

**Colorado Supreme Court Rules of Juvenile Procedure Committee
Minutes of May 3, 2019 Meeting**

I. Call to Order

The Rules of Juvenile Procedure Committee came to order around 9:00 AM in the Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Colorado Judicial Center. Members present or excused from the meeting were:

Name	Present	Excused
Judge Karen Ashby, Chair	X	
David P. Ayraud	X	
Magistrate Howard Bartlett		X
Jennifer Conn		X
Sheri Danz	X	
Traci Engdol-Fruhworth	X	
Judge David Furman		X
Ruchi Kapoor	X	
Shana Kloek	X	
Wendy Lewis		X
Peg Long	X	
Judge Ann Meinster		X
Judge Dave Miller		X
Chief Judge Mick O'Hara		X
Trent Palmer	X	
Professor Colene Robinson	X	
Magistrate Fran Simonet		X
Judge Traci Slade	X	
Magistrate Kent S. Spangler		X
John Thirkell		X
Pam Wakefield	X	
Non-voting Participants		
Justice Richard Gabriel, Liaison	X	
Terri Morrison	X	
J.J. Wallace	X	
Judge Craig Welling, Chair Designate	X	

Attachments & Handouts:

- (1) Rule 2.1 (appointment of counsel) draft
- (2) Rule 2.3 (emergency orders) draft
- (3) Contempt Email

- (4) Default Comments**
- (5) Email from David Ayraud re: formal end of D&N case**
- (6) HB 19-1232 (ICWA)**
- (7) All Draft Rules (emailed separately)**

II. Chair's Report

- A. The 3/15/19 minutes were approved without amendment.

III. Old Business

- A. Review of Present C.R.J.P

- 1. Rule 2.1 (appointment of counsel)

Ruchi Kapoor related that her office worked on the draft and combined aspects from the civil rule (C.R.C.P. 121 § 1-1) and from the criminal rule (Crim. P. 44). They strove for consistency between appointed RPC and private counsel and also for consistency with CJD 16-02 (which ORPC is currently updating).

Ruchi explained that subsection (c)(3) (substitution without leave of court) was drafted to address emergency situations and to conform to the CJD. By way of example, she related that ORPC recently had a situation where an RPC passed away during a pending case. The client needed an immediate substitution of counsel. This section was drafted to address concern over a form order lingering in the trial court's inbox. But, other committee members worried that substituting counsel without leave of court could be used on the eve of trial and delay the proceedings. The committee thought adding language allowing the court to veto a substitution or to only allow a substitution without leave of court an adequate number of days before a contested hearing so as not to delay the proceedings.

Sheri Danz noted that the rule, as proposed, does not include procedures for GALs and the committee discussed including express language indicating that the rule applied only to all non-GAL counsel. The committee also discussed incorporating GAL requirements into the rule. Sheri and Ruchi will confer to integrate GALs into the rule.

The committee examined subsection (b) (multiple representation). Ruchi stated that the CJD on RPC will include a prohibition on multi-respondent representation. General consensus was that multiple party representation is covered by the ethics rules and there is no need for a separate rule here. Committee members pointed out that sometimes two respondents may share one private counsel. Because this happens, the committee felt that a tip-off that this issue can arise and where to find the associated requirements may be a good idea in a comment. For example, it may be appropriate for the court to confirm that counsel has advised clients on potential conflicts and the clients have waived any conflict.

The committee was dissatisfied with subsection (d) (termination of representation) because it does not provide any examples of when termination of representation ends.

The committee preferred the approach taken by Crim. P. 44(e), which provides a list of when the proceedings end and counsel's representation is terminated. The committee acknowledged that there are multiple ways the proceedings end in D&N cases and different rules, CJD, and statutes may implicate counsel's obligations. *See* C.A.R. 3.4(b)(4) (obligating trial counsel to file a notice of appeal or ensure a notice of appeal is filed by different counsel); *but see* § 19-1-104(6)(obligating party with whom the child resides to certify the D&N case's APR order to the district court where the child resides). But the committee asked Ruchi to try to list the ways the proceedings (& representation) ends. This may include a residual clause that says the proceedings (& representation) ends "as otherwise ordered by the court."

2. Rule 2.3 Emergency Orders.

Tabled until next meeting.

3. Contempt

Traci Engdol-Fruhworth and Pam Wakefield reviewed the statute and rule and found no need for changes. In their experience, contempt has been used for recalcitrant parents and, in the past, for children who had run away from a placement or in truancy actions. Committee members indicated that it is not a best practice to use contempt against children. Committee members could only think of one recent use of contempt against for children. In those instances, contempt was used as a tool to avoid a situation involving trafficking and was done with the juveniles' consent. The committee considered whether to include a comment recommending that contempt never be used against children, but decided that was too pointed. However, the committee may consider a comment pointing to the Juvenile Justice and Delinquency Prevention Act (JJDP) Act, which requires states that receive funding from the Office of Juvenile Justice and Delinquency Prevention (OJJDP) to deinstitutionalize status offenders.

4. Default vs. Non-Appearing Party Rule

The committee summarized the history of this issue: committee members do not view default as a best practice and recognize many problems with its use in D&N cases. However, the committee also recognizes that some practitioners have strong views in favor of using default in D&N cases.

The chair framed the issue for today's decision-making: the committee needs to decide what procedural mechanism it should recommend to the supreme court for non-appearing respondents. Ultimately, the committee's recommendations will be published for public comment and the Supreme Court may adopt what rules it feels best.

A motion was made for the committee to adopt default as the procedure to resolve claims against non-appearing respondents. The motion was not seconded, and the motion failed.

A motion was made for the committee to adopt the proposed non-appearing/non-defending respondent procedure. A friendly amendment to the rule was accepted to delete the sentence authorizing a proffer of evidence. The committee felt this issue/process (whether an offer of proof suffices) should not be mentioned. It was felt that the issue could percolate with no suggestion in the rule on whether it's authorized or not.

The motion, with the friendly amendment, was seconded.

The motion, as amended, passed unanimously.

When the committee formally recommends a set of rules to the supreme court, the cover letter will highlight the committee's support for the non-appearing/non-defending process over default but will also note that default has supporters among some practitioners.

IV. New Business

1. Formal End to D&N case

The committee began by thinking about why a formal end to the D&N case is important and what problems would it solve: (1) provide a time when counsel completed representation; (2) provide a time after which the department must file a new petition if new allegations arise; (3) provide an opportunity to ensure that an APR order is certified into a district court DR case (members report that, in many case, this important step never happens); (4) provide a time for a formal end to a case when the child is not adopted (aged out; emancipated).

As the committee thought about these issues, members thought of many unique circumstances which ended a case and those number of circumstances weighed in favor of not making a one-fits-all rule. Committee members also felt that forming a rule may touch on substantive law rather than procedure (as with (2), above).

Committee members felt that solving the problems listed above may be best addressed through other rules. For example, when counsel has completed representation can be addressed in the counsel rule, or a rule on permanency orders may include language about certifying the APR order into a district court case. Another idea was to include a general "At the conclusion of the proceedings, the trial court shall enter a finding that permanency has been achieved for the child(ren) as indicated in these findings and order, and the court shall enter an order terminating jurisdiction and any continuing responsibility of any party or counsel in the dependency or neglect proceeding."

2. HB19-1232 (ICWA)

HB19-1232 has been sent to the governor for signature. He has thirty days, and, by its terms, it becomes effective upon signature. There has been no significant opposition to the Act, so it's anticipated that the governor will sign it. The Act is a overhaul of section 19-1-126, C.R.S. (2018). It specifically adopts the federal regulations implementing

ICWA. It also places new duties on the court and other parties. The new law defines “reason to know that a child is an Indian child” and sets out a process for the court when it “receives information that the child may have Indian heritage.” The ICWA subcommittee will take up incorporating the new law into the ICWA rules.

3. Complete Set of Draft Rules

The Complete Set of Draft Rules was distributed to the committee members. The chair noted that seeing all the rules together gave her a sense of satisfaction, and it was good to see all the work that’s been done over the last several years. She asked members to review the document and bring any issues to the attention of the committee by emailing the chair and/or J.J. She also asked for detail-oriented wordsmiths/grammar nerds to think about volunteering their time to take a close look at the rules.

The committee also discussed using comments. It was decided that comments can explain what the committee is doing and why the committee is doing it that way. Suggestions for additional comments should be emailed to the chair and/or J.J. as well.

Judge Ashby noted that this was her last meeting as chair of the committee due to her retirement at the end of the month. She expressed her gratitude for the committee’s hard work. Justice Gabriel thanked Judge Ashby for her lifetime of service on behalf of the supreme court. The committee presented Judge Ashby with a card celebrating her upcoming retirement.

Judge Welling will begin serving as chair. Judge Ashby will continue to serve on the committee as a member.

V. Adjourn Next Meeting June 21st

The Committee adjourned at 11:15 PM.

Respectfully Submitted,
J.J. Wallace