

**Colorado Supreme Court Advisory Committee on the Rules of Civil Procedure
November 16, 2018 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 Court of Appeals Full Court Conference Room on the third 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 (Ret.) Janice Davidson	x	
Damon Davis	x	
David R. DeMuro	x	
Judge Paul R. Dunkelman	x	
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	
Judge Cathy Lemon	x	
Bradley A. Levin	x	
David C. Little	x	
Chief Judge Alan Loeb		x
Professor Christopher B. Mueller	x	
Brent Owen	x	
John Palmeri	x	
Judge Sabino Romano	x	
Stephanie Scoville	x	
Lee N. Sternal		x
Magistrate Marianne Tims		x
Jose L. Vasquez	x	
Ben Vinci	x	
Judge John R. Webb	x	
J. Gregory Whitehair	x	
Judge Christopher Zenisek	x	
Non-voting Participants		
Justice Richard Gabriel, Liaison	x	
Jeremy Botkins (Kyle Sauer substituted)	x	

I. Attachments & Handouts

- November 16, 2018 agenda packet.

II. Announcements from the Chair

- The September 28, 2018 minutes were approved with one correction: change *C.R.C.P. 21* to *C.A.R. 21* on the fourth page;
- The 2019 meeting schedule is set with five meetings rather than seven; and
- There will be several new members joining the committee at the January meeting.

III. Present Business

A. C.R.C.P. 69

Subcommittee member Brent Owen reported that after circulating the memo, the subcommittee received additional comments. The subcommittee would like to discuss their proposal further before bringing it to the committee in light of the comments received. Subcommittee member Ben Vinci shared that he took the proposal to some of his colleagues who do C.R.C.P. 69 work, and they expressed concern regarding limiting a C.R.C.P. 69 deposition.

The committee then discussed writs of execution. Mr. Owen explained that they are a procedure to execute on property, but they are not used for garnishments. Mr. Vinci stated that he has used a writ of execution to seize a restaurant bar's assets.

Judge Berger tabled the discussion until the January meeting.

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

Tabled to January 25, 2019 meeting.

C. C.R.C.P. 47

Judge Elliff explained that this issue was brought to his attention by a colleague. He went on to state that there is a discrepancy between C.R.C.P. 47(b) and C.R.S. § 13-71-142. C.R.C.P. 47(b) provides that each *side* is entitled to one peremptory challenge, while C.R.S. § 13-71-142 provides that each *party* is entitled to an additional peremptory challenge. There is no case law addressing this discrepancy. If the rule was changed to follow the statute, multi-party complex cases would be unworkable. Further, this committee does not have jurisdiction to change the statute. As to C.R.C.P. 47(b), in *Blades v. DaFoe*, the supreme court has asserted that, “[T]he rule in Colorado is that multiple litigants, designated as co-plaintiffs or co-defendants, are together entitled to only one set of peremptory challenges, regardless of whether their interests are essentially common or generally antagonistic.” Judge Berger also pointed out that the rule trumps statute under case law. Judge Elliff recommends that the committee take no action.

Bradley Levin queried whether the committee should approach the appropriate legislative office to resolve this discrepancy. He does not feel comfortable having a statute that doesn't comport with the rule. Judge Dunkelman pointed out that this inconsistency is probably in the criminal rules as well. Justice Gabriel said that if Mr. Levin approaches the supreme court lobbyists with this issue, they may suggest contacting the Colorado Bar Association's Legislative Policy Committee. Mr. Levin agreed that it might make sense to approach the bar, and that he will do so.

D. C.R.C.P. 121

Subcommittee member Judge Kane explained that this issue came to the committee by a letter from a practitioner who asked about the applicability of C.R.C.P. 121-1-14(f) to electronic instruments. The subcommittee looked at legal authority to resolve this and didn't find much. Judge Kane called a public trustee, a lawyer who represents the public trustee, and other practitioners to discuss this matter. Judge Kane reported that the people he talked to seemed comfortable managing cases with electronic instruments without marking them with any notation of judgment or payment. Per the rule, if the instrument is paper based it is marked. If the instrument is electronic, there is no marking because it is difficult to designate an original. The subcommittee proposed adding “, and the original note is paper based” to make the rule more specific.

The committee turned to the second sentence in (f) regarding withdrawing a note from the court. Different courts around Colorado treat notes differently. Mr. Vinci pointed out that practically speaking, the second sentence in (f) is not followed by any courts and is archaic in requiring the court to keep a copy.

Judge Romano asked whether there are smaller districts around Colorado that keep the original. Judge Dunkelman reported that in Eagle County, they keep neither the original nor a photocopy because there is a copy on jPOD already.

A motion was taken to add “, and the original note is paper based”, to the first sentence and to remove the second sentence altogether. The committee voted 17:5 in favor of this motion.

E. C.R.C.P. 106

Subcommittee member Judge Zenisek reminded everyone that at the last full committee meeting, the subcommittee had submitted several alternatives for changing C.R.C.P. 106(a)(4), all intended to address the problem of delays caused by filing interlocutory appeals in district court to challenge rulings in criminal cases filed in county court. At the last meeting, the committee directed the subcommittee to draft a proposal that was simple. At this meeting, the subcommittee recommended inserting the limitation “, in any civil matter” into the rule and suggested two comments.

The committee first considered whether the suggested language excludes only criminal cases and not appeals from administrative agencies. Michael Hofmann reminded the committee that Judge Jones stated at the last meeting that civil includes agency appeals. Gregory Whitehair asked whether non-criminal would be more accurate. Mr. Holme asserted that the comment makes it clear that the target is civil cases.

Mr. Owen suggested removing the last sentence in the first comment, as it is not sure what appellate mechanism would be available, and the committee doesn't want unintended consequences. Judge Lemon voiced support for this as well, stating that stray citations wreak havoc when changes are later made to those references.

The committee discussed the usage of the word *inferior* in the comment. Judge Berger suggested using *lower* instead. Judge Davidson pointed out that lower makes her think of municipal court. David Demuro stated that lower is used in the rule already. Damon Davis contended that lower is more consistent with the current rule.

A motion was made for the rule change mentioned above to be adopted, along with the first comment with the following changes: the word *changed* replaced with *amended*, the last sentence of the comment struck, and the word *inferior* replaced with *lower*. This motion passed unanimously.

The committee then considered the second comment. Judge Zenisek explained that the comment was meant to reinforce the idea that this is a unique procedure utilized when there is no other remedy. Lisa Hamilton-Fieldman, a member of the subcommittee, didn't agree with adding the second comment. She did not favor putting interpretative information into comments. Judge Berger questioned the necessity of a comment that parrots part of the rule. A motion was made to permanently table comment 2. It passed overwhelmingly.

John Lebsack mentioned that the rule contains a reference to superior court, which does not exist. Judge Berger noted that when taking up a rule for another matter, it has been the committee's custom to fix other issues in the rule. A motion was made to remove the reference to superior court. It passed overwhelmingly.

F. C.R.C.P. 17(c)

Subcommittee chair Lisa Hamilton-Fieldman stated that considering the bar committee's proposal presents a huge task. At the last meeting, the committee voiced appreciation for the hard work that went into creating the proposal but was skeptical that these sweeping changes should be made. She also commented that the proposal looks less like a rule and more like a statute. Fellow subcommittee member Judge Dunkelman echoed these sentiments and stated that he and Ms. Hamilton-Fieldman will together determine whether the larger committee should take this up. Judge Berger stated that if this subcommittee determines the proposal should be considered, then he will appoint additional members to the subcommittee to help in this large task.

G. C.R.C.P. 304

Judge Berger turned the committee's attention to a letter from a practitioner who stated that there's a time limit for service in district court but not in county court.

The committee explored this issue. Mr. Vinci stated that county courts set limitations and handle cases in different ways to clear the docket, such as a delay reduction order. Judge Espinosa stated that they use delay reduction orders in Denver County, and the plaintiff is required to act, or the matter is dismissed.

Jose Vasquez stated that he's concerned that there are a lot of pro se litigants who don't understand or know that they must take action or be dismissed. He also stated that part of

the concern is that collection attorneys are instructing the court to keep cases open. This puts the burden on the defendant and may leave cases open for a long time.

Judge Berger sent this matter to the standing county court subcommittee for their consideration.

H. C.R.C.P. 4 + 304

The Process Servers Association of Colorado (PSACO) wrote a letter to the committee pointing out that recent Colorado legislation impacted notarization requirements. PSACO suggests rules 4 and 304 should allow unsworn declarations signed under penalty of perjury.

Mr. DeMuro stated that he's not sure the change is necessary, as the statute already addresses the rule. A few members suggested the rule should be changed to comport with the newly-changed statute. Mr. DeMuro agreed to look further into this issue and will also determine if other rules are impacted.

I. Form 1.3, JDF 602

Ms. Hamilton-Fieldman recommended that the committee immediately repeal Form 1.3, JDF 602, Notice to Elect Exclusion From C.R.C.P. 16.1 Simplified Procedure and also update the instructions for completing the civil case cover sheet, found on the judicial branch's website.

The committee discussed the fact that having Form 1.3 available is quite dangerous, and that cases could be proceeding under the wrong rule.

A motion was made to repeal Form 1.3, and it passed unanimously. Judge Berger stated he will get the form change proposal to the supreme court right away, and he will also talk to Polly Brock about updating the website.

J. C.R.C.P. 30(c)

Mr. Lebsack noticed a discrepancy between the Federal and Colorado rules on who has a right to attend depositions. He brought this to the committee today to explore because there is a general sense that Colorado rules should conform to Federal rules.

Mr. Levin reported that this issue has come up a few times in his 38 years of practice, and that often, it is difficult to resolve if a judge is not available at that moment. Other committee members mentioned that sometimes, you want a person excluded from a deposition to avoid having that person's later testimony be influenced by what they hear at the deposition. Judge Berger mentioned that barring someone from viewing a deposition is moot unless you also have an order prohibiting them from reading the transcript of the testimony.

Mr. Levin voiced support for referring to Rule 615 in C.R.C.P. 30(c), especially given that one doesn't anticipate this issue until the morning of the deposition. John Palmeri stated that he's not sure the rule should be changed, and that because this rarely comes up, the additional burden wouldn't be worth it. Mr. Holme stated that given the varying

views on this issue, and that there is a supreme court opinion already discussing this, the committee should not take the considerable time necessary to consider this issue. A straw vote was taken. By a vote of 11:14, a subcommittee will NOT further consider this issue.

K. Amount of Cases in Courts

Jose Vasquez asked whether the committee had discussed the impact of Colorado increasing jurisdictional limits in county courts. Justice Gabriel replied that there is a yearlong SCAO study currently underway, and a report will come out when the study is finalized.

IV. Future Meetings

January 25, 2019

March 29, 2019

June 28, 2019

The Committee adjourned at 3:22 p.m.

Respectfully submitted,

Kathryn Michaels