Colorado Supreme Court Advisory Committee on the Rules of Civil Procedure
September 28, 2018 Minutes

A quorum being present, the Colorado Supreme Court Advisory Committee on Rules of Civil Procedure was called to order by Judge Jerry Jones 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 (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	X	

I. Attachments & Handouts

- September 28, 2018 agenda packet & supplement.

II. Announcements from the Chair

- Judge Jones is filling in for Committee Chair Judge Berger today;
- The May 18, 2018 minutes were approved as submitted; and
- Kathryn Michaels is the new supreme court staff attorney assigned to this committee.

III. Present Business

A. C.R.C.P. 69 Brent Owen

Brent Owen reported that the subcommittee has come to a consensus on proposed language. The subcommittee plans to finalize their proposal in October and bring it to the full committee at the November 16th meeting. In the interim, the language will be shared outside the subcommittee to obtain input from the committee generally.

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

Judge Jones reminded the committee that the second sentence in Rule 16.2(e)(10) was construed three different ways by *In re Marriage of Runge*, a recent court of appeals case. The subcommittee was tasked with clarifying the rule to avoid further confusion. The proposed language is intended to make clear that the court may make a ruling if the misstatements or omissions occurred within five years. Judge Jones explained that the clause *under this paragraph* was included so as not to imply that a party could not file a C.R.C.P. 60 motion or a collateral attack such as personal jurisdiction as is contemplated by the second sentence in the rule. Judge Davidson commented that she was at the meeting where this rule was originally proposed, discussed, and forwarded to the supreme court, and the proposal at hand is what the committee originally intended.

Gregory Whitehair stated that the word *believes* feels odd and suggested *learns* or *discovers* instead. He also questioned whether this rule is intended to describe newly discovered evidence or a situation in which one later realizes he or she made a misstatement. Judge Jones responded that the discovery piece is separate. Additionally, Judge Jones reported that he spoke with practitioners in this subject area concerning the issue of whether discovery should be allowed. Some practitioners thought that discovery should not be allowed, while others thought it should be in the discretion of the court. Judge Jones also asked Judge Furman to run this by the Standing Committee on Family Law Issues. Judge Furman responded that 13 of the 25 committee members approved of the changes, 1 member said it was ok if the C.R.C.P. 60 reference was kept, and the remaining members did not respond.

Justice Gabriel found the proposed language a bit odd grammatically. Judge Lemon voiced a concern about changing more language than necessary and the unintended consequences of doing so. Judge Lemon recommended not addressing the parties'

subjective belief, and further, not saying the court must rule under one circumstance and deny under another. Judge Jones reported that he included *believes* because the rule seems to assume it. He further stated that the concept of the proposed rule change was to indicate that this is what a party alleges or believes, and a court will then rule on whether they agree. Judge Lemon suggested *alleges* rather than *believes.*

The conversation then turned to the length of time allowed by the rule. Judge Jones observed that 5 years is an extraordinarily long time and that no other rule comes close to this length in this type of rule. Judge Davidson commented that this was a difficult paragraph to crack because of its unusualness. C.R.C.P. 16.2 expedited the whole process, and some information could then be successfully concealed. Judge Davidson further explained that when this rule was written, 5 years was a compromise on time. To her, the only question is whether it is a cutoff from 5 years of the date of dissolution or 5 years from the filing, and, in Judge Davidson's view, this proposed language successfully clarifies on this point.

Judge Jones will fine-tune the language and report back with an improved proposal considering this discussion.

C. C.R.C.P. 47

Tabled to October 26, 2018 meeting.

D. C.R.C.P. 121 Judge Kane

Tabled to November 16, 2018 meeting. Ben Vinci would like to join this subcommittee.

E. C.R.C.P. 106 Judge Jones

Judge Jones reported that parties in criminal cases filed in county court are filing C.R.C.P. 106(a)(4) actions in district court to challenge a variety of interlocutory, discretionary rulings. This is problematic because this would not be possible were the cases originally filed in district court and because the result creates a substantial delay (possibly years) in resolving those cases. The subcommittee met and discussed potential alternatives to the current rule, and these alternatives are laid out in the subcommittee's memo. A second memo written by Judge Jones discusses the history of the rule and why it is used this way. The subcommittee is not making a specific proposal today. Rather, they are hoping the committee will weigh in to provide the subcommittee with more direction in resolving this issue.

Subcommittee member Judge Zenisek noted that in his view, simple is best. He continued by stating that people should not have an automatic interlocutory to delay a case. Fellow subcommittee member Judge Romano agreed with this sentiment. Mr. Whitehair commented that this method of appeal should be blocked, and that the two regular appeals options are more than enough due process. He further stated that nothing in the review mentioned a special case type that deserves extra protection.

Judge Jones explained that the subcommittee does not want to impact civil cases. He mentioned that the rule isn't used the same way in civil cases as it is in criminal cases. Additionally, this rule applies to agency and board decisions, and it works fine in that context.

Damon Davis stated that of the solutions presented in the memo, he liked either the second more ambitious option, or a combination of the third and fourth options. Mr. Davis encouraged the committee to be mindful of how the supreme court has already come down on this issue so as not to cut against their decisions. Subcommittee member Lisa Hamilton-Fieldman asserted that the subcommittee decided to come out how they did because although the supreme court has given its blessing, it did so before the changes to C.A.R. 21 when there was not an alternative method of appeal, and now there is. She also voiced her opinion that the solution of limiting it to just civil cases is appropriate.

Judge Jones clarified that Mr. Davis and Ms. Hamilton-Fieldman were referring to *Cty. Court v. Ruth*, 575 P.2d 1 (Colo. 1977). In this case, the court did go out of its way to sanction the use of 106(4)(a). Though, it was at a time when C.A.R. 21 was closed off to county court cases, which was later changed in 1999. If someone is charged with a felony in *district court* and has a speedy trial concern, options are 1) C.A.R. 21 or 2) an appeal to the court of appeals. If someone is charged with a felony in *county court*, C.R.C.P. 106(a)(4) provides a third option to appeal.

Dave DeMuro asked whether the subcommittee had a sense of which direction they'd like to pursue. Judge Jones responded that the first alternative, to simply add a clause that expressly limits the rule to civil cases, holds the most support. There is some backing for adding a comment as well. There is much less support in the subcommittee for changing the language in the rule concerning abuse of discretion.

Justice Gabriel stated that he would not be worried that the first option would overrule another case. While he can't speak for his colleagues, it doesn't seem that the first option would cause concern in that regard. Justice Gabriel said that he *is* concerned about the second option. Judge Davidson commented that the simple fix is good, and if there's interest by the group, perhaps the abuse of discretion piece could be clarified. Ms. Hamilton-Fieldman said she was reluctant to deal with the abuse of discretion piece as well. She said that 100 years of case law already explains the abuse of discretion part, so she is reluctant to get embroiled in recrafting something that doesn't possess such a long history. Judge Jones stated that he is not completely in favor of tackling the abuse of discretion piece either.

Michael Hofmann queried whether adding the clause "any civil matter" would be broad enough to conserve agency appeals. He suggested a comment might provide clarification if necessary. Mr. Hoffman concluded that he is in favor of the first approach so long as the rule isn't narrowed so much as to exclude agency appeals.

Judge Jones stated that the subcommittee will write a more concrete proposal for the larger group.

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

Judge Jones introduced local attorney and CBA committee representative David Kirch to discuss a proposed C.R.C.P. 17(c) revision regarding guardian ad litems (GALs). Mr. Kirch was later joined by Marcie McMinimee, also a local attorney and a member of the committee setting forth this proposal. Mr. Kirch explained that the proposed revision to the rule 1) incorporates the *Sorensen* test; 2) provides a list of permissible duties and roles that might be assigned by a court to a GAL, and; 3) specifies duties that should not be performed by a GAL.

Lee Sternal voiced his concern that these changes will require additional costs in litigation, specifically for a proposed settlement for a minor. Mr. Sternal also commented that he did not advise adopting a rule that prohibits the court from saying that the GAL may serve as a conservator.

Stephanie Scoville commented that the changes presented are quite substantive and queried whether there is a better place to make these changes. Ms. McMinimee and Mr. Kirch responded that the bar committee had considered making the changes via statute and CJD as well, but that ultimately, because C.R.C.P. 17(c) is where one sees GALs mentioned the most, proposing a rule change made the most sense. Mr. Demuro suggested that a trial benchbook might be another option.

Ms. Hamilton-Fieldman noted her concern, especially regarding the restrictions of what GALs can do. She stated that when there aren't funds to appoint counsel, not allowing a GAL to be appointed in financial matters might really harm those who need the assistance. In Ms. Hamilton-Fieldman's view, the suggested changes to C.R.C.P. 17(c) would be hugely substantive and would have many unintended consequences. Mr. Kirch remarked that they are open to rewording and redrafting.

The committee also discussed which subsections referred to adults and/or minors. Mr. Whitehair asked for the revising group to make this clear in the next draft.

Judge Jones and several other committee members noted the considerable thought and effort that went into this draft of C.R.C.P. 17(c). Due to the complicated nature of this rule and the significant changes suggested, Judge Jones recommended a subcommittee might best tackle this issue. A signup sheet was passed around for interested members to join this subcommittee.

IV. Future Meetings

October 26, 2018
November 16, 2018

The Committee adjourned at 2:55 p.m.

Respectfully submitted,
Kathryn Michaels