/Alimony	$	Medical/Dental	$
Other Income (identify)	$	Other Expenses (identify)	$
Other Income (identify)	$	Other Expenses (identify)	$
Total Income	$	**Total Expenses**	$

***You are not required to use this form but will have to prove to the court that you are entitled to claim this exemption.**

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Debtor's Notice to Garnishee: Even though I am filing this Objection, you are directed to send my nonexempt earnings to the Court at the address noted instead of to the party designated in paragraph "e" on the front of the Writ of Continuing Garnishment. The Court will hold my nonexempt earnings in its registry until my Objection is resolved.

I certify that the above is correct to the best of my knowledge and belief and that I sent a copy of this document by ☐certified mail (return receipt requested) to both the Garnishee and to the Judgment Creditor, or if the Judgment Creditor is represented by Counsel, ☐certified mail (return receipt requested) to the Judgment Creditor's Attorney or ☐E-Service to the Judgment Creditor's Attorney.

☐ By checking this box, I am acknowledging I am filling in the blanks and not changing anything else on the form.

☐ By checking this box, I am acknowledging that I have made a change to the original content of this form.

Garnishee

Address: _____

_____

Judgment Creditor or Attorney

Address: _____

_____

_____

Signature of Judgment Debtor or
Judgment Debtor's Counsel and Reg. Number

Memorandum

To: The Honorable Michael Berger, Chair of the Advisory Committee on Civil Rules

From: Dave DeMuro for the Subcommittee on Revisions in the Federal Civil Rules

Re: Whether to Recommend Adopting a Colorado Version of Fed. R. Civ. P. 5.2

Date: June 4, 2020

At the January 31, 2020, meeting of the Civil Rules Committee, Judge Jones submitted a proposed rule for a Colorado version of Federal Civil Rule 5.2, which is entitled "Privacy Protection for Filings Made with the Court." Our subcommittee agreed to look into the issue.

Federal Rule 5.2 was adopted in 2007 and does not appear to have been amended since its adoption. A copy of the federal version of 5.2 and its federal advisory committee notes is attached. As the advisory committee notes explain, Rule 5.2 was adopted to comply with a federal statute requiring the Supreme Court to adopt rules to protect privacy and security concerns that increased with the electronic filing of court documents. It is also explained in the notes that the policy is to make case files available electronically to the extent that they are available at the courthouse, except that certain "personal data identifiers" will not be in the public file.

Federal Rule 5.2 (a) and (b) provide that four items are to be redacted by the counsel doing the filing (not the court clerk), with six exemptions from the redaction requirement. Rule 5.2 has six more sections that address public access to court files in certain types of cases, filings under seal, and related matters.

Colorado does not have a rule that is similar to Federal Rule 5.2, but we do have Chief Justice Directive 05-01, entitled "Public Access to Court Records." It is stated on the cover page of that CJD that the Public Access Committee periodically makes recommendations for amendments. The CJD has been revised a number of times.

Although CJD 05-01 addresses public access to court files rather than imposing a duty on the filing party to redact certain documents, it impacts our task by addressing "Court records excluded from public access" in section 4.60. Section 4.60 (e) provides that requests from the public for access to pleadings or documents will be provided after redaction of seven categories of information: (1) data restricted by court order in a case; (2) driver license numbers; (3) financial account numbers (redaction is not required if the last four digits are used and do not reveal the entire account number); (4) personal identification numbers (e.g., passport, student or state IDs); (5) victim identifying information in cases with sex offenses; (6) Social Security numbers (and even partial numbers); and (7) Tax Identification numbers. Also, please note section 4.60 (d) lists 26 categories of "commonly filed court records" (including medical records) that are not generally accessible to the public unless the court orders otherwise.

With this background, we submit our proposed CRCP 5(g) (there is no Colorado Civil Rule 5.1 or 5.2, so we suggest making this a new subsection of Rule 5). The subcommittee closely followed Judge Jones's original proposal, which is more narrow than the Federal version, so I will point out some differences.

The heart of proposed Rule 5(g) is subsection (1) which requires party and nonparty filers to redact identification numbers in various categories and identify birth dates only by year and minors only by their initials. Unlike Federal Rule 5.1(a), this subsection requires the redaction of the complete number, not just the numbers prior to the last four digits, which was done to comply more closely with the CJD noted above. Subsections (2) and (3) of proposed Rule 5(g) closely follow subsections (d) and (f) of Federal Rule 5.2. Subsection (4) adds a sanction rule not found in the federal rule.

Our proposal does not include counterparts to the other five subsections of Federal Rule 5.2, either because they were not needed in the narrow redaction rule we propose or were addressed in the CJD.

Please let us know if you have any questions about our proposal.

Proposed C.R.C.P. 5(g)

Draft as of 6/04/20

(g) PRIVACY PROTECTION FOR FILINGS

(1) Redacted Filings. Unless otherwise required by statute or court order, a party or nonparty filing an electronic or paper document with the court shall redact an individual's social security number; taxpayer identification number; financial-account number; driver's license number; or other personal identification number, including but not limited to, passport number, student identification number, or state identification number. In addition, a party or nonparty filing an electronic or paper document with the court that includes a person's date of birth may only include the year of the person's birth, and if the document includes the name of a person known to be a minor shall identify the minor only by the minor's initials.

(2) Filings Made Under Seal. The court may order that a filing made under seal be made without redaction. The court may later unseal the filing or order the part or nonparty who made the filing to file a redacted version for the public record.

(3) Option for Additional Unredacted Filing Under Seal. A party or nonparty making a redacted filing may also file an unredacted copy under seal. The court shall retain the unredacted copy as part of the record.

(4) Sanctions. A court may impose sanctions for a violation of this rule only if it finds that the violation was knowing and willful.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title II. Commencing an Action; Service of Process, Pleadings, Motions, and Orders

Federal Rules of Civil Procedure Rule 5.2

Rule 5.2 Privacy Protection for Filings Made with the Court

Currentness

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

(b) Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following:

(1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 5.2(c) or (d); and

(6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255.

(c) Limitations on Remote Access to Electronic Files; Social-Security Appeals and Immigration Cases. Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention, access to an electronic file is authorized as follows:

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;

(2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:

(A) the docket maintained by the court; and

(B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

(d) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) Protective Orders. For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal. A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A person waives the protection of Rule 5.2(a) as to the person's own information by filing it without redaction and not under seal.

CREDIT(S)

(Adopted April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

2007 Adoption

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing

of documents and the public availability ... of documents filed electronically." The rule goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form. But the number of filings that remain in paper form is certain to diminish over time. Most districts scan paper filings into the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. See http://www.privacy.uscourts.gov/Policy.htm. The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to any part of an account number or social security number. It may also be necessary to protect information not covered by the redaction requirement--such as driver's license numbers and alien registration numbers--in a particular case. In such cases, protection may be sought under subdivision (d) or (e). Moreover, the Rule does not affect the protection available under other rules, such as Civil Rules 16 and 26(c), or under other sources of protective authority.

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the party or non-party making the filing.

Subdivision (c) provides for limited public access in Social Security cases and immigration cases. Those actions are entitled to special treatment due to the prevalence of sensitive information and the volume of filings. Remote electronic access by nonparties is limited to the docket and the written dispositions of the court unless the court orders otherwise. The rule contemplates, however, that nonparties can obtain full access to the case file at the courthouse, including access through the court's public computer terminal.

Subdivision (d) reflects the interplay between redaction and filing under seal. It does not limit or expand the judicially developed rules that govern sealing. But it does reflect the possibility that redaction may provide an alternative to sealing.

Subdivision (e) provides that the court can by order in a particular case for good cause require more extensive redaction than otherwise required by the Rule. Nothing in this subdivision is intended to affect the limitations on sealing that are otherwise applicable to the court.

Subdivision (f) allows a person who makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act.

Subdivision (g) allows the option to file a register of redacted information. This provision is derived from section 205(c)(3)(v) of the E-Government Act, as amended in 2004. In accordance with the E-Government Act, subdivision (g) refers to "redacted" information. The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Subdivision (h) allows a person to waive the protections of the rule as to that person's own personal information by filing it unsealed and in unredacted form. One may wish to waive the protection if it is determined that the costs of redaction outweigh the benefits to privacy. If a person files an unredacted identifier by mistake, that person may seek relief from the court.

Trial exhibits are subject to the redaction requirements of Rule 5.2 to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with the rule if and when they are filed as part of an appeal or for other reasons.

Notes of Decisions (7)

Fed. Rules Civ. Proc. Rule 5.2, 28 U.S.C.A., FRCP Rule 5.2
Including Amendments Received Through 2-1-20

End of Document

From: berger, michael
Sent: Friday, June 12, 2020 3:57 PM
To: michaels, kathryn
Subject: Fw: Civil Rules Comm. Part 1
Attachments: Scan 06122020_0002.pdf

From: Dick Holme <rpholme@live.com>
Sent: Friday, June 12, 2020 3:54 PM
To: berger, michael <michael.berger@judicial.state.co.us>
Subject: Civil Rules Comm. Part 1

Mike:
As you know, it has been 5 years since the adoption of Colorado's trial management and discovery rules. You have also known that I have collected comments and suggestions over the interim for clarifications, errors, reactions to changing law and circumstances, etc. I note this I advance so I reduce my need to apologize for presenting such a large batch of materials. Some of them seem reasonably simple and can be dealt with relatively easily. Others you ay wish to hand off to a subcommittee, although I think it would be useful to submit changes to the Supreme Court in time for an effective date of 1/1/21, although that may be unrealistic. [If you do send some to a subcommittee, I volunteer to serve on it as long as I am not the Chair.]

Attached are the materials I have gathered or generated in the past 5 years for consideration by the Civil Rules Committee:
1. An updated memo you received in the distant past with several changes proposed by Judges we talked to 3+ years ago relating to Rules 16, 16.1, 26, 121.
2. A memo I sent you 3 years ago about a serious problem I have with the Swenson case that I propose can be largely fixed with one very simple change in Rule 37 involving Rule 26(a)(2)(B)(1).
3. A discussion of a proposed addition to Comment 18 to Rule 26 to help clarify what kind of expert report needs to be filed by non-retained experts (e.g., treating physicians, mechanics, police).
4. A brief memo relating to an inconsistency between two provisions in Ruel 26 relating to depositions of non-retained experts,
Dick

P.S. I may have to send the attachments in 3 more emails.

1. An updated memo you received in the distant past with several changes proposed by Judges we talked to 3+ years ago relating to Rules 16, 16.1, 26, 121.

TO: Judge Michael Berger

FROM: Dick Holme

DATE: January 18, 2018, updated June 11, 2020

SUBJECT: Proposed Minor Changes to Rules 16, 26, and others

In late 2016, former Chief Justice Rice enlisted Loveland attorney Edward Gassman (one of the original developers of Rule 16.1) to create a "very small committee" to interview a number of district court judges about their views of and any suggestions they might have about the effectiveness of the 2015 amendments to the Rules of Civil Procedure. In turn, Gassman asked former Jefferson County District Court Chief Judge Steve Munsinger and me to assist him on this task. Over the next several months, the three of us had lunch meetings with the civil judges in the First (Jeffco), Second (Denver), Fourth (El Paso), Eighth (Larimer), Tenth (Pueblo), Seventeenth (Adams), Eighteenth (Arapahoe), and Nineteenth (Weld) judicial districts (and I might be missing one). (We failed after several attempts to arrange a meeting with the Fifth (Eagle and Summit) and Ninth (Pitkin and Garfield) districts.)

Attendance at all of them was quite good. Ed, Steve and I were all struck by the fact that in all meetings the judges seemed to be using the rule changes as intended, and specifically using the initial Case Management Conferences to discuss the cases substantively and with the intent of applying the concept of proportionality to control discovery practices. Most of the judges had also adopted the practice encouraged under the rules of requiring oral discovery motions before allowing written motions. This practice received a strongly favorable acceptance by the judges. I think that Ed, Steve and I were all pleasantly surprised at the apparent ease of implementing the new procedures and willingness of most of the judges to make them work.

Part of our meetings involved asking the judges if there were any changes or amendments they would like to see adopted. There were a few suggestions that received support from a number of the judges and which I have included below in this Memo. None of them change the nature of the 2015 amendments, and several clarify and enforce those earlier amendments. Given the fact that the 2015 amendments are now a year and a half old (actually 5 years old), it seemed like these tweaks could now be appropriately considered.

I think most of the proposals are self-explanatory but I can offer some additional explanations if desired or needed.

MEMORANDUM

RULES CHANGES SUGGESTED BY DISTRICT COURT JUDGES

C.R.C.P. 16

(b) Case Management Order.

(6) Evaluation of Proportionality Factors. The proposed order shall provide a brief assessment of **the facts supporting** each party's position **concerning** the application of any factors to be considered **by the court** in determining proportionality, including those factors identified in C.R.C.P. 26(b)(1).

(10) Computation and Discovery Relating to Damages. A claiming party shall state the categories of damages sought as disclosed pursuant to C.R.C.P. 26(a)(1)(C) and shall state its belief as to the total amount of damages at issue in the case. If any party asserts an inability to disclose fully the information on damages required by C.R.C.P. 26(a)(1)(C), the proposed order shall include a brief statement of the reasons for that party's inability as well as the expected timing of full disclosure and completion of discovery on damages.

(16) Trial Date and Estimated Length of Trial. The proposed order shall provide the parties' best estimate of **the date when** the **parties can probably be ready for trial** and of the length of the trial. The court shall include the trial date in the Case Management Order, unless the court uses a different trial setting procedure.

C.R.C.P. 26

(b) Discovery Scope and Limits. Unless otherwise modified by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General.

(2) Limitations. Except upon order for good cause shown and subject to the proportionality factors in subsection (b)(1) of this Rule, discovery **up to the following presumptive maximum amounts** shall be limited as follow

(A) A party may take **up to** one deposition of each adverse party and of two other persons, exclusive of persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2). The scope and manner of proceeding by way of deposition and the use thereof shall otherwise be governed by C.R.C.P. 26, 28, 29, 30, 31, 32, and 45.

(B) A party may serve on each adverse party **up to 15** written interrogatories, each of which shall consist of a single question. The scope and manner of proceeding by means of written interrogatories and the use thereof shall otherwise be governed by C.R.C.P. 26 and 33.

(C) No change

(D) A party may serve each adverse party requests for production of documents or tangible things or for entry, inspection or testing of land or property pursuant to C.R.C.P. 34, except

such requests for production shall be **up** to 20 in number, each of which shall consist of a single request.

(E) A party may serve on each adverse party **up to** 20 requests for admission, each of which shall consist of a single request. A party may also serve requests for admission of the genuineness of up to 50 separate documents that the party intends to offer into evidence at trial. The scope and manner of proceeding by means of requests for admission and the use thereof shall otherwise be governed by C.R.C.P. 36.

(F) In determining good cause to modify the **amounts of discovery authorized by** subsection (b)(2), the court shall consider the following:

(I) – (IV) No change

C.R.C.P. 121.

Section 1-15 DETERMINATION OF MOTIONS

1. Motions and Briefs; When Required; Time for Serving and Filing – Length.

(a) No change.

(b) **Except for a motion pursuant to C.R.C.P. 56, the** responding party shall have 14 days after the filing of the motion or such lesser or greater time as the court may allow in which to file a responsive brief. **For a motion pursuant to C.R.C.P. 56, the responding party shall have 21 days after the filing of the motion or such lesser or greater time as the court may allow in which to file a responsive brief.** If a motion is filed 42 days or less before the trial date, the responding party shall have **7** days after the filing of the motion or such lesser or greater time as the court may allow in which to file a responsive brief.

(c) – (d) No change.

OTHER PROPOSED CHANGES

C.R.C.P. 16.1

Add to end of 16.1(b)(2):

> **The court may require a certifying party to explain the steps taken pursuant to C.R.C.P. 11 to support the certification. If such support was not established, the court may order that the case shall be subject to this rule.**

Delete 16.1(d)(1).

> Judge Zenisek has complained of "many cases" in which certifications are included where the cases are plainly under $100,000. He has noted that "It makes me plain angry as it looks like [attorneys] are just trying to pull one over on a judge that they think is not paying attention."

Add new 16.1(k)(8) and renumber (k)(8) to (k)(9);

Limitation on evidence and argument. **Parties may not offer evidence or argue that the jury should consider an award in excess of $100,000.**

C.R.C.P. 16(b)(1) – At Issue Date

This may be controversial.

Adopt the original version of Rule 16(b)(1) submitted by the Civil Rules Committee to the Supreme Court but not adopted. It allowed an at issue date before the completion of a defending party's motions. (I do not have a copy of it at home, but Judge Berger may be able to find and attach that proposed provision.)

In 2015 this Committee as disappointed at the rejection of the provision for a couple reasons. It felt that filing motions to dismiss were largely denied and often used for delay. This problem has still proved to be a concern.

The problem of added delay and expense has been increased by the decision in the Warne case requiring more detailed factual pleadings at the outset of a case. This leads to more frequent /rule 12 motions and possible hearings before the at issue date begins real progress on the case. Additionally, many of the issues raised by Warne can be dealt with and resolved at the first case management conference with limited additional time and expense being necessitated.

At the least, some language in Rule 16(b)(1) may be needed to encourage judges to establish an expedited CMC to discuss the Warne issues before extensive motion briefing is required.

2. A memo I sent you 3 years ago about a serious problem I have with the *Swenson* case that I propose can be largely fixed with one very simple change in Rule 37 involving Rule 26(a)(2)(B)(1).

MEMORANDUM

TO: Judge Michael Berger
FROM: Richard Holme
DATE: October 10, 2017
SUBJECT: Enforcement of C.R.C.P. 26(a)(2)(B)(I)

I am genuinely concerned by what I believe are the negative implications of the Supreme Court's decision in *Catholic Health Initiatives Colorado v. Eric Swensson Asso's, Inc.*, 2017 CO 94 (Oct. 2, 2017) ("*Swensson*"), and what its strict application may mean to the speedy and inexpensive determination of actions.

The problem.

In *Swensson,* plaintiff claimed that defendant failed to design plaintiff's hospital so that it could have an Ambulatory Surgery Center. Plaintiff delivered its one and only expert opinion on damages which, without any support, opined solely and conclusory that plaintiff's damages were $11 million. The opinion contained no basis and reasons for the opinion; no data or other information the expert considered; and no specific breakdown or discussion of cost estimates. A month before trial, defendant requested the trial court to bar the expert's testimony at trial since the report was totally non-compliant with Rule 26(a)(2)(B)(I) (the "expert disclosure rule" – attached hereto). The last sentence of that sub-section of the rule provides that, "The witness's direct testimony shall be limited to matters disclosed in detail in the report."

The trial court struck the witness because there was nothing relevant he could testify to in compliance with the expert disclosure rule. This ruling also had the result that plaintiff's case would be barred for lack of any admissible evidence of damages. Plaintiff argued, and the Supreme Court unanimously agreed, that the trial court abused its discretion by not holding a hearing pursuant to Rule 37(c) and without specifically weighing harm to the parties and whether preclusion would be disproportionate to whatever harm was found.

Comment [21] to Rule 26 states, in pertinent part:

Sufficiency of disclosure of expert opinions and the bases therefor.

> This rule requires detailed disclosures of "all opinions to be expressed [by the expert] and the basis and reasons therefor." Such disclosures ensure that the parties know,

> well in advance of trial, the substance of all expert opinions that may be offered at trial. Detailed disclosures facilitate the trial, avoid delays, and enhance the prospect for settlement. At the same time, courts and parties must "liberally construe[], administer[] and employ[]" these rules "to secure the just, speedy, and inexpensive determination of every action." C.R.C.P. 1 . . . Reasonableness and the overarching goal of a fair resolution of disputes are the touchstones. If an expert's opinions and facts supporting the opinions are disclosed in a manner that gives the opposing party reasonable notice of the specific opinions and supporting facts, the purpose of the rule is accomplished. In the absence of substantial prejudice to the opposing party, this rule does not require exclusion of testimony merely because of technical defects in disclosure. (Emphasis added; brackets and quotation marks in original.)

My concerns with *Swensson* start with its implicit assumption that Rule 37(c) always controls decisions as to whether testimony should be limited (or some testimony precluded). Under normal trial practice when an objection to expert testimony is raised, the judge would look at the expert's report and rule on the spot whether the report was detailed enough to give the defendant "reasonable notice of the specific opinions and supporting facts." Under *Swensson*, in any trial where a party begins to offer expert testimony that has not been previously disclosed in detail, the trial would have to stop while the opposing party moves for sanctions under Rule 37(c). Because the new undisclosed testimony is likely to be a surprise, the opposing party will need to learn what the proposed testimony will be; determine what harm it may cause to either or both parties for the testimony to be precluded or limited in part; and attempt to learn whether the prior omission has some justification or was merely laziness or sandbagging. Then the court must have a hearing and determine, mid-trial, whether precluding the testimony in whole or in part should cause a continuance, require further discovery (most likely a deposition of the expert); perhaps declare a mistrial and dismiss the jury.

When, as in *Swensson*. a party is given a useless opposing expert report and then tries to make the litigation speedier and less expensive by raising the exact same objection shortly before the trial to save time and expense of going through

most of a trial before it raises the same objection, it is told that it must undergo the above Rule 37(c) precess.

A second and related concern is that requiring the objecting party to use the full Rule 37(c) requirements, the courts are normally required to reward the discovery abuser at the expense of the party who has complied with the rules. It would be a rare situation where the abusing party cannot dream up some form of milder sanction that would avoid "preclusion" and not cause it any "prejudice." Experience shows that frequently the use of Rule 37(c) causes the trial court to grant a continuance to the contumacious party, which unavoidably adds time and expense to the innocent party. In *Swensson*, for example, a judge might well say that taking the expert's deposition is appropriate to avoid preclusion and loss of the plaintiff's case. But then the innocent party is forced to take a deposition it may have not wanted to take as a matter of strategy or cost savings. Without a useful report the adverse party is left with stabbing in the dark at the opposing expert's thinking.

Once having taken the expert's deposition, Rule 26(e) – also subject to Rule 37(c) – provides in part:

> **27(e) Supplementation of Disclosures, Responses, and Expert Reports and Statements.** . . . Nothing in this section requires the court to permit an expert to testify as to opinions other than those disclosed in detail in the initial expert report or statement except that if the opinions and bases and reasons therefor are disclosed during the deposition of the expert by the adverse party, the court must permit the testimony at trial unless the court finds that the opposing party has been unfairly prejudiced by the failure to make disclosure in the initial expert report. Supplementation shall be performed in a timely manner.

Under *Swensson*'s analysis, this issue, too, might have to undergo a Rule 37(c) analysis after the deposition has been taken.

The requirements of the expert disclosure rule are not difficult to understand. The purposes of the requirements are clearly spelled out in Comment [21], as quoted above. Those requirements have already built in reasonable flexibility to avoid injustice. Anyone reading the rule can see what will happen if the party does not comply with its requirements. There seems little reason, other than gamesmanship, a desire to intentionally drive up the opposing party's cost and time, or the party's lawyer's lack of attention the basic rules and compliance with the mandate of Rule 1, for a party not to prepare a decent report.

Further, when a disobedience to such a requirement is so patently obvious it is hard for an ordinary lawyer to understand why such disobedience necessitates a return to the trial court for analysis under an additional rule with its increased delay and expense.

The Civil Rules Committee understood that the new, more limited discovery and expansive disclosure rules could, in some cases, lead to "injustice." However, that occasional certainty was not deemed disabling when weighed against the absolute certainty that the previously existing rules regularly created injustice because of the delays and increased expenses of many cases created by the former rules.

A possible compromise.

There is a minor change in Rule 37 that is available in this instance which could alleviate games, time and cost of this type of proceeding.

Rule 26(a) – the controls for which under *Swensson* are subject to Rule 37(c) – contains requirements for two very different kinds of discovery.

First, Rule 26(a)(1), relates to initial disclosures of witnesses, documents, damages and insurance. These are fundamental and necessary at the beginning of a case. Failure to disclose properly is expected to be dealt with at the initial case management conference and, if not then, at the earlier stages of the case. For these items of information there is ample time for a party to move under Rule 37 for full disclosure without delaying the prospect of a "speedy and inexpensive" trial.

Rule 26(a)(1) does not contain any enforcement mechanism. Failure to disclose witnesses, exhibits or damages may or may not be a problem in the case and may require considering a substantial volume of related discovery. Rule 37 provides the only balancing test and a method of sanctioning non-disclosure of

information which the disclosing party may not want to be offered at a trial anyway.

Second, Rule 26(a)(2) relates to the expert disclosures of testimony. This information is frequently available only after much discovery is completed and relatively close to the trial date, when filing Rule 37 motions is time pressured and often likely to result in delays of the trial or forcing a disadvantaged party to take the expert's deposition without any basis for knowing what questions to ask. As described in Comment [21], quoted above, these are disclosures that should be instrumental in assisting the parties in settling the case. They are decidedly different from the initial disclosures.

Unlike Rule 26(a)(1), Rule 26(a)(2) contains its own enforcement mechanism, only relates to information that the disclosing party does want to introduce, and only requires the trial court to consider the proposed expert's report to decide whether enforcement of the rule is appropriate. This is not a "sanction" for noncompliance, it is simply applying and enforcing the clear terms of Rule 26(a)(2).

The differences between these two types of disclosures can be dealt with by two simple revisions to Rule 37, as shown below:

> **(a) Motion for Order Compelling Disclosure or Discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery and imposing sanctions as follows:
>
> **(1) Appropriate Court.** An application for an order to a party or to a person who is not a party shall be made to the court in which the action is pending.
>
> (2) Motion.
>
> (A) If a party fails to make a disclosure required by C.R.C.P. 26(a)(1) any other party may move to compel disclosure and for appropriate sanctions. The motion shall be accompanied by a certification that the movant in good faith has conferred or attempted to confer with the

party not making the disclosure in an effort to secure the disclosure without court action.

. . .

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.

(1) A party that without substantial justification fails to disclose information required by C.R.C.P. 26(a)(1) ~~or 26(e)~~ shall not be permitted to present any evidence not so disclosed at trial or on a motion made pursuant to C.R.C.P. 56, unless such failure has not caused and will not cause significant harm, or such preclusion is disproportionate to that harm. The court, after holding a hearing if requested, may impose any other sanction proportionate to the harm, including any of the sanctions authorized in subsections (b)(2)(A), (b)(2)(B) and (b)(2)(C) of this Rule, and the payment of reasonable expenses including attorney fees caused by the failure.

In short, by the time parties are preparing expert disclosures, the parties should be sufficiently along in their trial preparation that they can be expected to do the final discovery/disclosures correctly and courts should be allowed to enforce the Rules to allow for a speedy and inexpensive determination of cases.

Colorado Rules of Civil Procedure

26(a)(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by subsection (a)(1) of this Rule, a party shall disclose to other parties the identity of any person who may present evidence at trial, pursuant to Rules 702, 703, or 705 of the Colorado Rules of Evidence together with an identification of the person's fields of expertise.

(B) Except as otherwise stipulated or directed by the court:

(I) Retained Experts. With respect to a witness who is retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve giving expert testimony, the disclosure shall be made by a written report signed by the witness. The report shall include:

(a) a complete statement of all opinions to be expressed and the basis and reasons therefor;

(b) a list of the data or other information considered by the witness in forming the opinions;

(c) references to literature that may be used during the witness's testimony;

(d) copies of any exhibits to be used as a summary of or support for the opinions;

(e) the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;

(f) the fee agreement or schedule for the study, preparation and testimony;

(g) an itemization of the fees incurred and the time spent on the case, which shall be supplemented 14 days prior to the first day of trial; and

(h) a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

The witness's direct testimony shall be limited to matters disclosed in detail in the

report.

(II) Other Experts. With respect to a party or witness who may be called to provide expert testimony but is not retained or specially employed within the description contained in subsection (a)(2)(B)(I) above, the disclosure shall be made by a written report or statement that shall include:

(a) a complete description of all opinions to be expressed and the basis and reasons therefor;

(b) a list of the qualifications of the witness; and

(c) copies of any exhibits to be used as a summary of or support for the opinions. If the report has been prepared by the witness, it shall be signed by the witness.

If the witness does not prepare a written report, the party's lawyer or the party, if self-represented, may prepare a statement and shall sign it. The witness's direct testimony expressing an expert opinion shall be limited to matters disclosed in detail in the report or statement.

(C) Unless otherwise provided in the Case Management Order, the timing of the disclosures shall be as follows:

(I) The disclosure by a claiming party under a complaint, counterclaim, cross-claim, or third-party claim shall be made at least 126 days (18 weeks) before the trial date.

(II) The disclosure by a defending party shall be made within 28 days after service of the claiming party's disclosure, provided, however, that if the claiming party serves its disclosure earlier than required under subparagraph 26(a)(2)(C)(I), the defending party is not required to serve its disclosures until 98 days (14 weeks) before the trial date.

(III) If the evidence is intended to contradict or rebut evidence on the same subject matter identified by another party under subparagraph (a)(2)(C)(II) of this Rule, such disclosure shall be made no later than 77 days (11 weeks) before the trial date.

3. A discussion of a proposed addition to Comment 18 to Rule 26 to help clarify what kind of expert report needs to be filed by non-retained experts (e.g., treating physicians, mechanics, police).

Proposed Revisions to C.R.C.P. 26(a)(2)(B)(II) – Comment 18.

The Civil Rules Committee proposes the insertion of some additional language in Comment [18] of C.R.C.P. 26 relating to requirements for expert disclosures for non-retained experts. The Committee has received copies of motions and orders limiting opinion testimony by treating physicians unless they have prepared full expert reports as required from retained experts. Although those motions and orders presently predate the 2015 revisions to Rule 26, they are being pressed upon some trial courts now as being good law. The argument seems to be that if an opinion goes beyond what is in the medical records (or whatever records the non-retained expert keeps), it converts the expert into a retained expert. There also seems to be an argument that if the doctor/expert forms an opinion they were not required to form as part of their job, then offering that opinion converts them into a retained expert. In other words, if a doctor has an opinion on causation formed during treatment, but did not have to form that opinion to provide treatment, then offering the opinion makes the doctor a retained expert. This same line of argument could apply to police officers, in-house accountants, auto repair mechanics or any other type of non-retained experts.

This limitation and requirement is contrary to what the Committee thinks is the clear meaning of existing Rule 26(a)(2)(B)(II) and Comments [18] and [21]. Such limitations and requirements certainly violate the intent of the Committee when it was preparing the 2015 amendments to Rule 26(a)(2)(B)(II). The Committee believes that it could be several years before an appellate case would raise this issue for a judicial determination. Because the Committee believes these rulings are so clearly contrary to the intent of the Rule, it requests the Court to amend Comment [18] to limit the mischief that could occur in the interim.

The Committee believes a modest change to Comment [18] should clarify any possible confusion. (*See* Holme, *New Pretrial Rules for Civil Cases – Part II: What is Changed*, 44 *The Colorado Lawyer,* 111, 118 (July 2015).

Proposed revisions to Comment [18] to Rule 26.

[18] Expert disclosures.

Retained experts must sign written reports much as before except with more disclosure of their fees. The option of submitting a "summary" of expert opinions is eliminated. Their testimony is limited to what is disclosed in detail in their report. Rule 26(a)(2)(B)(I).

"Other" (non-retained) experts must make disclosures that are less detailed. Many times, a lawyer has no control over a non-retained expert, such as a treating physician or police officer, and thus the option of a "statement" must be preserved with respect to this type of expert, which, if necessary, may be prepared by the lawyers. **For example, in addition to the opinions and diagnoses reflected in a plaintiff's medical records, a treating physician may have reached an opinion as to the cause of those injuries based upon treating the patient. Those opinions may not have been noted in the medical records but if sufficiently disclosed in a written report or statement as described in Comment [21], below, such opinions may be offered at trial without the witness having first prepared a full, retained expert report.** In ~~either~~ **any** event, the expert testimony is to be limited to what is disclosed in detail in the disclosure. Rule 26(a)(2)(B)(II).

Holme, Richard

From: Damon Davis <damon@killianlaw.com>
Sent: Monday, June 26, 2017 5:33 PM
To: Holme, Richard
Subject: Orders limiting non-retained doctors to their medical records
Attachments: ORDER GRANTING WITH AMENDMENTS DEFENDANT VIKING'S MOTION IN LIMINE TO LIMIT THE OPINION AND TESTIMONY OF PLAINTIFFS NON-RETAINED EXPERTS TO THEIR MEDICAL RECORDS.pdf; Minute Order - No Print.pdf; ORDER REGARDING MOTIONS IN LIMINE.pdf; ORDER RESOLVING DEFENDANTS COMBINED MOTIONS IN LIMINE.pdf

Dear Dick,

Attached are the orders I was able to find that limited treating physician's testimony to their medical records. There is not much analysis in any of them. I skimmed some of the motions and responses, and there was not much in them either. The big argument seems to be that if an opinion goes beyond what is in the medical records (or whatever records the non-retained expert keeps), it converts the expert to a retained expert. There also seems to be an argument that if the doctor/expert forms an opinion they did not have to form as part of their job, then offering that opinion converts them to a retained expert. In other words, if a doctor has an opinion on causation formed during treatment, but did not have to form that opinion in order to actually provide treatment, then offering the opinion makes the doctor a retained expert. It is not clear from the orders if these arguments that are being relied on.

Although these orders predate the rules change, they are being cited to the trial judges. The argument that is being made is that the rules change adopted the logic of these opinions and limited experts to their reports. I have not seen a post-amendment order, but have heard reports of them. I will put some feelers out and see if I can get any orders with analysis or any post-amendment orders.

Sincerely,

Damon Davis
Killian Davis Richter & Mayle, P.C.
202 North 7th Street
Grand Junction, CO 81502
Ph. 970-241-0707
Fax. 970-242-8375

Holme, Richard

From: Holme, Richard
Sent: Thursday, July 13, 2017 1:52 PM
To: David DeMuro
Cc: Holme, Richard
Subject: RE: Comment to Rule 26(a)(2)(B)(II) -response to DeMuro
Attachments: 4362641_2.docx

David: This is in response to your memo dated 7/11/17 concerning modifying comment to C.R.C.P. 26(a)(2)(B)(II). I have attached a draft of that revision that Damon Davis has said looks okay to him and which I have forwarded to Mike. It may answer some of your concerns, but let me address some of your concerns more directly.

First, unlike many of our rules, the requirements for disclosures of non-retained experts are significantly different from the federal counterpart. I think it is different in ways that make reliance on federal case law to interpret the Colorado version inappropriate.

Federal Rule 26(a)(2)(C) regarding non-retained experts does not require a "written report" but requires disclosure for non-retained experts to include [1] "the subject matter" of the evidence to be presented, and [2] "a summary of the facts and opinions to which the witness is expected to testify."

Colorado Rule 26(b)(2)(B)(II) regarding non-retained experts requires either a "written report" or a "statement" including [1] "a complete description of all opinions to be expressed and the basis and reasons therefor," [2] "a list of the qualifications of the witness," and [3] "copies of any exhibits to be used as a summary of or support for the opinions." Importantly, and unlike the federal rule, the Colorado Rule also limits the non-retained expert's direct trial testimony "to matters disclosed in detail in the report or statement." In short, Colorado's rule is more inclusive as to what must be disclosed and more restrictive as to admissibility without full disclosure.

What the Colorado Rule does not require from non-retained experts but would have to be included if a "report" were required is that the witness would have to [1] spend more of the witness's (often expensive and unavailable time) preparing the report instead of the lawyer being able to do it; [2] prepare a list of all data or other information considered; [3] list references to literature that may be used; [4] list all publications within the preceding 10 years; [5] provide details of the witness's fee agreement and update it 14 days before trial; and [6] list all other cases in which the witness has testified in the prior four years.

One might argue that much of this added material either will not exist or would be easy to produce, but for witnesses who are principally testifying because of their familiarity with the facts of the dispute, most of this additional information is also immaterial. Furthermore, to the extent the additional information is relevant, it probably should be included in the non-retained expert's statement if the witness is actually going to testify about it.

I think among the major reasons why defendants demand a "report" from a non-retained expert are [1] a "gotcha" effort to bar testimony, [2] an effort to make it more difficult for a physician or mechanic to find or make the time to prepare even a relatively simple report, and [3] an effort to drive up the expenses of plaintiffs to make it harder for them to maintain their cases.

After you have read this, please call me if you have further questions.

Dick

Memo

To: Dick Holme

From: Dave DeMuro

Date: July 11, 2017

Re: Modifying comment to C.R.C.P. 26 (a)(2)(B)(II)

At the June 23, 2017, meeting of the Civil Rules Committee, Damon Davis raised an issue about how Rule 26(a)(2)(B)(II) on disclosures of non-retained experts was being interpreted. He suggested that the Committee propose to the Supreme Court that it adopt an additional comment to the Rule based on an excerpt from your July 2015 article. Specifically, he cited a portion of your article where you give an example of a treating physician who has expressed opinions in plaintiff's medical records, but also "may have reached an opinion as to the cause of those injuries gained while treating the patient." You then wrote that even though such an opinion did not appear in the medical records, it may, "if appropriately disclosed," be offered at trial without the witness having prepared the full report required of a retained expert under Rule 26 (a)(2)(B)(I). I was one of a number of committee members who supported this proposal, and I believe that you agreed to draft proposed language to add to the comment.

Since that meeting, I have had some second thoughts about this proposal. Would it be fair for one party to call a treating physician to testify at trial about causation, a subject not in the medical records, without providing the full report that a retained expert on causation would be required to provide? On the other hand, you were careful to say in the article that the treater reached the causation opinion while treating the patient and the opinion must be appropriately disclosed.

I decided to research the body of federal case law on the issue of whether a treating expert may testify on opinions not in the medical records without filing the long report required of retained experts. The Wright & Miller treatise discusses the issue only briefly, but cites to many cases at volume 8A, § 2031.1, footnotes 13 and 14, and § 2031.2.

A leading case is Goodman v. Staples The Office Superstore, LLC, 644 F. 3d 817 (9th Cir. 2011). After reviewing decisions from three other circuits, the court concluded: "Today we join those circuits that have addressed the issue and hold that a treating physician is only exempt from Rule 26 (a)(2)(B)'s written report requirement to the extent that his opinions were formed during the course of treatment." 644 F. 3d at 826. Elsewhere in the case, the court spoke of the treating expert who "morphs" into a retained expert, and stated that the full report is only required as to the additional opinions.

The Goodman court addressed at length an earlier decision from the Sixth Circuit, Fielden v. CSX Transportation, Inc., 482 F.3d 866 (6th Cir. 2007). That case was consistent with Goodman by adopting the general rule that the full expert "report is not required when a treating physician testifies within a permissive core on issues pertaining to treatment, based on what he or she learned through actual treatment and from the plaintiff's records up to and including that treatment." 482 F. 3d at 871. But, it was also noted with apparent approval, that the physician in Fielden who gave an opinion on causation was not required to submit the full report because there was evidence that the physician formed that opinion during the course of treatment.

In other federal cases, I have seen courts require the full report to the extent the treater is giving opinions that are based on information that he or she learned later or where the attorney for a party requested the treater to address other issues and provided more records and paid the expert for his or her time. The court decisions are often very fact specific on what exact opinion the treater will give at trial, when did he or she form the opinion, and what was it based on.

I should note that the two cases cited above were decided under the prior federal rule that required no disclosure for non-retained experts. As you know, the current federal rule, Fed. R. Civ. P. 26(a)(2)(C), that requires a "summary" disclosure for experts not in the retained category, did not take effect until 12/01/10. But, from my review of the recent federal cases decided under the new rule, they continue to follow the principles of Goodman and Fielden in deciding whether the short disclosure is sufficient or the full report is required, at least as to some of the treater's opinions.

To return to the idea of a proposed comment to our Rule 26, the federal case law reassures me that you are right in the way you phrased this issue in the article (probably because you already knew about the federal cases). I think that the Colorado appellate courts will get to the same point as cases arise, and I question whether we should propose to add a comment that may amount to an advisory ruling.

But, if the Committee wants to recommend adoption of an additional comment at this time to help the trial bench and bar, I think that the comment should at least include the key points you made in the article: (1) the treater reached the opinion during the course of treatment, and (2) the opinion is properly disclosed under C.R.C.P. 26 (a)(2)(B)(II). To the extent that the opinions of the treating expert were not reached during treatment, I think they are the opinions of a retained expert to be disclosed under Rule 26 (a)(2)(B)(I), and I think that also should be included in the comment.

Holme, Richard

From: David DeMuro <ddemuro@vaughandemuro.com>
Sent: Friday, October 20, 2017 3:39 PM
To: Holme, Richard
Cc: moore, jenny; berger, michael
Subject: Amending the comment on CRCP 26(a)(2)(B)(II); Civil Rules Committee
Attachments: Proposed change to comment on Rule 26(a)(2)(B)(II).pdf

Dick: I understand that your proposed change to the comment on Rule 26(a)(2)(B)(II) will be on the agenda for the Civil Rules committee on 10/27/17. I will be out of town that day and may be able to participate by phone, but I thought I would set forth my view on this issue in writing.

I think we started down this path because Damon Davis reported a couple of anecdotes about judges not allowing treating physician experts under CRCP 26(a)(2)(B)(II) to testify about an opinion that was not set forth in medical records. That language is not expressly in the rule, but it does provide that a disclosure about the treating expert must include "a complete description of all opinions to be expressed and the basis and reasons therefor." So, if a party merely disclosed that the treater would testify consistently with the treatment records, and if the treatment records said nothing about causation, then I think the court acted properly in not allowing the opinion.

On the other hand, if the disclosure included the treater's causation opinion and the basis and reasons therefor, and if the opinion was truly formed based on treatment as opposed to specially hiring a causation expert, then the opinion can be given at trial, even though it was not stated in the medical records. That led to the suggestion that the comment be amended to address this alleged problem. You drafted some language (see attached) that speaks to this point very well, including stating that the treater had to reach the opinion during treatment and the opinion had to be properly disclosed under Rule 26(a)(2)(B)(II).

Nevertheless, I am concerned that the proposed amendment, while technically correct, may have an unintended consequence of giving lawyers a pathway to avoid the full disclosure obligation for the specially-retained expert. That is, once the lawsuit is contemplated or underway, the party or his or her attorney may ask that the treater,especially the family physician, see the party again and issue a further opinion on a subject such as causation. I had that happen in a case last year when 4 "treating" expert physicians were disclosed on the expert deadline with new causation opinions. We let it go and deposed the experts, but it led to problems because they had not made the full disclosures of a retained expert under Rule 26(a)(2)(B)(I), so we struggled in the depositions without information such as the medical literature they relied on.

I have since researched this issue and found that a number of federal courts have held that the treating physician is only exempt from the full disclosure required in FedRCivP 26(a)(2)(B) to the extent that his or her opinions were formed during treatment. Goodman v. Staples, 644 F.3d 817, 826 (9th Cir. 2011). That court added that when the treating expert "morphs" (the court's word) into a retained expert, the full report is required as to the additional opinions. Another court stated that the full report is not required for opinions formed "through actual treatment." Fielden v. CSX Transportation, Inc., 482 F. 3d 866, 871 ((6th Cir. 2007).

I must note that the federal rule has different language than our state rule, but FedRCivP 26(a)(2)(B) and (C) divide the experts and the disclosure obligations in a very similar manner, so I think that the federal cases are instructive. I also found that many of the federal cases are very fact specific as to when and how the treater learned more information or received a request that led to another opinion.

As a result, I would rather not have the proposed language added to the comment, put the anecdotes from Damon and me aside for now so we can see how much of a problem this becomes, and let the issue develop through the state courts which may want to follow the federal cases and stop parties from avoiding the full disclosure obligation in certain circumstances. Alternatively, I suggest adding to your proposed language a timing requirement. For example, adding to the end of your first sentence, "as long as the physician developed the opinion prior to a request from a party or its counsel made for purposes of litigation."

Please let me know if you have any questions about this.

Dave

David R. DeMuro
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4. A brief memo relating to an inconsistency between two provisions in Ruel 26 relating to depositions of non-retained experts.

Discrepancy Between C.R.C.P. 26(b)(2)(A) and 26(b)(4)(A) Regarding Permitted Depositions of "Other" [Non-Retained] Experts

An associate in my firm recently pointed out a discrepancy between Rule 26(b)(2)(A) [Discovery Limitations] on one hand, and 26(b)(4)(A) [Trial Preparations] and C.R.C.P. Form JDF 622, ¶11 [Proposed Case Management Order], on the other hand.

As shown below, 26(b)(2)(A) allows automatic depositions of all "retained experts" and "other experts," while 26(b)(4)(A) and JDF 622, ¶11, allow only automatic depositions of "retained experts," but not "other experts." Thus:

Rule 26(b)(2)(A) provides:

> A party may take one deposition of each adverse party and of two other persons, exclusive of persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2) ["Disclosure of Expert Testimony].

Rule 26(a)(2), in turn, requires "expert testimony" to be "disclosed" by both "Retained Experts" (26(a)(2)(B)(I)) and "Other Experts" (26(a)(2)(B)(II)).

Rule 26(b)(4)(A), however, provides:

> A party may depose any person who has been identified as an expert disclosed pursuant to subsection 26(a)(2)(B)(I) [*i.e.*, only "Retained Experts"] of this Rule whose opinions may be presented at trial. . . .

Form JDF 622 ¶11 adopts this same limitation as it provides in part:

> Proposed limitations on and modifications to the scope and types of discovery consistent with the proportionality factors in C.R.C.P. 26(b)(1): _____.
>
> Number of depositions per party (C.R.C.P. 26(b)(2)(A) limit 1 of adverse party + 2 others + experts per C.R.C.P. 26(b)(4)(A) [*i.e.*, only "Retained Experts"]). . . .

Concerning whether depositions of "Other [non-retained] Experts" should be automatically available, my recollection is that when the 2015 rule changes to Rules 16 and 26 were being developed, the object was to limit as much as possible the number of expert depositions and to limit the personal difficulties and delays of scheduling depositions of people like treating physicians and police officers who were witnesses only because of their personal knowledge about and involvement in the subject matter of the lawsuit. The prior version of Rule 26(b)(4)(A) did not include the cross reference to Rule 26(a)(2)(B)(I). Furthermore, the ability to depose "two others" would allow parties to take one or two non-retained experts if they felt a real need. Finally, even if depositions of non-retained witnesses were not allowed, their testimony still would be limited to their written disclosures.

It also should not be forgotten that trial courts will continue to be able to grant more or fewer depositions depending on requests by the parties and considering proportionality and the other limitations on discovery contained in Rule 26(b)(1).

However, under any scenario the Rules should be consistent. Thus, I recommend that one of the following two alternatives should be submitted to the Supreme Court (my personal preference would be alternative (1)):

(1) Amend Rule 26(b)(2)(A) [Discovery Limitations] as follows to prevent automatic rights to depose "other experts by adding the highlighted additional subsection reference –

> A party may take one deposition of each adverse party and of two other persons, exclusive of persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2)(B)(I)
>
> or

(2) Amend Rule 26(b)(4)(A) [Trial Preparations] as follows to allow for depositions of both retained and "other" experts by deleting the highlighted subsection –

> A party may depose any person who has been identified as an expert disclosed pursuant to subsection 26(a)(2)~~(B)(I)~~ of this Rule whose opinions may be presented at trial. . . .

Neither of these changes would require any change to Form JDF 622, ¶ 11, because it already incorporates Rule 26(b)(4)(A).

From: berger, michael
Sent: Thursday, March 12, 2020 8:10 AM
To: michaels, kathryn
Subject: FW: Rul121(c) "Local Rules" Amendment report

Kathryn, please include this email as part of the meeting materials.
Michael H. Berger

From: Dick Holme <rpholme@live.com>
Sent: Wednesday, March 11, 2020 5:05 PM
To: berger, michael <michael.berger@judicial.state.co.us>
Cc: Dick Holme <rpholme@live.com>
Subject: Rul121(c) "Local Rules" Amendment report

Judge Berger:

Report of Abolition of Local Civil Rules Subcommittee

In 1988, the Colorado Supreme Court adopted a new Civil Rule 121 which abolished all existing Local Rules and provided a very detailed procedure allowing local courts to adopt new rules as long as they were not inconsistent with the existing Civil Rules and following review and approval of any new local rules. One of the basic purposes of this was to reduce variations of individual practices so that lawyers in differing parts of the state to be comfortable that they could practice in various judicial districts and courts without having to learn or relearn a large number of separate practice requirements.
During the following years, numerous individual judges articulated a variety of “practice standards” applying only to their individual courts. In their early days these tended to be framed as “delay reduction” orders to insist on prompt service of process and expediting completion of pleading and motions practice. As time has passed, more and more practice standards have been adopted and have set up requirements for more and more pre-trial and trial standards. This appears to be a more consistent problem in smaller and more widely located judicial districts. As far as we know, no districts or judges have asked the Supreme Court to approve any of the practice standards in use around the state.
A couple Civil Rules Committee meetings ago some members of the Committee asked that it see

whether this is a problem that needs to be revisited. You appointed a small subcommittee comprised of Judge Elliff (Denver), Peter Goldstein (Colorado Springs), Damon Davis (Grand Junction) and yours truly (Denver) to examine this issue. Although we did not undertake a genuine search of the various forms of individual practice standards, we did receive copies of several forms of orders used by different judges. We had a couple phone conferences and concluded that we had enough samples to provide this report.

Some examples we received were noteworthy for containing similar language on various subjects – e.g., Civility and Professionalism, rejecting initial written discovery motions alternative dispute resolution. This suggested sharing of these orders and some lack of widely differing rules.

With some frequency the practice standards appeared to be efforts to articulate the judges' views of matters that have historically been within the court's discretion, and are not required in any of the Civil Rules. Furthermore, most of them appear to have been provided to counsel very early in the case, most commonly before the Case Management Conference. It was suggested that lawyers may feel it is inappropriate the start the CMO process by questioning the court's first order, but at least one of the lawyers and the judge in our subcommittee felt a primary reason for CMOs was to address as many things misconceptions and obstructions as possible that might interfere with the efficient handling of the case.

We did find a few examples of standards that contain provisions relating to deadlines for actions that were different than those adopted by this Committee – for example, requiring filing of all motions, particularly Shreck motions a month before required under the Civil Rules. We discussed this and concluded that this might well be curable at the CMO, but was potentially problematic. Yes, the judges still have the authority on a case by case basis to amend deadlines, but it should not be done as a matter of course and without hearing enough to know whether it is necessary.

Given the foregoing, the Subcomm has offered a proposed very brief amendment to Rule 121 as

a new subsection 121(c):

C.R.C.P. 121(c). No rule or order adopted in any judicial district or by an individual judge which is not approved as provided in section (b) of this Rule, shall alter the time or deadlines contained in these Civil Rules unless, at the Case

Management Conference or following a hearing, the court finds that there is a specific need for such an alteration in a pending case

(Existing subsection (c) would be renumbered to 121(d).)

However, the subcommittee feels the desirability or necessity of such an amendment should be
considered by the Committee as a whole before we expend any more time on this issue.

Dick Holme

From: berger, michael
Sent: Wednesday, February 5, 2020 1:36 PM
To: michaels, kathryn
Subject: FW: Rule 55.1 (Final).docx
Attachments: New Rule 55.1 (Final).docx

Kathryn, please add this as an agenda item for the March meeting, including in the packet both the
Criminal Rules Committee's proposal and Judge Dailey's email to Justice Samour.

Michael H. Berger

From: dailey, john <john.dailey@judicial.state.co.us>
Sent: Wednesday, February 5, 2020 1:29 PM
To: berger, michael <michael.berger@judicial.state.co.us>
Subject: Rule 55.1 (Final).docx

(fyi)

From: dailey, john
Sent: Monday, February 3, 2020 11:07 AM
To: samour, carlos <carlos.samour@judicial.state.co.us>
Cc: owens, wanda <wanda.owens@judicial.state.co.us>; michaels, kathryn <kathryn.michaels@judicial.state.co.us>; sberry@co.jefferson.co.us; gilman, shelley <shelley.gilman@judicial.state.co.us>; grohs, deborah <deborah.grohs@judicial.state.co.us>; hoffman, morris <morris.hoffman@judicial.state.co.us>; matt.holman@coag.gov; abe@rklawpc.com; Malone, Chelsea - DCC Judge <chelsea.malone@denvercountycourt.org>; mcgreevy@rmwpc.com; nichols, dana <dana.nichols@judicial.state.co.us>; bob.russel@denverda.org; karen.taylor@coloradodefenders.us; Sheryl.uhlmann@coloradodefenders.us; vandendp@co.larimer.co.us; yacuzzo, karen <karen.yacuzzo@judicial.state.co.us>
Subject: FW: Rule 55.1 (Final).docx

Justice Samour,

On behalf of the supreme court's advisory committee on rules of criminal procedure, I forward to you for transmittal to the court as a whole, the accompanying proposed rule on public access to court records. As you know, it is the result of considerable effort by every single member of the committee. Usually, our transmittal of a rule is accompanied by a lengthy letter explaining the reasons for our proposals. In light of the ongoing and keen public interest in a rule of

this nature, I’ve decided
not to wait until we could put a transmittal letter together before sending the rule up.

We will be prepared to answer any questions the court may have about the proposal.

Sincerely,

John Daniel Dailey,
Chair, Criminal Rules Committee

Rule 55.1. Access to Court Records in Criminal Cases

(a) Court records in criminal cases are presumed to be accessible to the public. Unless a court record or any part of a court record is otherwise inaccessible to the public pursuant to statute, rule, regulation, chief justice directive, or court order, the court may deny the public access to a court record or to any part of a court record only in compliance with this rule.

(1) Motion Requesting to Limit Public Access. A party may file a motion requesting that the court limit public access to a court record or to any part of a court record by making it inaccessible to the public or by allowing only a redacted copy of it to be accessible to the public. A party seeking to limit public access to a court record or to any part of a court record must file a motion pursuant to this rule and serve it on any opposing party. An opposing party must file any response within 7 days after service of the motion unless otherwise directed by the court. The body of the motion, the body of any response(s), and the body of any accompanying materials shall be inaccessible to the public until otherwise ordered by the court. The court may sua sponte make a court record inaccessible to the public or order that only a redacted copy of it be accessible to the public. If the court does so, it must notify the parties and comply with paragraphs (a)(5), (a)(6), (a)(7), (a)(8), and (a)(9) of this rule. In its discretion, the court may hold a hearing before sua sponte ordering a court record or any part of a court record inaccessible to the public.

(2) Contents of the Motion. A motion to limit public access shall identify the court record or any part of the court record that the moving party wishes to make inaccessible, state the reasons for the request, and specify how long the information identified should remain inaccessible to the public.

(3) Limited Access to Records Already Filed. A party may file a motion requesting that the court limit public access to a court record already filed or to any part of that court record by making it inaccessible to the public or by allowing only a redacted copy of it

to be accessible to the public. Such a motion must be served on any opposing party. Upon receiving the motion, the court shall immediately make the subject court record inaccessible to the public until otherwise ordered by the court. The body of the motion, the body of any response(s), and the body of any accompanying materials shall also be inaccessible to the public until otherwise ordered by the court. After being fully apprised of the circumstances, the court shall resolve the motion in accordance with the provisions of this rule.

(4) Hearing. The court may conduct a hearing on a motion to limit public access. Notice of the hearing shall be provided to the parties. The hearing shall be closed to the public, unless the court in its discretion determines otherwise.

(5) When Request Granted. The court shall not make a court record or any part of a court record inaccessible to the public pursuant to this rule without a written order. When a request to limit public access is granted, the court's order shall:

(A) specifically identify one or more substantial interests served by making the court record inaccessible to the public or by allowing only a redacted copy of it to be accessible to the public;

(B) explain how taking such action serves the interest(s) identified;

(C) explain why there would be a substantial probability of harm to the interest(s) identified;

(D) find that no less restrictive means than making the record inaccessible to the public or allowing only a redacted copy of it to be accessible to the public exists to achieve or protect the identified interest(s); and

(E) conclude that the identified interest(s) outweigh(s) the right of public access to the court record or to an unredacted copy of it.

(6) Duration. Any order limiting public access to a court record or to any part of a court record shall indicate how long the order will remain in effect.

(7) Access to the Court's Order. The court's order limiting access to a court record or to any part of a court record pursuant to this rule shall be accessible to the public, except that any information deemed inaccessible under this rule shall be redacted from the order.

(8) Review. The court shall review any order issued pursuant to this rule at the time of the expiration of the order or earlier upon motion of one of the parties. The court may postpone the expiration date of the order issued pursuant to this rule if it determines that the findings previously made under paragraph (a)(5) of this rule continue to apply or if it makes new findings under paragraph (a)(5) of this rule justifying postponement of the expiration date.

(9) Access to the Original Court Record. If a court limits access to a court record or to any part of a court record pursuant to this rule, only the court, the court's staff, authorized Judicial Department staff, the parties to the case, and the attorneys of record and their agents shall have access to the original court record.

(10) Effective Date. This rule shall be effective on _____.

2020 WL 579382

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. A PETITION FOR REHEARING IN THE COURT OF APPEALS OR A PETITION FOR CERTIORARI IN THE SUPREME COURT MAY BE PENDING.

Colorado Court of Appeals, Division VII.

DIA BREWING CO., LLC, a Colorado limited liability company, Plaintiff-Appellant,

v.

MCE-**DIA**, LLC, a Michigan limited liability company; Midfield Concessions Enterprises, Inc. a Michigan limited liability company; Andrea Hachem; Noureddine "Dean" Hachem; Samir Mashni; Simrae Solutions, LLC, a Colorado limited liability company; Sudan I. Muhammad; Pangea Concessions Group, LLC, a Florida limited liability company; Niven Patel; Rohit Patel; and Richard E. Schaden, Defendants-Appellees.

Court of Appeals No. 18CA2136

Announced February 6, 2020

Synopsis

Background: Brewing company that was unsuccessful in its bid for contract to establish restaurants and related businesses at airport sued successful bidder and related entities, alleging bid-rigging conspiracy. The District Court, Denver County, Brian R. Whitney, J., granted defendants' motions to dismiss the original complaint, and to strike **brewing** company's amended complaint. **Brewing** company appealed.

Holdings: The Court of Appeals, Lipinsky, J., held that:

[1] district court's dismissal of plaintiff's original complaint for failure to state a claim upon which relief could be granted, and for lack of subject-matter jurisdiction, did not make order granting dismissal a final judgment for purposes of extinguishing plaintiff's right to file an amended complaint;

[2] district court order dismissing **brewing** company's complaint was not a final order; and

[3] district court improperly struck **brewing** company's amended complaint.

Reversed and remanded.

Fox, J., filed dissenting opinion.

West Headnotes (15)

[1] **Pleading**
Condition of Cause and Time for Amendment

For purposes of rule permitting a party to amend a complaint once, as a matter of course, before a responsive pleading is filed, a motion to dismiss does not constitute a responsive pleading. Colo. R. Civ. P. 15(a).

[2] **Appeal and Error**
Amended and Supplemental Pleadings

Whether a plaintiff has waived its absolute right to amend a complaint once, as a matter of course, before a responsive pleading is filed, is a question of law that the Court of Appeals review de novo. Colo. R. Civ. P. 15(a).

[3] **Pleading**
After judgment or motion therefor
Pleading
After verdict or judgment or motion therefor

The entry of a final, appealable judgment cuts off the right to amend a pleading, despite the language of the rule permitting a party to amend a complaint once, as a matter of course, before a responsive pleading is filed. Colo. R. Civ. P. 15(a).

[4] **Pleading**
Amendment as of course

In the absence of a final judgment, the right to amend a complaint once as a matter of course before a responsive pleading is filed survives dismissal of the complaint. Colo. R. Civ. P. 15(a).

[5] **Pleading**
After judgment or motion therefor
Pretrial Procedure
Amendment or pleading over

District court's dismissal of plaintiff's original complaint for failure to state a claim upon which relief could be granted, and for lack of subject-matter jurisdiction, did not make order granting dismissal a final judgment for purposes of extinguishing plaintiff's right to file an amended complaint; plaintiff sought but was not granted a pre-dismissal hearing on its request to amend to establish standing, and following dismissal, plaintiff could elect either to appeal dismissal or file an amended complaint under rule allowing amendment once, as matter of course, before responsive pleading was filed. Colo. R. Civ. P. 12(b)(1), 12(b)(5), 15(a).

[6] **Pleading**
Affected by time of application in general

District courts should not impose arbitrary restrictions on making timely amendments to the pleadings, and procedural rules should focus upon resolution of actions on their merits. Colo. R. Civ. P. 12(b)(1), 12(b)(5), 15(a).

[7] **Action**
Persons entitled to sue

Standing is a jurisdictional prerequisite.

[8] **Appeal and Error**
Rulings on demurrer or motion relating to pleadings

A dismissal without prejudice is not a final judgment if the plaintiff can cure deficiencies through an amended complaint.

[9] **Pretrial Procedure**
Amendment or pleading over

District court order dismissing **brewing** company's complaint was not a final order, in action brought by **brewing** company alleging bid-rigging conspiracy for contract to establish restaurants at airport against successful bidder and related entities, and thus **brewing** company could file amended complaint as matter of course; although court held **brewing** company had not established actual injury to create standing, **brewing** company could have cured this defect by pleading additional facts to discredit summary ranking of bidders relied upon by district court. Colo. R. Civ. P. 12(b)(1), 12(b)(5), 15(a).

[10] **Appeal and Error**
Scope and extent of subsequent review in general

Decision by motions division of appellate court holding that plaintiff's appeal of order dismissing complaint was untimely, but

allowing appeal of order striking amended complaint, did not preclude Court of Appeals' finding that order dismissing complaint was not a final judgment for purposes of plaintiff's right to amend complaint as a matter of course following entry of order, where motions division neither considered nor determined this issue. Colo. R. Civ. P. 12(b)(1), 12(b)(5), 15(a).

[11] **Courts**
⇐Number of judges concurring in opinion, and opinion by divided court

A decision of a motions division regarding jurisdiction is not always binding on Court of Appeals.

[12] **Pleading**
⇐Form and sufficiency of amended pleading in general

Futility of amendment is a basis to deny a motion for leave to amend a pleading; a district court may deny a motion for leave to amend on grounds of futility if the proposed pleading could not survive a motion to dismiss.

[13] **Pleading**
⇐Form and sufficiency of amended pleading in general

For purposes of a motion for leave to amend a pleading, a proposed amendment would clearly be futile if, among other things, it failed to state a legal theory or was incapable of withstanding a motion to dismiss.

[14] **Pleading**
⇐Amendment as of course

A party amending a pleading as a matter of course does not need the court's leave to submit its amended pleading, and the court lacks the discretion to reject an amended complaint based on its alleged futility. Colo. R. Civ. P. 15(a).

[15] **Pleading**
⇐Sufficiency of amendment
Pretrial Procedure
⇐Amendment or pleading over

District court improperly struck **brewing** company's amended complaint under futility of amendment doctrine, in action brought by **brewing** company alleging bid-rigging conspiracy for contract to establish restaurants at airport against successful bidder and related entities; following dismissal of original complaint, **brewing** company had right to file amended complaint under rule permitting a party to amend a complaint once, as a matter of course, before a responsive pleading was filed, and was not seeking leave of court to do so. Colo. R. Civ. P. 12(a)(1), 15(a).

City and County of Denver District Court No. 18CV30611, Honorable Brian R. Whitney, Judge

Attorneys and Law Firms

Jones & Keller, P.C., G. Stephen Long, Christopher S. Mills, Denver, Colorado; The Law Offices of George A. Barton, P.C., George A. Barton, Denver, Colorado; Connelly Law, LLC, Sean Connelly, Denver, Colorado, for Plaintiff-Appellant

Merchant & Gould P.C., Peter A. Gergely, Denver, Colorado; Woodrow & Peluso, LLC, Steven L. Woodrow, Denver, Colorado, for Defendants-Appellees MCE-**DIA**, LLC, Midfield Concessions Enterprises, Inc., Andrea Hachem; Noureddine "Dean" Hachem; Samir

Mashni; Simrae Solutions, LLC, Sudan I. Muhammad; Pangea Concessions Group, LLC, Niven Patel; Rohit Patel,

Haddon, Morgan and Foreman, P.C., Pamela Robillard Mackey, Saskia A. Jordan, Adam Mueller, David G. Maxted, Denver, Colorado for Defendant-Appellee Richard E. Schaden

Opinion

Opinion by JUDGE LIPINSKY

¶ 1 Plaintiff, **DIA Brewing** Co., LLC (**Brewing**), had several options after the district court dismissed its claims without prejudice, if it wished to continue litigating against the defendants:

- move for leave to file an amended complaint that emedied the defects in its original pleading;
- file an amended complaint with the defendants' written consent; or
- commence a new case, with a new complaint.

¶ 2 But **Brewing** chose a different strategy that raises novel issues under Colorado law: it filed an amended complaint, purportedly as a matter of course under C.R.C.P. 15(a), despite the dismissal of its claims.

¶ 3 We decide three questions of law. First, we hold that, under the facts of this case, the orders dismissing **Brewing**'s claims without prejudice were not final judgments. Second, because the dismissal orders were not final judgments, we hold that **Brewing** retained the right to amend its complaint as a matter of course under C.R.C.P. 15(a). Third, we hold that the district court erred by deciding that **Brewing**'s amended complaint failed under the futility of amendment doctrine. Thus, we reverse the order striking **Brewing**'s amended complaint and remand for further proceedings.

I. Relevant Facts and Procedural History

¶ 4 **Brewing** unsuccessfully bid for a contract to establish restaurants and related businesses at Denver International Airport (**DIA**). The businesses included a Colorado-themed microbrewery, two burger restaurants, and a coffee bar. **DIA** issued publicly available rankings of the five qualified bidders, which ranked **Brewing** fourth.

¶ 5 **Brewing** then sued several public and private defendants, alleging a bid-rigging conspiracy between defendants MCE-**DIA**, LLC, the winner of the contract; Midfield Concessions Enterprises, Inc., Andrea Hachem, Noureddine "Dean" Hachem, Samir Mashni, Simrae Solutions, LLC, Sudan I. Muhammad, Pangea Concessions Group, LLC, Niven Patel, and Rohit Patel, who are affiliates of MCE-**DIA**, LLC; Richard E. Schaden, the CEO of the hamburger chain Smashburger; and **DIA** officials (who are no longer parties to the case).

*2 ¶ 6 More specifically, **Brewing** alleged that the owners of MCE-**DIA** offered partial ownership of the company to affiliates of one of the **DIA** officials in exchange for the official's help in awarding the contract to MCE-**DIA**. **Brewing** asserted that **DIA**'s ranking of the bidders was tainted and invalid based on defendants' alleged wrongful conduct.

¶ 7 **Brewing** pleaded claims for bid-rigging in violation of section 6-4-106, C.R.S. 2019; bribery and other predicate acts in violation of the Colorado Organized Crime Control Act, § 18-17-104, C.R.S.2019; tortious interference with prospective business opportunity; and civil conspiracy.

¶ 8 The nongovernmental defendants moved to dismiss for lack of subject matter jurisdiction under C.R.C.P. 12(b)(1), failure to plead fraud with particularity under C.R.C.P. 9(b), and failure to state claims on which relief could be granted under C.R.C.P. 12(b)(5). **Brewing** did not amend its complaint before the district court ruled on the dismissal motions. But, in its briefs opposing the motions to dismiss, **Brewing** requested leave to amend its complaint if the court determined that "additional averments are required," as well as a hearing on the dismissal motions.

¶ 9 After considering the materials filed by the defendants in support of their motions to dismiss, including the list ranking the bidders (which was not incorporated into the complaint), but without conducting a hearing, the district court concluded that **Brewing** lacked standing to assert any of its claims and had failed to plead fraud with particularity. In a series of orders (the June orders), the court dismissed the complaint in its entirety. The dismissal orders did not indicate whether the case was dismissed with or without prejudice.

¶ 10 **Brewing** did not move under C.R.C.P. 59 or 60 to vacate or set aside the June orders. Instead, the day before

the time to appeal the June orders expired, **Brewing** filed an amended complaint, contending that it had a right to amend as a matter of course under C.R.C.P. 15(a). The defendants moved to strike and dismiss the amended complaint, both on the grounds articulated in their original dismissal motions and based on the June orders.

¶ 11 The district court entered an order (the November order) ruling that the amended complaint was "denied for filing." The court said that **Brewing** had not "preserved amendment as a matter of course" when it included an amendment request in its responses to the dismissal motions and had not sought relief from the June orders under C.R.C.P. 59. Under the court's reasoning, **Brewing** could no longer amend as a matter of course after entry of the June orders because "whether with or without prejudice, the dismissal of all claims by the Court would be considered an 'order to or from which an appeal lies' " and thus were final judgments. In the alternative, the court ruled that the amended complaint failed under the futility of amendment doctrine because, like **Brewing**'s original complaint, it neither established standing nor pleaded fraud with particularity.

¶ 12 Following entry of the November order, **Brewing** appealed the June and November orders. The defendants moved to dismiss the appeal. A motions division of this court dismissed the appeal of the June orders as untimely but allowed the appeal to proceed with respect to the November order. **Brewing** does not challenge the motions division's partial dismissal. Defendants do not challenge our jurisdiction over the November order.

II. Analysis

A. Right to Amend Versus Leave to Amend

*3 [1]¶ 13 C.R.C.P. 15(a) allows for three types of amendment: amendment as a matter of course, amendment by leave of court, and amendment with the adverse party's written consent. "A party may amend his pleading once as a matter of course at any time before a responsive pleading is filed .... Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." C.R.C.P. 15(a). A motion to dismiss is not a responsive pleading. *Davis v. Paolino*, 21 P.3d 870, 873 (Colo. App. 2001).

¶ 14 **Brewing** contends that it had the right to amend its complaint as a matter of course, even after dismissal of its original claims, because the defendants never filed a responsive pleading and the court dismissed its original claims without prejudice. **Brewing** takes the position that it filed the amended complaint as a matter of course. Thus, whether the district court abused its discretion in denying **Brewing** leave to amend its complaint is not before us.

[2]¶ 15 Defendants contend that we should review the November order for an abuse of discretion. They argue that **Brewing**'s delay in attempting to amend, as well as other factors, gave the district court discretion to dismiss the amended complaint. But we agree with **Brewing** that whether it had the right to amend as a matter of course under C.R.C.P. 15(a) and whether the June orders cut off that right are questions of law that we review de novo. So we review de novo whether the district court committed legal error when it concluded that **Brewing** had lost its absolute right to amend as a matter of course. *See DCP Midstream, LP v. Anadarko Petroleum Corp.*, 2013 CO 36, ¶ 24, 303 P.3d 1187, 1193.

B. The Entry of a Final Judgment Cuts off a Plaintiff's Right to Amend as a Matter of Course Under C.R.C.P. 15(a)

[3]¶ 16 The entry of a final, appealable judgment cuts off the right to amend, despite the language of C.R.C.P. 15(a). *Harris v. Reg'l Transp. Dist.*, 155 P.3d 583, 587 (Colo. App. 2006); *Estate of Hays v. Mid-Century Ins. Co.*, 902 P.2d 956, 959 (Colo. App. 1995); *Wilcox v. Reconditioned Office Sys.*, 881 P.2d 398, 400 (Colo. App. 1994). The version of Fed. R. Civ. P. 15(a) in effect before the 2009 amendments was identical to the current version of C.R.C.P. 15(a). Thus, cases interpreting the older version of the federal rule are persuasive. *Harris*, 155 P.3d at 588. Federal courts construing the earlier version of Fed. R. Civ. P. 15(a) uniformly reached the same conclusion: the right to amend is cut off on entry of a final judgment. *Tool Box v. Ogden City Corp.*, 419 F.3d 1084, 1087 (10th Cir. 2005) (listing cases applying this rule); *accord* 3 James Wm. Moore et al., *Moore's Federal Practice* § 15.97[2] (2d ed. 1980) (noting that the absolute right to amend is lost after final judgment is entered). (Under the current version of the federal rule, a party may amend as a matter of course within twenty-one days after service of either a responsive pleading or a Fed. R. Civ. P.

12(b) motion. Fed. R. Civ. P. 15(a). The Colorado version of Rule 15(a) does not refer to Rule 12(b).)

¶ 17 The *Wilcox* division reasoned that "when final judgment is entered before a responsive pleading is filed, the liberal approach of C.R.C.P. 15 must be balanced against the value of preserving the integrity of final judgments." 881 P.2d at 400. The division, and later divisions addressing the issue, held that the right to amend is lost after entry of a final judgment because "the concerns of finality in litigation become even more compelling and the litigant has had the benefit of a day in court, in some fashion, on the merits of his claim." *Id.* (quoting *Union Planters Nat'l Leasing, Inc. v. Woods*, 687 F.2d 117, 121 (5th Cir. 1982)).

*4 [4]¶ 18 But, in the absence of a final judgment, our supreme court has said that the right to amend a complaint as a matter of course under Rule 15(a) survives dismissal. *Passe v. Mitchell*, 161 Colo. 501, 502, 423 P.2d 17, 17-18 (1967) (holding that in the absence of a responsive pleading, "no final judgment should have been entered in the absence of a showing of record that plaintiff waived the right to file an amended complaint"); *Wistrand v. Leach Realty Co.*, 147 Colo. 573, 576, 364 P.2d 396, 397 (1961) (After the district court entered a dismissal order without prejudice, "[t]o now urge that the dismissal prejudiced Leach's right to have his claim adjudicated does violence to [Rule 15(a)] and the court's order."); *Renner v. Chilton*, 142 Colo. 454, 456, 351 P.2d 277, 278 (1960) ("The language of [Rule 15(a)] is, however, clear and unequivocal. It expressly allows one amendment as a matter of right before the answer or reply is filed ....").

¶ 19 We perceive no conflict between the *Wilcox* and *Renner* lines of cases. *Renner* and its progeny allow a plaintiff to amend its complaint as a matter of course consistent with Rule 15(a); *Wilcox*, *Estate of Hays*, and *Harris* extinguish that right once the district court enters a final judgment. (We need not address whether **Brewing** unreasonably delayed in exercising its right to amend as a matter of course. **Brewing** filed its amended complaint forty-eight days after the district court dismissed its original complaint, and the defendants do not argue that **Brewing**'s amended complaint was untimely. *See* 6 Arthur R. Miller, Mary Kay Kane & A. Benjamin Spencer, *Federal Practice and Procedure* § 1483, Westlaw (3d ed. database updated Aug. 2019) ("In general ... a party could amend as of course within a *reasonable time* after an order dismissing the complaint had been entered, inasmuch as no responsive pleading had been served.") (emphasis added).)

¶ 20 This reconciliation strikes an appropriate balance between the liberal thrust of modern pleading standards, *see* C.R.C.P. 1(a) ("These rules shall be liberally construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action."), and the policy concern, identified in *Wilcox*, to preserve finality once "the litigant has had the benefit of a day in court ... on the merits of his claim," *Wilcox*, 881 P.2d at 400.

C. Whether the District Court Dismissed **Brewing**'s Claims Under C.R.C.P. 12(b)(1) or 12(b)(5) Is Inconsequential to the Finality Analysis

[5]¶ 21 The cases addressing a party's right to amend following dismissal of its claims did not limit their analysis to Rule 12(b)(5) dismissals. *See Passe*, 161 Colo. at 502, 423 P.2d at 17-18 (unless the plaintiff waives its right to file an amended complaint, the district court cannot dismiss an action with prejudice); *Wistrand*, 147 Colo. at 576, 364 P.2d at 397 (holding, without qualification, that the plaintiff could amend its complaint following a dismissal without prejudice); *Renner*, 142 Colo. at 456, 351 P.2d at 278 (noting that there are no exceptions to Rule 15(a)'s right to file an amended complaint before the filing of a responsive pleading).

¶ 22 Likewise, federal courts, which have more fully developed case law in this area, do not distinguish between Rule 12(b)(1) and 12(b)(5) dismissals for purposes of determining whether a party may file a post-dismissal amended pleading. *See, e.g.*, *Northlake Cmty. Hosp. v. United States*, 654 F.2d 1234, 1240 (7th Cir. 1981) ("The Federal Rules of Civil Procedure ... allow for the liberal amendment of pleadings, particularly to cure jurisdictional defects."); *Lone Star Motor Imp., Inc. v. Citroen Cars Corp.*, 288 F.2d 69, 75-77 (5th Cir. 1961) (holding that the district court erred in refusing to allow plaintiff to cure subject matter jurisdiction defect by amended complaint); *Keene Lumber Co. v. Leventhal*, 165 F.2d 815, 823 (1st Cir. 1948) (stating, in dicta, that the plaintiff could amend its complaint to establish diversity of citizenship "as a matter of right").

*5 ¶ 23 Further, two Colorado cases say that a plaintiff whose complaint is dismissed may elect either to stand by the dismissed complaint and appeal, or to file an amended complaint. *Passe*, 161 Colo. at 502, 423 P.2d at 17-18; *Wistrand*, 147 Colo. at 576, 364 P.2d at 397.

¶ 24 Lastly, our case law reflects the tension regarding

whether a district court can consider only evidence "supportive of standing," *Colo. Gen. Assembly v. Lamm*, 700 P.2d 508, 516 (Colo. 1985), or if it can consider "any ... evidence submitted on the issue of standing," *Bd. of Cty. Comm'rs v. Bowen/Edwards Assocs.*, 830 P.2d 1045, 1053 (Colo. 1992). This uncertainty disfavors crediting the evidence proffered by the party that seeks to defeat standing as a basis to deny the party that seeks to establish standing the right to amend under Rule 15(a), particularly where, as here, **Brewing** sought, but was not granted, a hearing.

[6]¶ 25 Of course, judicial economy always deserves consideration. Allowing a plaintiff to amend a complaint after a Rule 12(b)(1) dismissal — as opposed to taking an immediate appeal — will result in further proceedings before the district court. Yet the same would be true of an amendment after a Rule 12(b)(5) dismissal. And our supreme court has instructed district courts "not [to] impose arbitrary restrictions on making timely amendments," and that our procedural rules should "[f]ocus ... upon resolution of actions on their merits ...." *Benton v. Adams*, 56 P.3d 81, 85 (Colo. 2002). We must heed both admonitions.

¶ 26 We next consider whether the June orders constituted final judgments and conclude that they did not.

D. The June Orders Were Not Final Judgments

1. The District Court Dismissed **Brewing**'s Initial Claims Without Prejudice

¶ 27 Because the June orders did not specify whether the district court was dismissing **Brewing**'s initial claims with or without prejudice, we must determine whether the dismissals were with or without prejudice. The registry of actions said that the dismissals were without prejudice. But the content of an order, not its title, determines whether it is a final judgment. *Cyr v. Dist. Court*, 685 P.2d 769, 770 (Colo. 1984). A "[j]udgment" is "a decree and order to or from which an appeal lies." C.R.C.P. 54(a).

¶ 28 C.R.C.P. 41(b)(3) presumes that dismissal orders that do not specify with or without prejudice must be construed as effecting a dismissal without prejudice. *See Graham v. Maketa*, 227 P.3d 516, 517 (Colo. App. 2010) ("The dismissal order did not specify whether the action was being dismissed 'with' or 'without' prejudice, and so it is presumed to be without prejudice.").

¶ 29 Still, this conclusion does not end our analysis of whether the June orders were final judgments because, as we explain in the next section, dismissals without prejudice may be final judgments.

2. The June Orders Were Not Final Judgments Because **Brewing** Could Have Cured the Defects in Its Claims Through Amendment

[7]¶ 30 The district court's June orders dismissed **Brewing**'s claims because **Brewing** lacked standing and because **Brewing** failed to plead fraud with particularity. This first basis was a dismissal for lack of jurisdiction under C.R.C.P. 12(b)(1) because standing is a jurisdictional prerequisite. *C.W.B., Jr. v. A.S.*, 2018 CO 8, ¶ 16, 410 P.3d 438, 442; *City of Greenwood Vill. v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 436 (Colo. 2000). So, the question is whether the C.R.C.P. 12(b)(1) dismissals were final judgments.

***6** ¶ 31 A long line of Colorado cases holds that a dismissal without prejudice constitutes a final judgment only if the action "cannot be saved" by an amended complaint. *See, e.g., Schoenewald v. Schoen*, 132 Colo. 142, 143-44, 286 P.2d 341, 341 (1955) (dismissal without prejudice was not a final judgment); *Avicanna Inc. v. Mewhinney*, 2019 COA 129, ¶ 1 n.1, — P.3d —, — n.1 (noting that, "[w]here ... the circumstances of the case indicate that the action cannot be saved ..., dismissal without prejudice qualifies as a final judgment"); *Harris*, 155 P.3d at 585 (same); *Burden v. Greeven*, 953 P.2d 205, 207 (Colo. App. 1998) (same); *Carter v. Small Bus. Admin.*, 40 Colo. App. 271, 272-73, 573 P.2d 564, 566 (1977) (same).

¶ 32 The most common situation where a complaint "cannot be saved" occurs when further proceedings would be barred by a statute of limitations. *E.g., Harris*, 155 P.3d at 585; *B.C. Inv. Co. v. Throm*, 650 P.2d 1333, 1335 (Colo. App. 1982). Other cases involve clear preemption, *e.g., Richardson v. United States*, 336 F.2d 265, 266 n.1 (9th Cir. 1964); claims that are "so patently frivolous that they cannot be saved," *Rubins v. Plummer*, 813 P.2d 778, 779 (Colo. App. 1990); and other "special circumstance[s]," *In re Custody of Nugent*, 955 P.2d 584,

587 (Colo. App. 1997).

[8]¶ 33 This approach to determining the finality of dismissal orders comports with the federal courts' treatment of the issue. While federal courts articulate the test in different ways, the gist of the rule remains constant: a dismissal without prejudice is not a final judgment if the plaintiff can cure deficiencies through an amended complaint. *See, e.g., Goode v. Cent. Va. Legal Aid Soc'y*, 807 F.3d 619, 623 (4th Cir. 2015) ("An order dismissing a complaint without prejudice is not an appealable final order ... if 'the plaintiff could save his action by merely amending his complaint.' " (quoting *Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064, 1066-67 (4th Cir. 1993))); *Moya v. Schollenbarger*, 465 F.3d 444, 448-49 (10th Cir. 2006) ("[I]n this circuit, 'whether an order of dismissal is appealable' generally depends on 'whether the district court dismissed the *complaint* or the *action.* A dismissal of the complaint is ordinarily a non-final, nonappealable order (since amendment would generally be available), while a dismissal of the entire action is ordinarily final.' " (quoting *Mobley v. McCormick*, 40 F.3d 337, 339 (10th Cir. 1994))); *Ordower v. Feldman*, 826 F.2d 1569, 1572 (7th Cir. 1987) ("If a district court's dismissal leaves a plaintiff free to file an amended complaint, the dismissal is not considered a final appealable order."); *Borelli v. City of Reading*, 532 F.2d 950, 951 (3d Cir. 1976) (holding that "an implicit invitation to amplify the complaint is found in the phrase 'without prejudice' ").

[9]¶ 34 Viewing the June orders through this lens, **Brewing** could have saved its allegations related to standing in the original complaint, which the district court deemed insufficient, through an amended complaint. The court held that **Brewing** had not "sufficiently established actual injury to create standing" because it offered no evidence to support its allegation — i.e., it pleaded "[u]pon information and belief" — that it "was actually the highest scoring entity bidding" on the request for proposals. The court relied entirely on a summary ranking provided by MCE-**DIA** in support of its motion to dismiss, which showed that **Brewing** finished fourth of five bidders. So, in the court's view, **Brewing** had not sufficiently shown injury in fact.

*7 ¶ 35 **Brewing** could have cured this defect by pleading additional facts to discredit the *entire* summary ranking, as it does in its amended complaint. Specifically, the amended complaint alleges in detail how Bhavesh Patel, the alleged insider at **DIA**, manipulated the voting process to ensure that MCE-**DIA** won the contract. (The amended complaint alleges how Bhavesh Patel designed the judges' scorecards and manipulated **DIA**'s scoring tabulation matrix to ensure that MCE-**DIA** would prevail, and how he sought to improperly influence the judging through another alleged co-conspirator. These allegations are supported by an affidavit from an investigator who interviewed an official at **DIA** involved with the request-for-proposals process.)

[10] [11]¶ 36 Lastly, the motions division's conclusion that the June orders constituted appealable final judgments, and that **Brewing** had missed the deadline to appeal those orders, do not preclude us from holding that the June orders were not final judgments for purposes of amendment as a matter of course. The motions division neither considered nor determined whether **Brewing** had the right to amend as a matter of course following the entry. And "[a] decision of a motions division is not always binding." *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186, 189 (Colo. App. 2002); *see Allison v. Engel*, 2017 COA 43, ¶ 22, 395 P.3d 1217, 1222 (deciding that the court is not bound by a motions division's determination of jurisdiction).

¶ 37 In sum, based on consistent precedent from divisions of this court and the federal courts, we conclude that the June orders were not final judgments barring amendment as a matter of course under Rule 15(a) because **Brewing** could have amended its complaint to cure the deficiencies noted in the June orders.

III. The District Court Erred by Rejecting **Brewing**'s Amended Complaint Under the Futility of Amendment Doctrine

¶ 38 As explained above, in the November order, the district court held that **Brewing** could not amend its complaint as a matter of course and, moreover, if **Brewing** had moved for leave to amend under C.R.C.P. 15(a), its motion would fail under the futility of amendment doctrine.

[12] [13]¶ 39 Futility of amendment is a basis to deny a motion for leave to amend a pleading. *Benton*, 56 P.3d at 85-86. A district court may deny a motion for leave to amend on grounds of futility if the proposed pleading could not survive a motion to dismiss. *See id.* at 85. "A proposed amendment would clearly be futile if, among other things, it failed to state a legal theory or was incapable of withstanding a motion to dismiss." *Vinton v. Virzi*, 2012 CO 10, ¶ 13, 269 P.3d 1242, 1246.

[14]¶ 40 Futility of amendment does not apply to amended pleadings filed as a matter of course, however. By definition, a party amending as a matter of course does not need the court's leave to submit its amended pleading. "When the plaintiff has the right to file an amended complaint *as a matter of course,* ... the plain language of Rule 15(a) shows that the court lacks the discretion to reject the amended complaint based on its alleged futility." *Williams v. Bd. of Regents*, 477 F.3d 1282, 1292 (11th Cir. 2007) (interpreting the federal analogue to C.R.C.P. 15(a)). Of course, an opposing party could move for dismissal of the amended pleading under C.R.C.P. 12(b), which identifies the grounds for dismissal of a pleading.

[15]¶ 41 Here, the district court improperly analyzed **Brewing**'s amended complaint under the futility of amendment doctrine because **Brewing** filed the amended complaint as a matter of course and was not seeking leave of court to do so. For this reason, we reverse the district court's decision to disallow **Brewing**'s amended complaint under the futility of amendment doctrine. Because **Brewing** had the right to file its amended complaint as a matter of course, the next procedural step following remand will be defendants' submission of an "answer or other response" pursuant to C.R.C.P. 12(a)(1).

IV. Conclusion

*8 ¶ 42 The judgment is reversed. The case is remanded for further proceedings consistent with this opinion.

JUDGE WEBB concurs.

JUDGE FOX dissents.

JUDGE FOX, dissenting.

¶ 43 I agree that two questions of law are dispositive of this appeal. The first is whether a district court's order dismissing all claims under C.R.C.P. 12(b)(1) on the basis that the plaintiff lacks standing is a final judgment. The second is whether a plaintiff retains an absolute right to amend its complaint under C.R.C.P. 15(a) after final judgment is entered. I disagree with the majority that the June orders were nonfinal judgments and also disagree that, once final judgments were entered, **Brewing** retained an absolute right to amend. I would, therefore, affirm the district court's order dismissing plaintiff's amended complaint.

¶ 44 Because the majority fairly sets out the procedural history and the operative facts, I will not repeat them here.

I. Analysis

A. Right to Amend Versus Leave to Amend

¶ 45 "A party may amend his pleading once as a matter of course at any time before a responsive pleading is filed." C.R.C.P. 15(a). "Otherwise, a party may amend his pleading only by leave of court," which "shall be freely given when justice so requires." *Id.*

¶ 46 **Brewing** contends that it had an absolute right to amend its complaint even after it was dismissed for lack of standing because the defendants never filed a responsive pleading.[1] **Brewing** does not ask this court to construe its filing of the amended complaint as asking for leave.

¶ 47 Thus, I agree with the majority that we are not reviewing whether the district court abused its discretion by denying **Brewing** leave to amend its complaint. Rather, we are to review de novo whether the district court committed legal error when it concluded that **Brewing** had lost its absolute right to amend.[2] *See DCP Midstream, LP v. Anadarko Petroleum Corp.*, 2013 CO 36, ¶ 24, 303 P.3d 1187.

B. The Entry of a Final, Appealable Judgment Cuts Off a Plaintiff's Right to Amend Under C.R.C.P. 15(a)

¶ 48 For twenty-five years, divisions of this court have uniformly held that the entry of a final, appealable judgment cuts off the right to amend, notwithstanding the

language of C.R.C.P. 15(a). *Gandy v. Williams*, 2019 COA 118, ¶ 10, —— P.3d ——; *Harris v. Reg'l Transp. Dist.*, 155 P.3d 583, 587 (Colo. App. 2006); *Estate of Hays v. Mid-Century Ins. Co.*, 902 P.2d 956, 959 (Colo. App. 1995); *Wilcox v. Reconditioned Office Sys.*, 881 P.2d 398, 400 (Colo. App. 1994).

***9** ¶ 49 Before Fed. R. Civ. P. 15(a) was amended in 2009, it was identical to the Colorado rule, and federal courts construing that version of the rule uniformly reached the same conclusion: the right to amend is cut off when a final judgment is entered.[3] *Tool Box v. Ogden City Corp.*, 419 F.3d 1084, 1087 (10th Cir. 2005) (listing cases applying this rule); *Cooper v. Shumway*, 780 F.2d 27, 29 (10th Cir. 1985); *accord* 3 James Wm. Moore et al., *Moore's Federal Practice* § 15.97[2] (2d ed. 1980) (noting that the absolute right to amend is lost after final judgment is entered).

¶ 50 These opinions are sound. The *Wilcox* division reasoned that "when final judgment is entered before a responsive pleading is filed, the liberal approach of C.R.C.P. 15 must be balanced against the value of preserving the integrity of final judgments." 881 P.2d at 400. The division, and later divisions addressing the issue, struck that balance by holding that the right to amend is lost after a final judgment is entered because "the concerns of finality in litigation become even more compelling and the litigant has had the benefit of a day in court, in some fashion, on the merits of his claim." *Id.* (quoting *Union Planters Nat'l Leasing v. Woods*, 687 F.2d 117, 121 (5th Cir. 1982)). Instead, before amending, a plaintiff must move to set aside the dismissal judgment under C.R.C.P. 59 or 60(b). *See id.*

¶ 51 So, it should have been no surprise to **Brewing** that under these precedents, it had the following choices when the district court dismissed its complaint for lack of standing under C.R.C.P. 12(b)(1):

- timely move to amend the judgment of dismissal under C.R.C.P. 59 or to vacate the judgment under C.R.C.P. 60;
- timely appeal the June 2018 dismissal to this court; or
- file a new action, taking the risk that the June 2018 dismissal would be preclusive of the new action.

¶ 52 **Brewing** did none of these things. Instead, without properly seeking leave of court, **Brewing** filed an amended complaint forty-eight days after the June 2018 dismissal order, contending that it had an absolute right to do so, and it allowed the forty-nine-day appeal period for the June orders to expire without filing a notice of appeal. *See* C.A.R. 4(b).

¶ 53 Given these court of appeals cases and **Brewing**'s course of action, it can succeed in this appeal only if the June orders did not constitute final judgments, or if all of the court of appeals' decisions were contrary to Colorado Supreme Court precedent.

C. The District Court's June Orders Were Final Judgments

¶ 54 The court's June orders dismissed **Brewing**'s complaint because **Brewing** lacked standing and because **Brewing** failed to plead fraud with particularity. This first basis was a dismissal for lack of jurisdiction under C.R.C.P. 12(b)(1) because standing is a jurisdictional prerequisite. *C.W.B., Jr. v. A.S.*, 2018 CO 8, ¶ 16, 410 P.3d 438; *City of Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 436 (Colo. 2000). So, the question is whether the C.R.C.P. 12(b)(1) dismissals were final judgments.

¶ 55 I recognize that the district court initially characterized its dismissals as "without prejudice." Later, in response to an order to show cause from this court, the district court stated that the "without prejudice" designation was a "clerical error." This confusion does not affect my analysis. Usually, "a trial court's dismissal of a claim without prejudice does not constitute a final judgment," but this designation is not dispositive. *Brody v. Bock*, 897 P.2d 769, 777 (Colo. 1995).

***10** ¶ 56 The characterization of a dismissal order as either with or without prejudice may, as this case illustrates, lend uncertainty to the process. The principal effect of a dismissal without prejudice is that the dismissal does not preclude filing a new action. *Grynberg v. Phillips*, 148 P.3d 446, 450 (Colo. App. 2006). That characterization may also affect whether the order is a final, appealable judgment. *See id.* Generally, though not always, a dismissal without prejudice is not a final, appealable order, and this court usually will dismiss an appeal of an order dismissing a case without prejudice. *Avicanna Inc. v. Mewhinney*, 2019 COA 129, ¶ 1 n.1, —— P.3d ——.

¶ 57 The content of an order, not its title, determines whether it is a final judgment. *Cyr v. Dist. Court*, 685

P.2d 769, 770 (Colo. 1984). A "[j]udgment" is "a decree and order to or from which an appeal lies." C.R.C.P. 54(a). The controlling question is whether the order "constitutes a final determination of the rights of the parties in the action." *Cyr*, 685 P.2d at 770. "[A]n order of dismissal is to be treated as a judgment for the purposes of taking an appeal when it finally disposes of the particular action and prevents any further proceedings as effectually as would any formal judgment." *Levine v. Empire Sav. & Loan Ass'n*, 192 Colo. 188, 190, 557 P.2d 386, 387 (1976) (quoting *Herrscher v. Herrscher*, 41 Cal.2d 300, 259 P.2d 901, 903 (1953)).

¶ 58 Here, the district court's June orders disposed of all claims against all parties. The court adjudicated the critical question of whether **Brewing** had standing and concluded that it did not. There were no remaining issues, legal or factual, for the court to resolve after it granted the motions to dismiss. Under the Colorado Rules of Civil Procedure and supreme court precedent, the orders constituted final judgments. There was simply nothing left for the district court to do at that point, except to address issues of fees and costs. And a request for fees or costs does not generally affect the judgment's finality. *See* C.R.C.P. 58(a) (providing that entry of the judgment shall not be delayed for the taxing of costs); *Moya v. Schollenbarger*, 465 F.3d 444, 450 (10th Cir. 2006) (reasoning that dismissal of the entire action is ordinarily a final judgment); *Driscoll v. Dist. Court*, 870 P.2d 1250, 1252 (Colo. 1994) (fees and costs request does not affect finality of a judgment); *see also Baldwin v. Bright Mortg. Co.*, 757 P.2d 1072, 1074 (Colo. 1988). In asking the court to determine what fees and costs were due, the parties recognized as much.

¶ 59 The motions division of this court agreed. In the defendants' motion to dismiss the appeal, they argued that the June orders constituted appealable final judgments, but that the time for appeal had expired. The motions division agreed and dismissed the portion of the appeal relating to the June orders because they "dispos[ed] of this case on the merits."

¶ 60 While the district court never adjudicated the underlying merits of the plaintiff's various claims, it did adjudicate the question of whether the plaintiffs have standing to bring those claims. "Although dismissal for lack of subject matter jurisdiction does not adjudicate the merits of the claims asserted, it does adjudicate the court's jurisdiction." *W. Colo. Motors, LLC v. Gen. Motors, LLC*, 2019 COA 77, ¶ 19, 444 P.3d 847 (quoting *Sandy Lake Band of Mississippi Chippewa v. United States*, 714 F.3d 1098, 1103 (8th Cir. 2013)). As to that limited question — standing and, thus, jurisdiction — the dismissal order was an adjudication constituting a final judgment.

***11** ¶ 61 Because the June orders constituted final judgments, **Brewing** lost the absolute right to amend under C.R.C.P 15(a).[4]

D. Colorado Supreme Court Precedent Does Not Dictate a Different Result

¶ 62 In addressing the final question, I cannot disregard twenty-five years of court of appeals authority holding that entry of final judgment cuts off a plaintiff's right to amend under C.R.C.P. 15(a).

¶ 63 **Brewing** essentially argues that the prior court of appeals cases are contrary to earlier holdings of the Colorado Supreme Court, which have never been overruled by the supreme court in its adjudicatory or rulemaking capacities. As an intermediate appellate court, we are bound by supreme court authority. *See Silver v. Colo. Cas. Ins. Co.*, 219 P.3d 324, 330 (Colo. App. 2009). It matters not that the supreme court authority is old or that we purportedly discern a better rule of law. It is the prerogative of the supreme court alone to overrule its cases. *See id.*

¶ 64 **Brewing** relies on three supreme court cases: *Renner v. Chilton*, 142 Colo. 454, 351 P.2d 277 (1960); *Passe v. Mitchell*, 161 Colo. 501, 423 P.2d 17 (1967); and *Wistrand v. Leach Realty Co.*, 147 Colo. 573, 364 P.2d 396 (1961). According to **Brewing**, each of these cases holds that a plaintiff's right to amend is *not* cut off when a court grants a motion to dismiss so long as no responsive pleading has been filed.[5]

¶ 65 *Passe* and *Renner* involved a plaintiff's attempt to amend his complaint after the court had granted the defendant's C.R.C.P. 12(b)(5) motion to dismiss for failure to state a claim, and, in both cases, the supreme court held that the plaintiffs had a right to amend. *Passe*, 161 Colo. at 502, 423 P.2d at 17-18; *Renner*, 142 Colo. at 455-56, 351 P.2d at 277-78. In *Passe*, the court reasoned that "no final judgment should have been entered in the absence of a showing of record that plaintiff waived the right to file an amended complaint, and elected to stand upon the allegations of the complaint to which the motion to dismiss was addressed." *Passe*, 161 Colo. at 502, 423 P.2d at 17-18.

¶ 66 In *Wistrand*, the case most heavily relied on by **Brewing**, the plaintiff's contract claim was dismissed without prejudice under C.R.C.P. 12(b)(5) because the defendant was not a party to the contract. *Wistrand*, 147 Colo. at 574-75, 364 P.2d at 397. The plaintiff then filed a new suit against the same defendant on the theory of unjust enrichment. *Id.* at 575, 364 P.2d at 397. On appeal, the supreme court held that the legal theory of res judicata (now, claim preclusion) was inapplicable because the dismissal was without prejudice. *Id.* at 575-76, 364 P.2d at 397.

***12** ¶ 67 In a discussion that does not appear to be necessary to the court's holding on res judicata, the court noted that "[o]n dismissal of the original action [plaintiff] could have (1) amended its complaint, (2) stood on its complaint and appealed, (3) accepted a dismissal without prejudice or (4) had its rights finally adjudicated by a dismissal with prejudice and failure to appeal." *Id.* at 575, 364 P.2d at 397. **Brewing** relies on this language, and the language in *Passe* and *Renner*, to contend that it had an absolute right to amend its complaint even after dismissal.

¶ 68 I reject this argument because in all three cases the dismissals were under C.R.C.P. 12(b)(5) — not, as was the case here, under C.R.C.P. 12(b)(1).

¶ 69 A dismissal under Rule 12(b)(5) for failure to state a claim is fundamentally different from a dismissal under Rule 12(b)(1) for lack of jurisdiction.[6] On a Rule 12(b)(5) motion, a court must take the facts pleaded as true and may only consider the four corners of the complaint (together with documents appended to or referred to in the complaint). *Norton v. Rocky Mountain Planned Parenthood, Inc.*, 2018 CO 3, ¶ 7, 409 P.3d 331. In contrast, under Rule 12(b)(1), a court must make findings and conclusions necessary to adjudicate the jurisdictional question. A court may, and often must, look beyond the pleadings and consider relevant evidence to assure itself that it has the power to hear the case. *See Barry v. Bally Gaming*, 2013 COA 176, ¶ 8, 320 P.3d 387. And a court may (and in certain contexts, must) hold an evidentiary hearing and make factual findings related to its jurisdiction. *See, e.g., Trinity Broad. of Denver v. City of Westminster*, 848 P.2d 916, 926 (Colo. 1993).

¶ 70 In this case, defendants' challenge to the court's subject matter jurisdiction required the court to address whether **Brewing** had standing and thus whether the court had jurisdiction to adjudicate the pleaded claims. On a Rule 12(b)(1) motion, in contrast to a Rule 12(b)(5) motion, a court may look outside of the complaint to resolve a jurisdictional issue. *See Barry*, ¶ 8. Here, the court relied on the published list of bidders to conclude that **Brewing** did not have standing.[7]

¶ 71 Because the merits of the standing determination of the June orders are not before us, I do not address to what extent the allegations of a complaint regarding standing must be accepted as true by a district court. *See, e.g., Ainscough v. Owens*, 90 P.3d 851, 857 (Colo. 2004). I also need not decide whether the court may or must, as in certain other cases implicating the court's subject matter jurisdiction, conduct evidentiary proceedings to enable the court to make findings of fact and conclusions of law on the jurisdictional questions. *See, e.g., Trinity Broad.*, 848 P.2d at 926.

¶ 72 Because none of the supreme court decisions **Brewing** relied on addressed a dismissal under Rule 12(b)(1) for lack of jurisdiction, those holdings do not control here. And because a Rule 12(b)(1) dismissal order is at issue, this case does not require deciding whether *Harris*, a 2006 court of appeals case regarding a Rule 12(b)(5) dismissal, was inconsistent with *Renner*, *Passe*, or *Wistrand*.[8]

***13** ¶ 73 In conclusion, the district court did not err by dismissing the amended complaint because its June orders constituted final judgments that cut off **Brewing**'s right to amend. Because I would affirm on that ground, I would not address whether the court erred when it concluded, in the alternative, that the amended complaint was futile. To the extent that **Brewing**'s briefs invite us to give an advisory opinion on whether a new action would be barred by claim preclusion, I would decline the invitation because that question is not properly before us. During oral argument, however, the parties conceded that **Brewing** is free to initiate a new action regardless of the outcome of the amendment question at issue.

All Citations

--- P.3d ----, 2020 WL 579382, 2020 COA 21

Footnotes

1 The majority correctly recognizes that a motion to dismiss is not a responsive pleading. *Davis v. Paolino*, 21 P.3d 870, 873 (Colo. App. 2001).

2 Defendants contend that we should review the trial court's order dismissing the amended complaint for an abuse of discretion, and argue that **Brewing**'s delay in attempting to amend, as well as other factors, gave the trial court discretion to dismiss the amended complaint (or more accurately, to deny leave to amend). I agree with **Brewing** that the questions of whether it had an *absolute right* to amend under C.R.C.P. 15(a), and whether the June orders cut off that right, are questions of law that warrant de novo review.

3 Under the current federal rule, the absolute right to amend is cut off twenty-one days after service of a C.R.C.P. 12(b) motion.

4 I do not exclude the possibility that a dismissal based on lack of standing predicated solely on the four corners of a complaint may not be a final, appealable judgment. But in this case, the trial court considered information outside of the complaint to inform its standing ruling. Under these circumstances, a Rule 12(b)(1) dismissal is a final order or judgment.

5 These cases address a version of C.R.C.P. 15(a) that is substantively identical to the current version of the rule.

6 Because the district court in this case dismissed the complaint for lack of standing, the court noted that it was not reaching the defendants' C.R.C.P. 12(b)(5) grounds for dismissal.

7 Because, in my view, the June orders are not before us, I do not determine whether the trial court correctly relied on the published bidding list to conclude that **Brewing** lacked standing.

8 The *Harris* opinion took note of only *Renner*, distinguishing it on the ground that the motion to amend in *Renner* was "made before judgment was entered on the docket," whereas in *Harris*, judgment was entered on the docket before amendment. *Harris v. Reg'l Transp. Dist.*, 155 P.3d 583, 587 (Colo. App. 2006). The *Harris* division found this distinction sufficient to conclude that it was not bound by *Renner*.

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West's Colorado Revised Statutes Annotated
West's Colorado Court Rules Annotated
Colorado Rules of Civil Procedure
Chapter 2. Pleadings and Motions

C.R.C.P. Rule 15

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

Effective: January 1, 2018

Currentness

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is filed or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it any time within 21 days after it is filed. Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 14 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment: (1) Has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Credits

Amended eff. Jan. 1, 2012; Sept. 5, 2013.

Notes of Decisions (544)

Rules Civ. Proc., Rule 15, CO ST RCP Rule 15
Current with amendments received through December 1, 2019.

End of Document

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title III. Pleadings and Motions

Federal Rules of Civil Procedure Rule 15

Rule 15. Amended and Supplemental Pleadings

Currentness

(a) Amendments Before Trial.

(1) ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) ***Other Amendments.*** In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) ***Time to Respond.*** Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

(b) Amendments During and After Trial.

(1) ***Based on an Objection at Trial.*** If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) ***For Issues Tried by Consent.*** When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move--at any time, even after judgment--to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) Relation Back of Amendments.

(1) ***When an Amendment Relates Back.*** An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) ***Notice to the United States.*** When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

(d) Supplemental Pleadings. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

CREDIT(S)

(Amended January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 30, 1991, effective December 1, 1991; amended by Pub.L. 102-198, § 11, December 9, 1991, 105 Stat. 1626; amended April 22, 1993, effective December 1, 1993; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES

1937 Adoption

See generally for the present federal practice, [former] Equity Rules 19 (Amendments Generally), 28 (Amendment of Bill as of Course), 32 (Answer to Amended Bill), 34 (Supplemental Pleading), and 35 (Bills of Revivor and Supplemental Bills--Form); U.S.C. Title 28, § 399 [now 1653] (Amendments to show diverse citizenship) and [former] 777 (Defects of form; amendments). See *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 28, r. r. 1-13; O. 20, r. 4; O. 24, r. r. 1-3.

Note to Subdivision (a). The right to serve an amended pleading once as of course is common. 4 Mont.Rev.Codes Ann. (1935) § 9186; 1 Ore.Code Ann. (1930) § 1-904; 1 S.C.Code (Michie, 1932) § 493; *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 28, r. 2. Provision for amendment of pleading before trial, by leave of court, is in almost every code. If there is no statute the power of the court to grant leave is said to be inherent. Clark, *Code Pleading* (1928), pp. 498, 509.

Note to Subdivision (b). Compare [former] Equity Rule 19 (Amendments Generally) and code provisions which allow an amendment "at any time in furtherance of justice," (e.g., Ark.Civ.Code (Crawford, 1934) § 155) and which allow an amendment of pleadings to conform to the evidence, where the adverse party has not been misled and prejudiced (e.g., N.M.Stat.Ann. (Courtright, 1929) §§ 105-601, 105-602).

Note to Subdivision (c). "Relation back" is a well recognized doctrine of recent and now more frequent application. Compare Ala.Code Ann. (Michie, 1928) § 9513; Smith-Hurd Ill.Stats. ch. 110, § 170(2); 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 308-3(4). See U.S.C., Title 28, § 399 [now 1653] (Amendments to show diverse citizenship) for a provision for "relation back."

Note to Subdivision (d). This is an adaptation of former Equity Rule 34 (Supplemental Pleading).

1963 Amendment

Rule 15(d) is intended to give the court broad discretion in allowing a supplemental pleading. However, some cases, opposed by other cases and criticized by the commentators, have taken the rigid and formalistic view that where the original complaint fails to state a claim upon which relief can be granted, leave to serve a supplemental complaint must be denied. See *Bonner v. Elizabeth Arden, Inc.*, 177 F.2d 703 (2d Cir. 1949); *Bowles v. Senderowitz*, 65 F.Supp. 548 (E.D.Pa.), rev'd on other grounds, 158 F.2d 435 (3d Cir. 1946), cert. denied, *Senderowitz v. Fleming*, 330 U.S. 848, 67 S.Ct. 1091, 91 L.Ed. 1292 (1947); cf. *LaSalle Nat. Bank v. 222 East Chestnut St. Corp.*, 267 F.2d 247 (7th Cir.), cert. denied, 361 U.S. 836, 80 S.Ct. 88, 4 L.Ed.2d 77 (1959). But see *Camilla Cotton Oil Co. v. Spencer Kellogg & Sons*, 257 F.2d 162 (5th Cir. 1958); *Genuth v. National Biscuit Co.*, 81 F.Supp. 213 (S.D.N.Y.1948), app. dism., 177 F.2d 962 (2d Cir. 1949); 3 Moore's *Federal Practice* ¶15.01[5] (Supp.1960); 1A Barron & Holtzoff, *Federal Practice & Procedure* 820-21 (Wright ed. 1960). Thus plaintiffs have sometimes been needlessly remitted to the difficulties of commencing a new action even though events occurring after the commencement of the original action have made clear the right to relief.

Under the amendment the court has discretion to permit a supplemental pleading despite the fact that the original pleading is defective. As in other situations where a supplemental pleading is offered, the court is to determine in the light of the particular circumstances whether filing should be permitted, and if so, upon what terms. The amendment does not attempt to deal with such questions as the relation of the statute of limitations to supplemental pleadings, the operation of the doctrine of laches, or the availability of other defenses. All these questions are for decision in accordance with the principles applicable to supplemental pleadings generally. Cf. *Blau v. Lamb,* 191 F.Supp. 906 (S.D.N.Y.1961); *Lendonsol Amusement Corp. v. B. & Q. Assoc., Inc.,* 23 F.R.Serv. 15d.3, Case 1 (D.Mass.1957).

1966 Amendment

Rule 15(c) is amplified to state more clearly when an amendment of a pleading changing the party against whom a claim is asserted (including an amendment to correct a misnomer or misdescription of a defendant) shall "relate back" to the date of the original pleading.

The problem has arisen most acutely in certain actions by private parties against officers or agencies of the United States. Thus an individual denied social security benefits by the Secretary of Health, Education, and Welfare may secure review of the decision by bringing a civil action against that officer within sixty days. 42 U.S.C. § 405(g) (Supp. III, 1962). In several recent cases the claimants instituted timely action but mistakenly named as defendant the United States, the Department of HEW, the "Federal Security Administration" (a nonexistent agency), and a Secretary who had retired from the office nineteen days before. Discovering their mistakes, the claimants moved to amend their complaints to name the proper defendant; by this time the statutory sixty-day period had expired. The motions were denied on the ground that the amendment "would amount to the commencement of a new proceeding and would not relate back in time so as to avoid the statutory provision * * * that suit be brought within sixty days * * *" *Cohn v. Federal Security Adm.,* 199 F.Supp. 884, 885 (W.D.N.Y.1961); see also *Cunningham v. United States,* 199 F.Supp. 541 (W.D.Mo.1958); *Hall v. Department of HEW,* 199 F.Supp. 833 (S.D.Tex.1960); *Sandridge v. Folsom, Secretary of HEW,* 200 F.Supp. 25 (M.D.Tenn.1959). [The Secretary of Health, Education, and Welfare has approved certain ameliorative regulations under 42 U.S.C. § 405(g). See 29 Fed.Reg. 8209 (June 30, 1964); Jacoby, *The Effect of Recent Changes in the Law of "Nonstatutory" Judicial Review,* 53 Geo.L.J. 19, 42-43 (1964); see also *Simmons v. United States Dept. HEW,* 328 F.2d 86 (3d Cir. 1964).]

Analysis in terms of "new proceeding" is traceable to *Davis v. L. L. Cohen & Co.,* 268 U.S. 638 (1925), and *Mellon v. Arkansas Land & Lumber Co.,* 275 U.S. 460 (1928), but those cases antedate the adoption of the Rules which import different criteria for determining when an amendment is to "relate back". As lower courts have continued to rely on the *Davis* and *Mellon* cases despite the contrary intent of the Rules, clarification of Rule 15(c) is considered advisable.

Relation back is intimately connected with the policy of the statute of limitations. The policy of the statute limiting the time for suit against the Secretary of HEW would not have been offended by allowing relation back in the situations described above. For the government was put on notice of the claim within the stated period--in the particular instances, by means of the initial delivery of process to a responsible government official (see Rule 4(d)(4) and (5)). In these circumstances, characterization of the amendment as a new proceeding is not responsive to the realty [sic], but is merely question-begging; and to deny relation back is to defeat unjustly the claimant's opportunity to prove his case. See the full discussion by Byse, *Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform,* 77 Harv.L.Rev. 40 (1963); see also Ill.Civ.P. Act § 46(4).

Much the same question arises in other types of actions against the government (see *Byse,* supra, at 45 n. 15). In actions between private parties, the problem of relation back of amendments changing defendants has generally been better handled by the courts, but incorrect criteria have sometimes been applied, leading sporadically to doubtful results. See 1A Barron & Holtzoff, *Federal Practice & Procedure* § 451 (Wright ed. 1960); 1 id. § 186 (1960); 2 id. § 543 (1961); 3 *Moore's Federal*

Practice, par. 15.15 (Cum.Supp.1962); Annot., *Change in Party After Statute of Limitations Has Run,* 8 A.L.R.2d 6 (1949). Rule 15(c) has been amplified to provide a general solution. An amendment changing the party against whom a claim is asserted relates back if the amendment satisfies the usual condition of Rule 15(c) of "arising out of the conduct * * * set forth * * * in the original pleading," and if, within the applicable limitations period, the party brought in by amendment, first, received such notice of the institution of the action--the notice need not be formal--that he would not be prejudiced in defending the action, and, second, knew or should have known that the action would have been brought against him initially had there not been a mistake concerning the identity of the proper party. Revised Rule 15(c) goes on to provide specifically in the government cases that the first and second requirements are satisfied when the government has been notified in the manner there described (see Rule 4(d)(4) and (5)). As applied to the government cases, revised Rule 15(c) further advances the objectives of the 1961 amendment of Rule 25(d) (substitution of public officers).

The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. Again the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs. Also relevant is the amendment of Rule 17(a) (real party in interest). To avoid forfeitures of just claims, revised Rule 17(a) would provide that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed for correction of the defect in the manner there stated.

1987 Amendment

The amendments are technical. No substantive change is intended.

1991 Amendment

The rule has been revised to prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense.

Paragraph (c)(1). This provision is new. It is intended to make it clear that the rule does not apply to preclude any relation back that may be permitted under the applicable limitations law. Generally, the applicable limitations law will be state law. If federal jurisdiction is based on the citizenship of the parties, the primary reference is the law of the state in which the district court sits. *Walker v. Armco Steel Corp.,* 446 U.S. 740 (1980). If federal jurisdiction is based on a federal question, the reference may be to the law of the state governing relations between the parties. *E.g., Board of Regents v. Tomanio,* 446 U.S. 478 (1980). In some circumstances, the controlling limitations law may be federal law. *E.g., West v. Conrail, Inc.,* 107 S.Ct. 1538 (1987). Cf. *Burlington Northern R. Co. v. Woods,* 480 U.S. 1 (1987); *Stewart Organization v. Ricoh,* 108 S.Ct. 2239 (1988). Whatever may be the controlling body of limitations law, if that law affords a more forgiving principle of relation back than the one provided in this rule, it should be available to save the claim. Accord, *Marshall v. Mulrenin,* 508 F.2d 39 (1st Cir.1974). If *Schiavone v. Fortune,* 106 S.Ct. 2379 (1986) implies the contrary, this paragraph is intended to make a material change in the rule.

Paragraph (c)(3). This paragraph has been revised to change the result in *Schiavone v. Fortune, supra,* with respect to the problem of a misnamed defendant. An intended defendant who is notified of an action within the period allowed by Rule 4(m) [subdivision (m) in Rule 4 was a proposed subdivision which was withdrawn by the Supreme Court] for service of a summons and complaint may not under the revised rule defeat the action on account of a defect in the pleading with respect to the defendant's name, provided that the requirements of clauses (A) and (B) have been met. If the notice requirement is met within the Rule 4(m) [subdivision (m) in Rule 4 was a proposed subdivision which was withdrawn by the Supreme Court] period, a complaint may be amended at any time to correct a formal defect such as a misnomer or misidentification. On the basis of the text of the former rule, the Court reached a result in *Schiavone v. Fortune* that was inconsistent with the

liberal pleading practices secured by Rule 8. See Bauer, Schiavone: *An Un-Fortune-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure,* 63 Notre Dame L.Rev. 720 (1988); Brussack, *Outrageous Fortune: The Case for Amending Rule 15(c) Again,* 61 S.Cal.L.Rev. 671 (1988); Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision,* 86 Mich.L.Rev. 1507 (1987).

In allowing a name-correcting amendment within the time allowed by Rule 4(m), this rule allows not only the 120 days specified in that rule, but also any additional time resulting from any extension ordered by the court pursuant to that rule, as may be granted, for example, if the defendant is a fugitive from service of the summons.

This revision, together with the revision of Rule 4(i) with respect to the failure of a plaintiff in an action against the United States to effect timely service on all the appropriate officials, is intended to produce results contrary to those reached in *Gardner v. Gartman,* 880 F.2d 797 (4th Cir. 1989), *Rys v. U.S. Postal Service,* 886 F.2d 443 (1st Cir. 1989), *Martin's Food & Liquor, Inc. v. U.S. Dept. of Agriculture,* 14 F.R.D.3d 86 (N.D.Ill.1988). *But cf. Montgomery v. United States Postal Service,* 867 F.2d 900 (5th Cir. 1989), *Warren v. Department of the Army,* 867 F.2d 1156 (8th Cir. 1989); *Miles v. Department of the Army,* 881 F.2d 777 (9th Cir. 1989), *Barsten v. Department of the Interior,* 896 F.2d 422 (9th Cir. 1990); *Brown v. Georgia Dept. of Revenue,* 881 F.2d 1018 (11th Cir. 1989).

1993 Amendment

The amendment conforms the cross reference to Rule 4 to the revision of that rule.

2007 Amendment

The language of Rule 15 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 15(c)(3)(A) called for notice of the "institution" of the action. Rule 15(c)(1)(C)(i) omits the reference to "institution" as potentially confusing. What counts is that the party to be brought in have notice of the existence of the action, whether or not the notice includes details as to its "institution."

2009 Amendment

Rule 15(a)(1) is amended to make three changes in the time allowed to make one amendment as a matter of course.

Former Rule 15(a) addressed amendment of a pleading to which a responsive pleading is required by distinguishing between the means used to challenge the pleading. Serving a responsive pleading terminated the right to amend. Serving a motion attacking the pleading did not terminate the right to amend, because a motion is not a "pleading" as defined in Rule 7. The right to amend survived beyond decision of the motion unless the decision expressly cut off the right to amend.

The distinction drawn in former Rule 15(a) is changed in two ways. First, the right to amend once as a matter of course terminates 21 days after service of a motion under Rule 12(b), (e), or (f). This provision will force the pleader to consider carefully and promptly the wisdom of amending to meet the arguments in the motion. A responsive amendment may avoid

the need to decide the motion or reduce the number of issues to be decided, and will expedite determination of issues that otherwise might be raised seriatim. It also should advance other pretrial proceedings.

Second, the right to amend once as a matter of course is no longer terminated by service of a responsive pleading. The responsive pleading may point out issues that the original pleader had not considered and persuade the pleader that amendment is wise. Just as amendment was permitted by former Rule 15(a) in response to a motion, so the amended rule permits one amendment as a matter of course in response to a responsive pleading. The right is subject to the same 21-day limit as the right to amend in response to a motion.

The 21-day periods to amend once as a matter of course after service of a responsive pleading or after service of a designated motion are not cumulative. If a responsive pleading is served after one of the designated motions is served, for example, there is no new 21-day period.

Finally, amended Rule 15(a)(1) extends from 20 to 21 days the period to amend a pleading to which no responsive pleading is allowed and omits the provision that cuts off the right if the action is on the trial calendar. Rule 40 no longer refers to a trial calendar, and many courts have abandoned formal trial calendars. It is more effective to rely on scheduling orders or other pretrial directions to establish time limits for amendment in the few situations that otherwise might allow one amendment as a matter of course at a time that would disrupt trial preparations. Leave to amend still can be sought under Rule 15(a)(2), or at and after trial under Rule 15(b).[1]

Abrogation of Rule 13(f) establishes Rule 15 as the sole rule governing amendment of a pleading to add a counterclaim.

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See the Note to Rule 6.

Notes of Decisions (5286)

Footnotes

1

If the proposed amendment to Rule 15(a)(3) ... changing the time period is approved by the Judicial Conference, the following additional sentence will be added to the Committee Note: "Amended Rule 15(a)(3) extends from 10 to 14 days the period to respond to an amended pleading."

Fed. Rules Civ. Proc. Rule 15, 28 U.S.C.A., FRCP Rule 15
Including Amendments Received Through 3-1-20

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From: berger, michael
Sent: Monday, March 23, 2020 7:57 AM
To: lee lnslaw.net; michaels, kathryn
Subject: Re: Virtual Oaths

Lee, I'm not aware of a Colorado statute that addresses this. As you know, CRCP 30 (b)(7)
expressly authorizes the taking of depositions by telephone or other remote electronic device
and subsection (c) of that rule requires that the witness shall be put under oath or affirmation,
but doesn't address the precise question you raise. If and when we ever have another civil
rules committee meeting, I will put this on the discussion agenda. Thanks for your inquiry. Stay
well.

Michael H. Berger

From: lee lnslaw.net <lee@lnslaw.net>
Sent: Saturday, March 21, 2020 12:01 PM
To: berger, michael <michael.berger@judicial.state.co.us>
Subject: Virtual Oaths

Michael,
Apparently the Fla. Supreme Court has just issued a rule which allows oaths, such as what is typically
required from a witness prior to deposition or testimony to be accomplished “over the phone” so the
person who administers it is not personally present with the witness / deponent. Since I have seen
some comments that “we should do the same thing” my assumption is that perhaps “we” haven’t. If so,
perhaps we should be suggesting it as ‘our” way of fostering “social disengagement”(?).