AGENDA

COLORADO SUPREME COURT
COMMITTEE ON
RULES OF CIVIL PROCEDURE

Friday, January 29, 2016, 1:30p.m.
Ralph L. Carr Colorado Judicial Center
2 E.14th Ave., Denver, CO 80203
Fourth Floor, Supreme Court Conference Room

I. Call to order

II. Approval of November 20, 2015 minutes [Page 3 to 5]

III. 2016 Roster [Page 6 to 10]

IV. Announcements from the Chair

A. Introductions

B. Transmittal letter to supreme court December 14, 2015 [Page 11 to 24]

C. Rule 120 posted for public comment

D. Public hearings before the supreme court

E. Attendance of committee meetings by phone

V. Business

A. C.R.M. 6—(Judge Webb) [Page 25 to 26]

B. County Court Rules Subcommittee—(Ben Vinci)

C. New Form for admission of business records under hearsay exception rule—(Damon Davis and David Little)

D. Form 20—(Skip Netzorg)

E. County and Municipal appeals to district court—(Judge Berger)(discrepancies in civil, criminal, and appellate procedures and possible creation of joint committee)

F. C.A.R. 8(d)—(David DeMuro) (district court function in CAR 8(d); amendment and action appropriate for Civil Rules Committee) [Page 27 to 29]

G. C.R.C.P. 16.1 and Raising County Court Jurisdiction subcommittee—(Chief Judge (Ret.) Davidson)

H. C.R.C.P. 53—(Judge Zenisek)(passed to March 18, 2016 meeting)

I. C.R.C.P. 122—(Judge Berger) (Judge Moss email and addition of address and attorney registration number) [Page 30 to 31]

J. C.R.C.P. 121 § 1-14—(Judge Berger)(citation update) [Page 32 to 33]

K. Rule 47 (b) Alternate Jurors—(Judge Berger) (Should C.R.C.P. 47 (b) be amended to grant the trial court discretion (with or without the consent of the parties) to permit alternate jurors to deliberate and participate fully in considering and returning a verdict?) [Page 34 to 49]

VI. New Business

VII. Adjourn—Next meeting is March 18, 2016 at 1:30pm

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

Jenny Moore
Rules Attorney
Colorado Supreme Court
Jenny.moore@judicial.state.co.us
720-625-5105

Conference Call Information:

Dial (720) 625-5050 (local) or 1-888-604-0017 (toll free) and enter the access code, 30302435, followed by # key.

Colorado Supreme Court Advisory Committee on the Rules of Civil Procedure
November 20, 2015 Minutes

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

Name	**Present**	**Excused**
Judge Michael Berger, Chair	X	
Chief Judge (Ret.) Janice Davidson		X
Damon Davis	X	
David R. DeMuro	X	
Judge Ann Frick		X
Peter Goldstein	X	
Lisa Hamilton-Fieldman	X	
Richard P. Holme	X	
Judge Jerry N. Jones	X	
Judge Thomas K. Kane	X	
Debra Knapp	X	
Richard Laugesen	X	
Cheryl Layne	X	
Judge Cathy Lemon	X	
David C. Little	X	
Chief Judge Alan Loeb		X
Professor Christopher B. Mueller		X
Gordon “Skip” Netzorg	X	
Brent Owen	X	
Judge Ann Rotolo	X	
Stephanie Scoville	X	
Frederick B. Skillern		X
Lee N. Sternal	X	
Magistrate Marianne Tims	X	
Ben Vinci	X	
Judge John R. Webb	X	
J. Gregory Whitehair	X	
Judge Christopher Zenisek	X	
Non-voting Participants		
Justice Allison Eid, Liaison	X	
Jeannette Kornreich	X	

I. Attachments & Handouts

A. November 20, 2015 agenda packet

B. Post-Judgment Subcommittee handout

II. Announcements from the Chair

The September 26, 2015 minutes were approved as submitted.

Judge Berger announced that after 28 years Fred Skillern had decided not to renew his membership on the committee. Judge Berger recognized and thanked Mr. Skillern for his service to the committee. Judge Berger introduced new member Judge Adam Espinosa from Denver county court. Today was Judge Espinosa's first meeting, and Judge Berger welcomed him.

Fred Baumann and Diana Poole were introduced. Both guests appeared to answer any questions related to the C.R.C.P. 23 proposal.

III. Business

A. C.R.C.P. 23

Subcommittee chair Richard Laugesen began and stated that the subcommittee was ready to present its final draft of C.R.C.P. 23(g) that passed the subcommittee with one abstention. A concern was raised that a property interest remained with undispersed funds and there had been a few federal court opinions on the issue. An amendment to subsection (g)(2) was suggested that addressed the possible remaining property interest; however, there wasn't a second to adopt the amendment. A motion to adopt the amendment as submitted by the subcommittee passed 18:3.

B. Post-Judgment Subcommittee and County Court Working Group

There were proposals from the Post-Judgment Subcommittee, a subcommittee of the Civil Rules Committee, and the County Court Rules Subcommittee, a group operating through the State Court Administrator's Office. The Post-Judgment Subcommittee Chair, Ben Vinci, gave some history about the proposals before the committee. A motion was made to table all proposals until subcommittee membership could be expanded to include individuals representing the interests of debtors. With a vote of 13:2 that motion passed.

C. C.R.C.P 121 § 1-15

Subcommittee chair David DeMuro began and reminded the committee that at the September meeting the committee adopted amendments to Rule 121 §§ 1-12, 1-15, and Rule 10. One of the amendments to Rule 121 § 1-15 changed a historic comment; however, due to new procedure, historic comments will no longer being amended. As a result, Rule 121 § 1-15 has a new 2015 comment for the committee to consider. A motion to adopt the new 2015 comment passed unanimously. The only remaining issue with the proposal was the effective date. Mr. DeMuro said he'd follow up about it with Judge Berger with an effective date recommendation.

D. C.R.M. 6

Subcommittee chair Judge Webb began and said that the court of appeals sees cases with a late attempt to challenge a magistrate's ruling. The right to be heard by a district court judge is important and waiver shouldn't be implied. Some members thought that the proposal was an improvement, especially to self-represented parties. Other members had questions about how consent would be given and whether this new procedure would lead to delays. A motion to adopt the proposal passed 10:7.

E. Form 35.1

The Editing Subcommittee reviewed Form 35.1 and suggested minor, non-substantive revisions. A motion to adopt Form 35.1 passed unanimously.

F. County Court and Municipal appeals to district court

Judge Berger began and explained that there were inconsistencies between the statutes and court rules and a joint criminal, civil, and appellate rules subcommittee would be formed. The subcommittee will be set up and propose various amendments to the civil rules.

G. C.A.R. 8(d)

The Appellate Rules Committee sent this amendment to the Civil Rules Committee for consideration. C.A.R. 8(d) contains district court functions that need to be moved to the appropriate civil rule. A subcommittee will be set up to propose an amendment.

H. C.R.C.P 84

Richard Holme originally recommended deleting all forms, but after discussion with committee members and Colorado Legal Services his proposal has been revised. The new proposal is to keep all forms with the exception of Form 20. After discussion a motion was made to keep all forms, with the exception of Form 20, but that motion failed 10:9. A new motion was made to refer Form 20 to a subcommittee for amendment, and with one no vote that motion passed.

I. New Form for admission of business records under hearsay exception rule

Damon Davis and David Little had been working on this proposal and had a preliminary draft they were working with. The draft wasn't ready for circulation but, the subcommittee will keep the committee updated on their progress.

IV. Future Meetings

March 18, 2016

The Committee adjourned at 3:30 p.m.

Respectfully submitted,
Jenny A. Moore

Name and Address	Contact	Term
1. Justice Allison Eid, Liaison Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	allison.eid@judicial.state.co.us 720-625-5150	N/A
2. Judge Michael Berger, Chair Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	michael.berger@judicial.state.co.us 720-625-5150	1/1/2014 – 12/31/2017
3. Chief Judge (Ret.) Janice B. Davidson Institute for the Advancement of the American Legal System 2060 S. Gaylord Way Denver, CO 80208	janice.davidson@du.edu 303-871-6611	4/1/2015 – 3/31/2018
4. Damon Davis Killian Davis Richter & Mayle, P.C. 202 North 7th Street Grand Junction, CO 81502	damon@killianlaw.com 970-241-0707	5/15/2015-5/14/2018
5. David R. DeMuro, Esq. Vaughan & DeMuro 3900 E. Mexico Ave., Suite 620 Denver, Colorado 80210	ddemuro@vaughandemuro.com 303-837-9200 303-837-9400 Fax	1986-12/31/2017
6. Judge Adam Espinosa Denver County Court 1437 Bannock St., Courtroom 175 Denver, CO 80202	Adam.espinosa@denvergov.org 720-865-7270	10/1/2015 – 9/30/2018
7. Judge Ann Frick Lindsey-Flanigan Courthouse 520 West Colfax Room 135 Denver, Colorado 80204	ann.frick@judicial.state.co.us 720-865-8301	2010-12/31/2017
8. Judge Fred Gannett Eagle County Justice Center 885 Chambers Avenue P.O. Box 597 Eagle, CO 81631	frederick.gannett@judicial.state.co.us 970-328-8558	10/1/2015 – 9/30/2018

Name and Address	Contact	Term
9. Peter A. Goldstein, Esq. 217 E. Fillmore St. Colorado Springs, CO 80907	pagpc@prodigy.net 719-473-3040 719-473-0138 Fax	2001- 12/31/2017
10. Lisa Hamilton-Fieldman, Esq. 7125 W 32nd Ave Wheat Ridge CO 80033	artldf@yahoo.com 720-318-5637	2004- 12/31/2017
11. Richard P. Holme, Esq. Davis Graham & Stubbs 1550 17th St., Ste. 500 Denver, CO 80202	richard.holme@dgslaw.com 303-892-9400 x7340 303-893-1379 Fax	1994- 12/31/2017
12. Judge Jerry N. Jones CO Court of Appeals 2 East 14th Avenue Denver, CO 80203	jerry.jones@judicial.state.co.us 720-625-5150 720-625-5148 Fax	1/1/2016- 12/31/2018
13. Judge Thomas K. Kane El Paso County Judicial Building 270 S. Tejon St. P.O. Box 2980 Colorado Springs, CO 80903	thomas.kane@judicial.state.co.us 719-452-5000 719-452-5006 Fax	2000- 12/31/2017
14. Debra R. Knapp, Esq. Denver City Attorney's Office 201 W Colfax Avenue, # 1207 Denver, CO 80202	Debra.knapp@denvergov.org 720-913-8408	1/1/2016- 12/31/2018
15. Richard W. Laugesen, Esq. 1830 S. Monroe St. Denver, CO 80210	Laugesen@indra.com 303-300-1006 303-300-1008 Fax	1978- 12/31/2017
16. Cheryl Layne, Clerk of Court Eighteenth Judicial District 4000 Justice Way #2009 Castle Rock CO 80109	cheryl.layne@judicial.state.co.us 720-437-6200	1/1/2016- 12/31/2018

Name and Address	Contact	Term
17. Judge Cathy Lemon Denver City & County Building 1437 Bannock Street Denver, CO 80202	cathy.lemon@judicial.state.co.us 720-865-8301	9/1/2014- 8/31/17
18. Bradley A. Levin Levin Rosenberg, PC 1512 Larimer Street, Suite 650 Denver, CO 80202	bal@levinrosenberg.com 303-575-9390	1/1/2016- 12/31/2018
19. David C. Little, Esq. Montgomery Little & Soran 5445 DTC Pkwy., Ste. 800 Englewood, CO 80111	dlittle@montgomerylittle.com 303-779-2720 303-220-0412 Fax	1/1/2016- 12/31/2018
20. Chief Judge Alan Loeb Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	alan.loeb@judicial.state.co.us 720-625-5305 720-625-5148 Fax	1/1/2016- 12/31/2018
21. Professor Christopher B. Mueller University of Colorado School of Law Campus Box 401 Boulder, CO 80309	muellerc@spot.colorado.edu 303-492-6973 303-492-1200 Fax	1/1/2016- 12/31/2018
22. Gordon “Skip” Netzorg Sherman & Howard, LLC 633 17th Street Ste. 3000 Denver, CO 80202	gnetzorg@shermanhoward.com 303-299-8381	4/1/2015 – 3/31/2018
23. Brent Owen Squire Patton Boggs 1801 California Street, Suite 4900 Denver, CO 80202	brent.owen@squirepb.com	4/1/2015 – 3/31/2018

Name and Address	Contact	Term
24. Stephanie Scoville Office of the Attorney General Ralph L. Carr Colorado Judicial Center 1300 Broadway, 10th Floor Denver, CO 80203	stephanie.scoville@state.co.us 720-508-6573	4/15/2015 – 3/15/2018
25. Lee N. Sternal, Esq. 414 W. 9th St. Pueblo, CO 81003-4718	lnslaw@msn.com 719-545-9746 719-545-1122 Fax	1/1/2016-12/31/2018
26. Magistrate Marianne Tims Jefferson Combined Court 100 Jefferson County Parkway Golden, CO 80401	marianne.tims@judicial.state.co.us 303-271-6145	9/1/2014-8/31/2017
27. Jose L. Vasquez, Esq. Colorado Legal Services 1905 Sherman Street, Suite 400 Denver, CO 80203	jvasquez@colegalserv.org 303-866-9356	1/1/2016-12/31/2018
28. Ben Vinci, Esq. Vinci Law Office 2250 S Oneida St, Suite 303 Denver, CO 80224-2559	ben@vincilaw.com 303-512-0340 303- 872-1898	1/1/2016-12/31/2018
29. Judge John R. Webb CO Court of Appeals 2 East 14th Avenue Denver, CO 80203	john.webb@judicial.state.co.us 720-625-5150 720-625-5148 Fax	1/1/2016-12/31/2018
30. J. Gregory Whitehair, Esq. The Whitehair Law Firm, LLC 12364 W. Nevada Pl., Ste. 305 Lakewood, CO 80228	jgw@whitehairlaw.com 303-908-5762	1/1/2016-12/31/2018
31. Judge Christopher Zenisek Jefferson County District Court 100 Jefferson County Parkway Golden, CO 80401	Christopher.zenisek@judicial.state.co.us 303-271-6145	1/1/2016-12/31/2018

Name and Address	Contact	Term
Non-Voting Participants		
32. Jeannette Kornreich Assistant Legal Counsel SCAO 1300 Broadway Suite 1200 Denver, CO 80203	Jeannette.kornreich@judicial.state.co.us 720-625-5823	N/A
33. Jenny Moore Rules Attorney Colorado Supreme Court Ralph Carr Judicial Center 2 East 14 Avenue Denver, CO 80203	jenny.moore@judicial.state.co.us 720-625-5105	N/A

Court of Appeals

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

Michael H. Berger
Judge

December 14, 2015

Honorable Allison Eid, Justice
Colorado Supreme Court

Re: Colorado Supreme Court Civil Rules Committee

Dear Justice Eid:

I write to you in your capacity as the Liaison Justice to the Civil Rules Committee.

The Civil Rules Committee recommends to the Court the adoption of the following amendments to the Colorado Rules of Civil Procedure. Copies of each of the proposed amendments, both clean and marked, are attached to this letter and to the electronic version of this letter.

I. Orders Authorizing Sales by the Public Trustee--C.R.C.P. 120

A. Background

C.R.C.P. 120 governs the procedures whereby a party seeking foreclosure of real (or personal) property

obtains a district court order authorizing the sale of the property by the public trustee. As such, it provides important judicial and due process protections to owners of property burdened by a deed of trust.

The current version of Rule 120 has been the subject of criticism and comments. Some have argued that it is not sufficiently protective of homeowners and is too solicitous of the interests of creditors, particularly in an era when ownership of the debt that underlies the foreclosure may be open to legitimate question.

The specific impetus of the committee's work on this rule was a request by two members of the Colorado General Assembly, Beth McCann and Angela Williams, to Chief Justice Rice that Rule 120 be reexamined. The Chief Justice then referred the Representatives' concerns to the Committee.

In particular, the Representatives were concerned that some district judges have refused to consider whether the moving party was the real party in interest; i.e., they owned the debt or had an agency relationship sufficient to give them standing to prosecute the foreclosure, contrary to the Supreme Court's decision in *Goodwin v. District Court*, 779 P. 2d 837 (Colo. 1989), which held that the Rule 120 court must consider whether the moving parties are the real parties in interest when the issue is properly raised by the debtors.

I appointed a subcommittee to study both the issues raised by the Representatives and any other issues relating to the rule. The subcommittee was chaired by former Arapahoe County district judge Fred Skillern, an expert in real estate law.

Many of the proposed changes are clarifying in nature but some are substantive. Addressing recurring problems regarding the lack of knowledge of the persons that attest to the information in the motion, the proposed rule requires that the motion be verified "by a person with direct knowledge who is competent to testify regarding the facts stated in the motion." Subsection (a). The proposed rule also requires identification by name and address of the servicer of the loan and if that person is not authorized to modify the debt, the identification of the person who has such authority. Subsection (b)(4).

The proposed rule explicitly provides that the scope of the hearing includes whether the moving party is the real party in interest, i.e., owns the indebtedness or has a sufficient agency relationship to permit that person to prosecute the foreclosure. Subsection (d)(1)(C). The rewrite also requires the Rule 120 court to determine, under any federal or state law, the status of any request for loan modification which bars a foreclosure sale as a matter of law. Subsection (d)(1)(D).

There was concern expressed by a small minority of the Committee that at least some of the proposed amendments were legislative in nature and were properly in the domain of the General Assembly, and not the Court in its rule-making capacity. I note in this regard that in recent years a number of bills have been introduced in the General Assembly to address the foreclosure process; for a variety of reasons none of these bills were passed by the General Assembly or signed into law by the Governor.

A strong majority of the Committee believes that the current proposal constitutes an appropriate exercise of the Court's rule-making authority and does not impinge upon the legislative prerogatives of the General Assembly. The proposed rule was approved by all but one of the Committee members voting.

B. Public Hearing and Effective Date

The Subcommittee was very careful to consider the views of all known constituent groups with an interest in pubic trustee foreclosures and believes that it considered all of those views. As a result, the Committee does not believe that a public hearing is necessary, though there is no doubt that this is a matter of significant public concern and interest.

Regarding the effective date, should the Court adopt the proposed amendments, the Committee recommends that the rule apply to Rule 120 proceedings filed on or after a date that is the first day of the month after 60 days from the court's adoption of the rule to give lawyers and district judges an opportunity to learn about and conform their forms and procedures to the amended rule. The rule would not be applicable to Rule 120 proceedings that were filed before the effective date of the rule.

II. C.R.C.P. 23 (Class actions, relating to payment of undistributed class settlement funds to COLTAF)

A. Background

As the Court knows, funding for legal services programs has been problematic, particularly in this low interest rate environment. This proposal, initiated by COLTAF, would create a new subsection (g) of C.R.C.P. 23 and would require that not less than 50% of the unclaimed class settlement funds (defined as "residual funds" in the proposed rule) be paid to COLTAF.

This proposal was referred to a subcommittee chaired by former Committee chair Richard Laugesen. The subcommittee was staffed not only by members of the Committee, but also by Fred Baumann, Esq., the

Chair of the Colorado Access to Justice Commission, and Diana Poole, Executive Director of the COLTAF Foundation.

After careful consideration of the proposal by the subcommittee, the full Committee debated the rule and approved it by a vote of 18 to 3. While the financial fruits of this proposed rule are likely to be modest, in this environment every bit helps. The Committee recommends adoption of this proposed rule.

B. Public Hearing and Effective Date

The Committee does not believe that a public hearing is necessary with respect to this rule proposal. The Committee recommends that, if adopted, the rule become effective on July 1, 2016 for class action settlements approved by district courts on or after that date. This proposed effective date is different than the others proposed in this letter because a substantial lead time is necessary to enable class action lawyers to include these provisions in any proposed settlement.

III. Authority of district judges to dispense with written motions for certain types of motions and page limits for district court filings--C.R.C.P. 121, Sections 1-12, 1-14 and C.R.C.P. 10

A. Background

1. Written Motions

In recent years, a number of district court judges have dispensed with written motions in discovery disputes and other similar motions, with substantial benefit. Those judges have found that much unnecessary briefing and hyperbole is avoided when lawyers are required to address the judge either personally or by telephone and that most discovery and related motions can be adjudicated more promptly and at substantially lower costs for all involved when written motions, responses, and replies are eliminated. This proposed amendment recognizes that in spite of the beneficial nature of such procedures, they are not currently authorized by the Colorado Rule of Civil Procedure. This amendment corrects that problem.

2. Page Limits

Addressing page limits, the current rule governing page limits in district court filings is precatory, not mandatory. The current rule states that motions exceeding ten pages are "disfavored." It does not take much imagination to predict how poorly that rule has governed page limits.

Effective July 1, 2015, the General Assembly expanded the remedies available in actions under the Colorado Anti Discrimination Act (CADA), to make the

state law remedies co-extensive with those available under corresponding federal anti-discrimination laws. As a result, some district courts, particularly the Denver district court, expects a significant increase in state court filings under CADA. These cases generally involve substantial motions practice, in particular summary judgment motions of substantial length and complexity. Chief Judge Michael Martinez of the Second Judicial District requested the Committee to revisit page limits on district court motions, responses and replies.

I appointed a subcommittee, chaired by longtime practitioner, author, and commentator David DeMuro to study these issues.

The subcommittee and the full Committee debated what page limitations are reasonable and the proposal before the Court constitutes the considered recommendations of district court judges and experienced civil practitioners. The proposed rule recognizes that the district courts always retain discretion to increase (or decrease) the page limits in particular cases or with respect to particular motions. Bu the Committee is confident that most motions will fall within these limits and will provide to the litigants an adequate opportunity to inform the district judges of their views on particular motions.

In order to make meaningful these page limitations, it is also necessary to amend C.R.C.P. 10, which governs the format of documents filed in the district courts, regarding line spacing and font size. While these requirements are not as extensive or precise as the requirements in the Colorado Appellate Rules, they are modeled upon those rules, which seem to work well.

B. Public Hearing and Effective Date

The Committee does not believe that a public hearing is necessary and recommends that, if the Court adopts these rules, that they become effective for motions filed on or after the first day of the month following 60 days from the date that the rule is adopted.[1] Motions that are in process should not be subject to the new rule. Thus, if a motion has been filed before the effective date of the rule, the page limits for the response and a reply will be governed by the prior rule, not the new rule.

IV. Colorado Rules for Magistrates, Rules 5 & 6—new disclosures to persons who consent to magistrate proceedings

[1] The Committee has attempted to make uniform all but one of the proposed effective dates for these proposed rules, even though in some cases, an earlier effective date could easily be supported.

A. Background

There are two components of this proposed rule change. The first involves a correction of an incorrect citation in Rule 6(a)(1)(I). That proposal was approved unanimously by the Committee.

The second, substantive component would add a new subsection (g) to Rule 5 which would require an advisement to persons involved in proceedings in which a magistrate exercises jurisdiction by consent. Under the current version of the rule, unless a party objects to the exercise of jurisdiction by a magistrate within a designated period of time, consent is conclusively presumed. The proposed rule recognizes that the right to be heard by a district court judge—a constitutionally appointed judicial officer—is important. A party should not lose that right through ignorance.

This issue was brought to the attention of the Committee by Court of Appeals Judge John Webb, a member of the Committee. I appointed Judge Webb to chair a subcommittee to address this question.

The proposed rule requires a specific advisement, to persons who appear before magistrates in proceedings that require consent, that they must consent to the proceeding being conducted by the magistrate and that any party who fails to file a written objection within 14

days of the notice or referral, setting, or hearing, will be deemed to have consented.

This proposal was approved by the Committee by a vote of 10-7.

B. Public Hearing and Effective Date

The Committee does not believe that a public hearing is necessary. If adopted, the Committee recommends that, for all proceedings initiated before Magistrates, the rule become effective on the first day of the month following 60 days from the adoption of the Rule by this Court,. It would not apply to proceedings before magistrates already underway.

V. Mandatory Financial Disclosures in Domestic Relations Cases—C.R.C.P. 16.2 (e)(2), Form 35.1

A. Background

These are non-substantive, conforming amendments. They were approved unanimously by the Committee.

B. Public Hearing and Effective Date

The Committee recommends that no public hearing be held and that the rule become effective for all financial disclosures made on or after a date that is the first day of

the month after the expiration of 60 days from the date of approval by the Court.

VI. County Court Rule Regarding New Trials and Amendment of Judgments—minor amendments to conform the Rule time limits with related statutory time limits

A. Background

The Committee was notified that there are inconsistencies between the time limits contained in C.R.C.P. 359, and a related statute, section 13-6-311(b), C.R.S. 2015. C.R.C.P. 359 provides that the time for appeal is extended to 21 days after the disposition of a timely motion for new trial. The statute, on the other hand, requires the notice of appeal to be filed within 14 days of the disposition of the motion for new trial. The proposed amendment conforms the time period in the rule to the time period mandated by statute. This proposal was adopted unanimously by the Committee.

B. Public Hearing and Effective Date

The Committee does not believe that a public hearing is necessary and recommends an effective date on the first day of the month which 60 days from the adoption of the amendment by the Court.

VII. Garnishment rules, C.R.C.P. 103, 403 and Form 32.

A. Background

These amendments make clarifying changes to the existing rule and do not affect the substantial rights of any parties. They were approved unanimously by the Committee.

B. Public Hearing and Effective Date

No public hearing is required. The Committee recommends that the rule become effective on a date that is the first day of the month after 30 days from the adoption of the amendment by the Court.

Respectfully submitted,

Michael H. Berger, Chair

Civil Rules Committee

Rule 5. General Provisions

(a) – (f) **[NO CHANGE]**

(g) In any proceeding where a district court magistrate may perform a function for which consent is required under C.R.M. 6, the notice of referral, setting, or hearing of the proceeding shall inform the parties that:

(1) All parties must consent to the proceeding being conducted by the magistrate, and

(2) Any party who fails to file a written objection within 14 days of the notice will be deemed to have consented.

(hg) All magistrates in the performance of their duties shall conduct themselves in accord with the provisions of the Colorado Code of Judicial Conduct. Any complaint alleging that a magistrate, who is an attorney, has violated the provisions of the Colorado Code of Judicial Conduct may be filed with the Office of Attorney Regulation Counsel for proceedings pursuant to C.R.C.P. 251.1, et. seq. Such proceedings shall be conducted to determine whether any violation of the Code of Judicial Conduct has occurred and what discipline, if any, is appropriate. These proceedings shall in no way affect the supervision of the Chief Judge over magistrates as provided in C.R.M. 1.

Rule 6. Functions of District Court Magistrates

(a) (1) (A) – (H) **[NO CHANGE]**

(I) Conduct probable cause hearings pursuant to rules promulgated under the Interstate Compact for Adult Offender Supervision, C.R.S. sections 24-60-2801~~301~~ to 2803~~-309, the Uniform Act for Out-of-State Parolee Supervision~~.

(J) **[NO CHANGE]**

(2) **[NO CHANGE]**

(b) – (e) **[NO CHANGE]**

(f) A district court magistrate shall not perform any function for which consent is required under any provision of this Rule unless the notice of the referral, setting, or hearing of the proceeding before the magistrate complied with Rule 5(g).

Rule 5. General Provisions

(a) – (f) **[NO CHANGE]**

(g) In any proceeding where a district court magistrate may perform a function for which consent is required under C.R.M. 6, the notice of referral, setting, or hearing of the proceeding shall inform the parties that:

(1) All parties must consent to the proceeding being conducted by the magistrate, and

(2) Any party who fails to file a written objection within 14 days of the notice will be deemed to have consented.

(h) All magistrates in the performance of their duties shall conduct themselves in accord with the provisions of the Colorado Code of Judicial Conduct. Any complaint alleging that a magistrate, who is an attorney, has violated the provisions of the Colorado Code of Judicial Conduct may be filed with the Office of Attorney Regulation Counsel for proceedings pursuant to C.R.C.P. 251.1, et. seq. Such proceedings shall be conducted to determine whether any violation of the Code of Judicial Conduct has occurred and what discipline, if any, is appropriate. These proceedings shall in no way affect the supervision of the Chief Judge over magistrates as provided in C.R.M. 1.

Rule 6. Functions of District Court Magistrates

(a) (1) (A) – (H) **[NO CHANGE]**

(I) Conduct probable cause hearings pursuant to rules promulgated under the Interstate Compact for Adult Offender Supervision, C.R.S. sections 24-60-2801 to 2803.

(J) **[NO CHANGE]**

(2) **[NO CHANGE]**

(b) – (e) **[NO CHANGE]**

(f) A district court magistrate shall not perform any function for which consent is required under any provision of this Rule unless the notice of the referral, setting, or hearing of the proceeding before the magistrate complied with Rule 5(g).

C.A.R. Rule 8

RULE 8. STAY OR INJUNCTION PENDING APPEAL

Comment [CJB1]: Most of the proposed changes are consistent with Fed. R. App. P., and make the rule more readable and user-friendly.

(a) Motions for Stay.

(1) Initial Motion in District Court~~Stay Must Ordinarily be Sought in the First Instance in Trial Court; Motion for Stay in Appellate Court~~. ~~Application for~~ A party must ordinarily move first in the district court for the following relief:

(A) a stay of the judgment or order of a ~~trial~~ district court pending appeal~~, or for~~;

(B) approval of a supersedeas bond~~,~~; or ~~for~~

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending~~during the pendency of an appeal. must ordinarily be made in the first instance in the trial court.~~

(2) Motion in the Court of Appeals; Conditions on Relief. A motion for ~~such~~ relief under Rule 8(a)(1) may be made to the appellate court or to a justice or judge ~~or justice~~ thereof~~,~~. ~~but the~~

Comment [CJB2]: To be consistent with Rule 8.1 and court structure.

(A) Any such motion must~~shall~~ show that:

(i) ~~show that~~ moving first~~application to~~ in the ~~trial~~ district court ~~for the relief sought is not~~ would be impracticable, or

(ii) ~~that~~ the ~~trial~~ district court has denied an application, or has failed to afford the relief ~~which the applicant~~ requested, ~~with~~ and state the reasons given by the ~~trial~~ district court for its action.

(B) The motion ~~shall~~ must also include:

(i) ~~show~~ the reasons for granting the relief requested and the facts relied ~~up~~on~~,~~;

(ii) ~~and if the facts are subject to dispute the motion shall be supported by~~ originals or copies of affidavits or other sworn statements ~~or copies thereof~~ if the facts are in dispute~~.~~; and

(iii) ~~With the motion shall be filed such~~relevant parts of the record ~~as are relevant~~.

(C) The moving party must give ~~R~~reasonable notice of the motion ~~shall be given~~ to all parties.

(D) ~~The~~A motion under this Rule 8(a)(2) ~~shall~~ must be filed with the clerk and normally will be considered by a ~~panel or~~ division of the court, but in exceptional cases where such procedure would be impracticable ~~due to the requirements of time~~, the ~~application~~ motion may be made to and considered by a single justice or judge ~~or justice of the court~~.

(E) Except as provided in Rule 8(c), the court may condition relief on a party's filing a bond or other appropriate security in the district court.

(b) ~~Stay May be Conditioned Upon Giving of Bond;~~ Proceedings Against Sureties. ~~Relief available in the appellate court under this Rule may be conditioned upon the filing of a bond or other appropriate security in the trial court.~~ If a party gives 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 ~~trial~~ district court and irrevocably appoints the district court clerk ~~of the trial court~~ as the surety's~~his~~ agent ~~up~~on whom any documents~~papers~~ affecting the surety's ~~his~~ liability on the bond or undertaking may be served. ~~His~~ On motion, the surety's liability may be enforced ~~on motion~~ in the district~~trial~~ court without the necessity of an independent action. The motion and ~~such~~ any notice ~~of the motion as~~ that the ~~trial~~ district court prescribe~~d~~s may be served on the district court clerk ~~of the trial court~~, who must~~shall forthwith~~ promptly mail a copy~~ies~~ to each ~~the~~ surety~~ies~~ whose~~if their~~ address~~es~~ is~~are~~ known.

Comment [CJB3]: e-mail?

(c) When Bond Not Required. The appellate court may, in its discretion, dispense with or limit the amount of bond when the appellant is an executor, administrator, conservator, or guardian of an estate and has given sufficient bond as such. The court may not require the following to furnish bond:

(1) ~~T~~the state;~~,~~

(2) the county commissioners of the various counties;~~,~~

(3) cities~~,~~;

(4) towns~~,~~; ~~and~~

(5) school districts; ~~and~~

(6) all charitable, educational, and reformatory institutions under the patronage or control

of the state; and

(7) all public officials when suing or defending in their official capacities for the benefit of the public ~~shall not be required to furnish bond~~.

(d) Bond; Release of Lien or of Notice of Lis Pendens. If a money judgment ~~for the payment of money~~ has been made a lien upon real estate, the lien will be released when a bond is given ~~such lien shall be released thereby~~. The clerk of the court that granted a ~~wherein~~ stay ~~has been granted shall~~will issue a certificate that the judgment has been stayed. ~~, and such~~ The certificate may be recorded with the recorder of the county in which the ~~such~~ real estate is located~~situated~~. The~~Such~~ certificate may also be served ~~up~~on any officer holding an execution. Upon such service, ~~and thereupon~~ all proceedings under such execution must~~shall~~ be discontinued, and the~~such~~ officer must~~shall~~ return the same ~~in~~to the issuing court~~from which it was issued~~ together with the ~~copy of the~~ certificate served ~~up~~on the officer~~him~~. ~~and~~ The ~~shall set forth in his~~ return must indicate what the officer ~~he~~ has done under the execution.

Comment [CJB4]: This appears to be a district court function, not an appellate court function. But it should not be deleted from Rule 8 if it is not covered by a civil rule, but we have not found one -- It is not covered in CRCP 62 or 105(f), or in § 13-52-102 (property subject to execution) or § 38-35-110 (lis pendens statute). The current court of appeals staff attorneys have not seen this issue come up.

Rule 122 Case Specific Appointment of Appointed Judges Pursuant to C.R.S. §13-3-111

(a) – (b) [NO CHANGE]

(c) [NO CHANGE]

(1) The name, address, and registration number of the Appointed Judge;

(2) –(6) **[NO CHANGE]**

(7) A copy signed by the Appointed Judge of the following oath: "I, (name of Appointed Judge), do solemnly swear or affirm ~~by the ever living God,~~ that I will support the Constitution of the United States and of the State of Colorado, and faithfully perform the duties of the office upon which I am about to enter."

(8) **–** (10) **[NO CHANGE]**

(d) – (k) [NO CHANGE]

Rule 122 Case Specific Appointment of Appointed Judges Pursuant to C.R.S. §13-3-111

(a) – (b) [NO CHANGE]

(c) (1) **–** (6)

(7) A copy signed by the Appointed Judge of the following oath: "I, (name of Appointed Judge), do solemnly swear or affirm that I will support the Constitution of the United States and of the State of Colorado, and faithfully perform the duties of the office upon which I am about to enter."

(8) **–** (10) **[NO CHANGE]**

(d) – (k) [NO CHANGE]

Rule 121. Local rules – Statewide Practice Standards

(a) – (c) [NO CHANGE]

Section 1-14

DEFAULT JUDGMENTS

1. – 2. [NO CHANGE]

3. If the party against whom default judgment is sought is in the military service, or his status cannot be shown, the court shall require such additional evidence or proceeding as will protect the interests of such party in accordance with the Service ~~M~~members Civil Relief Act ~~(SCRA)~~, 50 U.S.C. § 3931~~520~~, including the appointment of an attorney when necessary. The appointment of an attorney shall be made upon application of the moving party, and expense of such appointment shall be borne by the moving party, but taxable as costs awarded to the moving party as part of the judgment except as prohibited by law.

4. [NO CHANGE]

~~COMMITTEE~~ COMMENT

2006

[1] This Practice Standard was needed because neither C.R.C.P. 55, nor any local rule specified the elements necessary to obtain a default judgment and each court was left to determine what was necessary. One faced with the task of attempting to obtain a default judgment usually found themselves making several trips to the courthouse, numerous phone calls and redoing needed documents several times. The Practice Standard is designed to minimize both court and attorney time. The Practice Standard sets forth a standardized check list which designates particular items needed for obtaining a default judgment. For guidance on affidavits, see C.R.C.P. 108. See also Sections 13-63-101, C.R.S., concerning affidavits and requirements by the court.

Rule 121. Local rules – Statewide Practice Standards

(a) – (c) [NO CHANGE]

Section 1-14

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COMMENT

2006

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COLORADO COURT OF APPEALS **2015COA179**

Court of Appeals No. 13CA0802
City and County of Denver District Court No. 10CV4452
Honorable Robert L. McGahey, Jr., Judge

Albert Johnson,

Plaintiff-Appellee,

v.

VCG Restaurants Denver, Inc., d/b/a PT's All Nude, a Colorado corporation; and Ryan Lee Schonlaw,

Defendants-Appellants.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division IV
Opinion by JUDGE HAWTHORNE
Loeb, C.J., and Webb, J., concur

Announced December 31, 2015

The Viorst Law Offices, P.C., Anthony Viorst, Denver, Colorado, for Plaintiff-Appellee

Berg, Hill, Greenleaf & Ruscitti, LLP, Rudy E. Verner, Boulder, Colorado; Lindsey M. Killion, Lakewood, Colorado, for Defendants-Appellants

¶ 1 As a matter of first impression in Colorado, we hold that C.R.C.P. 47(b) does not grant a trial court the discretion to permit an alternate juror to deliberate and participate fully with the principal jurors in considering and returning a verdict when one party objects. We also hold that erroneously permitting an alternate juror to do so is presumptively prejudicial.[1]

¶ 2 In this action to recover damages for personal injuries, defendants, VCG Restaurants Denver, Inc., (VCG) and Ryan Lee Schonlaw, appeal the district court's judgment entered on a jury verdict in favor of plaintiff, Albert Johnson. We reverse and remand for a new trial.

I. Facts and Procedural History

¶ 3 Mr. Johnson was a patron at VCG's adult nightclub. While waiting outside after the nightclub had closed, he was confronted by VCG's employees. An altercation ensued between Mr. Schonlaw (VCG's employee) and Mr. Johnson. As a result of this altercation, Mr. Johnson suffered physical injuries. He ultimately brought

[1] The supreme court has granted certiorari in *Roberts v. L & H, LLC*, (Colo. App. No. 11CA1851, Mar. 7, 2013) (not published pursuant to C.A.R. 35(f)), a case that may prove dispositive, but has not yet been decided.

claims against several defendants, some of whom are parties to this appeal.

¶ 4 In a pretrial order, the court informed the parties: "We will seat an alternate juror. I will advise counsel on the first day of trial how the alternate will be designated. My preference is that the alternate be allowed to deliberate, but we will determine this before the end of the trial." The alternate juror sat through the entire trial, and the court permitted the alternate to participate in all pre-deliberation discussions. After the close of evidence, the court asked the parties if they wanted to allow the alternate to deliberate. Mr. Johnson agreed to do so, but defendants objected. The court overruled defendants' objection.

¶ 5 Then the court told the jury that all seven members, including the alternate, were going to deliberate. The court explained, "I decided the appropriate thing to do is to allow all seven of you to constitute the jury in this case, so you will all deliberate."

¶ 6 The jury deliberated and found in favor of several defendants, but it returned a verdict in Mr. Johnson's favor with respect to Mr. Schonlaw and VCG. The trial court entered a final judgment of $74,452.83 against Mr. Schonlaw and $246,462 against VCG.

II. Alternate Juror Deliberation

¶ 7 Defendants contend that the trial court erred in allowing an alternate juror to deliberate with the jury over their objection. We agree.

A. Standard of Review

¶ 8 We review de novo a district court's order interpreting a rule of civil procedure because it presents a legal question. *City & Cty. of Broomfield v. Farmers Reservoir & Irrigation Co.*, 239 P.3d 1270, 1275 (Colo. 2010). We apply statutory construction principles to procedural rules. *Northstar Project Mgmt., Inc. v. DLR Grp., Inc.*, 2013 CO 12, ¶ 12. Thus, we interpret a procedural rule according to its commonly understood and accepted meaning, otherwise known as its plain language. *Id.*; *Farmers Reservoir & Irrigation Co.*, 239 P.3d at 1275.

B. Analysis

¶ 9 We begin by examining Rule 47(b)'s plain language and then address whether erroneously applying the rule constitutes reversible error.[2]

1. Error

¶ 10 Under Rule 47(b), "[i]f the court and the parties agree, alternate jurors may deliberate and participate fully with the principal jurors in considering and returning a verdict." Although defendants objected to the alternate juror deliberating, the court overruled their objection stating, "These jurors have sat through five days of a very difficult trial, not only that because I allow pre-deliberation discussions, every one of those jurors has been involved in any pre-deliberation discussion that has been made, so I'm going to exercise my discretion and allow the alternate to deliberate." Apparently, the court relied on its discretion to prohibit or limit pre-deliberation discussions of evidence under C.R.C.P. 47(a)(5) as a basis for allowing the alternate juror to participate in

[2] Although Mr. Johnson conceded at oral arguments that the trial court erred, we are not bound by this concession and address this argument. *See People v. Knott*, 83 P.3d 1147, 1148 (Colo. App. 2003).

those deliberations. But even if Rule 47(a)(5) grants the court discretion to do so — a ruling neither challenged by defendants nor resolved in this opinion — Rule 47(a)(5) does not extend to allowing the alternate juror to ultimately deliberate with the regular jurors.

¶ 11 The parties do not dispute that defendants objected to allowing the alternate juror to deliberate. And Rule 47(b) provides no exception to the requirement that the court and all parties must agree to an alternate juror's participation in deliberations. Thus, the trial court erred in ignoring the rule's plain language requiring defendants' agreement before permitting the alternate juror to deliberate.

¶ 12 Mr. Johnson does not assert that Rule 47(b)'s plain language requires a contrary conclusion. Instead, he argues that there is no constitutional provision barring civil juries consisting of seven jurors. And he asserts that the language of C.R.C.P. 48 stating that "[t]he jury shall consist of six persons, unless the parties agree to a smaller number, not less than three," and almost identical language under section 13-71-103, C.R.S. 2015, indicates that a court has the discretion to allow a jury of seven to deliberate. Furthermore, he claims that the court's discretion to discharge an alternate juror

under section 13-71-142, C.R.S. 2015, grants courts the discretion to permit alternate jurors to deliberate.

¶ 13 Regardless of whether a court may empanel six or seven jurors or discharge an alternate, the question is whether Rule 47(b) permits alternates to deliberate when one party objects.

Mr. Johnson does not explain why we should look to Rule 48 or sections 13-71-103 and 13-71-142 when Rule 47(b) directly addresses this issue. If a rule is clear and unambiguous on its face, we should not look beyond its plain language. *See Vigil v. Franklin*, 103 P.3d 322, 327 (Colo. 2004). And as discussed previously, Rule 47(b)'s plain language does not grant a court discretion to permit an alternate to deliberate without the parties' agreement.

¶ 14 Mr. Johnson also relies on the dissent in *Haralampopoulos v. Kelly*, ___ P.3d ___, ___ , 2011 WL 4908743 (Colo. App. No. 10CA0668, Oct. 13, 2011), *rev'd*, 2014 CO 46, for the proposition that after a court empanels an alternate juror, it has the discretion to permit that alternate to deliberate following a lengthy trial. However, the supreme court did not reverse that decision based on the dissent's rationale as to the alternate juror issue. And in any event, *Haralampopoulos's* dissent is inapplicable because it

concluded that all parties agreed to permit the alternates to deliberate, while defendants here objected to the alternate juror deliberating. As the dissent stated, "[f]or this reason, the cases that guardian relies on, which hinge on the appellant not having agreed to allow the alternates to deliberate, are inapposite." *Id.* at 29 (Webb, J., dissenting). Accordingly, we conclude that the court erred in permitting the alternate juror to deliberate with the regular jurors.

2. Reversal Required

¶ 15 The question remains whether this error requires automatic reversal, as defendants contend. Although we decline to adopt an automatic reversal rule for two reasons, we nonetheless reverse.

¶ 16 First, the standard in civil cases should be no higher than the standard adopted in criminal cases. *See Springs v. Perry*, 8 P.3d 517, 519 (Colo. App. 2000) (applying rebuttable presumption of prejudice in civil context when court reinstates discharged alternate after deliberations have begun). Holding otherwise would create an incongruity in the law, which is disfavored. *See Morales-Guevara v. Koren*, 2014 COA 89, ¶ 30. Second, our supreme court recently narrowed the circumstances where automatic reversal applies in

criminal cases. *See People v. Novotny*, 2014 CO 18, ¶ 27. And as discussed below, even before *Novotny*, our supreme court held that an automatic reversal rule does not apply in the criminal context when an alternate juror deliberates despite a party's objection. *People v. Boulies*, 690 P.2d 1253, 1257 (Colo. 1984).

¶ 17 Alternatively, Mr. Johnson asserts that the error was harmless. We hold that allowing an alternate juror to deliberate despite a party's objection creates a presumption of prejudice which, if not rebutted, requires reversal. Thus, we apply the presumption of prejudice rule applied in our supreme court's prior analysis of an alternate juror participating in deliberations in a criminal case. *Id.* at 1257. And because Mr. Johnson fails to rebut this presumption, we conclude the error was not harmless.

¶ 18 Whether to apply a presumption of prejudice when a court permits an alternate juror to deliberate with the regular jurors in a civil jury trial despite a party's objection is also a matter of first impression in Colorado. Although civil litigants do not have a constitutional right to a jury trial, the supreme court's analysis in the criminal context — where a jury trial is a constitutional right — is nonetheless informative.

¶ 19 The supreme court first addressed the issue of whether an alternate juror is permitted to deliberate in *Boulies*. Although the court remanded the case to the trial court to determine whether the alternate was present during deliberations, it elaborated on the principles applicable to resolving whether prejudicial impact is presumed. *See id.* at 1255. The court was asked to adopt a rule requiring the defendant to demonstrate that the alternate juror affected the deliberations. *Id.* But it concluded that an alternate juror's mere presence during deliberations would sufficiently impinge on the defendant's constitutional right to a jury trial so as to create a presumption of prejudice which, if not rebutted, would require reversal. *Id.* at 1255-56. *Boulies* explained "that prejudice should be presumed to flow from a substantial intrusion of an unauthorized person into the jury's deliberations." *Id.* at 1257. Accordingly, *Boulies* stated that a threshold factual determination was whether the alternate juror had participated in deliberation. Then it concluded that "justice requires that this matter be remanded for an evidentiary hearing." *Id.* at 1255.

¶ 20 In reaching this conclusion, the supreme court relied on the defendant's constitutional and statutory right to a jury trial, as well

as the guarantee that a jury reaches its verdict in secrecy. *Id.* at 1255-56. Although trial by jury is not a constitutional right in civil actions, under C.R.C.P. 38(a) a party is entitled to a jury trial "in actions wherein a trial by jury is provided by constitution or by statute." *See Colo. Coffee Bean, LLC v. Peaberry Coffee Inc.*, 251 P.3d 9, 27 (Colo. App. 2010). Our supreme court has recognized the sanctity of civil jury deliberations. *Ravin v. Gambrell*, 788 P.2d 817, 820 (Colo. 1990). And, despite the lack of a constitutional predicate for the right to a civil jury trial, "it is axiomatic that all litigants who are entitled to a jury trial in a proceeding, whether civil or criminal, are entitled to fair and impartial jurors." *Blades v. DaFoe*, 704 P.2d 317, 320 (Colo. 1985).

¶ 21 Following *Boulies*, in *People v. Burnette*, 775 P.2d 583, 584-85 (Colo. 1989), the supreme court held that a rebuttable presumption of prejudice also arises when a juror is replaced with an alternate juror during deliberations. *Burnette* reiterated the concern with allowing an alternate's presence during deliberations was that "'[o]nce the prescribed number of jurors becomes 'the jury,' then, and immediately, any other persons are strangers to its proceedings.'" *Id.* at 589-90 (alteration in original) (quoting *Boulies*,

690 P.2d at 1256). The court declared that "the presence in the jury room of any person unauthorized to participate in the deliberations destroys the sanctity of the jury, which must reach its decision in private and free from outside influence." *Id.* at 590. Finally, *Burnette* concluded that the danger associated with the unauthorized participation of an alternate juror was at least equal to that of an alternate juror's presence during deliberations. *Id.* This conclusion is consistent with the Supreme Court's recognition that a defendant could be prejudiced by an alternate juror participating in deliberations. *See United States v. Olano*, 507 U.S. 725, 739 (1993).

¶ 22 The same concerns with jury secrecy and sanctity that support a presumption of prejudice in criminal cases are present in civil cases. *See Jones v. Sisters of Providence in Wash., Inc.*, 994 P.2d 838, 842 (Wash. 2000) (concluding that the rationale supporting the application of a presumption of prejudice when an alternate juror participated in criminal case deliberations applied equally where an alternate juror participated in civil case deliberations); *see also State v. Cuzick*, 530 P.2d 288, 289-90 (Wash. 1975) (applying presumption of prejudice in a criminal

case). And it is persuasive that *Jones* derived its presumption of prejudice from *Cuzick*, a criminal case our supreme court has described as providing the "best analysis" supporting the application of a presumption of prejudice. *Boulies*, 690 P.2d at 1256-57.

¶ 23 Applying these principles here, because the alternate juror participated in deliberations with the regular jurors, the burden shifted to Mr. Johnson, the nonobjecting party, to rebut the presumption of prejudice. *See id.* at 1256 n.5.

¶ 24 Mr. Johnson has not sought a remand hearing at which to rebut this presumption. Instead, he argues that on the existing record the trial court's error was harmless because the verdict would remain the same regardless of the alternate's participation in deliberations, given the alternate's participation in pre-deliberation discussions. However, he acknowledges that the jury was given an instruction to avoid reaching any conclusions until the end of trial:

> You must not individually or as a group form final opinions about any fact or about the outcome of this case until after you have heard and considered all of the evidence, the closing arguments of the attorneys, and the rest of the instructions in the law which I will give you.

Absent evidence to the contrary, jurors are presumed to follow the court's instructions. *Vaccaro v. Am. Family Ins. Grp.*, 2012 COA 9, ¶ 29.

¶ 25 Mr. Johnson does not point to anything in the record that suggests the jury failed to follow this instruction. Thus, regardless of any pre-deliberation discussion, we must assume that the jury had not yet reached a verdict before deliberating. And because the jury was deliberating on the outcome for the first time, we must assume that the alternate juror necessarily influenced the verdict.

¶ 26 This latter assumption is consistent with *Boulies*, which asks only whether the alternate juror participated and cites to several cases where the presumption of prejudice was rebutted when alternate jurors were found not to have been present during deliberations. 690 P.2d at 1256 n.5. In fact, the People in *Boulies* argued that "even if the alternate's presence at the jury's deliberations is established by the defendant, he should be required to demonstrate that the alternate had some effect on those deliberations." *Id.* at 1255. However, the supreme court declined to adopt such a rule. *Id.* at 1255-56.

¶ 27 Nor need we do so here because assessing Mr. Johnson's harmless error contention further would require an impermissible inquiry into the jury's secret deliberations. *See People v. Juarez*, 271 P.3d 537, 546 (Colo. App. 2011); *Montrose Valley Funeral Home, Inc. v. Crippin*, 835 P.2d 596, 598 (Colo. App. 1992) ("CRE 606(b), applicable to both civil and criminal cases, prohibits inquiry into the deliberative processes of jurors."). And CRE 606(b) has survived a constitutional challenge where it was applied to preclude evidence on a juror's racially biased statements during deliberations. *Pena-Rodriguez v. People*, 2015 CO 31, ¶ 25 ("Accordingly, we conclude that the trial court's application of CRE 606(b) to bar admission of the jurors' affidavits did not violate Petitioner's Sixth Amendment right."). Thus, Mr. Johnson has failed to overcome the presumption that the alternate juror's participation in the deliberations prejudicially influenced the verdict and defendants are entitled to a new trial.

III. Pro Rata Apportionment of Liability

¶ 28 Defendants argue that the trial court erred in failing to give a verdict form and a jury instruction addressing the pro rata

apportionment of liability. We need not address this issue because of our resolution of defendants' first argument.

IV. Conclusion

¶ 29 The judgment is reversed, and the case is remanded for a new trial consistent with this opinion.

CHIEF JUDGE LOEB and JUDGE WEBB concur.