

## AGENDA

### COLORADO SUPREME COURT COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Friday, November 22, 2019 1:30 p.m.  
Ralph L. Carr Colorado Judicial Center  
2 E.14<sup>th</sup> Ave., Denver, CO 80203

#### **Fourth Floor, Supreme Court Conference Room**

- I. Call to order
- II. Approval of September 27, 2019 minutes [Pages 1 to 6]
- III. Announcements from the Chair
- IV. Present Business
  - A. Colorado Municipal Court Rules of Procedure 204, 210, 212, 216, 223, 237, 241, 243, 248, and 254—Proposed Rule Changes—(Municipal Court Subcommittee)(materials to come)
  - B. JDF 601—District Court Civil Case Cover Sheet Modification to Include Associated Cases—(Bradley Levin)
  - C. Colorado Rules for Magistrates—(Magistrate Tims)
  - D. JDF 105—Service of Pattern Interrogatories—(Judge Berger)
  - E. County Court Subcommittee Proposed Rule Changes (307, 341, and 412)—(Ben Vinci)
  - F. C.R.C.P. 103—Amendments Needed in Light of House Bill 19-1189—(Jose Vasquez)
  - G. C.R.C.P. 8(c)—Amendments Needed in Light of *Orange Collar v. Mowery*—(John Palmeri)
  - H. C.R.C.P. 4(m)—(Judge Jones)
  - I. Local Rules—(Richard Holme)
  - J. C.R.C.P. 304—Time Limit for Service from Attorney Daniel Vedra—(Ben Vinci)
  - K. C.R.C.P. 121, § 1-23 + C.R.C.P. 65.1—Federal Civil Rules Changes—(David DeMuro)  
[Pages 7 to 11]

V. Adjourn—**Next meeting is JANUARY 31, 2020 at 1:30 pm.**

Michael H. Berger, Chair  
[michael.berger@judicial.state.co.us](mailto:michael.berger@judicial.state.co.us)  
720 625-5231

**Conference Call Information:**

**Dial (720) 625-5050 (local) or 1-888-604-0017 (toll free) and enter the access code, 551050, followed by # key.**

**Colorado Supreme Court Advisory Committee on the Rules of Civil Procedure  
September 27, 2019 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	
Damon Davis	x (phone)	
David R. DeMuro	x	
Judge Paul R. Dunkelman		x
Judge J. Eric Elliff	x	
Judge Adam Espinosa	x	
Peter Goldstein	x (phone)	
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 (phone)	
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	
Ben Vinci	x	
Judge John R. Webb	x	
J. Gregory Whitehair	x	
Judge Christopher Zenisek	x (phone)	
<b>Non-voting Participants</b>		
Justice Richard Gabriel, Liaison	x	
Jeremy Botkins	x	

**I. Attachments & Handouts**

- Sep 27, 2019 agenda packet.

**II. Announcements from the Chair**

- The June 28, 2019 minutes were approved as presented.

**III. Present Business**

**A. JDF 601**

Subcommittee Chair Bradley Levin stated that the subcommittee had met to talk about how to connect related case filings in state district courts. He explained that there is related case doctrine in the federal courts, but that it has changed over time. Currently, Colorado lacks a statewide rule on the topic and instead jurisdiction-specific local rules often govern. Mr. Levin explained that Denver District Court has a form that can be filled out to connect related cases and Jefferson County has a multiple filings provision that talks about related cases; meanwhile, other counties have nothing. In considering these issues, the first question the subcommittee has is whether there should be a standardized rule. Then, the question is how one would find out about it. Another issue the subcommittee raised in their initial discussions is what happens if a defendant knows about a related case. Mr. Levin said there can also be issues about what constitutes a related case. Within the subcommittee, there was a vigorous discussion whether pending cases in other districts are related. Mr. Levin ended by stating that the subcommittee will meet again and present a proposal to the greater committee soon, likely at the next meeting.

**B. Colorado Rules for Magistrates**

Subcommittee Chair Magistrate Tims shared that the subcommittee has met twice and, in those discussions, decided that the biggest problems in the magistrate rules deal with consent. Magistrate Tims reported that the subcommittee is still determining the best way to tackle this project.

Judge Berger commented that this is a big and difficult venture and continued that it raises questions as to whether certain actions may be taken by a judicial officer who did not go through the constitutional appointment to become a judge. Judge Berger told the subcommittee that there is no time limit on this project, but that hopefully next year they will come up with something.

Justice Gabriel mentioned to the subcommittee that before finalizing any proposals, they should coordinate with other rules committees. Judge Berger said he will make sure that happens.

### **C. JDF 105**

The committee discussed revised form JDF 105. Judge Berger shared that currently, clerks review these filings and make redactions if there is private information within the filled-out forms.

Judge Jones commented that the Criminal Rules Committee is currently looking at sealing and suppressing documents with the goal of coming up with standards. If that is successful, the standards might be spread to other committees, including this one.

Judge Berger will talk to court services over at SCAO to see if they have any requirements about how this is triggered. Tabled until November.

### **D. Title 12 Citations in the Civil Rules**

Jeremy Botkins shared that the proposed changes presented today are to update statute references from the last two sessions of the legislature after certain sections were reorganized. Judge Berger stated that the need to change forms when statutes move around is why it is a best practice to avoid placing statutory citations into rules, except when unavoidable. The committee voted unanimously to approve these forms for consideration by the supreme court.

### **E. County Court Rules 307, 341, and 412**

The committee discussed the proposed changes to rule 341. Subcommittee chair Ben Vinci shared that the goal of this proposal is to get cases moving along. The committee explored the proposal's use of the phrase *due diligence*. A motion overwhelmingly passed to have the subcommittee reconsider the language in the proposal.

Next, the conversation turned to proposed changes to rule 412. Mr. Vinci introduced Denver County Court Judge Campbell and Denver County Court Self-Represented Litigant Coordinator Jordan Sagle. Judge Campbell stated that there is a real need to protect privileged information and the court does not feel that they have enough authority at this point to protect the information of people who come into their courtrooms. Mr. Sagle shared that there is no statutory mechanism to seal civil cases in county court. He continued that people sometimes come to the courthouse and file protection orders or evictions that have no basis. These matters remain on that defendant's permanent record for the rest of their lives, impacting greatly their ability to obtain a job or lease a home. The purpose of this draft of rule 412 is to give county court judges the ability to limit or seal a case in some way.

Judge Jones commented that he has met with Chief Justice Coats about this issue, and that the Chief wants to start the process of creating rules in this area with the criminal rules committee. Once that committee comes up with a new rule, it can spread to other committees. Judge Jones continued that any recommendation to adopt a new rule in this area would be dead on arrival at this time.

After several committee members discussed the urgent need for a rule on this topic, Judge Berger offered to write a letter to Chief Justice Coats to start a conversation regarding this issue. Professor Mueller suggested the letter mention the immediacy of a remedy needed. Judge Berger will also reach out to the Chair of the Criminal Rules Committee, Judge Dailey, to discuss this issue. Judge Berger will also circulate a draft of his letter to the Chief Justice with Judge Campbell, Mr. Vinci, and Judge Jones.

The committee then turned to the proposed draft of rule 307. The subcommittee is going to take back this draft to further consider the language.

**F. C.R.C.P. 304**

Judge Berger stated that the committee will wait to review this until 4(m) is considered.

**G. C.R.C.P. 16.1**

Judge Berger shared that he facilitated a group of district court judges a few weeks ago at the judicial conference and received largely positive responses to the new 16.1 rule. Judge Berger went on to state that some defendants are filing a motion in limine to prohibit a plaintiff from arguing that the damages were more than \$100,000 at trial. The committee discussed, and then Judge Berger stated that he is not suggesting the committee consider proposing to change the rule.

**H. C.R.C.P. 263**

Judge Berger stated that in an email included in the packet, Judge Moss brought forth the issue that currently there is a civil rule requiring silence in the Supreme Court Library, but the rule is not strictly followed. Stephanie Scoville commented that Chief Justice Coats recently issued a decorum order to address issues that may occur when members of the public use the building. She queried whether the rule is a tool that the librarians use to control noise in the library.

Judge Jones shared that he is a regular library patron and that the rule requiring silence is not honored. Judge Jones has experienced issues with people in the library tapping things on the table loudly or listening to music; he continued that no one whispers in the library anymore. Several other members noted the value of keeping the rule based on the authority it provides to the librarians.

A motion to take no action on the rule passed unanimously.

**I. C.R.C.P. 103**

This issue came to the committee from Bob Connelly, a retired Colorado attorney. The legislature passed a bill during the last session that impacts rule 103. The new statutes do not apply until October 2020, so there is time to change the rule.

Judge Berger directed Jose Vasquez to chair a subcommittee taking up this issue.

**J. C.R.C.P. 8(c)**

Judge Berger stated that currently, rule 8(c) allows discharge in bankruptcy as an affirmative defense. Federal courts have removed this from their rule and have held that bankruptcy charges are self-effectuating. Judge Berger suggested that the committee discuss amending rule 8(c) to say that it isn't an affirmative defense under bankruptcy law.

A motion to set up a subcommittee and not limit it to just the bankruptcy issue in rule 8(c) passed overwhelmingly.

**K. C.R.C.P. 4(m)**

Judge Jones brought this issue to the committee after running into this working on a case. The committee discussed delay reduction orders and how they do not satisfy the notice requirements of rule 4(m). Judge Jones is concerned that perhaps courts are sending a message that these orders are suggestions and aren't enforceable. He is also concerned that as a practical matter, the 63-day deadline is meaningless. Judge Jones stated that there are drawbacks to a change. He has heard that litigants should get this secondary notice, and there also might be unintended consequences.

Judge Zenisek stated that this procedure is needed for docket management in trial courts because a lot of cases don't move forward. Judge Elliff concurred and stated that flexibility is vital for district court judges.

Judge Berger stated that the court is sensitive to two things: not having widely disparate delay reduction orders and the fact that different districts administer their business differently than others. He also stated that if the supreme court adopts a rule and there's an inconsistency in local practice, then the rule controls.

Judge Berger created two subcommittees to deal with these issues. First, a subcommittee will determine an appropriate rule change proposal for 4(m). A second subcommittee will take up the broader question on conflicts between litigation orders and local rules.

**L. Expert Disclosures, Stock Case Management Orders, and Telephone Testimony**

Damon Davis brought these issues to the committee by way of a letter. He suggested the committee consider updating rules 16 and 26. Judge Berger shared that Mr. Holme has an ongoing list of things to be changed about these rules and that next year the committee can look at this.

**M. Colorado Municipal Court Rules of Procedure**

Tabled until November.

- N. Richard Holme shared that at the next meeting he is going to propose adding a subpart to rule 56 allowing judges to have oral conferences prior to the filing of motions.

**IV. Future Meetings**

November 22, 2019

The Committee adjourned at 3:47 p.m.



To: Honorable Michael H. Berger  
Chair, Supreme Court Advisory Committee on Colorado Rules of Civil Procedure

From: Dave DeMuro

Re: Report of the Subcommittee on changes in the Federal Civil Rules

Date: November 8, 2019

---

This is a report from the subcommittee that evaluates changes in the Federal Civil Rules to decide whether to recommend comparable changes in the Colorado Civil Rules. The subcommittee has not been active lately because the extensive and excellent work by Dick Holme's subcommittee on the 12/01/15 federal changes addressed the most important recent federal changes. But, there have been a number of federal changes since then that we have considered.

The subcommittee decided to recommend only one fairly modest change at this time. I will address that proposed change, and then summarize the other significant recent federal changes so the full committee is aware of them.

We recommend the repeal of C.R.C.P. 65.1 and the amendment of C.R.C.P. 121, § 1-23.

Fed.R.Civ.P. 62, on staying proceedings to enforce judgments, was extensively revised, effective 12/01/18. As a result, related changes were made at the same time to Fed.R.Civ.P. 65.1 which had been entitled "Proceedings against a surety." The change broadened the rule from addressing bonds to addressing the more general term of "security providers."

We considered proposing limited changes to C.R.C.P. 65.1, but as we studied our Rule on bonds in civil actions, C.R.C.P. 121, § 1-23, we decided that the needed changes on security providers fit better in this rule, which was already broader than the federal rules. Therefore, we recommend the adoption of additional paragraphs 8 and 9 to Rule 121, §1-23, as set forth in the attached proposed rule. Paragraph 8 captures the principles from Rule 65.1, while ¶ 9 broadens the definition of "bond" to cover other types of security providers for the whole rule.

It made more sense to us to address these issues in our existing rule than to retain Rule 65.1 which has always seemed a little out of place. Therefore, we also recommend the repeal of C.R.C.P. 65.1 which will be mooted if these proposed changes are adopted.

Please note that in our recommended change to Rule 121, § 1-23, we have departed from a concept that appears in both our Rule 65.1 and the federal version. That concept is that the court clerk is appointed as the agent for service for the security provider and is assigned the duty of sending the motion to enforce the obligation to the security provider. Our proposal today departs from that concept because it is questionable how effective it will be to make the clerk the agent for service, and it seems unfair to ask the clerk to recognize when the situation arises that

requires this action, and then to find the security provider's address and arrange and pay for mailing. Instead, our proposal places the burden of serving the security provider with the motion on the party seeking to enforce the obligation, as that party has the incentive to act. Please note that we retained the concept that the security provider submits to the jurisdiction of the court when providing the security.

Other recent federal changes that we did not recommend.

To return to Fed.R.Civ.P. 62 noted above, a number of changes took effect on 12/01/18 that we are not recommending to the committee. These include (1) extending the automatic stay to 30 days (the full committee previously recommended 14 days to the Colorado Supreme Court which adopted that recommendation), and (2) removing the word "supercedeas" as antiquated (maybe, but not worth the change). There are a number of inconsistencies between C.R.C.P. 62 and the new federal version, but some of those inconsistencies predate the recent federal changes. The subcommittee did not believe it was necessary to resolve those issues as we are not aware of complaints about our Rule 62.

The most extensive federal changes on 12/01/18 were to Fed.R.Civ.P. 23 on class actions. These changes resulted from a long study project on class actions at the federal level. The subcommittee believed that there is not a substantial volume of class action litigation in our state courts, and we are not aware of any need for changing our much simpler Rule 23. Again, it should be noted that the federal rule already differed from our Rule 23 before the recent federal changes.

There were some other federal changes on a smaller scale. The federal courts cut back on the "three days for mailing" rule that Colorado eliminated in 2012. They also eliminated the requirement that pleadings and other filings have a certificate of service, in those cases where all parties are filing electronically (the subcommittee thought this change was not needed). The federal courts also changed some language in Fed.R.Civ.P. 4(m) on the time limit for service of process after the complaint was filed, but the same technical wording problem does not exist in our version of Rule 4(m). Incidentally, the federal version of Rule 4(m) was amended in 2015 to cut the time limit from 120 days to 90; our version of that rule, adopted in 2013, has a 63-day time limit.

Finally, it appears that there are no changes to the Federal Civil Rules that are about to take effect on December 1, 2019.

## **C.R.C.P. 121, § 1-23. Bonds in Civil Actions**

**1. Bonds Which Are Automatically Effective Upon Filing With The Court.** The following bonds are automatically effective upon filing with the clerk of the court:

- (a) Cash bonds in the amount set by court order, subsection 3 of this rule, or any applicable statute.
- (b) Certificates of deposit issued by a bank chartered by either the United States government or the State of Colorado, in the amount set by court order, subsection 3 of this rule, or any applicable statute. The certificate of deposit shall be issued in the name of the clerk of the court and payable to the clerk of the court, and the original of the certificate of deposit must be deposited with the clerk of the court.
- (c) Corporate surety bonds issued by corporate sureties presently authorized to do business in the State of Colorado in the amount set by court order, subsection 3 of this rule, or any applicable statute. A power of attorney showing the present or current authority of the agent for the surety signing the bond shall be filed with the bond.

**2. Bonds Which Are Effective Only Upon Entry of an Order Approving the Bond.**

- (a) Letters of credit issued by a bank chartered by either the United States government or the State of Colorado, in the amount set by court order, subsection 3 of this rule, or any applicable statute. The beneficiary of the letter of credit shall be the clerk of the district court. The original of the letter of credit shall be deposited with the clerk of the court.
- (b) Any Other Proposed Bond.

**3. Amounts of Bond.**

**(a) Supersedeas Bonds.** Unless the court otherwise orders, or any applicable statute directs a higher amount, the amount of a supersedeas bond to stay execution of a money judgment shall be 125% of the total amount of the judgment entered by the court (including any prejudgment interest, costs and attorneys fees awarded by the court). The amount of a supersedeas bond to stay execution of a non-money judgment shall be determined by the court. Nothing in this rule is intended to limit the court's discretion to deny a stay with respect to non-money judgments. Any interested party may move the trial court (which shall have jurisdiction notwithstanding the pendency of an appeal) for an increase in the amount of the bond to reflect the anticipated time for completion of appellate proceedings or any increase in the amount of judgment.

**(b) Other Bonds.** The amounts of all other bonds shall be determined by the court or by any applicable statute.

**4. Service of Bonds Upon All Parties of Record.** A copy of all bonds or proposed bonds filed with the court shall be served on all parties of record in accordance with [C.R.C.P. 5\(b\)](#).

**5. No Unsecured Bonds.** Except as expressly provided by statute, and except with respect to appearance bonds, no unsecured bond shall be accepted by the court.

**6. Objections to Bonds.** Any party in interest may file an objection to any bond which is automatically effective under subsection 1 of this rule or to any proposed bond subject to subsection 2 of this rule. A bond, which is automatically effective under subsection 1 remains in effect unless the court orders otherwise. Any objections shall be filed not later than 14 days after service of the bond or proposed bond except that objections based upon the entry of any amended or additional judgment shall be made not later than 14 days after entry of any such amended or additional judgment.

**7. Bonding Over a Lien.** If a money judgment has been made a lien upon real estate by the filing of a transcript of the judgment record by the judgment creditor, the lien shall be released upon the motion of the judgment debtor or other interested party if a bond for the money judgment has been approved and filed as provided in this section 1-23. The order of the court releasing the lien may be recorded with the clerk and recorder of the county where the property is located. Once the order is recorded, all proceedings by the judgment creditor to enforce the judgment lien shall be discontinued, unless a court orders otherwise.

**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. Any party seeking to enforce such liability shall provide notice 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 obligation.

## COMMENTS

### 2006

[1] The Committee is aware that issues have arisen regarding the effective date of a bond, and thus the effectiveness of injunction orders and other orders which are conditioned upon the filing of an acceptable bond. Certain types of bonds are almost always acceptable and thus, under this rule, are automatically effective upon filing with the Court subject to the consideration of timely filed objections. Other types of bonds may or may not be acceptable and should not be effective until the Court determines the sufficiency of the bond. The court may permit property bonds upon such conditions as are appropriate to protect the judgment creditor (or other party sought to be protected). Such conditions may include an appraisal by a qualified appraiser, information regarding liens and encumbrances against the property, and title insurance.

[2] This rule also sets the presumptive amount of a supersedeas bond for a money judgment. The amount of a supersedeas bond for a non-money judgment must be determined in the particular case by the court and this rule is not intended to affect the court's discretion to deny a supersedeas bond in the case of a non-money judgment.

### **Rule 65.1. 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.~~