The Honorable Michelle A. Amico
Chief Judge, 18th Judicial District
Arapahoe, Douglas, Elbert & Lincoln Counties

April 23, 2024

Colorado Supreme Court
2 E. 14th Avenue
Denver, CO 80202

Re: Request for Comments – Colorado Rules for Magistrates

To the Justices of the Colorado Supreme Court,

As the Chief Judge of the Eighteenth Judicial District, I am the administrative head of our District and County Courts. Thus, I am tasked with administrative functions, such as assigning judicial officers to dockets, establishing uniform case management, and evaluating magistrate performance. *See* Chief Justice Directive 95-01, Authority and Responsibility of Chief Judges. The Eighteenth Judicial District is currently composed of five courthouses spread across four counties (Arapahoe, Douglas, Elbert, and Lincoln Counties). There are 32 judicial officers assigned to preside over our District Court dockets, including 8 full-time magistrates. Magistrates serve the citizens of our District in a variety of functions, as permitted by the Colorado Rules for Magistrates. The Eighteenth Judicial District utilizes magistrates in the District Court to handle Domestic Relations, Child Support, Probate, Mental Health, Paternity, Juvenile Delinquency, Dependency and Neglect, Truancy, Adoptions, Relinquishments, Criminal, and certain Problem-Solving Court case types.

Given the significance of our magistrates' work in the Eighteenth Judicial District, I appreciate the Civil Rules Committee's time and careful consideration in confronting the enormous undertaking of revising the Colorado Rules for Magistrates. From reviewing the materials on the Civil Rules Committee's website, I understand that the Committee was tasked to create a set of magistrate rules that are clear to comprehend, internally consistent, and easy to navigate. This effort can only be applauded as the Colorado Rules for Magistrates have been described by divisions of the Court of Appeals as "creat[ing] a 'confusing appellate labyrinth' perplexing both counsel and pro se parties alike, leading to the dismissal of a 'significant, and perhaps unacceptable' number of appeals." *In re Marriage of Stockman*, 251 P.3d 541, 543 (Colo. App. 2010) (quoting *C.A.B.L.*, 221 P.3d 433, 444 (Colo. App. 2009) (Roy, J., specially concurring)).

There are certain revisions included in the proposed Colorado Rules for Magistrates that will be helpful moving forward, for example: clarifying the procedure for which a party is deemed to have consented to magistrate jurisdiction in C.R.M. 3(f); fixing inconsistent deadlines in C.R.M. 7; specifying that a reply is not allowed in C.R.M. 7(h); updating the language in C.R.M. 7(a) to provide a consistent advisement to all parties; and including civil infractions as a function of county court magistrates in C.R.M. 8. I believe that all those changes accomplish the Committee's goals of providing clarity and simplicity to the process and that those changes will assist judicial officers, attorneys, and parties who navigate the Colorado Rules for Magistrates.

Upon learning of the proposed revisions to the Colorado Rules for Magistrates, I undertook to learn more and met with a workgroup within our District, which was composed of the undersigned, several judicial officers, and several legal research attorneys. This workgroup was particularly important due to the size of the Eighteenth Judicial District and its familiarity with the application of the Colorado Rules for Magistrates. This comment is submitted to alert the Colorado Supreme Court regarding potential impacts that could arise if certain provisions of the proposed Colorado Rules for Magistrates were to be adopted.

Accordingly, below are some of the concerns:

1. **District court capacity to review all magistrate decisions, including interlocutory appeals.**

First, one of the major changes in the proposed Colorado Rules for Magistrates is the deletion of C.R.M. 7(b). Under the current C.R.M. 7, orders issued where the parties have consented to a magistrate are appealed directly to the Court of Appeals, while orders issued where consent is unnecessary are reviewed in the district court. Eliminating C.R.M. 7(b) would redirect appeals from matters that a magistrate hears with consent to the district court judges. These matters include criminal matters such as entry of guilty pleas and modification of probation; probate matters such as appointments of guardians and conservators; civil matters such as dismissals with prejudice, default judgments, and any final judgments following a bench trial. Particularly prominent among these are permanent orders, which can be extremely complex, in domestic relations cases.

Second, the proposed Colorado Rules for Magistrates appear to remove the requirement that a magistrate's order be final, as historically defined, to be considered reviewable. The current rules limit review to a final order or judgment; however, under the proposed language, any order that "fully resolves the issue or claim" may be reviewed. Until recently, "issue or claim" has been interpreted to mean the ultimate issue of an action, i.e. permanent orders, modification of parenting time, etc., and not to include orders issued during the litigation such as discovery orders, temporary orders, etc. By removing the finality requirement from the Colorado Rules for Magistrates, the proposed changes appear to make virtually any decision made by a magistrate subject to reconsideration and district court review. This action could expand the scope and costs of litigation for parties, as well as decrease efficiencies in docket management, as the district court judges could experience a dramatic uptick in the number of petitions for review filed. In the alternative, if finality for purposes of district court review is defined as any order or judgment that "fully resolves an issue or claim," then C.R.M. 7 could enumerate a list of magistrate orders that are excluded from review. The list could include orders that would create repeated delays if reviewed, such as

procedural orders, case management orders, discovery orders, and temporary orders except those that are considered final for appeal.

For context, more than 100 domestic relations petitions for review were filed in Arapahoe County alone in 2023. This number neither includes petitions for review filed in other case types (i.e. probate and juvenile) nor includes the number of petitions for review filed in Douglas County. Should these changes be made to the Colorado Rules for Magistrates, I anticipate a substantial increase in the number of petitions for review filed within our District.

2. **The deadlines included in the proposed revisions will be challenging for the parties and the judicial officers to accommodate, which may result in an increase of orders appealed to the Colorado Court of Appeals when it could have been handled within the district court.**

The proposed rules change the timeframes within which parties must request reconsideration or review as well as the timeframes within which the district court must rule upon such requests. I am concerned about the new deadlines in proposed C.R.M. 7(f) conflicting with existing deadlines in C.R.C.P. 121, §1-15(11) and C.R.C.P. 60(a), and I am also concerned about the parties' and the judicial officers' ability and capacity to comply with the tight timelines in proposed C.R.M. 7. Domestic relations cases involve issues of the utmost importance to families and children, and there are already a significant number of motions that are to be given priority on the domestic relations docket. All of this is compounded when considered in the greater context that domestic relations judicial officers might be handling 300-400 open cases at any given point.

First, we tried to map out the proposed review process (attached) and had a hard time mapping the process outlined in proposed C.R.M. 7(f), (g). It was especially confusing that the proposed 7-day deadline in C.R.M. 7(f) to file a motion for reconsideration or a motion to correct clerical errors conflicts with the existing deadlines in C.R.C.P. 121, §1-15(11), which must be filed within 14 days of the order, and C.R.C.P. 60(a), which can be filed at any time. Which deadline controls, and are the parties precluded from filing a motion to correct clerical errors after 7 days? Unfortunately, a clerical error can go unnoticed by the parties and the judicial officer for more than 7 days, and impacted parties should not be limited in seeking review to such a short timeframe, especially if the clerical error isn't discovered until after the transcript is ordered and reviewed.

Second, while there are exceptions for extensions of time, the proposed Colorado Rules for Magistrates contain a 28-day timeframe for a magistrate to rule on a C.R.C.P. 121, §1-15(11) or C.R.C.P. 60(a) motion and a 63-day timeframe for a district court judge to rule on a petition for review. While I appreciate the Committee's desire for finality for the parties, the reality is that this expedited process will be challenging to accommodate on already busy dockets, especially in domestic relations where other motion types are designated by statute to take priority or to be handled on an expedited basis. *See* C.R.S. § 14-10-129(1)(a)(II) (modification of parenting time due to an intent to relocate shall be given priority on the court's docket); C.R.S. § 14-10-129(4) (a motion to restrict parenting time shall be heard and ruled upon by the court no later than 14 days after the filing of the motion); C.R.S. § 14-10-129.5(1) (within 35 days of the filing of a verified motion alleging non-compliance with a parenting time order, the court must either deny the motion, or set the matter for hearing as expeditiously as possible, or order the parties to mediate); C.R.S. § 14-13-106 (any question of the existence or exercise of jurisdiction raised in a child-

custody proceeding must be given priority on the court's calendar and handled expeditiously); C.R.S. § 13-14-104.5(4), (10) (a motion for a temporary civil protection order shall be set for hearing at the earliest possible time and shall take precedence over all matters except those matters of the same character, and shall be heard as expeditiously as possible; if granted, the return date of the citation must be set not more than 14 days after the issuance of the temporary civil protection order and citation). Petitions for review can be extremely complex, and if a district court judge is not able to enter an order on a petition for review in the allocated time, then it could be appealed to the Court of Appeals. This process seems inefficient for everyone, as the district court might be in a better position to review the underlying order if it were not limited to the tight deadlines in proposed C.R.M. 7.

3. **Magistrates currently have the ability to handle C.R.C.P. 60(a) motions and can reconsider their non-final orders.**

Under the existing rules, a magistrate may not reconsider an order unless it is to correct a clerical error pursuant to C.R.C.P. 60(a) or it has not yet become final. *See* C.R.M. 5(a); *People In Int. of J.D.*, 464 P.3d 785, 788 (Colo. 2020) (a magistrate, just as a judge, retains the ability to modify or reconsider any of his rulings made in the course of judicial proceedings until those proceedings culminate in a final, reviewable order or judgment); *People v. Maes*, 2024 CO 15, ¶ 18 (Colo. 2024) ("[A]n action is the whole, and issues and claims are the building blocks that comprise it. A court can resolve an individual component of an action without resolving the action in its entirety."). Otherwise, a magistrate's final order can only be reformed through district court review or direct appeal.

As can be seen from the attached flowchart, we attempted to map out the process contemplated in the proposed Colorado Rules for Magistrates. Simply put, this proposed process is confusing, even to attorneys and those familiar with the Colorado Rules for Magistrates. Additionally, there is the potential for competing processes to take place – one party could file a motion to reconsider and another party to the same case could file a petition for review on the same order. Thus, two different judicial officers could be handling competing reconsiderations or reviews of the same order, creating a parallel review process, which would be confusing to the parties, potentially result in conflicting orders, and unnecessarily drain judicial resources. Considering that magistrates already have the ability to correct a clerical error pursuant to C.R.C.P. 60(a) and to revisit a non-final order, it is unclear why this provision is necessary in the proposed Colorado Rules for Magistrates. For example, if the intent is to have the district court judges review all magistrate orders, then perhaps allowing magistrates to reconsider their own orders under C.R.C.P. 59 or C.R.C.P. 60(b) would be appropriate.

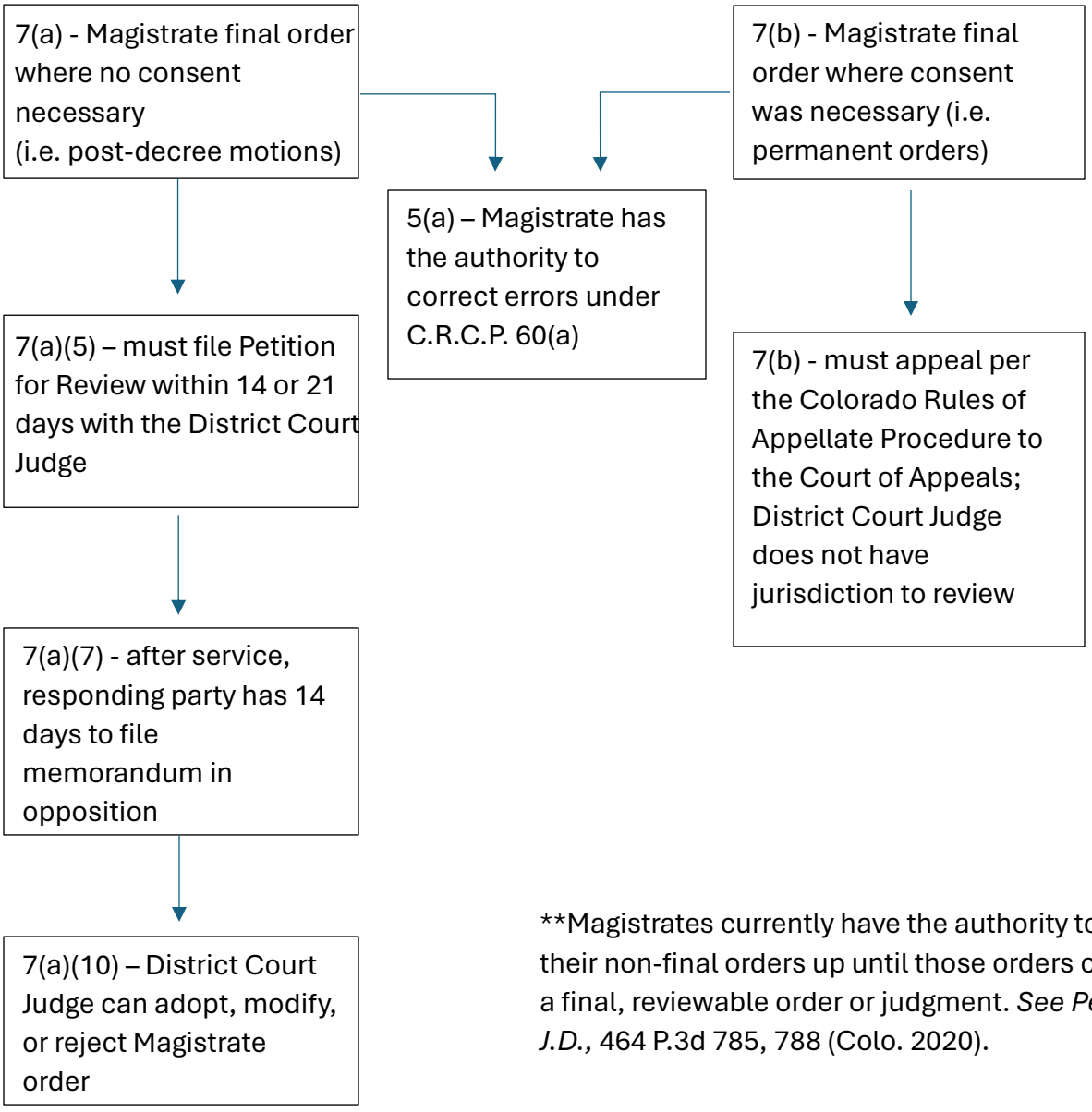
In conclusion, I appreciate the opportunity to submit this comment regarding the proposed Colorado Rules for Magistrates, and I especially appreciate the Civil Rules Committee's decision to carefully study and look for solutions with the goal of simplifying and clarifying the Colorado Rules for Magistrates. I am hopeful that my above comments will assist in providing information regarding anticipated challenges at the district court level, which translate to a significant impact to equal access to justice for the citizens we serve.

Sincerely,

Michelle A. Amico
Chief Judge
18th Judicial District

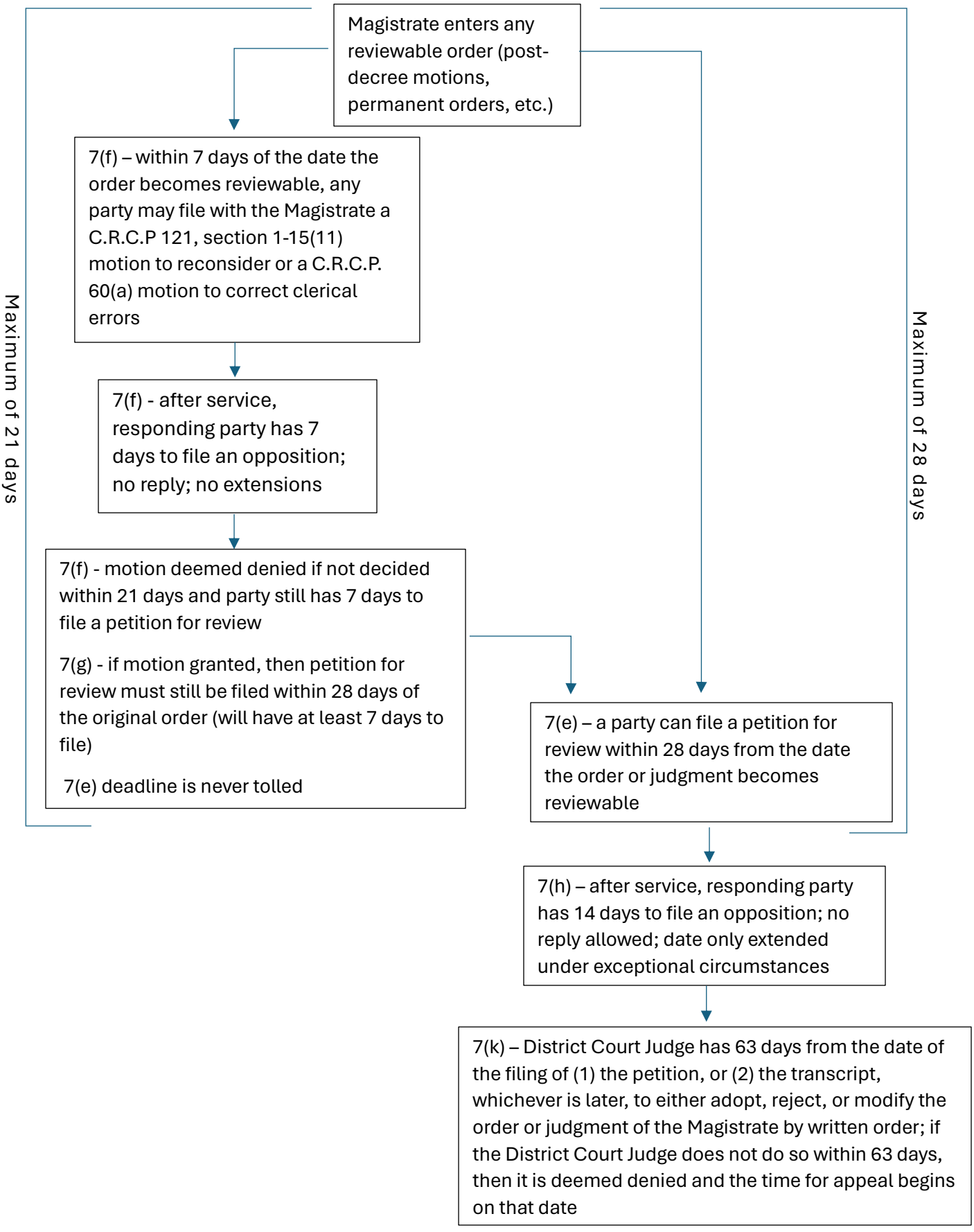
Encl: CRM 7 Flowchart with CRCP 60(a)

1. Current process for filing Petitions for Review or Appeals of Magistrate Orders in DR cases:



**Magistrates currently have the authority to reconsider their non-final orders up until those orders culminate into a final, reviewable order or judgment. *See People In Int. of J.D.,* 464 P.3d 785, 788 (Colo. 2020).

2. Proposed process for Petitions for Review or Appeals of Magistrate Orders in DR cases



stevens, cheryl

From: David Ayraud <dayraud@larimer.org>
Sent: Tuesday, March 19, 2024 4:26 PM
To: supremecourtrules
Subject: [External] Public Comment on Proposed Rules 3, 5, 6, 7, and 8 of the Colorado Rules for Magistrates

Colorado Supreme Court
2 E. 14th Avenue
Denver, CO 80202

Justices of the Colorado Supreme Court,

I received a request for feedback through the Colorado Bar Association on proposed rules regarding Magistrates. The rules controlling our magistrates are vital to our courts' operations. As the members of the judiciary are already extremely well aware, the magistrates within our system, at least in my view, are the "workhorses" of the system, who deal with an ever increasing workload and have an immense impact on how the public views the judicial branch - many of whom do not know or understand the distinction between a magistrate and judge.

I discussed the proposed rules and received feedback from various attorneys in our office. There were three specific provisions in the proposed rules that raise questions:

Proposed Rule C.R.M. 7(j) and its reference to C.R.M. 6(c)

Proposed rule CRM 7(j) says that conclusions of law made by a magistrate and any order entered in a civil case under CRM 6(c) which effectively ends a case shall be subject to de novo review.

Subsections (b), (d) and (e) of proposed CRM 6 refer to Title 14 and 26 (domestic relations and child support), Juvenile cases under Title 19, and probate and mental health matters, all of which are also more broadly defined as "civil".

While rules that more specifically pertain to domestic relations, child support, juvenile, probate and mental health would likely be deemed to control in those areas if they contradict the more broadly styled "civil" rule, the converse does not hold - namely, just because there are rules on these more specific topics, this does not mean rules for "civil cases" that do not specifically conflict do not apply to these specialized civil cases as well.

For example, magistrates in juvenile cases hear and issue rulings on Allocation of Parental Responsibilities or Termination of Parental Rights. There is no provision in CRM (7) that definitively states a standard of review for DR, JV, PR or MH cases, but CRM (7) does say, "Conclusions of law made by a magistrate and any order entered in a civil case under C.R.M. 6(c) which effectively ends a case shall be subject to de novo review." This can be interpreted to mean that in civil cases (including those under Title 19) a magistrate's findings of fact and conclusions of law are subject to de novo review, but only in criminal cases are findings of fact subject to the clear error standard.

If this is the intent, the concern is that it is not uncommon for a magistrate to issue an order allocating parental responsibilities or terminating parental rights in JV cases. If both facts and conclusions of law are subject to de novo review, this realistically will stop magistrates from conducting such hearings as the losing party in such hearings will simply seek a de novo trial with the district court.

If the intent is to have hearings before magistrates in domestic relations, child support, juvenile, probate and mental health, be subject to de novo review for conclusions of law, but otherwise be subject to a clearly erroneous standard, the rule should be clarified. One suggestion is to amend C.R.M. (7)(j) to say:

Conclusions of law made by a magistrate under C.R.M. 6(a), (b), (d) and (e) shall be subject to de novo review. Conclusions of law and any order which effectively ends a case entered in a civil case by a magistrate under C.R.M. 6(c) shall be subject to de novo review.

Standard of Review C.R.M. (7)

Another confusing aspect of CRM (7) is that the proposed subsection (j) says "Findings of fact made by the magistrate shall be accepted by the reviewing judge unless they are clearly erroneous." However, the preceding subsection (i) says, "The reviewing judge also may conduct further proceedings, take additional evidence, or order a trial de novo in the district court." It is difficult to reconcile how a reviewing judge must accept findings of fact by the magistrate unless clearly erroneous, but a reviewing judge simultaneously has the authority to order a trial de novo. Is the intent of subsection (i) to address situations in which the record or requested transcript is incomplete or unavailable, or the magistrate fails to make findings of fact, and therefore the court is unable to assess whether the magistrate's findings of fact were clearly erroneous? If so, that clarification should be added.

Timing for Review and Requests for Magistrate Reconsideration for Clerical Error

Finally, CRM (7) sets a deadline of 28 days to seek review of a magistrate's order. It adds a provision to seek reconsideration for clerical error within 7 days, and then says if a magistrate fails to rule in 21 days it is deemed denied. My concern is that if the filing happens on the last day, nobody will know if the magistrate is going to correct the order or not until the deadline to seek review expires. The deadline for the magistrate to rule should either be reduced to 14 days. This would allow parties one week to file for review if the magistrate fails to rule or rules on the last day.

Thank you,

David Ayraud

From: connors, linda <linda.connors@judicial.state.co.us>

Subject: Subject: CRM 7

I think it would be helpful to clarify in this rule that there are different timelines for JV/Title 19 cases (C.R.S. 19-1-108(5.5)). I see lot of inconsistency with Magistrates as to whether they put a CRM 7 notice or a C.R.S. 19-1-108 notice on Title 19 orders. Attorneys and pro se parties also get this confused, and will miss the deadline thinking they have the time allotted under CRM 7 to appeal. Thanks for your consideration, Linda Connors

Sent from Mail for Windows

From: Ashley Emerson <aemerson@gemfamlaw.com>
Sent: Saturday, January 20, 2024 2:52 PM
To: supremecourtrules
Subject: [External] Comments regarding Proposed Changes to Colorado Rules for Magistrates

To whom it may concern,

As a family law practitioner who regularly practices in front of magistrates, I find that the proposed changes provide both attorneys and the general public with clarity regarding their appellate rights and procedures, clarity regarding their rights regarding appearing before magistrates when consent is necessary, and generally supports the goal of judicial economy.

I believe that by not only clarifying a parties' right to (and the process through which they can) object to appear before a magistrate but also making the review and appellate process more straightforward, more people will feel comfortable appearing before a magistrate on matters where consent is necessary and help clear district judge dockets rather than crowd them.

There has been much confusion, even among seasoned family law practitioners, regarding appellate procedure after a magistrate has entered orders on, for example, permanent orders in a divorce. Where a Rule 60 would generally be the appropriate method to seek corrections/ clarification with a judge, we have found ourselves feeling without a method of addressing such issues without meeting the high burden under CRM 7 as it is currently written.

I support the proposed changes and thank those who have worked so very hard on these revisions.

Sincerely,

Ashley G. Emerson, Partner
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General comments: We have concerns about the changes in 7(a), (b), and (e). These changes require that every request to reconsider a Magistrate's decision must be done by way of a petition to the District Court, instead of only those which do not require consent. This change will significantly affect the workload of the current DR district court judges and will likely result in a large increase in the number of Petitions for Review that are filed in the district court.

As a practical matter, DR judges review DR magistrate orders. In Adams County, we are averaging over 20 Petitions for Review annually per DR docket. Currently, it is difficult to find the time to handle full dockets, issue timely permanent orders, and to issue timely orders on C.R.M. 7 Petitions for review. There is a general consensus among the state DR bench and bar that we are not able to issue orders as fast as parties would like. Without additional resources by way of more statutorily appointed DR Judges, the DR judges do not have the resources to absorb this additional caseload. Making this change will likely result in a significant delay in the time in which it takes for parties to get rulings on their permanent orders.

C.R.M 7(a): We appreciate the change in the deadline to file a Petition for Review to 28 days. We routinely get requests for extensions of time, and hopefully this change will alleviate some of those filings.

C.R.M.7(d): We appreciate the clarification in this section. There has been confusion as to what is a "final order."

C.R.M. 7(f): We appreciate this addition and believe this modification will provide the Magistrates an opportunity to correct any mistakes before a Petition is filed in the District Court. What is the logic for the 7 day turnaround? The deadline should be 21 days to give counsel and pro se parties an opportunity to review the case and thoughtfully decide if they would like to request a reconsideration. Short-frame deadlines often lead to incomplete filings or additional requests for enlargements of time. The deadline for filing the Petition should be a certain number of days from when the motion to reconsider is ruled upon (or has been ripe, if it will be deemed denied after a certain number of days).

C.R.M.7(h): The rule should set a deadline for the filing of a transcript, as opposed to requiring that a party should indicate that one has been ordered. When parties file petitions for review without a transcript, but they are asking the Court to consider a transcript, the Petition, Response, and Reply are not actually based upon the transcript which the Court is to rely upon because no one has received it yet.

We routinely have cases where transcripts are ordered, but ultimately payment is never made and, thus, the transcript is never created or provided to the Court. Additionally, not including language regarding when the transcript should be filed, puts the reviewing Court in a position where it is unclear when the petition is ripe. Whose responsibility is it to follow up when a transcript is not filed, the Court or the party? When can the Court review a Petition without receipt of a transcript even though the party has indicated that one has been ordered? Instead, language such as, "If a transcript of the proceedings before the magistrate is not available when the petition is filed and a party is requesting that the district court review a transcript in connection with the petition, that party may request an extension of time to file the petition until after the transcript is available."

It is unclear what the language "this date cannot be extended" is referring to: is it referring to the 14 day deadline or the 28 day deadline?

(i)Clarification as to whether the District Court can remand to the magistrate for further proceedings would be extremely helpful. Judges are split across the state, with many judges believing that C.R.M. 7 allows remand for further proceedings and others believing that it does not.

(k) This deadline will be fairly impossible to meet, particularly with the increase in the number of Petitions that will come to the District Court. Additionally, this change will result in other litigants not receiving their orders in a timely manner and will back up the Court's docket across the board. Because of the difficulty in the trial court issuing orders within this deadline, the number of matters referred to the Court of Appeals would likely increase significantly.

We also ask the committee to consider how the Court is to consider this deadline in conjunction with requests for enlargement of time for the reply and response. The Court will be put in a position of having to deny any requests for enlargement of time for the reply or response, because it will cut into the time that we have to rule on the petition for review after it is ripe but before the 63 days expires.

Thank you for your consideration. Please do not hesitate to reach out if you would like to discuss this further.

Kelley Southerland, District Court Judge
Domestic Relations Docket, Adams County

Rayna Gokli, District Court Judge
Domestic Relations Docket, Adams County

Teri Vasquez, District Court Judge
Domestic Relations Docket, Adams County

COLORADO FAMILY LAW PROJECT

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February 28, 2024

Dear Justices and Committee Members,

Thank you for your time and consideration in addressing these Rules. They are an essential part of domestic relations (DR) practice and recognizing the opportunity to streamline the appellate process better is much appreciated. I am a Denver-based family law practitioner offering unbundled and mediation family law services to the Denver metro area. For nearly a decade, I've worked extensively with *pro se* and middle-to-low-income litigants on a sliding scale basis. I also serve as a member of the CBA ADR and Family Law Section Executive Councils, co-chair of the DR Rules Subcommittee on Appeals and Post-Judgments, the CBA Legislative Policy Committee, and co-chair of the Education/Outreach Committee of the LLP Program (past co-chair of the original PALS committee alongside Judge Arkin).

Here are my thoughts and suggestions:

1. Generally, I would suggest that references to "he or she" be replaced with "they."

2. CRM 3(f)(1)(A) I would add that we include a more direct advisement for CRM 7 waiver. I mean that instead of the Court adding a written advisement in 11-point font to the Case Management Order (yes, I've seen this a few times!), the Court must explain and discuss magistrate consent along with disclosures and mediation at the Initial Status Conference. This proposal is especially important if this Court declines to allow magistrates to reconsider their orders.

3. CRM 7(d) concerning "fully resolves the issue or claim before the magistrate" still leaves the door open to argument and confusion that a temporary order issue is fully resolved with a temporary order. I would suggest further clarifying this so it's clear that a final ruling is a judgment under CRCP 58 or something like that.

4. CRM 7(e): The 28-day deadline to file a Magistrate Review is helpful. It would also be helpful to include a Response deadline (is it 21 days from the 28-day deadline, or is it also 28 days

affording the other side the same timeframe to respond?) Are replies accepted? They are not elsewhere, so it could be confusing if it is not addressed here.

5. CRM 7(f): I suggest reconsidering the Motion to Reconsider/clerical error timeline. As written, the magistrate has 21 days from the final order to reconsider. That means if the magistrate doesn't rule on it and the Motion is denied, or the magistrate does rule on the Motion and it is on the 21st day, both parties only have one week after that to file a magistrate's review. This timeline effectively gives practitioners less time than the current Rule of 14 days to prepare a Magistrate Review. This timeline will also confuse *pro se* litigants.

4. CRM 7(i) I suggest removing punitive language concerning a presumption against an unrequested transcript. "If a transcript of the proceedings before a magistrate was not requested, the reviewing judge shall presume that the record would support the magistrate's findings of fact." Speaking from experience working with pro se parties, many have no idea they can obtain a transcript as part of a magistrate review (or that they must appeal to the district court judge). I feel this language unfairly punishes litigants. The district court should consider the record; if a transcript is available, consider that too. This language will also make appeals less successful and even easier to deny (they are frequently denied as they are now).

Or, revise the Rule to require that a transcript be requested and offer better services for said requirement. We're running into serious problems with transcript services, creating unfair or unreasonable payment protocols. They are not uniform and depend heavily on the contractor. For example, I've had issues with transcription services in Arapahoe County, where the contractor would only accept payment from one party's lawyer, and the judge ordered the transcript costs to be shared equally. If you ask for an alternative payment option, the contractor ignores the request or becomes difficult to work with.

I've also encountered other transcript contractors imposing a payment requirement that unfairly forces low-income litigants to pay upfront plus an additional retainer.

There are many issues with transcript requests, and if a party chooses not to use one, can't use one, or would prefer to rely on the order itself, they should not have a presumption imposed against them for doing so.

Again, thank you for your time and efforts on this critical work, and I appreciate your consideration. I am happy to chat about any further questions or comments about my proposals—feel free to email me or call.

Best,

Maha

Comments to Proposed Changes to Magistrate Rules 3,5,6,7,8
Of the Colorado Rules for Magistrates

Respectfully submitted by
Elizabeth D. Leith
Presiding Judge
Denver Probate Court

I suggest further consideration of the following:

Rule 3(f)(1)(A)

…after entering an appearance *either in writing or in person*, or filing a responsive pleading….

This suggestion is made to include parties who may not file a formal entry of appearance through an attorney and may not file a responsive pleading – ie they just appear for the hearing and then receive the magistrate advisement on the record.

Rule 7(d)

(2) DELETE…..A minute order that is dated and signed by a magistrate shall constitute a written order or judgment.

I do not support the use of a minute order to stand as a court order, and I do not support the use of a transcript to constitute a court order. A minute order is not designed to be a full order with findings and a ruling. I believe the use of a minute order (and a transcript) as a court order is a disservice to the public as well as to those who must attempt to decipher a court order based on the cryptic notes contained in a minute order. A transcript has the opposite problem, as the parties, attorneys, police officers, judicial officers – all must read through pages of transcript to attempt to discern the court orders to be followed.

I understand that certain courts and judicial officers use these two methods to create orders in an attempt to reduce their workload. I do not subscribe to that reasoning as I believe that as public servants judges and magistrates have an obligation to provide a work product, which is the court order. There are other ways to reduce workload and still produce a written order, such as form orders with pre-prepared findings and fill in the blanks for case specific information or directing counsel to prepare the written order for review and signature by the judge or magistrate.

Time Frames

Motions to Reconsider or to Correct Clerical Errors – ruling must be within 21 days. This seems rather tight.

Petitions for Review to the District Court Judge – must be filed within 28 days from the order, opposition must be filed within 14 days and cannot be extended unless there are exceptional circumstances. Does the inability to receive a transcript that has been requested constitute an exceptional circumstance? Similarly, can there be an extension of the 63 day deadline to enter the order of review if the timely requested and paid for transcript has not yet been submitted? Does the language stating the review order must be entered within 63 days of the petition for review or filing of the transcript imply an extension?

FourthStreet
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April 24, 2024

Colorado Supreme Court
2 E. 14th Avenue, Denver, CO 80202

Re: Proposed Changes to Rules for Magistrates

Dear Colorado Supreme Court:

I hope this letter finds you well. I am writing to comment on the proposed changes to the Colorado Rules for Magistrates, particularly the changes to the review process under C.R.M. 7**.** I am responsible for all the appellate work at a boutique law firm in Douglas County. My firm specializes almost exclusively in DR and JV cases, in which magistrates are often involved. Therefore, I litigate numerous review proceedings under C.R.M. 7, and the proposed rule change will affect my practice.

Overall, I believe the new rule improves upon the existing rule. I agree that the same review process should apply regardless of whether the magistrate required consent. I appreciate including a procedure for requesting that a magistrate reconsider his or her own order. Most of all, I *strongly* support the provision deeming a petition for review denied if the reviewing judge does not rule within 63 days. The magistrate review stage is a major bottleneck in the appellate process in which

extreme delays constitute a significant barrier to justice. I have seen district court judges take over a year or more to rule on petitions for magistrate review in cases that affect custody of minor children and/or a dependent spouse or parent's access to support. Much of this dysfunction may be attributable to expecting that district court judges be both trial judges and appellate judges at the same time. A judge who is forced to prioritize between scheduling criminal trials with speedy trial deadlines versus making time to work on appeals of child custody orders will prioritize the former to the detriment of the latter every single time. The system is not working at this stage, and allowing litigants who are experiencing unconscionable delays in the district court to simply move on to the Court of Appeals after a certain amount of time has passed will be a welcome change.

If I may make one suggestion, it would be that the new rule could do more to clarify when a magistrate's order becomes final for purposes of review.

A magistrate's order is reviewable if it "fully resolves" an "issue or claim." The order must also be written, dated, and signed by the magistrate. This is the standard under both the existing C.R.M. 7(3) as well as the proposed new C.R.M. 7(d). The word "issue" broadly encompasses any point in dispute, including interlocutory issues. *See In re People v. Maes*, 2024 CO 15, ¶ 17. However, just because an order resolves an issue does not mean the order *fully* resolves it—"an issue or claim is fully resolved when a magistrate no longer has authority to revisit its determination." *Id.*, ¶ 21 (citing *People in Interest of J.D.*, 2020 CO 48, ¶ 12).

Because practically every written magistrate order will satisfy the broad "issue or claim" element of reviewability, an order's ripeness for review will usually hinge on the "fully resolves" element instead. As I understand *Maes* and *J.D.*, the "fully resolves" element is met when the magistrate loses jurisdiction to reconsider its order, either because the order has the effect of transferring jurisdiction to a judge or because the order completely ends the litigation.

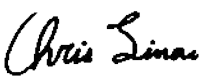
At least, this is my understanding under the *current* rule. The *new* rule is less clear to me on this point. I note that the proposed new C.R.M. 7(f) allows a magistrate to reconsider his or her

own order up to 21 days *after* the order becomes reviewable. If a magistrate will be able to reconsider an order *after* it becomes reviewable, then it will no longer be true that a magistrate's order only becomes reviewable once the magistrate loses reconsideration authority. At what point, then, does an issue or claim become "fully resolved" if the magistrate still retains reconsideration authority?

I would therefore respectfully suggest adding some language defining what "fully resolves" means in the context of the new C.R.M. 7(d), given that magistrate orders could now be subject to both reconsideration and review at the same time. Leaving "fully resolves" undefined may create confusion over whether a litigant should immediately file interlocutory petitions for review of every adverse written order a magistrate issues over the course of a case, or if the litigant should instead wait for a final judgment that completely ends the litigation, as in a traditional appeal.

I appreciate the Court's taking the time to consider this comment.

Sincerely,



Christopher J. Linas

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by email to: supremecourtrules@judicial.state.co.us

Justice Gabriel, Judge Jones, and the Civil Rules Committee:

My comment is limited to the proposed additional language to Rule 3(f)(1)(A). I submit you could be more precise in how and when an advisement is accomplished. In a related observation, I submit you should seize the opportunity to say what a "proceeding" is for purposes of Rule 3.

I believe in adding the new language to Rule 3(f)(1)(A) you are attempting to make clear that the "Arapahoe County Rule" (for lack of a better phrase) is not acceptable. Putting an "advisement" in a written case management order alone should not count as a party being "provided notice of the referral". But I worry that courts may continue to bury such an advisement in a multi-page or multi-issue document. I believe that my worry could be allayed if the timing of the required advisement be after an entry of appearance or responsive pleading. And, any advisement should be "orally or in writing". To do that the new phrase would have to be re-sequenced so that it would say something like, "after entry or responsive pleading, if a party is advised orally or in writing, they are deemed to have consented if …"

Relatedly, I submit you have an opportunity to say what a "proceeding" is for purposes of this rule. The word appears four times in your proposed Rule 3(f)(1). It seems important.

What is a "proceeding"? Is it a whole case? Or is it the hearing event where consent is required? If it is a "whole case", then an early objection might dispossess a magistrate of authority to act and render Rule 6(b)(1) meaningless. If you seize the opportunity to say what a "proceeding" is for purposes of this rule, then Rule 6(b)(1) retains its significance, and magistrates can continue to do what they do.

Magistrates do a lot of things that I believe customers (and district court judges) want (no matter when an objection is lodged). To name only a few, those are: conduct and manage an initial status conference; conduct further status conferences to measure compliance with other rules and case management orders (such as complete initial disclosures, discuss temporary orders, schedule or complete mediation); manage (grant or deny) requests for formal discovery; determine whether a court appointed expert is necessary or appropriate (e.g. business evaluator, vocational evaluator, real estate appraiser); and conduct temporary orders hearings. All of these things are permitted under Rule 6(b)(1). (Or at least they're not prohibited).

I do not find an appellate case that clearly says what a "proceeding" is. In fact, I find the potential for confusion. Some cases seem to suggest that a proceeding is a whole case. For example, in In re: B.B.O., 2012 CO 40, 277 P.3d 818 (Colo. 2012) the supreme court referenced standing and an allocation of responsibilities case, i.e. the whole case, as the "proceeding". Recently the supreme court again suggested that a "proceeding" was the "action" or a whole case. In citing the definition of "action" the court said it was the whole "civil … judicial proceeding" or "the over-arching conflict between the parties [which] can and often does

incorporate multiple issues and claims." *See, People v. Maes, 2024 CO 15, --- P.3d --- (Colo. 2024) @¶¶ 17-18*. Yet another Colorado supreme court case suggests otherwise. In People v. Yascavage, 101 P.3d 1090 (Colo. 2004), the supreme court referenced a proceeding as a discrete issue or single hearing (i.e. the hearing at which a summoned witness has an obligation to appear).

If you seize the opportunity to clearly state, either in the rule or a comment specific to Rule 3, that a "proceeding" is only the hearing for which consent is necessary, then no matter when an objection is lodged magistrates can continue to attend to tasks authorized under Rule 6(b)(1).

I submit you should consider two things in the final version of Rule 3. One, assure that the advisement is "orally or in writing after entry or responsive pleading". Two, take the opportunity to say what a "proceeding" is for purposes of Rule 3(f)(1).

Thank you for your consideration.

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Magistrate
19th Judicial District / Weld County

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April 25, 2024

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Re: Colorado Rules for Magistrates — comments on proposed changes

To the Court:

I write to provide comments on the proposed changes to the Colorado Rules for Magistrates ("Proposed Rules"). Although the Proposed Rules address several procedural problems of the current rules, they still do not honor the rights of litigants to decisions made by constitutionally appointed judges under the Colorado Constitution. They allow magistrates to rule on critical issues without the parties' consent and then heavily insulate those rulings from judicial reconsideration. It is disappointing that this problem was not addressed in the Proposed Rules.

Proposed Rule 7(j) forces a reviewing judge to accept a magistrate's questionable determinations of disputed factual issues unless they rise to the difficult appellate standard of being "clearly erroneous." Under that standard, a reviewing judge is not allowed to reach a different conclusion on a disputed factual issue unless the record lacks any support for the magistrate's finding. Rule 7(j) appears to require a judge to disregard the judge's own assessment and accept the magistrate's findings even if the judge conducted a trial *de novo* pursuant to Rule 7(i) and disagreed with the magistrate's assessment of conflicting evidence.

The problem is now most pronounced in the area of domestic relations. Under the Proposed Rules, a magistrate could redetermine a child's best interests based on the magistrate's own assessment of disputed facts, decrease parenting time, decrease a parent's decision-making role, and dictate terms and conditions of parenting—and the parent would have no recourse to any judge to challenge the magistrate's assessment of disputed facts. Similarly, the Proposed Rules allow no judicial recourse from a magistrate's findings on disputed facts by which property is taken from one former spouse and given to the other. These are some of the most important family and property matters that Colorado courts address for individuals. Yet the proposed Rules would deprive Coloradans of the right to have them decided by any actual judge who is appointed, reviewed, and retained by voters under the Colorado Constitution.

Notably, federal courts hold that the right to a constitutionally appointed judge requires that the judge must remain the ultimate decision-maker over disputed issues. *E.g., U.S. v. Raddatz*, 447 U.S. 667, 683 (1980). This requirement is met if the judge has broad discretion to accept, reject, or modify a magistrate's findings, including the discretion to conduct a *de novo* hearing to resolve credibility claims. *Id.* at 680-81. A party's right to a constitutionally appointed judge is violated when a judge instead defers to a magistrate's factual determinations under a "clearly erroneous" standard of review. *Gee v. Estes*, 829 F.2d 1005, 1008-09 (10th Cir. 1987). The

same analysis should apply to Coloradans' right to decisions made by judges under the Colorado Constitution.

Since Colorado's constitutionally appointed judges are subject to review and retention by the voters, the right to a constitutionally appointed judge is even more meaningful in Colorado than in the federal system. Our judges are democratically accountable. Our magistrates are not. Magistrates are not even subject to performance reviews like those used for judges. Yet the Proposed Rules leave magistrates effectively unreviewable. The use of magistrates without the parties' consent thus end-runs and thwarts the Colorado Constitution's system of judicial accountability.

The subcommittee that developed the Proposed Rules reported that it was unable to find any model from any other state for the Proposed Rules. This raises the question whether the Colorado judiciary should continue with its experiment of handing off judicial decisions to magistrates without the parties' consent. It is an inefficient system, adding an extra layer of appellate review, transcript costs, attorney fees, delays, and confusion. The inefficiency suggests that appointed judges simply do not like to decide certain categories of cases within their jurisdiction. Have judges forgotten, in the words of the late Judge Jack B. Weinstein, that they are "public servants pledged to do justice, not exalted elites who bless the masses with such bites of judicial time as [they] deign to dole out"?

An efficient system would limit magistrates to: (1) consent jurisdiction, from which parties could appeal directly to the Court of Appeals; and (2) those functions in which magistrates support and do not substitute for constitutionally appointed judges. These limitations would incentivize chief judges to hire and retain only well-regarded magistrates to whose jurisdiction parties would indeed consent.

Thank you for your consideration.

Best regards,

Ruth M. Moore

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April 25, 2024

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VIA email: supremecourtrules@judicial.state.co.us

RE: Comments on proposed changes to Colorado Rules for Magistrates

To the Court:

I am writing to comment on the proposed changes to the Colorado Rules for Magistrates. I am an appellate practitioner who works often on domestic relations cases. I deal regularly with rulings from magistrates and understand the impact these rules have on my clients' cases. This experience drives my comments. The magistrate rules which allow for use of magistrates without consent and require a petition for review from the district court before appealing, negatively impact my clients financially and reduces their access to justice on appeal. Some aspects of the proposed rules make these problems even worse.

1. In general, the proposed rules go the opposite direction that they should. Ideally, there would be no petition for review process at all, and magistrates would only be used with the consent of the parties. Magistrates are not appointed, reviewed, or retained by the voters under the Colorado Constitution, and forcing their use deprives litigants of their right to be heard before a constitutionally appointed judge. Thus, the use of a magistrate should be by consent only. The forced use of a magistrate without consent is especially troubling given that Proposed Rule 7(j) forces a reviewing judge to accept a magistrate's resolution of disputed factual matters absent clear error. This requirement means that critical and sensitive matters that are highly fact-based – especially in the area of domestic relations – are being delegated to non-constitutional judicial officers without any meaningful review of their findings. The use of a magistrate should be limited to consent only, and those decisions appealed directly to the Court of Appeals.

2. In that same vein, the magistrate review process requires litigants to endure essentially two appeals: one to the district court and one to the court of appeals. This drastically increases cost and complexity, adding additional attorneys' fees and transcript costs, and it results in the additional possibility for technical error, especially for pro se litigants.

3. There is also requirement that all issues be raised in the petition for review to be preserved for appeal. The proposed rules create problems that seem to disregard this serious limitation on the ability to appeal.

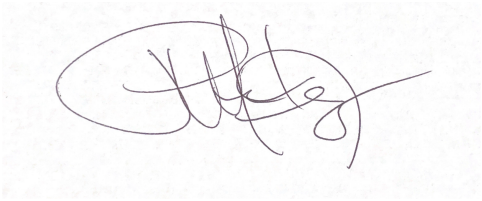
a. For instance, proposed C.R.M. 7 (h) requires a litigant to file the petition for review despite there being no transcript available, which is highly problematic. Often a party cannot adequately present arguments without reviewing and referring to the transcript. Given that any appeal is limited to issues raised in the petition, what happens when arguments cannot be made or even discovered without the transcript? This potentially denies parties adequate review on appeal simply because they were not able to get a transcript in a timely manner (which is currently commonplace).

b. Moreover, proposed C.R.M. 7 (f) allows for C.R.C.P. 60(a) clerical and a section 121 1-15(11) review of a magistrate's ruling but only gives the parties seven days after the deemed denied period to prepare and file a petition for review. (There is a 21-day deemed denied period from the date of the original judgment and a 28-day filing deadline for petition for review, leaving potentially only seven days after any order or deemed denied period). Seven days is too short. Again, an appeal is limited by the issues raised in the petition for review, so the petition is important for preservation and requires some diligence in preparation.

The proposed rules do not address the fundamental problem with the magistrate system, which is that is requires two levels of appeal, two transcripts, additional cost, and limited factual review, all resulting from a ruling that could be by a judicial officer who is not an appointed judge and for which the parties have not given consent. The proposed rules further exacerbate the problems created by this system, as discussed above. These rules do not increase access to justice for litigants, they reduce caseload for appointed judges, and they further impair the ability of litigants to obtain proper review of their cases.

Thank you for considering these comments.

Respectfully,



Paige Mackey Murray