

**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:

<b>Name</b>	<b>Present</b>	<b>Not Present</b>
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	
<b>Non-voting Participants</b>		
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 may 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 cjd's. 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.