AGENDA

COLORADO SUPREME COURT
COMMITTEE ON THE
RULES OF CIVIL PROCEDURE

Friday, June 28, 2019 1:30 p.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 January 29, 2019 minutes [Pages 1 to 5]

III. Announcements from the Chair

A. Rule Change Order Regarding C.R.C.P. 80/380 [Pages 6 to 11]

IV. Present Business

A. Colorado Municipal Court Rules of Procedure 204, 210, 212, 216, 223, 237, 241, 243, 248, and 254—Proposed Rule Changes— (Municipal Court Subcommittee) [Pages 12 to 83]

B. Use of the Words "Must" and "Shall" in the Civil Rules—(Judge Webb) [Pages 84 to 94]

C. C.R.C.P. 16.2(e)(10)—(Judge Jones & Lisa Hamilton-Fieldman) [Pages 95 to 97]

D. Possible Amendments to the Colorado Rules for Magistrates—(Judge Berger) [Pages 98 to 115]

E. C.R.C.P. 4 + 304—Unsworn Declarations— (David DeMuro) [Pages 116 to 122]

F. JDF 601—District Court Civil Case Cover Sheet Modification to Include Associated Cases—(Judge Berger) [Pages 123 to 126]

G. JDF 105—Service of Pattern Interrogatories—(Judge Berger) [Pages 127 to 133]

H. Title 12 Citations in the Civil Rules—(Jeremy Botkins) [Pages 134 to 135]

I. County Court Subcommittee Proposed Rule Changes (307, 341, and 412)—(Ben Vinci) [Pages 136 to 139]

To Be Discussed in September:

J. C.R.C.P. 304—Time Limit for Service from Attorney Daniel Vedra—(Ben Vinci)

K. C.R.C.P. 16.1—Evaluating the new rule—(Richard Holme)

L. C.R.C.P. 263—Silence in the Library—(Judge Berger)

M. C.R.C.P. 69—(Brent Owen)

V. Adjourn—**Next meeting is SEPTEMBER 27, 2019 at 1:30 pm.**

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

Conference Call Information:

Dial (720) 625-5050 (local) or 1-888-604-0017 (toll free) and enter the access code, 551050, followed by # key.

Colorado Supreme Court Advisory Committee on the Rules of Civil Procedure
January 25, 2019 Minutes

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

Name	**Present**	**Not Present**
Judge Michael Berger, Chair	x	
Chief Judge Steven Bernard	x	
Chief Judge (Ret.) Janice Davidson	x	
Damon Davis	x (phone)	
David R. DeMuro	x	
Judge Paul R. Dunkelman	x	
Judge J. Eric Elliff		x
Judge Adam Espinosa	x	
Peter Goldstein		x
Lisa Hamilton-Fieldman	x	
Michael J. Hofmann	x	
Richard P. Holme	x	
Judge Jerry N. Jones	x	
Judge Thomas K. Kane	x	
Cheryl Layne	x (phone)	
John Lebsack	x	
Judge Cathy Lemon		x
Bradley A. Levin	x	
David C. Little	x	
Professor Christopher B. Mueller	x	
Brent Owen	x	
John Palmeri	x	
Judge Sabino Romano	x	
Stephanie Scoville	x	
Lee N. Sternal		x
Magistrate Marianne Tims	x (phone)	
Jose L. Vasquez	x	
Judge Juan G. Villaseñor	x	
Ben Vinci	x	
Judge John R. Webb		x
J. Gregory Whitehair	x	
Judge Christopher Zenisek		x
Non-voting Participants		
Justice Richard Gabriel, Liaison	x	
Jeremy Botkins	x	

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I. Attachments & Handouts

- January 25, 2019 agenda packet.
- 17(c) materials from guest David Kirch.

II. Announcements from the Chair

- The November 16, 2018 minutes were approved with one correction: in the last sentence of the second paragraph of item (e), the word *criminal* was changed to *civil*;
- Judge Berger welcomed new members Chief Judge Steven Bernard and Judge Juan Villaseñor and invited all new and returning members to introduce themselves;
- Judge Berger explained the results of the submission of proposed rules to the supreme court: public comments are being obtained for the proposed changes to rules 26, 106, and 121; the court is holding action on rules 80 and 380 until the criminal committee also acts; and the court approved the proposed changes, effective immediately, to rules 6, 57, 59, and the repeal of JDF 602;
- Judge Berger asked that going forward, subcommittees proposing rule changes address whether public comments should be solicited, and separately, what the effective date of a rule should be if approved; and
- Justice Gabriel explained that the supreme court wants to be transparent and fair in adopting rule changes and always considers holding public comment periods. Because the committee did not unanimously vote for some of the proposed rule changes, the public comment period will allow those outside the committee to comment on certain changes.

III. Present Business

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

Subcommittee chair Lisa Hamilton-Fieldman stated that with great respect to all the work that has been done on this proposal, the subcommittee recommends that the proposed rule not be further considered. Ms. Hamilton-Fieldman stated that the proposed changes are substantive and, in her opinion, legislative.

Judge Berger offered guest Mr. David Kirch a chance to speak before the committee voted. Mr. Kirch stated that this proposal sets out a roadmap for the courts to deal with guardian ad litems (GALs) and follows the *Sorensen* case closely. Mr. Kirch cited Chief Justice Directive 04-06 to argue that GAL issues have been dealt with largely by the courts. He described the rest of the rule as guidance to the judiciary on how to handle GALs. Mr. Kirch believes this to be a judicial governance issue that wouldn't appropriately be addressed by the legislature. Ms. Hamilton-Fieldman stated that she is uncomfortable taking substantive provisions from cases and translating them into rules. Justice Gabriel commented that he shares the concern that this feels substantive rather than procedural.

The committee voted 22-2 that the matter should not proceed in the committee.

B. C.R.C.P. 69

Subcommittee chair Brent Owen reported that they are in the process of reviewing a new proposal to bring to the committee.

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

Judge Jones reminded everyone that his memo considered today addresses the ambiguity flagged in *In re Marriage of Runge* where three different judges came up with three different interpretations of the rule in question. The proposal at hand is based on the committee's response to the first proposal, brought last year. Judge Jones reported that this new version cleans up the language and draws a hard line that a court must rule on a motion that is filed within 5 years of a final decree but must deny such a motion that is filed more than 5 years after the final decree.

The committee discussed the use of the word *believes* in the proposed rule. Judge Davidson was concerned about the open-endedness of using *believes* and thought it could open the door to discovery. Judge Jones stated that the language as proposed doesn't relieve the court of the obligation to determine whether the motion is valid or not. He then said that while the word *believes* is fuzzy, it recognizes the reality of the courts.

Judge Kane offered that these types of motions aren't unusual, especially from self-represented litigants who usually make quite specific allegations. When the allegations are specific, Judge Kane has allowed discovery.

Professor Mueller proposed slightly altering Judge Jones' proposed language to the following: "If a disclosure contains a misstatement or omission materially affecting the division of assets or liabilities, any party may file and the court shall consider and rule on a motion seeking to reallocate assets and liabilities based on such a misstatement or omission, provided that the motion is filed within 5 years of the final decree or judgment. The court shall deny any such motion that is filed under this paragraph more than 5 years after the final decree or judgment." These two sentences would replace the sentence in the rule that starts "If the disclosure …." The rest of the rule would remain as is. The committee voted 24-1 to approve this language. Judge Berger stated that Judge Jones will draft the language and return with it to ensure it is as intended.

D. C.R.C.P. 304

Ben Vinci reported that the subcommittee scheduled a meeting for next month to discuss this issue.

E. C.R.C.P. 4 + 304

David DeMuro explained that Steve Glen, President of the Process Servers Association of Colorado (PSACO), wrote a letter to the committee pointing out recent Colorado legislation impacting notarization requirements. PSACO suggests rules 4 and 304 should be changed to allow unsworn declarations signed under penalty of perjury. Mr. DeMuro's position in his memo was that the statute should be self-actuating; however, Judge Berger pointed out to him before the meeting, and Mr. DeMuro now agrees, that maybe the committee ought to encompass this in the rules. Judge Berger stated that the committee

does not want law being applied differently, and that adding language into rule 121 might solve problems for some people.

Mr. Vinci strongly opposed any change to the rules on this matter. He sees it as essential that a process server has their signature notarized, and that not requiring a notary could create problems. Ms. Hamilton-Fieldman shared this view. She also mentioned, however, that notaries are becoming difficult to find.

Judge Berger stated that this judgment call was already made by the legislature, and at this point, the committee is simply discussing conforming language to the statute. Judge Berger proposed adding relevant language to rule 121, as that rule is frequently used by practitioners. If the committee changed rule 121, there would need to be a corollary change made to county court rules. Richard Holme suggested adding language to rule 108. Chief Judge Bernard asserted that the original suggestion to let the statute control is persuasive; unless someone can point out a specific conflict with the rule, the statute should be sufficient. Guest Steve Glen shared that 16 counties said they would accept unsworn affidavits, then a clerk refused to do so. He stated that consistency is needed.

A straw vote was taken on whether something should be added to district and county court civil rules or whether the committee should take no action. 16 voted to change the rules and 8 voted to take no action. Judge Berger sent this to the subcommittee to suggest language and asked that the language address both county and district courts.

F. C.R.C.P. 16.1

Mr. Holme reported that people are probably beginning to use the new 16.1, but that there is nothing in place to understand if the rule is working or not. He suggested that perhaps some informal communications with district court judges could provide feedback on how the rule is being used. Mr. Holme also proposed seeing whether SCAO would be willing to gather information regarding case filings to determine how people are using rule 16.1.

Justice Gabriel noted that he thinks there would be pushback against having committee members call judges to ask for information because the judges might feel pressured to respond. He then stated that gathering information on this matter from SCAO could be useful.

Judge Elliff, via email, provided the anecdotal report that very few cases since September 1st have fallen under 16.1. Judge Kane mentioned that it might be a little soon to gather data. Anecdotally, Judge Kane has had one case fall under 16.1. John Lebsack offered that out of 30 attorneys at his office who handle these types of issues, 6 reported to proceeding under 16.1, and of those 6, most have had one or two. Mr. Vinci mentioned that his office has used 16.1 a lot, but that perhaps firms that charge hourly are against using it. Judge Berger directed a subcommittee to work on this issue. Interested members are to email Mr. Holme to join his work on this matter.

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G. Denver County Court Procedures

Mr. Holme brought this article to the committee's attention to see if there is anything the committee could do to encourage Colorado District Courts to learn from the experience of the Denver County Court. Justice Gabriel shared that Justice Boatright provides an orientation for new judges and that perhaps someone could mention the procedural fairness training piece to the Justice. Judge Villaseñor confirmed that procedural fairness is covered in new judge orientation. Justice Gabriel also mentioned the annual judicial conference as a place where procedural fairness could be highlighted. Finally, Judge Jones offered that there is also a judicial education committee that would take ideas on procedural fairness.

IV. Future Meetings

March 29, 2019
June 28, 2019
September 27, 2019
November 22, 2019

The Committee adjourned at 3:27 p.m.

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RULE CHANGE 2019(06)
COLORADO RULES OF CIVIL PROCEDURE

Rule 80. Reporter; Stenographic Report or Transcript as Evidence

~~**(a) Reporter.** Unless the parties stipulate to the contrary, a district court or superior court shall, and any other court or referee or master in its discretion may, direct that evidence be taken stenographically and appoint a reporter for that purpose. His fee shall be fixed by the court subject to limitations imposed by law, and shall be paid in the manner provided by law; and if taxed to litigant may be taxed ultimately as costs in the discretion of the court. The cost of a transcript shall be paid in the first instance by the party ordering same.~~

~~**(b) Official Reporters.** Each court of record may designate one or more official court reporters.~~

~~**(c) Stenographic Report or Transcript as Evidence.** Whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony.~~

~~**(d) Reporter's Notes: Custody, Use, Ownership, Retention**. All reporter's notes shall be the property of the state. Reporter's notes shall be retained by the court for no less than twenty-one years after the creation of the notes, or such other period as may be prescribed by supreme court directive or by instructions in the manual entitled, Colorado Judicial Department, Records Management. During the period of retention, reporter's notes shall be made available to the reporter of record, or to any other reporter or person the court may designate. During the trial or the taking of other matters on the record, the notes shall be considered the property of the state, even though in the custody of the reporter. After the trial and appeal period, the reporter shall list, date, and index all notes and shall properly pack them for storage. The state shall provide the storage containers and space.~~

Repealed February 14, 2019, effective immediately.

COMMENT

[1] C.R.C.P. 80 has been repealed as Chief Justice Directive 05-03 entitled, Management Plan for Court Reporting and Recording Services, addresses matters related to court reporters in District Court matters.

Rule 380. Reporter; Stenographic Report or Transcript as Evidence.

(a) - **(b)** [NO CHANGE]

(c) Reporter's Notes, Electronic or Mechanical Recording; Custody, Use, Ownership, Retention. All ~~reporter's notes and~~ electronic or mechanical recordings shall be the property of the state. The ~~notes and~~ recordings shall be retained by the court for no less than six months after the creation of the ~~notes or~~ recordings, or such other period as may be prescribed by supreme court directive or by instructions in the manual entitled, Colorado Judicial Department ~~,~~ Record~~s~~ Retention Manual ~~Management~~. During the period of retention, ~~notes and~~ recordings shall be made available to the ~~reporter of record, or to any other reporter or~~ person the court may designate. During the trial or the taking of other matters on the record, the ~~notes and~~ recordings shall be considered the property of the state, even though in the custody of the reporter, judge, or clerk. ~~After the trial and appeal period, the reporter shall list, date and index all notes and recordings and shall properly pack them for storage. Where no reporter is used, the clerk of court shall perform this function. The state shall provide the storage containers and space.~~

Rule 80. Reporter; Stenographic Report or Transcript as Evidence

Repealed February 14, 2019, effective immediately.

COMMENT

[1] C.R.C.P. 80 has been repealed as Chief Justice Directive 05-03 entitled, Management Plan for Court Reporting and Recording Services, addresses matters related to court reporters in District Court matters.

Rule 380. Reporter; Stenographic Report or Transcript as Evidence.

(a) - (b) [NO CHANGE]

(c) Reporter's Notes, Electronic or Mechanical Recording; Custody, Use, Ownership, Retention. All electronic or mechanical recordings shall be the property of the state. The recordings shall be retained by the court for no less than six months after the creation of the recordings, or such other period as may be prescribed by supreme court directive or by instructions in the manual entitled, Colorado Judicial Department Record Retention Manual. During the period of retention, recordings shall be made available to the person the court may designate. During the trial or the taking of other matters on the record, the recordings shall be considered the property of the state, even though in the custody of the reporter, judge, or clerk.

Amended and Adopted by the Court, En Banc, February 14, 2019, effective immediately.

By the Court:

Richard L. Gabriel
Justice, Colorado Supreme Court

michaels, kathryn

From: berger, michael
Sent: Friday, June 7, 2019 3:25 PM
To: michaels, kathryn
Subject: Fw: Colorado Municipal Court Rules - Proposed Revisions
Attachments: Memorandum to Civil Rules Committee - CMCR Proposed Changes.pdf

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From: Robert Frick <Robert.Frick@longmontcolorado.gov>
Sent: Friday, June 7, 2019 9:43 AM
To: berger, michael
Subject: Colorado Municipal Court Rules - Proposed Revisions

Hello Judge Berger,

Attached is a Memorandum from the Colorado Municipal Court Rules Subcommittee regarding proposed changes to the Colorado Municipal Court Rules. We are presently set for an appearance before the Civil Rules Committee on June 28, 2019.

The attached Memorandum is in a .pdf format. Please advise if you would like a .doc format.

We recommend looking at the proposed rule revisions into two separate groups:

Group 1 – Rules 204, 210, 223, 241, and 254
Group 2 – Rules 212, 216, 237, 243, and 248

Group 1 is anticipated to non-controversial and may be recommended for adoption with little delay. Group 2 may be controversial and require further publication and invitation for comment. Let me know what else the Committee or you need in advance.

We are looking forward to coming before the Committee.

Please confirm receipt of this email. Thank you.

Robert J. Frick
Presiding Judge and Department Director
Longmont Judicial Department
Municipal Court - Probation

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www.coloradomunicipalcourts.org

MEMORANDUM

TO: Civil Rules Committee

FROM: Judge Robert J. Frick, Chair, Colorado Municipal Court Rules Subcommittee

Judge Billy R. Stiggers, II, Colorado Municipal Court Rules Subcommittee

RE: Proposed Changes to the Colorado Municipal Court Rules

Date: May 29, 2018

I. INTRODUCTION

The Colorado Municipal Court Rules Subcommittee ("Colorado Municipal Court Rules Subcommittee" or "Subcommittee") respectfully submits the following proposed changes to the Colorado Municipal Court Rules for consideration by the Civil Rules Committee ("Civil Rules Committee" or "Committee") for recommendation of adoption to the Colorado Supreme Court.

The proposed revisions come after a rulemaking process that occurred with the Subcommittee from 2017 to 2019.[1] This process reflects a substantive and wholesale look at the Colorado Municipal Court Rules that has not occurred since 1988.[2]

The Subcommittee recognizes that the proposed rule revisions fall into either a 'simple or clean-up' to 'contested' categories. Different stakeholders have a wide variety of positions

[1] See https://www.coloradomunicipalcourts.org/rulemaking/

[2] Colorado Municipal Court Rules, Amended June 30, 1988, effective January 1, 1989 (exception: Rule of Seven – December 14, 2011).

regarding the proposed changes. The Committee has several options for consideration and recommendation of adoption to the Colorado Supreme Court. As such, the Subcommittee recommends that the Committee consider the proposed rule revisions as follows:

Group 1 – Rules 204, 210, 223, 241, and 254

Group 2 – Rules 212, 216, 237, 243, and 248

The Subcommittee would anticipate that the proposed rule revisions as contained in Group 1 are non-controversial and may be recommended for adoption by the Committee to the Supreme Court with little delay. The proposed rule revisions as contained in Group 2 may be controversial or potentially have wide public interest and require further publication and invitation for public comment.

A. Historical Background

Municipal or local courts are often referred to as "quality of life courts". The courts give the public their primary and often only impression of the criminal justice system. However, the role of these courts has evolved over time. Municipalities, especially Home Rule Municipalities, have asserted greater jurisdiction and handle more complex matters. Changes in case law and legislation have further necessitated changes to the Colorado Municipal Court Rules.

The Colorado Municipal Court Rules were promulgated for the "just determination of all charter and ordinance violations. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay."[3] The

[3] C.M.C.R. 202

Colorado Municipal Court Rules were revised substantively and most recently on June 30, 1988 (with the noted exception of the "Rule of Seven" changes in 2011).[4] Much has changed in practice and subject matter of the Colorado Municipal Courts since those revisions.

There are 271 incorporated municipalities in Colorado representing 101 Home Rule Cities/Towns; 12 Statutory Cities, 1 Territorial Charter City; and 157 Statutory Towns. There are two consolidated City and County governments.[5] Municipalities may often be in one or more counties and judicial districts.[6] There are approximately 215 Colorado Municipal Courts serving these communities.[7]

The size and subject matter that come before the Colorado Municipal Courts differs greatly amongst the jurisdictions. Colorado Municipal Courts range from small 'part-time' courts that handle traffic and simple criminal matters to 'major-courts' such as Aurora, Colorado Springs, Lakewood, and Denver[8] that handle case numbers that exceed most of the Colorado Judicial Districts. Serious crimes including acts of domestic violence, assault, auto theft, drug possession, etc., are the subject matter of many jurisdictions. Additionally, the Colorado Municipal Courts, especially Home Rule municipalities, often have exclusive jurisdiction in municipal ordinances that are civil in nature such as local election laws, business

[4] Colorado Municipal Court Rules, Amended June 30, 1988, effective January 1, 1989 (exception: Rule of Seven – December 14, 2011).
[5] See https://www.coloradomunicipalcourts.org/about/
[6] The City and County of Denver and City and County of Broomfield are the two consolidated City and County governments in Colorado; See also https://www.coloradomunicipalcourts.org/about/
[7] See https://www.coloradomunicipalcourts.org/about/; See generally www.cml.org.
[8] The City and County of Denver is a consolidated City and County government. Municipal ordinance violations and infractions go before the Criminal/General Sessions Division of the City and County of Denver's County Court.

and other licensing, liquor and marijuana regulation, safety and health regulations, code and nuisance violations.

Colorado Municipal Courts are given grants and limitations of power by the United States Constitution,[9] the Colorado Constitution,[10] the Colorado Revised Statutes,[11] and rules of procedure promulgated by the Colorado Supreme Court[12]. These courts have original, special, exclusive, limited and concurrent jurisdiction in relation to other courts within the State.

B. Colorado Municipal Court Rules - Rulemaking

The Colorado Supreme Court – Civil Rules Committee appointed the Colorado Municipal Courts Rules Subcommittee on August 14, 2017. Judge Corrine Magid served initially as Chair of the Subcommittee. Members of the Colorado Municipal Judges Association make up this Subcommittee. Judge Robert J. Frick replaced Judge Corrine Magid as Chair on March 26, 2019.[13]

A variety of working groups, stakeholder meetings, and input occurred between 2017 and 2019.[14] The Subcommittee solicited input from city attorneys and prosecutors, Colorado Criminal Defense Bar, municipal judges, attorneys, law schools and clinics, municipal public defender's offices, and members of the public.[15] There were many informal discussions and

[9] United States Constitution, Amendments I through X and XIV.
[10] Colorado Constitution, Art. II, §§ 1-30; Art. III; Art. VI, §1; Art. XX; Art. XIV, §§ 13 and 14; Art. XX, §§ 1, 6, and 10.
[11] See generally Colorado Revised Statutes 13-10-101, 13-10-103, 13-10-104, 13-10-112, 31-1-101, *et seq.,* 31-4-208, 13-10-105(2), 31-15-101 through 1004, 31-16-101 *et seq.,* 31-16-111, and 42-4-110.
[12] Colorado Municipal Court Rules of Procedure (C.M.C.R.); Colorado Rules of Criminal Procedure (Crim. P), Rules 37 and 57; Colorado Appellate Rules (C.A.P.).
[13] Governor Jared Polis appointed Corinne Magid to the Jefferson County Court in the First Judicial District on February 7, 2019. Judge Magid subsequently stepped down as Chair for the Subcommittee.
[14] See https://www.coloradomunicipalcourts.org/rulemaking/
[15] See https://www.coloradomunicipalcourts.org/rulemaking/

debates throughout this process. The subcommittee gathered recommendations, proposals, and ideas regarding rule changes from a number of stakeholders.[16] There was an online comment period on the Colorado Municipal Judges Association website available to the public from November 1, 2018 through January 15, 2019.[17] The Subcommittee collected and published the online stakeholder comments[18] and the various versions of the proposed rule changes as they evolved throughout this process.[19]

The proposed rule changes were presented at the Colorado Municipal League – "Prosecutor's Boot Camp" on January 18, 2019 to the city attorneys and prosecutors, as they existed at that time. There was feedback and discussion received and brought back before the Subcommittee and Working Groups for consideration.

Proposed changes of the Colorado Municipal Court Rules were first submitted to the Civil Rules Committee on April 1, 2019. A subsequent presentation of the proposed rule changes occurred at the Colorado Municipal Judges Association Spring 2019 Judicial Conference on April 26, 2019 which resulted is some changes to certain proposed rules and alternative proposals for consideration.

The Subcommittee respectfully submits this Memorandum and incorporates all changes herein.

C. Subcommittee Members

[16] See https://www.coloradomunicipalcourts.org/rulemaking/working-and-proposed-rules/
[17] See https://www.coloradomunicipalcourts.org/rulemaking/
[18] See https://www.coloradomunicipalcourts.org/stakeholder-comments/
[19] See https://www.coloradomunicipalcourts.org/rulemaking/;
https://www.coloradomunicipalcourts.org/rulemaking/working-and-proposed-rules/

The following members of the Colorado Municipal Judges Association serve as members of the Colorado Municipal Court Rules Subcommittee: Judge Teresa Ablao; Judge Paul Basso; Judge Melissa Beato; Judge Corrin M. Flannigan; Judge Robert J. Frick; Judge Lisa Hamilton-Fieldman; Judge William Hardesty; Judge Geri Joneson; Judge Andrea Koppenhofer; Judge Corrine Magid; Judge Cynthia Mares; Judge Care' McInnis; Judge Leonard Miller; Judge Brandilynn Nieto; Judge Charles Peters; Judge Angela Schmitz; Judge Billy R. Stiggers, II; Judge Victor M. Zerbi.

Sub-Subcommittee (Working Groups) were created to address specific rules with the following leads:

Rule 212 – Judge Andrea Koppenhoffer

Rule 216 – Judge Billy R. Stiggers, II

Rule 217 – Judge Melissa Beato

Rule 243 – Judge Andrea Koppenhoffer

Rule 248 – Judge Corinne Magid

Others Rules – Judge Robert J. Frick

II. Group 1 – Proposed Revisions to Rules 204, 210, 223, 241, and 254

A. Rule 204

The Subcommittee proposes two changes to Rule 204. See Exhibit 1.

The first proposal is to increase the minimum time prior to the time that defendant is required to appear from 7 days to 14 days. In practice, most of the Colorado Municipal Courts set out arraignment dates anywhere from three to 14 weeks after the alleged incident or contact by law enforcement has occurred. This additional 7-day period, in part, allows for additional administrative processing by law enforcement and courts.

The second proposal is to define how alternate service may be accomplished, as Rule 204 was previously silent. Service by mail shall be complete upon the return of the receipt signed by the defendant or signed on behalf of the defendant by one authorized by law to do so (e.g. a parent accepting service on behalf of a minor, etc.). Personal service shall be made by a peace officer or any disinterested party over the age of eighteen years.

The proposal to include service by any 'disinterested party over the age of eighteen years' was to specifically include, although not limited to, the non-sworn personnel of a law enforcement agency or those employees of a municipality whose duties include enforcing the health and safety municipal code and charter provisions (e.g. code enforcement inspector, animal control officer, etc.).

B. Rule 210

The Subcommittee proposes changes to Rule 210 to reflect the court's duty to inform on first appearance in court and on pleas of guilty pursuant to § 16-7-207, C.R.S. See Exhibit 2.

The court's duty to inform on first appearance in court and on pleas of guilty pursuant to § 16-7-207, C.R.S., is now applicable to the Colorado Municipal Courts as of July 1, 2018 for prosecutions of municipal charter and ordinance violations.[20] The application of the enhanced advisement requirements of § 16-7-207, C.R.S., does not apply to traffic infractions.[21] As such, there are now slight inconsistencies and differences in language between Rule 210 and § 16-7-207, C.R.S. Further, a defendant's right to trial by jury or by the court is defined in Rule 223 and does not need to be duplicated in Rule 210.

The right to 'have process issued by the court' as detailed in the current Rule 210(4)(IV) is proposed to be removed as it is not contained in § 16-7-207, C.R.S., nor the analogous provisions of Crim.P. 10. Service of a subpoena is defined in § 13-9-115, C.R.S. and other applicable case law and statutes.

C. Rule 223

The Subcommittee proposes three changes to Rule 223. See Exhibit 3.

Under the Colorado Municipal Court Rules, "Trials shall be to the Court" unless the defendant is entitled to a jury trial.[22] The United States and Colorado Constitutions grant

[20] See H.B. 16-1309 and 17-1083. ((Note: The effective date of H.B. 16-1309 changed from May 1, 2017 to July 1, 2018, by H.B. 17-1316. See L. 2017, p. 607)).
[21] See H.B. 17-1083.
[22] C.M.C.R. 223(a)

defendants in criminal trials the right to trial by jury. The states are required to afford jury trials for serious offenses[23]. The right to a jury trial is a fundamental right.[24] Both § 13-10-101, C.R.S. and C.M.C.R. 223 recognize the right to a jury trial in municipal court prosecutions. Exceptions have been made for minor traffic violations, which have been decriminalized and no jail sentence may be imposed.[25] Some municipalities have by ordinance provided for no jury trials for violations allegedly committed by minors, for which no jail term may be imposed.

The first proposal is to include additional language 'or the offense carries the possible penalty of imprisonment'. This language is proposed to further define when someone is eligible for a jury trial and is the status of current law. The addition of this language does not create a new right to a jury trial, but rather adds clarification. In addition, recent discussion before the Colorado legislature in HB 16-1309[26], 17-1083[27], and 19-1225[28] has made a noticeable distinction between what municipal ordinances may be 'jail able' versus 'non-jail able' for purposes of advisement, counsel representation, and bail.

The second proposal is to modify Rule 223 to remove the language after 'arraignment or' to delineate that the 21 day period for filing a jury demand and tendering the jury fee does not begin until the after the 'entry of plea'. This proposal provides further clarification and consistency of practice amongst the Colorado Municipal Courts.

[23] *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).
[24] *People v. Curtis*, 681 P.2d 504 (Colo. 1984).
[25] See C.R.S. 42-4-1701 *et seq.*
[26] H.B. 16-1309 – Concerning a Defendant's Right to Counsel.
[27] H.B. 17-1083 – Court's Duty to Inform on First Appearance – Traffic Infractions.
[28] H.B. 19-1225 – Concerning Prohibiting the Use of Monetary Bond for Certain Level of Offenses

The third proposal is to add 'unless good cause is shown' to allow a court discretion in the determination on whether or not a defendant has waived his right to a jury trial if he fails to comply with the requirements of filing a written jury demand. The Subcommittee does not propose to define what may constitute 'good cause'. This will allow for a case by case determination and more discretion by the court. This specific language proposal came from Prof. Ann England of the University of Colorado School of Law – Criminal Defense Clinic and "would allow for counsel to raise issues regarding choice of jury trial or court trial … if there was in fact good cause for a defendant's failure to file a jury demand."[29]

Please note that the stakeholder comments from the (Denver) Office of the Municipal Public Defender contends that the procedural requirements of the 'written jury demand', 'jury fee', and '21 day' deadline should be removed and are unconstitutional.[30]

The Subcommittee does not propose to remove the procedural requirements of a 'written jury demand', 'jury fee', or the '21 day' deadline as detailed in Rule 223 at this time. An overwhelming majority of Subcommittee members and municipal judges prefer these procedural requirements of Rule 223 for cases that come before the Colorado Municipal Courts. The 'jury fee' may be "waived by the judge because of indigence of the defendant."[31] The third proposal to add 'unless good cause is shown' will allow a court discretion in the determination of whether or not good cause may exist when a defendant waives his right to a

[29] See Exhibit 11 - Stakeholder Comment – University of Colorado School of Law – Criminal Defense Clinic 1-2-2019.
[30] See Exhibit 12 - Stakeholder Comment – (Denver) Office of the Municipal Public Defender – 1-15-2019.
[31] C.M.C.R. 223(a)

jury trial if he fails to comply with the requirements of filing a written jury demand. This may be the subject for future changes to Rule 223.

D. Rule 241

The Subcommittee proposes changes to Rule 241 to expand the authority of the Colorado Municipal Courts to issue a search warrant when it relates to a charter or ordinance violation involving a threat to public health, safety or order. See Exhibit 4.

As mentioned in the Introduction of this Memorandum, the size and subject matter that come before the Colorado Municipal Courts differs greatly amongst the jurisdictions. Colorado Municipal Courts range from small 'part-time' courts that handle traffic and simple criminal matters to 'major-courts' such as Aurora, Colorado Springs, Lakewood, and Denver[32] that handle case numbers that exceed most of the Colorado Judicial Districts. Serious crimes including acts of domestic violence, assault, auto theft, drug possession, etc., are the subject matter of many jurisdictions. The Colorado Municipal Courts, especially Home Rule municipalities, often have exclusive jurisdiction in municipal ordinances that are civil in nature such as local election laws, business and other licensing, liquor and marijuana regulation, safety and health regulations, code and nuisance violations.

The proposed changes to Rule 241 through the stakeholder process notably have been related to Home Rule municipalities as they deal with the ever-increasing issues involving marijuana sale and grow operations, unattended deaths (to which no criminal activity is suspected or are natural), and other threats to public health, safety, or order. The proposed

[32] The City and County of Denver is a consolidated City and County government. Municipal ordinance violations and infractions go before the Criminal/General Sessions Division of the City and County of Denver's County Court.

Rule 241 changes provide for additional tools for municipalities (and their respective law enforcement, code enforcement, and public health agencies) as they deal with these matters of local concern. A particular municipality may still seek a search warrant from the respective state court as the law allows.

The Subcommittee anticipates that the expansion of Rule 241 may also provide some relief to the state courts. Nothing of the proposed Rule 241 changes will impact the ability to appeal the decision of a lower court to a higher court as authorized by law.

E. Rule 254

The Subcommittee proposes the addition of Rule 254 as a simple and clarifying rule to provide guidance for Colorado Municipal Courts. The subject matter of the proposed Rule 254 is the current law. See Exhibit 5.

As mentioned in the Introduction of this Memorandum, the size and subject matter that comes before the Colorado Municipal Courts differs greatly amongst the jurisdictions. Colorado Municipal Courts range from small 'part-time' courts that handle traffic and simple criminal matters to 'major-courts' such as Aurora, Colorado Springs, Lakewood, and Denver[33] that handle case numbers that exceed most of the Colorado Judicial Districts. Serious crimes including acts of domestic violence, assault, auto theft, drug possession, etc., are the subject matter of many jurisdictions. The Colorado Municipal Courts, especially Home Rule municipalities, often have exclusive jurisdiction in municipal ordinances that are civil in nature

[33] The City and County of Denver is a consolidated City and County government. Municipal ordinance violations and infractions go before the Criminal/General Sessions Division of the City and County of Denver's County Court.

such as local election laws, business and other licensing, liquor and marijuana regulation, safety and health regulations, code and nuisance violations.

The Colorado Supreme Court has adopted the Colorado Municipal Court Rules of Procedure that govern the operations, proceedings and conduct of all municipal courts within the State of Colorado.[34] The Colorado Municipal Court Rules "… are intended to provide for the just determination of all municipal charter and ordinance violations. They shall be construed to secure simplicity in procedure, fairness and administration and the elimination of unjustifiable expense and delay."[35] If no procedure is specifically presented by the Colorado Municipal Court Rules, the court can look for guidance to any directive of the Supreme Court regarding the conduct of formal judicial proceedings.[36]

[34] C.R.S. 13-10-103 and 13-10-112; C.M.C.R. 201.

[35] C.M.C.R. 202; *City of Englewood v. Municipal Court,* 687 P.2d 521 (Colo. App. 1984).

[36] [If no procedure is specifically presented by the Municipal Court Rules, the court can look for guidance to the Colorado Rules of Criminal Procedure. *Bachicha v. Municipal Court,* 581 P.2d 746 (Colo. App. 1978). "As their parallel purposes and numbering system indicate, the Colorado Rules of Criminal Procedure and the Colorado Municipal Court Rules of Procedure are *in pari materia.* See, Crim. P. 2; C.M.C.R. 202. Being *in pari materia,* they should be reconciled if possible. See*, People v. Cornelison,* 559 P.2d 1102 (Colo. 1977). See also, *People ex rel. Farina v. District Court,* 184 Colo. 406, 521 P.2d 778 (1974); "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these Rules of Criminal Procedure or with any directive of the Supreme Court regarding the conduct of formal judicial proceedings in the criminal courts, and shall look to the Rule of Civil Procedure and to the applicable." See, *People v. Cornelison, supra; People v. Linger,* 566 P.2d 1367 (Colo. App. 1977).]

III. Group 2 – Proposed Revisions to Rules 212, 216, 237, 243, and 248

A. Rule 212

The Subcommittee proposes two changes to Rule 212. See Exhibit 6.

The first proposed change is to require that motions filed with the Colorado Municipal Courts be 'written' unless otherwise ordered by the court. This changes the presumptive practice from 'oral' to 'written' motions, but does allow for the discretion of the court to allow oral motions.

Many, but not all, of the Colorado Municipal Courts already have this as a standard practice. These particular Colorado Municipal Courts require the filing of 'written motions' as part of a standing or administrative order or as part of pre-trial order when a matter is set for trial. Time deadlines, pre-trial procedures, notice and opportunity for timely hearings, and other administrative concerns will help to facilitate the effective and efficient handling of a particular case and overall docket management. Compliance by all parties with C.R.C.P. 5 regarding the service and filing of pleadings and other papers is required.

This proposed change for the presumption of written motions, in part, focuses on those motions that involve the suppression of evidence, statements or other constitutional considerations that often require an ability for a reflective and versed response and an opportunity to make argument.

Of note is the concern raised by the (Denver) Office of Municipal Public Defender. They argue, among other things, that this "proposed revision could drastically and unnecessarily

increase the workloads of the defense, prosecution, court staff, and judges. …"[37] A similar concern by several municipal judges is notably for the simple or administrative requests that may come from the parties to a case. In response, a court does have the discretion to allow for oral motions.

The second proposed change is to make a presumptive deadline that motions are filed "within 21 days of entry of plea, or within other such time frame as is established by the court. …"[38] This proposed change establishes a definitive time deadline for the filing of motions but does allow discretion of the court to deviate from this deadline. This presumptive 21 day deadline is also consistent with the proposed Rule 223[39] and 216[40] changes.

The Subcommittee recognizes the concerns raised by both Professor Anne England[41] and the (Denver) Office of the Municipal Public Defender[42] that the requirement for motions to be filed within 21 days (of entry of plea or by such other time period as is established by the court) may be in conflict with the proposed changes to Rule 216 that discovery is to be provided within 21 days (of entry of plea or by such other time period is established by the court).

In response, the proposed changes to both Rule 212 and 216 allow for greater discretion by the court to establish time periods as appropriate, recognizing the current Rule 248 speedy trial of 91 day requirements. A party may also file for relief from the presumptive deadlines as appropriate with the respective Colorado Municipal Court on any case. The Subcommittee also

[37] See Exhibit 12 - Stakeholder Comment – (Denver) Office of the Municipal Public Defender – 1-15-2019
[38] See Exhibit 6
[39] See Exhibit 3
[40] See Exhibit 7
[41] See Exhibit 11 - Stakeholder Comment – University of Colorado School of Law – Criminal Defense Clinic 1-2-2019.
[42] See Exhibit 12 - Stakeholder Comment – (Denver) Office of the Municipal Public Defender – 1-15-2019

recognizes that the Rule 212 presumptive 21-day period for filing of motions may be extended (perhaps to 28 or 35 days, staying consistent with the "Rule of Seven") if changes are made to the Rule 248 speedy trial requirements.

B. Rule 216

The Subcommittee proposes substantive changes to Rule 216. The Subcommittee's revision of Rule 216 gives greater and more defined discovery rules for both the prosecution and the defense. The proposed changes will expand the discovery obligations of the parties with certain additional procedural requirements and safeguards. The changes make Rule 216 more analogous to Crim.P. 16 with some noted differences. The Subcommittee's goal is to ensure a fair trial for both sides in the municipal court and attenuate allegations of "trial by ambush." There is both support and opposition to these proposed changes. See Exhibit 7.

The current discovery procedures, in practice, vary greatly amongst the jurisdictions. There is often confusion between the requirements of Crim.P. 16 and Rule 216. Discovery obligations have changed in case law over time. Certain discovery may be mandatory or permissive. Many jurisdictions in current practice have standing orders, or incorporate as part of part of any pre-trial order, specific discovery obligations analogous to Crim.P. 16 (e.g. disclosure of criminal histories) either as outright obligations or upon written request or motion of the parties.

The present Rule 216 governing discovery for criminal cases in municipal court mandates the prosecution to provide the defendant with certain materials in its possession to include "any books, papers, documents, photographs, or tangible objects" and "the names and addresses of

persons whom the prosecution intends to call as witnesses at the hearing or trial, together with any witness statements."[43] However, no one rule of describes all of the law which must be applied.

Case law has expanded prosecutorial discovery obligations over the years and these changes are not reflected in the current Rule 216. Among other obligations, the prosecution is required to produce any exculpatory materials.[44] Evidence bearing on prosecution witness' credibility is exculpatory evidence.[45] Statements within the possession of the police are deemed in the possession of the prosecutor.[46] The prosecutor's disclosure obligation extends to materials and information in the possession or control of law enforcement.[47]

Municipal courts presently have the discretion to order discovery to the extent necessary to promote judicial efficiency and fundamental fairness.[48] The municipal rules, the Colorado Court of Appeals reasoned, are "to be read as a whole and liberally construed," and "[l]iberal discovery procedures in criminal cases are to be encouraged so as to avoid surprise or deception in the production of evidence."[49]

Proposed Rule 216 Part I (a) expands on the current Rule 216 (a) prosecution disclosure obligations for information and materials within the prosecution's possession and control. Inter alia, the proposed rule adds and/or specifies the prosecutions discovery obligation for police reports, criminal histories, electronic surveillance, body camera video, and material that would reduce the guilt of the defendant or reduce the punishment. A primary goal of the Subcommittee

[43] C.M.C.R. 216(a)-(b)
[44] See *Brady v. Maryland,* 373 U.S. 83 (1983).
[45] *People v. Cevallos-Acosta,* 140 P. 3d 116, 125 (Colo. App. 2005).
[46] *People v. Garcia,* 690 P.2d 869, 873 (Colo. App. 1984).
[47] *People v. District Court,* 793 P.2d 163 (Colo. 1990); *People v. Cevallos-Acosta,* 140 P. 3d 116, 125 (Colo. App. 2005).
[48] *Englewood by People v. Municipal Court of Englewood,* 687 P.2d 521, 523 (Colo. App. 1984).
[49] *Englewood by People v. Municipal Court of Englewood,* 687 P.2d 521, 522-523 (Colo. App. 1984)

and the comments to the proposed rule changes was to incorporate advances in technology into the current Rule 216. Electronic surveillance and body worn cameras are frequently used in municipal court trials. The Subcommittee asserts it is essential for Rule 216 to explicitly address the discovery of such materials. The other expanded items in the Proposed Rule 216 Part I (a) incorporate case law, statutes/ordinances, and common municipal court discovery orders into a consistent, coherent rule.

Proposed Rule 216 Part I (b) adds that the prosecution's discovery obligation begins at the defendant's oral or written requests and provides for specific deadlines. Another key revision is in Proposed Rule 216 Part 1(c). The change specifies the prosecution's obligations to make reasonable efforts to provide discoverable information in the possession of other government personnel. This is not required in the current Rule 216. This rule change will require extra efforts by municipal prosecution offices but will, more importantly, ensure a fair and informed trial for the defendant.

There are currently no discovery obligations for a defendant under Rule 216. Any disclosure obligations on a municipal defendant are by case law, a specific order of a municipal court or under § 16-7-102, C.R.S. a criminal trial procedure statute requiring the defense disclosure of an alibi defense and witnesses to the prosecution.

The Proposed Rule 216 Part II adds a defendant's duty to disclose certain information to the prosecution. Under the proposed rule change, the defendant is obligated to disclose nontestimonial identification, expert witness medical and scientific reports, nature of defense(s), and provide a 14-day notice of an alibi defense and witnesses.

These are the most notably impactful changes to the prosecution and defendant discovery obligations contemplated by the Subcommittee's proposed rule change. The Subcommittee is of

the view that prosecution and defense discovery are related and that the giving of a fair right of discovery to the defense is dependent upon giving also a fair right of discovery to the prosecution. The hope is this will result in consistently fair trials.

The Subcommittee feels it is in the interest of justice to have Rule 216 more analogous to Crim.P. 16. Crim.P. 16 provides broadly defined discovery obligations for the prosecution and defense that coalesce case law, statutes, court orders and common practices into a coherent rule. Crim.P. 16 has proven its effectiveness in Colorado state court. The proposed rule change will help eliminate the current confusion and inconsistencies found in Colorado municipal court practice under the current Rule 216. Finally, the Subcommittee asserts it will be more efficient for the entire legal community to have a more consistent discovery rule for state and municipal courts.

C. Rule 237

The Subcommittee proposes to change Rule 237 to include the reference to Crim.P. 37.1. This proposed rule change did not go through the Subcommittee Rulemaking process and offered for the first time. See Exhibit 8.

Rule 237, as with all of the Colorado Municipal Court Rules, was most substantively amended on June 30, 1988.[50] At the time of adoption, Crim.P. 37.1 had not been adopted for purposes of interlocutory appeals. Crim.P. 37.1 was added to the Criminal Rules of Procedure July 16, 1992[51] and was not included into Rule 237. This proposed change will specifically allow

[50] Colorado Municipal Court Rules, Amended June 30, 1988, effective January 1, 1989 (exception: Rule of 7 – December 14, 2011).
[51] Crim.P. 37.1, Added Uly 16, 1992, effective November 1, 1992; (b) to (e) amended and adopted December 14, 2011, effective July 1, 2012.

for interlocutory appeals from the Colorado Municipal Courts and the related computation of time.

Interlocutory appeals from the Colorado Municipal Courts, as they have from county court, has become more commonplace involving the return of property and to suppress evidence or granting a motion to suppress an extra-judicial confession or admission. However, Rule 237 is silent as to interlocutory appeals. Further, a reviewing court is limited to the current language in Rule 248 for the computation of time. Please note that proposed revisions to Rule 248 to include, among other things, the computation of time for interlocutory appeals.[52]

For a recent example, in the Order Granting Rule 106(a)(4) Relief, dated May 16, 2019, from *Stephen Westra v. Westminster Municipal Court,*[53] the district court in that case held that it lacked jurisdiction to hear an interlocutory appeal from the Westminster Municipal Court and followed Rule 248(b) for the computation of time. This decision has not been appealed as of the submission of this Memorandum.

D. Rule 243

The Subcommittee proposes the addition of Rule 243 to define the Presence of the Defendant. See Exhibit 9.

The current Colorado Municipal Court Rules are silent as to when the Presence of the Defendant is required. For guidance, the Colorado Municipal Courts may rely upon Crim.P. 43,

[52] See Exhibit 10.
[53] *Stephen Westra v. Westminster Municipal Court,* 17th Judicial District Court Case No. 2018CV31365 (Appeal from Westminster Municipal Court case _____).

§ 16-7-202, C.R.S. and the Colorado Rules for Traffic Infractions when applicable. As technology has improved and as recent legislation has required[54], the Colorado Municipal Courts as a whole have an expanded use of interactive audiovisuals devices, especially for purposes of in-custody arraignments, bond hearings, advisements, and other appearances.

The proposed addition of Rule 243 is analogous to Crim.P. 43, while incorporating similar provisions of § 16-7-202, C.R.S. and the Colorado Rules for Traffic Infractions.

E. Rule 248

The Subcommittee proposes changes to the Rule 248 expanding time for speedy trial and the computation of time. There is a majority proposal and an alternate proposal for consideration. There is both support and opposition to these proposed changes. See Exhibit 10.

Both the majority and the alternate proposed rule changes include the computation of time as contemplated with the proposed changes to Rule 237. This outlines, among other things, time computation for interlocutory appeals, new trials after reversal on appeal, mistrials, and other delays caused, analogous to Crim.P. 48.

The majority proposal is to keep the existing 91 day period for speedy trial and then allow for an additional delay of up to 91 days (from the current "not to exceed 28 days"[55]) when good cause exists to warrant such a delay (for demonstration, 91 days plus up to an additional 91 days for a total of up to 182 days). The alternate proposal is to adopt the same or

[54] E.g. H.B. 17-1338 – Concerning a Requirement for Timely Hearing for a Defendant with a Municipal Court Hold.
[55] See C.M.C.R. 248(b).

similar standards as Crim.P. 48 and set speedy trial "within six months from the entry of plea"[56] or a similar time period (such as 182 to be consistent with the "Rule of Seven"). There are pros and cons to either approach.

A majority of municipal court judges favor the increased speedy trial requirements, under either the 'majority proposal' or 'the alternate proposal'. There is a small minority of municipal court judges that would prefer the speedy trial time periods remain under the current rule.

There are concerns noted from the (Denver) Office of the Municipal Prosecutor[57] and Professor England of the University of Colorado Law School – Criminal Defense Clinic[58] that the proposed changes do not include any definition or list of factors as to what may constitute 'good cause' for essentially doubling what would be the current speedy trial time period.

In response, the proposed changes do not include a definition or list of factor or factors for 'good cause' and this is intentional. This proposed change allows an opportunity for the parties make argument as to what factor or factors may constitute 'good cause' in a particular situation. It also allows for greater discretion on behalf of the court in making any findings and determination.

[56] See Crim.P. 48(b).
[57] See Exhibit 12 - Stakeholder Comment – (Denver) Office of the Municipal Public Defender – 1-15-2019
[58] See Exhibit 11 - Stakeholder Comment – University of Colorado School of Law – Criminal Defense Clinic 1-2-2019.

Group 1 Exhibits

Rules 204, 210, 223, 241, and 254

EXHIBIT 1

Rule 204 – Proposed Revisions
Version 10-31-2018

[REDLINE VERSION]

Rule 204

…

(e) Service of Summons and Complaint. A copy of a summons or summons and complaint issued pursuant to these rules shall be served personally upon the defendant. In lieu of personal service, service may be made by leaving a copy of the summons or summons and complaint at the defendant's usual place of abode with some person over the age of eighteen years residing therein or by mailing a copy to the defendant's last known address by certified mail, return receipt requested, not less than ~~7~~ 14 days prior to the time the defendant is required to appear. Service by mail shall be complete upon the return of the receipt signed by the defendant or signed on behalf of the defendant by one authorized by law to do so. Personal service shall be made by a peace officer or any disinterested party over the age of eighteen years.

…

(No other proposed changes to this Rule)

[CLEAN VERSION]

Rule 204

…

(e) Service of Summons and Complaint. A copy of a summons or summons and complaint issued pursuant to these rules shall be served personally upon the defendant. In lieu of personal service, service may be made by leaving a copy of the summons or summons and complaint at the defendant's usual place of abode with some person over the age of eighteen years residing therein, or by mailing a copy to the defendant's last known address by registered mail with return receipt requested or certified mail with return receipt requested, not less than 14 days prior to the time the defendant is required to appear. Service by mail shall be complete upon the return of the receipt signed by the defendant or signed on behalf of the defendant by one authorized by law to do so. Personal service shall be made by a peace officer or any disinterested party over the age of eighteen years.

…

(No other proposed changes to this Rule)

EXHIBIT 2

Rule 210 – Proposed Revisions
Version 12-6-2018

[REDLINE VERSION]

Rule 210. Arraignment.

…

(4) ~~A defendant appearing without counsel at arraignment shall be advised by the court of the nature of the charges contained in the complaint and of the maximum penalty which the court may impose in the event of a conviction; in addition, the court shall inform the defendant of the following rights~~: At the first appearance of the defendant in court or upon arraignment, whichever is first in time, it is the duty of the judge to inform the defendant and make certain that the defendant understands the following:

(I) ~~To bail;~~ The defendant need make no statement, and any statement made can and may be used against him or her.
(II) ~~To make no statement, and that any statement made can and may be used against the defendant~~; The defendant has a right to counsel.
(III) ~~To be represented by counsel, and, if indigent, the right to appointed counsel as applicable;~~ If the defendant is an indigent person, he or she may make application for a court-appointed attorney, and, upon payment of the application fee, he or she will be assigned counsel as provided by law or applicable rule of criminal procedure.
(IV) ~~To have process issued by the court, without expense to the defendant, to compel the attendance of witnesses in defendant's behalf;~~ Any plea the defendant makes must be voluntary on his or her part and not the result of undue influence or coercion on the part of anyone.
(V) ~~To testify or not to testify in defendant's own behalf;~~ The defendant has a right to bail, if the offense is bailable, and the amount of bail that has been set by the court.
(VI) To a trial by jury ~~where such right is granted by statute or ordinance, together with the requirement that the defendant, if desiring a jury trial, demand such trial by jury in writing within 21 days after arraignment or entry of a plea; also the number of jurors allowed by law, and of the requirement that the defendant, if desiring a jury trial, tender to the court within 21 days after arraignment or entry of a plea a jury fee of $25 unless the fee be waived by the judge because of the indigence of the defendant~~ or by the court pursuant to C.M.C.R. 223.
(VII) ~~To appeal.~~ The nature of the charges against the defendant and the maximum possible penalties.
…

(No other proposed changes to this Rule)

[CLEAN VERSION]

Rule 210. Arraignment.

….

(4) At the first appearance of the defendant in court or upon arraignment, whichever is first in time, it is the duty of the judge to inform the defendant and make certain that the defendant understands the following:

(I) The defendant need make no statement, and any statement made can and may be used against him or her.
(II) The defendant has a right to counsel.
(III) If the defendant is an indigent person, he or she may make application for a court-appointed attorney, and, upon payment of the application fee, he or she will be assigned counsel as provided by law or applicable rule of criminal procedure.
(IV) Any plea the defendant makes must be voluntary on his or her part and not the result of undue influence or coercion on the part of anyone.
(V) The defendant has a right to bail, if the offense is bailable, and the amount of bail that has been set by the court.
(VI) To a trial by jury or by the court pursuant to C.M.C.R. 223.
(VII) The nature of the charges against the defendant and the maximum possible penalties.
…

(No other proposed changes to this Rule)

COMMENT:

The court's duty to inform on first appearance in court and on pleas of guilty pursuant to 16-7-207, C.R.S., is now applicable to municipal courts as of July 1, 2018. See H.B. 16-1316 and 17-1083 ((Note: The effective date of H.B. 16-1316 changed from May 1, 2017 to July 1, 2018, by H.B. 17-1316. See L. 2017, p. 607)).

A defendant's right to trial by jury or by the court is detailed in C.M.C.R. 223.

EXHIBIT 3

Rule 223 – Proposed Revisions
Version 5-1-19

[REDLINE VERSION]

Rule 223. Trial by Jury or by the Court.

(a) Trial by Jury. Trial shall be to the court, unless the defendant is entitled to a jury trial under the constitution, ordinance, charter, ~~or~~ general laws of the state, or the offense carries the possible penalty of imprisonment, in which case the defendant shall have a jury, if, within 21 days after ~~arraignment or~~ entry of a not guilty plea, the defendant files with the court a written jury demand and at the same time tenders to that court a jury fee of $25, unless the fee is waived by the judge because of the indigence of the defendant. If the action is dismissed or the defendant is acquitted of the charge, or if the defendant, having paid the jury fee, files with the court at least 7 days before the scheduled trial date a written waiver of jury trial, the jury fee shall be refunded. A defendant who fails to file with the court the written jury demand as provided above waives the right to a jury trial unless good cause is shown.

…

(No other proposed changes to this Rule)

[CLEAN VERSION]

Rule 223. Trial by Jury or by the Court.

(a) Trial by Jury. Trial shall be to the court, unless the defendant is entitled to a jury trial under the constitution, ordinance, charter, general laws of the state, or the offense carries the possible penalty of imprisonment, in which case the defendant shall have a jury, if, within 21 days after entry of a not guilty plea, the defendant files with the court a written jury demand and at the same time tenders to that court a jury fee of $25, unless the fee is waived by the judge because of the indigence of the defendant. If the action is dismissed or the defendant is acquitted of the charge, or if the defendant, having paid the jury fee, files with the court at least 7 days before the scheduled trial date a written waiver of jury trial, the jury fee shall be refunded. A defendant who fails to file with the court the written jury demand as provided above waives the right to a jury trial unless good cause is shown.

…

(No other proposed changes to this Rule)

EXHIBIT 4

Rule 241 – Proposed Revisions
Version 5-1-19

[REDLINE VERSION]

Rule 241. Search and Seizure

(a) Authority to Issue Warrant. A judge of any court shall have power to issue a search warrant under this Rule ~~only~~ when~~:~~
~~**(1)**~~ It relates to a charter or ordinance violation involving a ~~serious~~ threat to public health, safety or order~~; and~~
~~**(2) The violation is not also a violation prohibited by state statute for which a search warrant could be issued by a district or county court**~~.

…

(No other proposed changes to this Rule)

[CLEAN VERSION]

Rule 241. Search and Seizure

(a) Authority to Issue Warrant. A judge of any court shall have power to issue a search warrant under this Rule when it relates to a charter or ordinance violation involving a threat to public health, safety or order.

…

(No other proposed changes to this Rule)

EXHIBIT 5

Rule 254– Proposed Revisions
Version 11-29-2018

[REDLINE VERSION]

Rule 254. ~~No Colorado Rule.~~ Application

These Rules apply to all proceedings in municipal courts in the state of Colorado. In the absence of a specific Rule, the court may look for guidance to the Colorado Rules of Criminal Procedure, the Colorado Rules of Civil Procedure, the Colorado Rules for Traffic Infractions, and any other rules or Chief Justice directives promulgated by the Colorado Supreme Court regarding the conduct of formal judicial proceedings.

[CLEAN VERSION]

Rule 254. Application

These Rules apply to all proceedings in municipal courts in the state of Colorado. In the absence of a specific Rule, the court may look for guidance to the Colorado Rules of Criminal Procedure, the Colorado Rules of Civil Procedure, the Colorado Rules for Traffic Infractions, and any other rules or Chief Justice directives promulgated by the Colorado Supreme Court regarding the conduct of formal judicial proceedings.

Group 2 Exhibits

Rules 212, 216, 237, 243, and 248

EXHIBIT 6

Rule 212 – Proposed Revisions
Version 11-28-2018

[REDLINE VERSION]

Rule 212. Pleadings and Motions Before Trial.

…

(b) Oral or Written Motions. All motions shall be ~~oral~~ written unless otherwise ordered by the court.

…

(e) Time for Making Motion. Motions shall be made before a plea is entered, ~~but the court may permit it to be made within a reasonable time thereafter~~ within 21 days of the date of entry of a plea, or within such other time frame as is established by the court. If a party wishes to file a brief in support of a Motion, such brief shall be filed with the Motion.

…

(No other proposed changes to this Rule)

[CLEAN VERSION]

Rule 212. Pleadings and Motions Before Trial.

…

(b) Oral or Written Motions. All motions shall be written unless otherwise ordered by the court.

…

(e) Time for Making Motion. Motions shall be made before a plea is entered, within 21 days of the date of entry of a plea, or within such other time frame as is established by the court. If a party wishes to file a brief in support of a Motion, such brief shall be filed with the Motion.

…

(No other proposed changes to this Rule)

EXHIBIT 7

Rule 216 – Proposed Revisions

Version 2-1-2019

[REDLINE VERSION]

Rule 216. Discovery and Inspection

~~**(a) By Defendant.** Upon the motion of a defendant or upon the court's own motion at any time after the filing of the complaint or summons and complaint the court may order the prosecution to permit the defendant to inspect and copy or photograph any books, papers, documents, photographs, or tangible objects that are within the prosecution's possession and control, upon a showing that the items sought may be material to the preparation of the defense and that the request is reasonable. The order shall specify the time, place, and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just~~.

~~**(b) Witness's Statements.** At any time after the filing of the complaint or summons and complaint, upon the request of a defendant or upon the order of court, the prosecution shall disclose to the defendant the names and addresses of persons whom the prosecution intends to call as witnesses at the hearing or trial, together with any witness statements.~~

~~**(c) Irrelevant Matters.** If the prosecution claims that any material or statement ordered to be produced under this rule contains matter which does not relate to the subject matter of the witness's testimony, the court shall order it to deliver the statement for the court's inspection in chambers. Upon such delivery the court shall excise the portions of the statement which do not relate to the subject matter of the witness's testimony, then the court shall direct delivery of the statement to the defendant.~~

~~**(d) Statement Defined.** The term "statement" as used in sections (b) and (c) of this Rule in relation to any witness who may be called by the prosecution means:~~

~~(1) A written statement made by such witness and signed or otherwise adopted or approved by the witness;~~

~~(2) A mechanical, electrical, or other recording, or a transcription thereof, which is a recital of an oral statement made by such witness; or~~

~~(3) Stenographic or written statements or notes which are in substance recitals of an oral statement made by such witness and which were reduced to writing contemporaneously with the making of such oral statement~~.

Definitions.

(1) "Defense", as used in this rule, means an attorney for the defendant, or a defendant if pro se.

Part I. Disclosure to the Defense

(a) Prosecutor's Obligations.

(1) The prosecuting attorney shall make available to the defense the following material and information which is within the possession or control of the prosecuting attorney, and shall provide duplicates upon request, and concerning the pending case:

(I) Police, arrest and crime or offense reports, including statements of all witnesses;

(II) Any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons;

(III) Any books, papers, documents, photographs, videos, body camera videos, or tangible objects held as evidence in connection with the case;

(IV) Any record of prior criminal convictions of the accused, any codefendant or any person the prosecuting attorney intends to call as a witness in the case;

(V) All tapes and transcripts of any electronic surveillance (including wiretaps) of conversations involving the accused, any codefendant or witness in the case;

(VI) A written list of the names and addresses of the witnesses then known to the district attorney whom he or she intends to call at trial;

(VII) Any written or recorded statements of the accused or of a codefendant, and the substance of any oral statements made to the police or prosecution by the accused or by a codefendant, if the trial is to be a joint one.

(2) The prosecuting attorney shall disclose to the defense any material or information within his or her possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce the punishment therefor.

(3) The prosecuting attorney's obligations under this section (a) extend to material and information in the possession or control of members of his or her staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to his or her office.

(b) Prosecutor's Performance of Obligations.

(1) The prosecuting attorney shall perform his or her obligations under subsections (a)(1)(I), (III), (VI), and with regard to written or recorded statements of the accused or a codefendant under (VII) as soon as practicable but not later than 21 days after the defendant's entry of “not guilty” plea or by such other

time period is established by the court, the matter is set for trial and written request of the defense, except that portions of such reports claimed to be nondiscoverable may be withheld pending a determination and ruling of the court under Part III but the defense must be notified in writing that information has not been disclosed. The prosecution's obligations does not begin until the written request by the defendant.

(2) The prosecuting attorney shall perform all other obligations under subsection (a)(1) as soon as practicable but not later than 14 days before trial, or by such date as is established by the court.

(3) The prosecuting attorney shall ensure that a flow of information is maintained between the various investigative personnel and his or her office sufficient to place within his or her possession or control all material and information relevant to the accused and the offense charged.

(4) The trial court may enter orders consistent with this rule for the time, place, and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

(c) Material Held by Other Governmental Personnel.

(1) Upon the defense's request and designation of material or information which would be discoverable if in the possession or control of the prosecuting attorney and which is in the possession or control of other governmental personnel, the prosecuting attorney shall use diligent good faith efforts to cause such material to be made available to the defense.

(2) The court shall issue suitable subpoenas or orders to cause such material to be made available to the defense, if the prosecuting attorney's efforts are unsuccessful and such material or other governmental personnel are subject to the jurisdiction of the court.

(d) Discretionary Disclosures.

(1) The court in its discretion may, upon motion, require disclosure to the defense of relevant material and information not covered by Parts I (a), (b), and (c), upon a showing by the defense that the request is reasonable.

(2) The court may deny disclosure authorized by this section if it finds that there is substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweighs any usefulness of the disclosure to the defense.

(3) Where the interests of justice would be served, the court may order the prosecution to disclose the underlying facts or data supporting the opinion in that particular case of an expert endorsed as a witness. If a report has not been prepared by that expert to aid in compliance with other discovery obligations of this rule, the court may order the party calling that expert to provide a written summary of the testimony describing the witness's opinions and the bases and reasons therefor, including results of physical or mental examination and of scientific tests, experiments, or comparisons. The intent of this

section is to allow the defense sufficient meaningful information to conduct effective cross- examination under CRE 705.

(e) Matters not Subject to Disclosure.

(1) **Work Product.** Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting attorney or members of his legal staff.

(2) **Informants.** Disclosure shall not be required of an informant's identity where his or her identity is a prosecution secret and a failure to disclose will not infringe the constitutional rights of the accused. Disclosure shall not be denied hereunder of the identity of witnesses to be produced at a hearing or trial.

Part II. Disclosure to Prosecution

(a) The Person of the Accused.

(1) Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, upon request of the prosecuting attorney, the court may require the accused to give any nontestimonial identification, which is defined as including, but is not limited to, identification by fingerprints, palm prints, footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, specimens of material under fingernails, or other reasonable physical or medical examination, handwriting exemplars, voice samples, photographs, appearing in lineups, and trying on articles of clothing.

(2) Whenever the personal appearance of the accused is required for the foregoing purposes, reasonable notice of the time and place of such appearance shall be given by the prosecuting attorney to the accused and his or her counsel. Provision may be made for appearance for such purposes in an order admitting the accused to bail or providing for his or her release.

(b) Medical and Scientific Reports.

(1) Subject to constitutional limitations, the trial court may require that the prosecuting attorney be informed of and permitted to inspect and copy or photograph any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons.

(2) Subject to constitutional limitations, and where the interests of justice would be served, the court may order the defense to disclose the underlying facts or data supporting the opinion in that particular case of an expert endorsed as a witness. If a report has not been prepared by that expert to aid in compliance with other discovery obligations of this rule, the court may order the party calling that expert to provide a written summary of the testimony describing the witness's opinions and the bases and reasons therefor, including results of physical or mental examinations and of scientific tests,

experiments, or comparisons. The intent of this section is to allow the prosecution sufficient meaningful information to conduct effective cross-examination under CRE 705.

(c) Nature of Defense.

Subject to constitutional limitations, the defense shall disclose to the prosecution the nature of any defense, other than alibi, which the defense intends to use at trial. The defense shall also disclose the names and addresses of persons whom the defense intends to call as witnesses at trial. At the entry of the not guilty plea, the court shall set a deadline for such disclosure. In no case shall such disclosure be less than 7 days before trial, except for good cause shown. Upon receipt of the information required by this subsection (c), the prosecuting attorney shall notify the defense of any additional witnesses which the prosecution intends to call to rebut such defense within a reasonable time after their identity becomes known.

(d) Notice of Alibi.

The defense, if it intends to introduce evidence that the defendant was at a place other than the location of the offense, shall serve upon the prosecuting attorney as soon as practicable but not later than 14 days before trial a statement in writing specifying the place where he or she claims to have been and the names and addresses of the witnesses he or she will call to support the defense of alibi. Upon receiving this statement, the prosecuting attorney shall advise the defense of the names and addresses of any additional witnesses who may be called to refute such alibi as soon as practicable after their names become known. Neither the prosecuting attorney nor the defense shall be permitted at the trial to introduce evidence inconsistent with the specification, unless the court for good cause and upon just terms permits the specification to be amended. If the defense fails to make the specification required by this section, the court shall exclude evidence in his behalf that he or she was at a place other than that specified by the prosecuting attorney unless the court is satisfied upon good cause shown that such evidence should be admitted.

Part III. Regulation of Discovery

(a) Investigation Not to be Impeded.

Subject to the provisions of Parts I (d) and III (d), neither the prosecuting attorney, the defense counsel, the defendant nor other prosecution or defense personnel shall advise persons having relevant material or information (except the defendant) to refrain from discussing the case or with showing any relevant material to any party, counsel or their agent, nor shall they otherwise impede counsel's investigation of the case. The court shall determine that the parties are aware of the provision.

(b) Continuing Duty to Disclose.

If, subsequent to compliance with these standards or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, including the names and addresses of any additional witnesses who have become known or the materiality of whose testimony has become known to the district attorney after making available the written list required in part I (a)(1)(VI), he or

she shall promptly notify the other party or his or her counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

(c) Custody of Materials.

Materials furnished in discovery pursuant to this rule may only be used for purposes of preparation and trial of the case and may only be provided to others and used by them for purposes of preparation and trial of the case, and shall be subject to such other terms, conditions or restrictions as the court, statutes or rules may provide. Defense counsel is not required to provide actual copies of discovery to his or her client if defense counsel reasonably believes that it would not be in the client's interest, and other methods of having the client review discovery are available. An attorney may also use materials he or she receives in discovery for the purposes of educational presentations if all identifying information is first removed.

(d) Protective Orders.

With regard to all matters of discovery under this rule, upon a showing of cause, the court may at any time order that specified disclosures be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit the party to make beneficial use thereof.

(e) Excision.

(1) When some parts of certain material are discoverable under the provisions of these court rules, and other parts are not discoverable, the nondiscoverable material may be excised and the remainder made available in accordance with the applicable provisions of these rules.

(2) Material excised pursuant to judicial order shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(f) In Camera Proceedings.

Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or portion of such showing, to be made in camera. FOR MUNICIPAL COURTS OF RECORD, a record shall be made of such proceedings. If SUCH court enters an order granting relief following a showing in camera, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(g) Failure to Comply; Sanctions.

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a

continuance, prohibit the party from introducing in evidence the material not disclosed or enter such other order as it deems just under the circumstances.

Part IV. Procedure

(a) General Procedural Requirements.

(1) In all criminal cases, in procedures prior to trial, there may be a need for one or more of the following three stages:

(I) An exploratory stage, initiated by the parties and conducted without court supervision to implement discovery required or authorized under this rule;

(II) An omnibus stage, when ordered by the court, supervised by the trial court and court appearance required when necessary;

(III) A trial planning stage, requiring pretrial conferences when necessary.

(2) These stages shall be adapted to the needs of the particular case and may be modified or eliminated as appropriate.

(b) Setting of Omnibus Hearing.

(1) If a plea of not guilty or not guilty by reason of insanity is entered at the time the accused is arraigned, the court may set a time for and hold an omnibus hearing in all cases.

(2) In determining the date for the omnibus hearing, the court shall allow counsel sufficient time:

(I) To initiate and complete discovery required or authorized under this rule;

(II) To conduct further investigation necessary to the defendant's case;

(III) To continue plea discussion.

(3) The hearing shall be no later than 35 days after arraignment.

(c) Omnibus Hearing.

(1) If an omnibus hearing is held, the court on its own initiative, utilizing an appropriate checklist form, should:

(I) Ensure that there has been compliance with the rule regarding obligations of the parties;

(II) Ascertain whether the parties have completed the discovery required in Part I (a), and if not, make orders appropriate to expedite completion;

(III) Ascertain whether there are requests for additional disclosures under Part I (d);

(IV) Make rulings on any motions or other requests then pending, and ascertain whether any additional motions or requests will be made at the hearing or continued portions thereof;

(V) Ascertain whether there are any procedural or constitutional issues which should be considered; and

(VI) Upon agreement of the parties, or upon a finding that the trial is likely to be protracted or otherwise unusually complicated, set a time for a pretrial conference.

(2) Unless the court otherwise directs, all motions and other requests prior to trial should be reserved for and presented orally or in writing at the omnibus hearing. All issues presented at the omnibus hearing may be raised without prior notice by either party or by the court. If discovery, investigation, preparation, and evidentiary hearing, or a formal presentation is necessary for a fair determination of any issue, the omnibus hearing should be continued until all matters are properly disposed of.

(3) Any pretrial motion, request, or issue which is not raised at the omnibus hearing shall be deemed waived, unless the party concerned did not have the information necessary to make the motion or request or raise the issue.

(4) Stipulations by any party or his or her counsel should be binding upon the parties at trial unless set aside or modified by the court in the interests of justice.

(5) FOR MUNICIPAL COURTS OF RECORD, a verbatim record of the omnibus hearing shall be made. This record shall include the disclosures made, all rulings and orders of the court, stipulations of the parties, and an identification of other matter determined or pending.

(d) Pretrial Conference.

(1) Whenever a trial is likely to be protracted or otherwise unusually complicated, or upon request by agreement of the parties, the trial court may (in addition to the omnibus hearing) hold one or more pretrial conferences, with trial counsel present, to consider such matters as will promote a fair and expeditious trial. Matters which might be considered include:

(I) Making stipulations as to facts about which there can be no dispute;

(II) Marking for identification various documents and other exhibits of the parties;

(III) Excerpting or highlighting exhibits;

(IV) Waivers of foundation as to such documents;

(V) Issues relating to codefendant statements;

(VI) Severance of defendants or offenses for trial;

(VII) Seating arrangements for defendants and counsel;

(VIII) Conduct of jury examination, including any issues relating to confidentiality of juror locating information;

(IX) Number and use of peremptory challenges;

(X) Procedure on objections where there are multiple counsel or defendants;

(XI) Order of presentation of evidence and arguments when there are multiple counsel or defendants;

(XII) Order of cross-examination where there are multiple defendants;

(XIII) Temporary absence of defense counsel during trial;

(XIV) Resolution of any motions or evidentiary issues in a manner least likely to inconvenience jurors to the extent possible; and

(XV) Submission of items to be included in a juror notebook.

(2) At the conclusion of the pretrial conference, a memorandum of the matters agreed upon should be signed by the parties, approved by the court, and filed. Such memorandum shall be binding upon the parties at trial, on appeal and in postconviction proceedings unless set aside or modified by the court in the interests of justice. However, admissions of fact by an accused if present should bind the accused only if included in the pretrial order and signed by the accused as well as his or her attorney.

(e) Juror Notebooks.

Juror notebooks may be available during all jury trials and deliberations to aid jurors in the performance of their duties. When juror notebooks are available, the parties shall confer about the items to be included in juror notebooks and, by the pre-trial conference or other date set by the court, shall make a joint submission to the court of items to be included in a juror notebook. The use of juror notebooks is optional in municipal courts.

Part V. Time Schedules and Discovery Procedures

(a) Mandatory Discovery.

The furnishing of the items discoverable, referred to in Part I (a), (b) and (c) and Part II (b)(1), (c) and (d) herein, is mandatory upon written request of the defendant.

(b) Time Schedule.

(1) In the event the defendant enters a plea of not guilty or not guilty by reason of insanity, or asserts the defense of impaired mental condition, the court shall set a deadline for such disclosure to the prosecuting attorney of those items referred to in Parts II (b) (1) and (c) herein, subject to objections which may be raised by the defense within that period pursuant to Part III (d) of this rule. In no case shall such disclosure be less than 7 days before trial, except for good cause shown.

(2) If either the prosecuting attorney or the defense claims that discoverable material under this rule was not furnished, was incomplete, was illegible or otherwise failed to satisfy this rule, or if claim is made that discretionary disclosures pursuant to Part I (d) should be made, the prosecuting attorney or the defense may file a motion concerning these matters and the motion shall be promptly heard by the court.

(3) For good cause, the court may, on motion of either party or its own motion, alter the time for all matters relating to discovery under this rule.

(c) Cost and Location of Discovery.

The cost of duplicating any material discoverable under this rule shall be borne by the party receiving the material, based on the actual cost of copying the same to the party furnishing the material. Copies of any discovery provided to a defendant by court appointed counsel shall be paid for by the defendant. The place of discovery and furnishing of materials shall be at the office of the party furnishing it, or at a mutually agreeable location.

(d) Compliance Certificate.

(1) When deemed necessary by the trial court, the prosecuting attorney and the defense shall furnish to the court a compliance certificate signed by all counsel listing specifically each item furnished to the other party. The court may, in its discretion, refuse to admit into evidence items not disclosed to the other party if such evidence was required to be disclosed under Parts I and II of this rule.

(2) If discoverable matters are obtained after the compliance certificate is filed, copies thereof shall be furnished forthwith to the opposing party and, upon application to the court, the court may either permit such evidence to be offered at trial or grant a continuance in its discretion.

(e) Additional Rules.

Municipal courts may make such additional orders for discretionary or mandatory discovery by the defense or by the prosecution as are consistent with these rules and with any applicable law.

[CLEAN VERSION]

Rule 216. Discovery and Inspection

Definitions.

(1) "Defense", as used in this rule, means an attorney for the defendant, or a defendant if pro se.

Part I. Disclosure to the Defense

(a) Prosecutor's Obligations.

(1) The prosecuting attorney shall make available to the defense the following material and information which is within the possession or control of the prosecuting attorney, and shall provide duplicates upon request, and concerning the pending case:

(I) Police, arrest and crime or offense reports, including statements of all witnesses;

(II) Any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons;

(III) Any books, papers, documents, photographs, videos, body camera videos, or tangible objects held as evidence in connection with the case;

(IV) Any record of prior criminal convictions of the accused, any codefendant or any person the prosecuting attorney intends to call as a witness in the case;

(V) All tapes and transcripts of any electronic surveillance (including wiretaps) of conversations involving the accused, any codefendant or witness in the case;

(VI) A written list of the names and addresses of the witnesses then known to the district attorney whom he or she intends to call at trial;

(VII) Any written or recorded statements of the accused or of a codefendant, and the substance of any oral statements made to the police or prosecution by the accused or by a codefendant, if the trial is to be a joint one.

(2) The prosecuting attorney shall disclose to the defense any material or information within his or her possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce the punishment therefor.

(3) The prosecuting attorney's obligations under this section (a) extend to material and information in the possession or control of members of his or her staff and of any others who have participated in the

investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to his or her office.

(b) Prosecutor's Performance of Obligations.

(1) The prosecuting attorney shall perform his or her obligations under subsections (a)(1)(I), (III), (VI), and with regard to written or recorded statements of the accused or a codefendant under (VII) as soon as practicable but not later than 21 days after the defendant's entry of “not guilty” plea plea or by such other time period is established by the court, the matter is set for trial and written request of the defense, except that portions of such reports claimed to be nondiscoverable may be withheld pending a determination and ruling of the court under Part III but the defense must be notified in writing that information has not been disclosed. The prosecution’s obligations does not begin until the written request by the defendant.

(2) The prosecuting attorney shall perform all other obligations under subsection (a)(1) as soon as practicable but not later than 14 days before trial, or by such date as is established by the court.

(3) The prosecuting attorney shall ensure that a flow of information is maintained between the various investigative personnel and his or her office sufficient to place within his or her possession or control all material and information relevant to the accused and the offense charged.

(4) The trial court may enter orders consistent with this rule for the time, place, and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

(c) Material Held by Other Governmental Personnel.

(1) Upon the defense's request and designation of material or information which would be discoverable if in the possession or control of the prosecuting attorney and which is in the possession or control of other governmental personnel, the prosecuting attorney shall use diligent good faith efforts to cause such material to be made available to the defense.

(2) The court shall issue suitable subpoenas or orders to cause such material to be made available to the defense, if the prosecuting attorney's efforts are unsuccessful and such material or other governmental personnel are subject to the jurisdiction of the court.

(d) Discretionary Disclosures.

(1) The court in its discretion may, upon motion, require disclosure to the defense of relevant material and information not covered by Parts I (a), (b), and (c), upon a showing by the defense that the request is reasonable.

(2) The court may deny disclosure authorized by this section if it finds that there is substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweighs any usefulness of the disclosure to the defense.

(3) Where the interests of justice would be served, the court may order the prosecution to disclose the underlying facts or data supporting the opinion in that particular case of an expert endorsed as a witness. If a report has not been prepared by that expert to aid in compliance with other discovery obligations of this rule, the court may order the party calling that expert to provide a written summary of the testimony describing the witness's opinions and the bases and reasons therefor, including results of physical or mental examination and of scientific tests, experiments, or comparisons. The intent of this section is to allow the defense sufficient meaningful information to conduct effective cross- examination under CRE 705.

(e) Matters not Subject to Disclosure.

(1) **Work Product.** Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting attorney or members of his legal staff.

(2) **Informants.** Disclosure shall not be required of an informant's identity where his or her identity is a prosecution secret and a failure to disclose will not infringe the constitutional rights of the accused. Disclosure shall not be denied hereunder of the identity of witnesses to be produced at a hearing or trial.

Part II. Disclosure to Prosecution

(a) The Person of the Accused.

(1) Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, upon request of the prosecuting attorney, the court may require the accused to give any nontestimonial identification, which is defined as including, but is not limited to, identification by fingerprints, palm prints, footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, specimens of material under fingernails, or other reasonable physical or medical examination, handwriting exemplars, voice samples, photographs, appearing in lineups, and trying on articles of clothing.

(2) Whenever the personal appearance of the accused is required for the foregoing purposes, reasonable notice of the time and place of such appearance shall be given by the prosecuting attorney to the accused and his or her counsel. Provision may be made for appearance for such purposes in an order admitting the accused to bail or providing for his or her release.

(b) Medical and Scientific Reports.

(1) Subject to constitutional limitations, the trial court may require that the prosecuting attorney be informed of and permitted to inspect and copy or photograph any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons.

(2) Subject to constitutional limitations, and where the interests of justice would be served, the court may order the defense to disclose the underlying facts or data supporting the opinion in that particular case of an expert endorsed as a witness. If a report has not been prepared by that expert to aid in compliance with other discovery obligations of this rule, the court may order the party calling that expert to provide a written summary of the testimony describing the witness's opinions and the bases and reasons therefor, including results of physical or mental examinations and of scientific tests, experiments, or comparisons. The intent of this section is to allow the prosecution sufficient meaningful information to conduct effective cross-examination under CRE 705.

(c) Nature of Defense.

Subject to constitutional limitations, the defense shall disclose to the prosecution the nature of any defense, other than alibi, which the defense intends to use at trial. The defense shall also disclose the names and addresses of persons whom the defense intends to call as witnesses at trial. At the entry of the not guilty plea, the court shall set a deadline for such disclosure. In no case shall such disclosure be less than 7 days before trial, except for good cause shown. Upon receipt of the information required by this subsection (c), the prosecuting attorney shall notify the defense of any additional witnesses which the prosecution intends to call to rebut such defense within a reasonable time after their identity becomes known.

(d) Notice of Alibi.

The defense, if it intends to introduce evidence that the defendant was at a place other than the location of the offense, shall serve upon the prosecuting attorney as soon as practicable but not later than 14 days before trial a statement in writing specifying the place where he or she claims to have been and the names and addresses of the witnesses he or she will call to support the defense of alibi. Upon receiving this statement, the prosecuting attorney shall advise the defense of the names and addresses of any additional witnesses who may be called to refute such alibi as soon as practicable after their names become known. Neither the prosecuting attorney nor the defense shall be permitted at the trial to introduce evidence inconsistent with the specification, unless the court for good cause and upon just terms permits the specification to be amended. If the defense fails to make the specification required by this section, the court shall exclude evidence in his behalf that he or she was at a place other than that specified by the prosecuting attorney unless the court is satisfied upon good cause shown that such evidence should be admitted.

Part III. Regulation of Discovery

(a) Investigation Not to be Impeded.

Subject to the provisions of Parts I (d) and III (d), neither the prosecuting attorney, the defense counsel, the defendant nor other prosecution or defense personnel shall advise persons having relevant material or information (except the defendant) to refrain from discussing the case or with showing any relevant material to any party, counsel or their agent, nor shall they otherwise impede counsel's investigation of the case. The court shall determine that the parties are aware of the provision.

(b) Continuing Duty to Disclose.

If, subsequent to compliance with these standards or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, including the names and addresses of any additional witnesses who have become known or the materiality of whose testimony has become known to the district attorney after making available the written list required in part I (a)(1)(VI), he or she shall promptly notify the other party or his or her counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

(c) Custody of Materials.

Materials furnished in discovery pursuant to this rule may only be used for purposes of preparation and trial of the case and may only be provided to others and used by them for purposes of preparation and trial of the case, and shall be subject to such other terms, conditions or restrictions as the court, statutes or rules may provide. Defense counsel is not required to provide actual copies of discovery to his or her client if defense counsel reasonably believes that it would not be in the client's interest, and other methods of having the client review discovery are available. An attorney may also use materials he or she receives in discovery for the purposes of educational presentations if all identifying information is first removed.

(d) Protective Orders.

With regard to all matters of discovery under this rule, upon a showing of cause, the court may at any time order that specified disclosures be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit the party to make beneficial use thereof.

(e) Excision.

(1) When some parts of certain material are discoverable under the provisions of these court rules, and other parts are not discoverable, the nondiscoverable material may be excised and the remainder made available in accordance with the applicable provisions of these rules.

(2) Material excised pursuant to judicial order shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(f) In Camera Proceedings.

Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or portion of such showing, to be made in camera. FOR MUNICIPAL COURTS OF RECORD, a record shall be made of such proceedings. If SUCH court enters an order granting relief following a showing in camera, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(g) Failure to Comply; Sanctions.

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed or enter such other order as it deems just under the circumstances.

Part IV. Procedure

(a) General Procedural Requirements.

(1) In all criminal cases, in procedures prior to trial, there may be a need for one or more of the following three stages:

(I) An exploratory stage, initiated by the parties and conducted without court supervision to implement discovery required or authorized under this rule;

(II) An omnibus stage, when ordered by the court, supervised by the trial court and court appearance required when necessary;

(III) A trial planning stage, requiring pretrial conferences when necessary.

(2) These stages shall be adapted to the needs of the particular case and may be modified or eliminated as appropriate.

(b) Setting of Omnibus Hearing.

(1) If a plea of not guilty or not guilty by reason of insanity is entered at the time the accused is arraigned, the court may set a time for and hold an omnibus hearing in all cases.

(2) In determining the date for the omnibus hearing, the court shall allow counsel sufficient time:

(I) To initiate and complete discovery required or authorized under this rule;

(II) To conduct further investigation necessary to the defendant's case;

(III) To continue plea discussion.

(3) The hearing shall be no later than 35 days after arraignment.

(c) Omnibus Hearing.

(1) If an omnibus hearing is held, the court on its own initiative, utilizing an appropriate checklist form, should:

(I) Ensure that there has been compliance with the rule regarding obligations of the parties;

(II) Ascertain whether the parties have completed the discovery required in Part I (a), and if not, make orders appropriate to expedite completion;

(III) Ascertain whether there are requests for additional disclosures under Part I (d);

(IV) Make rulings on any motions or other requests then pending, and ascertain whether any additional motions or requests will be made at the hearing or continued portions thereof;

(V) Ascertain whether there are any procedural or constitutional issues which should be considered; and

(VI) Upon agreement of the parties, or upon a finding that the trial is likely to be protracted or otherwise unusually complicated, set a time for a pretrial conference.

(2) Unless the court otherwise directs, all motions and other requests prior to trial should be reserved for and presented orally or in writing at the omnibus hearing. All issues presented at the omnibus hearing may be raised without prior notice by either party or by the court. If discovery, investigation, preparation, and evidentiary hearing, or a formal presentation is necessary for a fair determination of any issue, the omnibus hearing should be continued until all matters are properly disposed of.

(3) Any pretrial motion, request, or issue which is not raised at the omnibus hearing shall be deemed waived, unless the party concerned did not have the information necessary to make the motion or request or raise the issue.

(4) Stipulations by any party or his or her counsel should be binding upon the parties at trial unless set aside or modified by the court in the interests of justice.

(5) FOR MUNICIPAL COURTS OF RECORD, a verbatim record of the omnibus hearing shall be made. This record shall include the disclosures made, all rulings and orders of the court, stipulations of the parties, and an identification of other matter determined or pending.

(d) Pretrial Conference.

(1) Whenever a trial is likely to be protracted or otherwise unusually complicated, or upon request by agreement of the parties, the trial court may (in addition to the omnibus hearing) hold one or more pretrial conferences, with trial counsel present, to consider such matters as will promote a fair and expeditious trial. Matters which might be considered include:

(I) Making stipulations as to facts about which there can be no dispute;

(II) Marking for identification various documents and other exhibits of the parties;

(III) Excerpting or highlighting exhibits;

(IV) Waivers of foundation as to such documents;

(V) Issues relating to codefendant statements;

(VI) Severance of defendants or offenses for trial;

(VII) Seating arrangements for defendants and counsel;

(VIII) Conduct of jury examination, including any issues relating to confidentiality of juror locating information;

(IX) Number and use of peremptory challenges;

(X) Procedure on objections where there are multiple counsel or defendants;

(XI) Order of presentation of evidence and arguments when there are multiple counsel or defendants;

(XII) Order of cross-examination where there are multiple defendants;

(XIII) Temporary absence of defense counsel during trial;

(XIV) Resolution of any motions or evidentiary issues in a manner least likely to inconvenience jurors to the extent possible; and

(XV) Submission of items to be included in a juror notebook.

(2) At the conclusion of the pretrial conference, a memorandum of the matters agreed upon should be signed by the parties, approved by the court, and filed. Such memorandum shall be binding upon the parties at trial, on appeal and in postconviction proceedings unless set aside or modified by the court in the interests of justice. However, admissions of fact by an accused if present should bind the accused only if included in the pretrial order and signed by the accused as well as his or her attorney.

(e) Juror Notebooks.

Juror notebooks may be available during all jury trials and deliberations to aid jurors in the performance of their duties. When juror notebooks are available, the parties shall confer about the items to be included in juror notebooks and, by the pre-trial conference or other date set by the court, shall make a joint submission to the court of items to be included in a juror notebook. The use of juror notebooks is optional in municipal courts.

Part V. Time Schedules and Discovery Procedures

(a) Mandatory Discovery.

The furnishing of the items discoverable, referred to in Part I (a), (b) and (c) and Part II (b)(1), (c) and (d) herein, is mandatory upon written request of the defendant.

(b) Time Schedule.

(1) In the event the defendant enters a plea of not guilty or not guilty by reason of insanity, or asserts the defense of impaired mental condition, the court shall set a deadline for such disclosure to the prosecuting attorney of those items referred to in Parts II (b) (1) and (c) herein, subject to objections which may be raised by the defense within that period pursuant to Part III (d) of this rule. In no case shall such disclosure be less than 7 days before trial, except for good cause shown.

(2) If either the prosecuting attorney or the defense claims that discoverable material under this rule was not furnished, was incomplete, was illegible or otherwise failed to satisfy this rule, or if claim is made that discretionary disclosures pursuant to Part I (d) should be made, the prosecuting attorney or the defense may file a motion concerning these matters and the motion shall be promptly heard by the court.

(3) For good cause, the court may, on motion of either party or its own motion, alter the time for all matters relating to discovery under this rule.

(c) Cost and Location of Discovery.

The cost of duplicating any material discoverable under this rule shall be borne by the party receiving the material, based on the actual cost of copying the same to the party furnishing the material. Copies of any discovery provided to a defendant by court appointed counsel shall be paid for by the defendant. The place of discovery and furnishing of materials shall be at the office of the party furnishing it, or at a mutually agreeable location.

(d) Compliance Certificate.

(1) When deemed necessary by the trial court, the prosecuting attorney and the defense shall furnish to the court a compliance certificate signed by all counsel listing specifically each item furnished to the other party. The court may, in its discretion, refuse to admit into evidence items not disclosed to the other party if such evidence was required to be disclosed under Parts I and II of this rule.

(2) If discoverable matters are obtained after the compliance certificate is filed, copies thereof shall be furnished forthwith to the opposing party and, upon application to the court, the court may either permit such evidence to be offered at trial or grant a continuance in its discretion.

(e) Additional Rules.

Municipal courts may make such additional orders for discretionary or mandatory discovery by the defense or by the prosecution as are consistent with these rules and with any applicable law.

EXHIBIT 8

Rule 237 – Proposed Revisions
Version 5-1-19

[REDLINE VERSION]

RULE 237. APPEALS

(a) Appeals From Courts Not of Record. Appeals from courts not of record shall be in accordance with sections 13-10-116 to 13-10-125, C.R.S. Rulings on motions in such courts are not appealable.
(b) Appeals From Courts of Record. Appeals from courts of record shall be in accordance with Rule 37 and 37.1 of the Colorado Rules of Criminal Procedure.

[CLEAN VERSION]

RULE 237. APPEALS

(a) Appeals From Courts Not of Record. Appeals from courts not of record shall be in accordance with sections 13-10-116 to 13-10-125, C.R.S. Rulings on motions in such courts are not appealable.
(b) Appeals From Courts of Record. Appeals from courts of record shall be in accordance with Rule 37 and 37.1 of the Colorado Rules of Criminal Procedure.

EXHIBIT 9

Rule 243 – Proposed Revisions
Version 5-1-2019

[REDLINE VERSION]

Rule~~s~~ 242 ~~and 243.~~ No Colorado Rule~~s~~.

Rule 243. Presence of the Defendant.

(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) Continued Presence Not Required. The trial court in its discretion may complete the trial, and the defendant shall be considered to have waived his right to be present, whenever a defendant, initially present:

(1) Voluntarily absents himself after the trial has commenced, whether or not he has been informed by the court of his obligation to remain during the trial, or

(2) After being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.

(c) Presence Not Required. A defendant need not be present in the following situations:

(1) A corporation may appear by counsel for all purposes.

(2) At a conference or argument upon a question of law.

(3) At a reduction of sentence under Rule 235.

(4) Payment before appearance for traffic infractions as authorized by Rule 6 of the Colorado Rules for Traffic Infractions.

(5) At a First Hearing, as authorized by Rule 7 of the Colorado Rules for Traffic Infractions.

(d) Presence of the defendant

(1) If the maximum penalty for the offense charged is more than one year's imprisonment, the defendant must be personally present for arraignment; except that the court, for good cause shown, may accept a plea of not guilty made by an attorney representing the defendant without requiring the

defendant to be personally present. In all prosecutions for lesser offenses, the defendant may appear by his or her attorney who may enter a plea on his or her behalf. See also 16-7-202, C.R.S.

(2) If a plea of guilty or nolo contendere (no contest) is entered by counsel in the absence of the defendant, the court may command the appearance of the defendant in person for the imposition of sentence.

(e) Presence of the Defendant by Interactive Audiovisual Device.

(1) Definitions. As used in this Rule 243:

(I) "Interactive audiovisual device" means a television, telephone, or computer based audiovisual system capable of two-way transmission and of sufficient audio and/or visual quality that persons using the system can converse with each other with a minimum of disruption.

(2) A defendant may be present within the meaning of this Rule 243 by the use of an interactive audiovisual device, in lieu of the defendant's physical presence, for the following hearings:

(I) First appearances for the purpose of advisement and setting of bail, including first appearances on probation or deferred sentence revocation complaints;

(II) Further appearances for the filing of charges;

(III) Hearings to modify bail;

(IV) Entry of pleas and associated sentencing or probation violation hearings in of municipal charter and ordinance violations.

(VI) Restitution hearings;

(VII) Appeal bond hearings;

(VIII) Any hearing to which the Court authorizes after motion and due consideration consistent with this rule.

(VIII) Rule 235 hearings.

(3) Minimum standards. Every use of an interactive audiovisual device must comply with the following minimum standards in addition to those set forth in Rule 243(e)(I):

(I) If defense counsel appears, such appearance may be done by interactive audiovisual device. If defense counsel does not appear in the same location as the defendant, a separate confidential communication line, such as a phone line, shall be provided to allow for private and confidential communication between the defendant and counsel.

(II) Installation of the interactive audiovisual device in the courtroom shall be done in such a manner that members of the public are reasonably able to observe, and, where appropriate, participate in the hearing.

(4) Nothing in this rule shall require a court to use an interactive audiovisual device.

(5) In the event of inclement weather or other exceptional circumstances, which would otherwise prevent a hearing from occurring, the court may conduct the hearing by use of an interactive audiovisual procedure consistent with this rule.

[CLEAN VERSION]

Rule 242. No Colorado Rule.

Rule 243. Presence of the Defendant.

(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) Continued Presence Not Required. The trial court in its discretion may complete the trial, and the defendant shall be considered to have waived his right to be present, whenever a defendant, initially present:

(1) Voluntarily absents himself after the trial has commenced, whether or not he has been informed by the court of his obligation to remain during the trial, or

(2) After being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.

(c) Presence Not Required. A defendant need not be present in the following situations:

(1) A corporation may appear by counsel for all purposes.

(2) At a conference or argument upon a question of law.

(3) At a reduction of sentence under Rule 235.

(4) Payment before appearance for traffic infractions as authorized by Rule 6 of the Colorado Rules for Traffic Infractions.

(5) At a First Hearing, as authorized by Rule 7 of the Colorado Rules for Traffic Infractions.

(d) Presence of the defendant

(1) If the maximum penalty for the offense charged is more than one year's imprisonment, the defendant must be personally present for arraignment; except that the court, for good cause shown, may accept a plea of not guilty made by an attorney representing the defendant without requiring the defendant to be personally present. In all prosecutions for lesser offenses, the defendant may appear by his or her attorney who may enter a plea on his or her behalf. See also 16-7-202, C.R.S.

(2) If a plea of guilty or nolo contendere (no contest) is entered by counsel in the absence of the defendant, the court may command the appearance of the defendant in person for the imposition of sentence.

(3) Payment before appearance for traffic infractions as authorized by Rule 6 of the Colorado Rules for Traffic Infractions.

(e) Presence of the Defendant by Interactive Audiovisual Device.

(1) Definitions. As used in this Rule 243:

(I) "Interactive audiovisual device" means a television, telephone, or computer based audiovisual system capable of two-way transmission and of sufficient audio and/or visual quality that persons using the system can converse with each other with a minimum of disruption.

(2) A defendant may be present within the meaning of this Rule 243 by the use of an interactive audiovisual device, in lieu of the defendant's physical presence, for the following hearings:

(I) First appearances for the purpose of advisement and setting of bail, including first appearances on probation or deferred sentence revocation complaints;

(II) Further appearances for the filing of charges;

(III) Hearings to modify bail;

(IV) Entry of pleas and associated sentencing or probation violation hearings in of municipal charter and ordinance violations.

(VI) Restitution hearings;

(VII) Appeal bond hearings;

(VIII) Any hearing to which the Court authorizes after motion and due consideration consistent with this rule.

(VIII) Rule 235 hearings.

(3) Minimum standards. Every use of an interactive audiovisual device must comply with the following

minimum standards in addition to those set forth in Rule 243(e)(I):

(I) If defense counsel appears, such appearance may be done by interactive audiovisual device. If defense counsel does not appear in the same location as the defendant, a separate confidential communication line, such as a phone line, shall be provided to allow for private and confidential communication between the defendant and counsel.

(II) Installation of the interactive audiovisual device in the courtroom shall be done in such a manner that members of the public are reasonably able to observe, and, where appropriate, participate in the hearing.

(4) Nothing in this rule shall require a court to use an interactive audiovisual device.

(5) In the event of inclement weather or other exceptional circumstances, which would otherwise prevent a hearing from occurring, the court may conduct the hearing by use of an interactive audiovisual procedure consistent with this rule.

EXHIBIT 10

Rule 248 – Proposed Revision
Version 5-1-2019

Proposal 1 – Majority Proposal

[REDLINE VERSION]

Rule 248. Dismissal

…

(b) By the Court.

(1) If there is unnecessary delay in the trial of a defendant, the court may dismiss the case. If the trial of a defendant is delayed more than 91 days (13 weeks) after the ~~arraignment~~ entry of a plea of not guilty by the defendant, ~~or unless the delay is occasioned by the action or request of the defendant~~, the court shall dismiss the case and the defendant shall not thereafter be tried for the same offense; except if ~~on the day of trial set within the last 7 days of the above time limit a necessity for a continuance arises which~~ the court, in the exercise of sound judicial discretion, determines ~~would warrant an additional delay, then one continuance, not exceeding 28 days, may be allowed, after which the dismissal shall be entered as above provided if trial is not held within the additional time allowed~~ good cause exists to warrant ~~an~~ additional delay up to 91 days. The court may not dismiss the case on these grounds if the delay is occasioned by the action or request of the defendant.

(2) In computing the time within which a defendant shall be brought to trial as provided in this Rule, the following periods of time shall be excluded:

(I) The period of delay caused by an interlocutory appeal or an appeal from an order that dismisses one or more counts of a charging document prior to trial;

(II) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance;

(III) The period or delay resulting from the voluntary absence or unavailability of the defendant; however, a defendant shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained, or he resists being returned to the municipality for trial;

(IV) The period of delay caused at the instance of the defendant.

(3) If trial results in a conviction which is reversed on appeal, any new trial must be commenced within 91 days after the date of the receipt by the trial court of the mandate from the district or appellate court.

(4) If a trial results in a mistrial, any new trial must be commenced within 91 days after the date of the mistrial.

(5) If a trial date has been fixed by the court, and thereafter the defendant requests and is granted a continuance for trial, the period within which the trial shall be had is extended for an additional 91 days from the date upon which the continuance was granted.

(6) If a trial date has been fixed by the court and the defendant fails to appear to any court date after the plea of not guilty, the period in which the trial shall be had is extended for an additional 91 days from the date of the defendant's next appearance in court.

(7) If a trial date has been fixed by the court, and thereafter the prosecuting attorney requests and is granted a continuance, the time is not thereby extended within which the trial shall be had, as is provided in subsection (b)(1) of this Rule, unless the defendant in person or by his counsel in open court of record expressly agrees to the continuance. The time for trial, in the event of such agreement, is then extended by the number of days intervening between the granting of such continuance and the date to which trial is continued.

(8) To be entitled to a dismissal under this Rule, the defendant must move for dismissal prior to the commencement of his trial or the entry of a plea of guilty to the charge or an included offense. Failure so to move is a waiver of the defendant's rights under this Rule.

(9) If a trial date is offered by the court and the defendant nor his or her counsel expressly objects to the offered date as beyond the time within which the trial shall be had pursuant to this rule, then the period within which the trial shall be had is extended until such trial date and may be extended further pursuant to any other applicable provision of this Rule.

[CLEAN VERSION]

Rule 248. Dismissal

…

(b) By the Court.

(1) If there is unnecessary delay in the trial of a defendant, the court may dismiss the case. If the trial of a defendant is delayed more than 91 days (13 weeks) after the entry of a plea of not guilty by the defendant, the court shall dismiss the case and the defendant shall not thereafter be tried for the same offense; except if the court, in the exercise of sound judicial discretion, determines good cause exists to warrant additional delay up to 91 days. The court may not dismiss the case on these grounds if the delay is occasioned by the action or request of the defendant.

(2) In computing the time within which a defendant shall be brought to trial as provided in this Rule, the following periods of time shall be excluded:

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(II) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance;

(III) The period or delay resulting from the voluntary absence or unavailability of the defendant; however, a defendant shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained, or he resists being returned to the municipality for trial;

(IV) The period of delay caused at the instance of the defendant.

(3) If trial results in a conviction which is reversed on appeal, any new trial must be commenced within 91 days after the date of the receipt by the trial court of the mandate from the district or appellate court.

(4) If a trial results in a mistrial, any new trial must be commenced within 91 days after the date of the mistrial.

(5) If a trial date has been fixed by the court, and thereafter the defendant requests and is granted a continuance for trial, the period within which the trial shall be had is extended for an additional 91 days from the date upon which the continuance was granted.

(6) If a trial date has been fixed by the court and the defendant fails to appear to any court date after the plea of not guilty, the period in which the trial shall be had is extended for an additional 91 days from the date of the defendant's next appearance in court.

(7) If a trial date has been fixed by the court, and thereafter the prosecuting attorney requests and is granted a continuance, the time is not thereby extended within which the trial shall be had, as is provided in subsection (b)(1) of this Rule, unless the defendant in person or by his counsel in open court of record expressly agrees to the continuance. The time for trial, in the event of such agreement, is then extended by the number of days intervening between the granting of such continuance and the date to which trial is continued.

(8) To be entitled to a dismissal under this Rule, the defendant must move for dismissal prior to the commencement of his trial or the entry of a plea of guilty to the charge or an included offense. Failure so to move is a waiver of the defendant's rights under this Rule.

(9) If a trial date is offered by the court and the defendant nor his or her counsel expressly objects to the offered date as beyond the time within which the trial shall be had pursuant to this rule, then the period within which the trial shall be had is extended until such trial date and may be extended further pursuant to any other applicable provision of this Rule.

Proposal 2 – Alternate Proposal

Rule 248 – Alternate Proposed Revision
Version 5-1-2019

[REDLINE VERSION]

Rule 248. Dismissal

…

(b) By the Court.

(1) If there is unnecessary delay in the trial of a defendant, the court may dismiss the case. If the trial of a defendant is delayed more than ~~91~~ 182 days (~~13~~26 weeks) after the ~~arraignment~~ entry of a plea of not guilty by the defendant, ~~or unless the delay is occasioned by the action or request of the defendant~~, the court shall dismiss the case and the defendant shall not thereafter be tried for the same offense; except if ~~on the day of trial set within the last 7 days of the above time limit a necessity for a continuance arises which~~ the court, in the exercise of sound judicial discretion, determines ~~would warrant an additional delay, then one continuance, not exceeding 28 days, may be allowed, after which the dismissal shall be entered as above provided if trial is not held within the additional time allowed~~ good cause exists to warrant ~~an~~ additional delay up to 182 days. The court may not dismiss the case on these grounds if the delay is occasioned by the action or request of the defendant.

(2) In computing the time within which a defendant shall be brought to trial as provided in this Rule, the following periods of time shall be excluded:

(I) The period of delay caused by an interlocutory appeal or an appeal from an order that dismisses one or more counts of a charging document prior to trial;

(II) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance;

(III) The period or delay resulting from the voluntary absence or unavailability of the defendant; however, a defendant shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained, or he resists being returned to the municipality for trial;

(IV) The period of delay caused at the instance of the defendant.

(3) If trial results in a conviction which is reversed on appeal, any new trial must be commenced within 91 days after the date of the receipt by the trial court of the mandate from the district or appellate court.

(4) If a trial results in a mistrial, any new trial must be commenced within 182 days after the date of the mistrial.

(5) If a trial date has been fixed by the court, and thereafter the defendant requests and is granted a continuance for trial, the period within which the trial shall be had is extended for an additional 182 days from the date upon which the continuance was granted.

(6) If a trial date has been fixed by the court and the defendant fails to appear to any court date after the plea of not guilty, the period in which the trial shall be had is extended for an additional 91 days from the date of the defendant's next appearance in court.

(7) If a trial date has been fixed by the court, and thereafter the prosecuting attorney requests and is granted a continuance, the time is not thereby extended within which the trial shall be had, as is provided in subsection (b)(1) of this Rule, unless the defendant in person or by his counsel in open court of record expressly agrees to the continuance. The time for trial, in the event of such agreement, is then extended by the number of days intervening between the granting of such continuance and the date to which trial is continued.

(8) To be entitled to a dismissal under this Rule, the defendant must move for dismissal prior to the commencement of his trial or the entry of a plea of guilty to the charge or an included offense. Failure so to move is a waiver of the defendant's rights under this Rule.

(9) If a trial date is offered by the court and the defendant nor his or her counsel expressly objects to the offered date as beyond the time within which the trial shall be had pursuant to this rule, then the period within which the trial shall be had is extended until such trial date and may be extended further pursuant to any other applicable provision of this Rule.

[CLEAN VERSION]

Rule 248. Dismissal

…

(b) By the Court.

(1) If there is unnecessary delay in the trial of a defendant, the court may dismiss the case. If the trial of a defendant is delayed more than 182 days (26 weeks) after the entry of a plea of not guilty by the defendant, the court shall dismiss the case and the defendant shall not thereafter be tried for the same offense; except if the court, in the exercise of sound judicial discretion, determines good cause exists to warrant additional delay up to 182 days. The court may not dismiss the case on these grounds if the delay is occasioned by the action or request of the defendant.

(2) In computing the time within which a defendant shall be brought to trial as provided in this Rule, the following periods of time shall be excluded:

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(III) The period or delay resulting from the voluntary absence or unavailability of the defendant; however, a defendant shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained, or he resists being returned to the municipality for trial;

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(3) If trial results in a conviction which is reversed on appeal, any new trial must be commenced within 91 days after the date of the receipt by the trial court of the mandate from the district or appellate court.

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(7) If a trial date has been fixed by the court, and thereafter the prosecuting attorney requests and is granted a continuance, the time is not thereby extended within which the trial shall be had, as is provided in subsection (b)(1) of this Rule, unless the defendant in person or by his counsel in open court of record expressly agrees to the continuance. The time for trial, in the event of such agreement, is then extended by the number of days intervening between the granting of such continuance and the date to which trial is continued.

(8) To be entitled to a dismissal under this Rule, the defendant must move for dismissal prior to the commencement of his trial or the entry of a plea of guilty to the charge or an included offense. Failure so to move is a waiver of the defendant's rights under this Rule.

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[CURRENT LANGUAGE]

Rule 248. Dismissal

…

(b) By the Court. If there is unnecessary delay in the trial of a defendant, the court may dismiss the case. If the trial of a defendant is delayed more than 91 days (13 weeks) after the arraignment of the defendant, or unless the delay is occasioned by the action or request of the defendant, the court shall dismiss the case and the defendant shall not thereafter be tried for the same offense; except that if on the day of a trial set within the last 7 days of the above time limit a necessity for a continuance arises which the court in the exercise of sound judicial discretion determines would warrant an additional delay, then one continuance, not exceeding 28 days, may be allowed, after which the dismissal shall be entered as above provided if trial is not held within the additional time allowed.

Select Stakeholder Comments – Exhibits

EXHIBIT 11

From: Ann England

To: info@coloradomunicipalcourts.org

Cc: Cooke, Linda

Subject: [External] Comments about proposed municipal court rules

Date: Wednesday, January 02, 2019 9:35:18 PM

Hello Municipal Court Committee on Rule Changes:

First, I would like to express my gratitude for many of the changes that have been proposed in these changes. I am a professor at the University of Colorado, School of Law and the director of the criminal defense clinic there. Maybe more importantly my clinic has held the Boulder municipal court public defender contract for the last 13 years. I also had the honor of acting as the public defender for the City of Longmont for a few years.

Proposed Rule 212(e) - I am concerned with the 21 day deadline from the entry of plea only because in proposed Rule 216 the prosecution is not required to give discovery including body camera footage until 21 days after entry of the plea. This would be the same day that the defense is required to file motions. This will make it impossible for the defense to file anything but very stock motions. It will make it impossible for the defense to determine if there is a good faith basis to file constitutional motions regarding the stop and statements and file motions in limine. I think that there needs to be time after the prosecution's discovery deadline, especially the body camera footage, for the defense to file motions. I understand that each individual Court can modify this but this inconsistency seems like a procedural problem the Rules should avoid. What if Rule 216(b)(1) required the disclosure of the materials within 14 days of the entry of the not guilty plea. Then the 21 day deadline to file motions would allow the defense to file them 7 days after the prosecution's initial disclosure?

Proposed Rule 216. I very much appreciate the changes made to this Rule and think that they will give criminal defendants and their counsel the ability to better try cases and receive fairer outcomes. I have a few suggestions: First is to specifically add the language "body camera footage" to 1(a)(III). Although it does say videos, we see body camera footage in almost every case and this change would clarify what is meant by video. My second suggestion is listed above. I also would change the final sentence of 1(b)(1) which states, "The prosecution's obligations does not begin until the written request of the defendant". I am not sure how this would work? Why is there a difference if it is a jury trial or a court trial. In both a jury trial and court trial the defendant needs full discovery. So I would strike that last sentence or clarify it. I would also add "or by such date as is established by the court" to 1(b)(1) just so that if Court's are setting trials quickly they can issue orders that require the prosecution to move more quickly.

Proposed Rule 223 - I believe that after the final sentence "A defendant who fails to file with the court the written jury demand as provided above waives the right to a jury trial.´ that the Committee add the words "unless good cause is shown". This would allow counsel to raise issues regarding the choice of a jury trial or a court trial with the Court via written motion, as required in Rule 212 if there is in fact good cause for a defendant's failure to file a jury trial demand.

Proposed Rule 248 – I would ask that the Committee clarify what is "good cause" and add that "good cause" can only allow for one continuance by the Court. Under the State's speedy trial rules, the reasons for the additional time are very specifically defined. C.R.Crim.P, Rule 48 states, "The period of delay not exceeding six months resulting from a continuance granted at the request of the prosecuting attorney, without the consent of the defendant, if: (A) The continuance is granted because of the unavailability of evidence material to the state's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at the later date; or

(B) the continuance is granted to allow the prosecuting attorney additional time in felony cases to prepare the state's case and additional time is justified because of exceptional circumstances of the case and the court entered specific findings with respect to the justification." It seems inconsistent that under the State's rules there is a very specific and limited ability to increase speedy trial. It specifically does not authorize the extension of speedy trial because of Court congestion. The same limitations should apply to Municipal Court. If the Court does allow for such a continuance to accommodate Court congestion beyond speedy trial there should be a requirement that the Court grant the defendant a PR bond so that a defendant, who is prepared for trial does not end up sitting in jail longer due to the Court's docket.

I hope that this input is helpful in the creation of these new Rules. I look forward to them going into effect.

Regards,

Ann England
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EXHIBIT 12

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January 14, 2019

Colorado Supreme Court Civil Rules Committee
Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80202

Submitted via email to info@coloradomunicipalcourts.org

RE: Proposed revisions to Colorado Municipal Court Rules

Honorable Corrine Magid and Robert J. Frick:

Thank you for the opportunity to comment on these proposed revisions to the rules. The Office of the Municipal Public Defender for the City and County of Denver (hereinafter "OMPD") is the largest municipal defense office in Colorado. Each year we handle more than 12,000 cases involving indigent individuals accused of violating Denver municipal ordinances. We welcome the chance to present our position on these proposed changes and answer any follow questions you or the Committee may have.

OMPD Supports the Proposed Revisions to Rule 204

Extending the time within which a defendant served with a Municipal Summons and Complaint must appear from seven to fourteen days is a welcome change. A large number of individuals accused of municipal ordinance violations are indigent, transient, and without reliable transportation. Providing an additional seven days recognizes and works to accommodate the difficulties these individuals face on a daily basis. OMPD strongly supports this change.

OMPD Objects to the Proposed Revisions to Rule 212

The proposed revision "All motions shall be written unless otherwise ordered by the court" creates an additional requirement which conflicts with and could undermine the stated purpose of the Municipal Court Rules "to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay." C.M.C.R. 202.

First, this proposed revision imposes a written requirement that does not exist in the Colorado state court analog Crim.P. 12.

Second, the proposed revision could drastically and unnecessarily increase the workloads of the defense, prosecution, court staff, and judges. In Denver, jury trials are set every Tuesday, Wednesday, and Thursday. There are often between ten and twenty jury trials set per day. A large percentage of those cases are dismissed on the day of trial. Creating a requirement that all motions be in writing (unless otherwise ordered by the court) and filed within 21 days of the entry of a plea could result in a glut of pretrial Motions and Motions Hearings in cases which are ultimately dismissed.

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The requirement "Motions shall be made . . . within 21 days of the date of entry of a plea" is problematic when viewed in conjunction with the proposed revisions to C.M.C.R. 216, which requires the prosecution to provide discovery "as soon as practicable but not later than 21 days after the defendant's entry of 'not guilty' plea." Given these time frames, it is possible that a defendant may not have discovery until the day Motions are due.

OMPD respectfully suggests that the Committee eliminate the requirements that all motions be in writing and filed with 21 days of the date of entry of a plea, or alternatively, include language that allows practitioners to file motions after an established deadline for "good cause."

OMPD Supports the Proposed Revisions to Rule 216

OMPD welcomes the proposed changes to Rule 216, which acknowledge municipal defendants' constitutional rights to present a defense, confrontation, and due process of law. OMPD is confident that these revisions will work to eliminate confusion and create uniformity in discovery requirements across Colorado's various municipal courts.

Given the rise in the use of body worn cameras by law enforcement officers, and concomitant reduction in inaccurate claims by defendants and law enforcement officers, OMPD respectfully requests the Committee explicitly include body worn camera footage in Part 1,(a),(IV) of Rule 216.

OMPD Suggests Revisions to Rule 223

OMPD contends that the prerequisites to jury trial set forth in Rule 223 violate municipal defendant's fundamental constitutional rights to a jury trial. The controlling Colorado Supreme Court case, Christie v. People, overlooks the strain and unrealistic time constraints these perquisites place on defendants' fundamental right to a jury trial, which shall remain inviolate. 837 P.2d 1237 (Colo. 1992).

Many municipal defendants are advised of these prerequisites at their first in custody appearance. Notably, this appearance provides incarcerated defendants with their first opportunity to argue bond and seek release from incarceration. Contrary to Court's claim in Christie, advisement of the prerequisites does little to focus an incarcerated defendant's mind on what s/he must to preserve these rights. These defendants are primarily concerned with their release from jail, their jobs, their families, their possessions, and maintaining their residences (in the event they have one).

Municipal defendants who are able to post bond and be released must then work to keep jobs (often after missing days of work), regain their possessions (which is extremely difficult for homeless defendants), and pay their rent. Domestic violence cases with no contact orders are even more challenging where the defendant must obtain a civil assist for wallet and keys and find an entirely new place to live). In most cases, these defendant's lives are in a state of crisis, characterized by the prospect of losing their jobs, family ties, possessions, and homes. The requirement that they satisfy these prerequisites within 21 days of their first appearance is unconstitutional.

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Many out of custody municipal defendants do not have $25.00 to secure a jury trial. Denver courts do not *sua sponte* waive the fee for those individuals. To obtain a waiver of the fee, those individuals must

1. Collect written documentation required for the Application for Public Defender. §21-1-103(3), C.R.S.
2. Travel to the Lindsey Flanigan Courthouse (which for many clients, involves lengthy trips via public transit);
3. Proceed through security, (which can take up to an hour on busy court days);
4. Go the third floor, and wait in the OMPD office for administrative staff to process the application (which can take anywhere from 20 minutes to 3-4 hours).
5. Repeat the process if they do not have the requisite documentation.

Individuals who do not qualify for representation by OMPD must perform the following tasks:

1. Secure the $25 dollar fee.
2. In many instances, take a day off work.
3. Travel to Lindsey Flanigan Courthouse (via public transit or personal vehicle and pay for parking).
4. Proceed through security.
5. Wait in line at the Clerk's Office, and tender the $25 fee and written demand.

When one views these prerequisites through a procedural justice lens, it is clear that they violate municipal defendants' fundamental constitutional right to jury trials. OMPD respectfully suggests that the Committee eliminate the $25 fee (or waiver) and written demand prerequisites. Or alternatively, eliminate the requirement that defendant's complete these prerequisites within 21 days of being so advised. Doing so will ensure that individuals who wish to exercise their fundamental rights to a jury trial may do so, and that individuals who do not wish to exercise their right to a jury trial do not.

OMPD Supports the Proposed Revision to Rule 241 (No comment)

OMPD Objects to Proposed Revisions to Rule 248

The proposed revision "except if the court, in the exercise of sound judicial discretion, determines good cause exists to warrant an additional delay of up to 91 days," doubles the time within which a municipal defendant must be brought to trial without establishing any guidelines or parameters for municipal court judges.

OMPD fears without any guidance or parameters different judges will perform different analysis and make inconsistent findings as to what constitutes "good cause." This conflicts with the requirement in Rule 202 that the rules "shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay."

OMPD suggests that the Committee include the following non-exhaustive list of factors a court shall consider in determining whether good cause exists:

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- Reason for the delay. Barker v. Wingo, 407 U.S. 514 (1972).

- Whether the prosecution has exercised due diligence. See §18-1-405(6)(g)(I). C.R.S. (The continuance is granted because of the unavailability of evidence material to the state's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that this evidence will be available at the late date);

- Any prejudice to the defendant from the delay. Barker v. Wingo, 407 U.S. 514 (1972).

The addition of these factors will provide the court with guidance, ensure fairness, and eliminate unjustifiable expense and delay.

OMPD Supports the Proposed Revisions to Rule 254 (no comment).

Respectfully,

Damon Brune
Deputy Public Defender

/s/ Alice Norman
Alice Norman
Chief Public Defender

Office of the Municipal Public Defender

PREDISPOSITION MEMORANDUM

TO: Standing Committee on the Rules of Civil Procedure

FROM: Must/Shall Subcommittee

DATE: May 13, 2019

For discussion at the June 28, 2019 meeting, the subcommittee[1] respectfully submits the following report.

Recommendation

A majority of the subcommittee recommends that "shall" be replaced with "must" in most of the civil rules. This change would align with the federal rules, other Colorado rules[2], and the trend in modern usage. However, rule-by-rule examination would be advisable because not every use of "shall" connotes a mandate.

A minority of the subcommittee favors retaining "shall" and sees the majority's recommendation as a solution in search of a problem. No Colorado case has interpreted "shall" in the civil rules

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[1] Judge John Webb (Chair), Judge Karen Brody, David DeMuro, Lisa Hamilton-Fieldman, John Lebsack, David Little, Brent Owen, Stephanie Scoville, Leah A. Walker, Judge Juan Villaseñor, and Judge Christopher Zenisek.

[2] The subcommittee did not expand its view to what other states have done with their civil rules.

as meaning "may," although that interpretation has sometimes been reached in statutes. *See Danielson v. Castle Meadows, Inc.*, 791 P.2d 1106, 1113 (Colo. 1990) ("If the legislative purpose underlying the statute is not fulfilled by a permissive construction, 'may' is construed to impose the mandatory requirement associated with the word "shall.'"); *People v. Back*, 2013 COA 114, ¶ 25 (concluding that, while the generally accepted meaning of "shall" is that it is mandatory, it can also mean "should" or "may" depending on legislative intent).

Despite this disagreement within the subcommittee, everyone agreed that "shall" not be replaced with "must" on only a go forward basis and that, whether the parent committee adopts the majority or the minority view, a comment should be added explaining why the shall to must change was made (or not).[3] However, the

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[3] "The restyled rules minimize the use of inherently ambiguous words. For example, the word 'shall' can mean 'must,' 'may,' or something else, depending on context. The potential for confusion is exacerbated by the fact that 'shall' is no longer generally used in spoken or clearly written English. The restyled rules replace 'shall' with 'must,' 'may,' or 'should,' depending on which one the context and established interpretation make correct in each rule." Fed. R. Civ. P. 1 2007 advisory committee notes.

subcommittee elected not to propose language until the parent committee has made its choice.

Background

On March 26, Judge Berger terminated email voting on the C.R.C.P. 16.2(e)(10) proposal[4] after some members questioned the proposed wording and other members "raised important questions about the use of the word 'must' as opposed to 'shall' in this and other rules." He appointed a subcommittee to consider the broader issues.

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[4] As set forth in this section, it is the duty of parties to an action for decree of dissolution of marriage, legal separation, or invalidity of marriage, to provide full disclosure of all material assets and liabilities. If a disclosure contains a misstatement or omission materially affecting the division of assets or liabilities, any party may file and the court must consider and rule on a motion seeking to reallocate assets and liabilities based on such a misstatement or omission, provided that the motion is filed within 5 years of the final decree or judgment. The court must deny any such motion that is filed under this paragraph more than 5 years after the final decree or judgment. ~~If the disclosure contains misstatements or omissions, the court shall retain jurisdiction after the entry of a final decree or judgment for a period of 5 years to allocate material assets or liabilities, the omission or non-disclosure of which materially affects the division of assets and liabilities.~~ The provisions of C.R.C.P. 60 ~~shall~~ must not bar a motion by either party to allocate such assets or liabilities pursuant to this paragraph. This paragraph ~~shall~~ must not limit other remedies that may be available to a party by law.

Subcommittee Considerations

"Though 'shall' generally means 'must,' legal writers sometimes use, or misuse, 'shall' to mean 'should,' 'will,' or even 'may.'" *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 n.9 (1995). According to the Guiding Principles for Restyling the Civil Rules p. xviii[5]:

> Banish shall. The restyled civil rules, like the restyled appellate and criminal rules, use must instead of shall. Shall is notorious for its misuse and slipperiness in legal documents. No surprise, then, that the Committee changed shall to may in several instances, to should in several other instances, and to the simple present tense when the rule involves no obligation or permission (There is one form of action; this order controls the course of the action).

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5 https://www.uscourts.gov/sites/default/files/guiding_principles.pdf

Federal Position

In 2007, the federal rules of civil procedure were revised to replace "shall" with "must."[6] According to the advisory committee notes:

> The language of Rule 56 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Despite the intention that the changes be "stylistic only," the advisory committee further explained that

> Former Rule 56(c), (d), and (e) stated circumstances in which summary judgment "shall be rendered," the court "shall if practicable" ascertain facts existing without substantial controversy, and "if appropriate, shall" enter summary judgment. In each place "shall" is changed to "should." . . . . "Should" in amended Rule 56(c) recognizes that courts will seldom exercise the discretion to deny summary judgment when there is no genuine issue as to any material fact. Similarly sparing exercise of this discretion is appropriate under Rule 56(e)(2). Rule 56(d)(1), on the other hand, reflects the more open-ended discretion to decide whether it is practicable to determine what material facts are not genuinely at issue.

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[6] This change was part of a revision project that affected most of the rules.

Even so, in 2012, "shall" was restored to Fed. R. Civ. P. 56(a). According to the advisory committee notes,

> "Shall" is restored to express the direction to grant summary judgment. The word "shall" in Rule 56 acquired significance over many decades of use. Rule 56 was amended in 2007 to replace "shall" with "should" as part of the Style Project, acting under a convention that prohibited any use of "shall." Comments on proposals to amend Rule 56, as published in 2008, have shown that neither of the choices available under the Style Project conventions — "must" or "should" — is suitable in light of the case law on whether a district court has discretion to deny summary judgment when there appears to be no genuine dispute as to any material fact. Eliminating "shall" created an unacceptable risk of changing the summary-judgment standard. Restoring "shall" avoids the unintended consequences of any other word.[7]

Colorado Considerations

In 2013, the General Assembly added subsection (6.5) to section 2-4-401 defining "must" and subsection (13.7) defining "shall."[8] However, it applies to "statutes enacted on or after August

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[7] The advisory committee cited to *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), in its discussion of the return to "shall."

[8] A copy of this statute is attached.

7, 2013, but only with regard to language that appears in small capital font in the session laws."

Several subcommittee members pointed to our supreme court's preference for consistency between our civil rules and the federal rules.

> It cannot seriously be disputed that the Colorado Rules of Civil Procedure were modeled almost entirely after the corresponding federal rules, with the principal goal of establishing uniformity between state and federal judicial proceedings in this jurisdiction . . . . Beyond the convenience and practical benefits of permitting practicing attorneys to move effortlessly from one forum to another, both this court and the Supreme Court have long emphasized the undesirability of having vastly different outcomes result from nothing more than a choice of forums.

Warne v. Hall, 2016 CO 50, ¶¶ 15, 17 (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64, 77-78 (1938); *AE, Inc. v. Goodyear Tire & Rubber Co.*, 168 P.3d 507, 511 (Colo. 2007)).

Still, the minority emphasized the absence of a Colorado decision interpreting "shall" as meaning "may" in any of the civil rules. Some members in the minority believe that at least in court rules "shall" has a commonly understood meaning of something that must be done. However, the same could be said of statutes.

See, e.g., Riley v. People, 104 P.3d 218, 221 (Colo. 2004) ("There is a presumption that the word 'shall' when used in a statute is mandatory."); *People v. Dist. Court*, 713 P.2d 918, 921 (Colo. 1986) ("Moreover, this court has consistently held that the use of the word "shall" in a statute is usually deemed to involve a mandatory connotation." (citing *People v. Clark*, 654 P.2d 847 (Colo. 1982); *Swift v. Smith*, 119 Colo. 126, 201 P.2d 609 (1948))); *People v. Kazadi*, 284 P.3d 70, 78 (Colo. App. 2011) ("We apply these rules of statutory construction to the interpretation of supreme court rules."), *aff'd*, 2012 CO 73.

In any event, some members offered specific rules where "must" is not the best replacement for "shall." Rule 56 was suggested, both to conform to the federal rule and to "avoid messing with the summary judgment standard." Also, the "shall" in Rule 11(b) is considered a directive on how the court must interpret something and therefore changing to must ("Limited representation of a pro se party . . . shall [*must*] not constitute an entry of appearance[.]") could be interpreted as a directive on the attorney instead of the court. These examples show that each rule would

need to be reviewed for context to determine if changing “shall” to “must” is appropriate.

The subcommittee chair polled the Court of Appeals liaison judges on other rules. We were informed that the recently revised Rules of Probate Procedure include a global shift from “shall” to “must”; a global change has not been considered as to the Rules of Criminal Procedure; although many Rules of Appellate procedure have been revised, some rules say “shall” while others say “must”; and a global change will be considered when the Rules of Juvenile Procedure are revised in the near future.

Respectfully submitted,

/s/

John R. Webb
Subcommittee chair[9]

<u>Source Material</u>

- The US Courts provide a list of information and materials used in restyling the federal rules.

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[9] The assistance of Leah A. Walker, Reporter of Decisions for the Court of Appeals, in preparing this report is acknowledged.

https://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/style-resources.

- The Plain Writing Act of 2010 requires federal executive agencies (but not courts) to use clear and concise communication the public can understand for specified documents issued by the agency. A website set up to provide guidance in following this law, https://plainlanguage.gov/guidelines/conversational/shall-and-must/, makes three points on this issue:

  (1) Shall is "misused," "breeds litigation," and is not used in everyday speech.

  (2) Must is now extensively used (although the only other jurisdictions cited are Australia and three Canadian provinces).

  (3) "Delete every shall."

- Bryan Garner says that "shall is a chameleon-hued word" and as such should be "replace[d] with a clearer word more characteristic of American English: must, will, is, may or the phrase is entitled to."

http://www.abajournal.com/magazine/article/shall_we_abandon_shall/

MEMORANDUM

TO: Civil Rules Committee

FROM: Judge Jones

RE: Revised proposed revision to Rule 16.2(e)(10) to address the ambiguity flagged in *In re Marriage of Runge*, 2018 COA 23M, 415 P.3d 884

I proposed revisions to this rule at the last committee meeting. Several members expressed concerns regarding clarity. So I went back to the drawing board and, with input from a couple of folks, came up with the following:

> If a party believes that the disclosure contains a misstatement or omission materially affecting the division of assets or liabilities, the party may file and the court shall consider and rule on any motion seeking to reallocate assets and liabilities based on such a misstatement or omission, provided that the motion is filed within 5 years of the final decree or judgment. The court shall deny any such motion that is filed under this paragraph more than 5 years after the final decree or judgment.

Again, the intent is to make clear that a court must rule on a motion that is filed within 5 years of a final decree, but must deny such a motion that is filed more than 5 years after the final decree.

Rule 16.2. Court Facilitated Management of Domestic Relations Cases and General Provisions Governing Duty of Disclosure

(a) – (e)(9) [NO CHANGE]

(e)(10) As set forth in this section, it is the duty of parties to an action for decree of dissolution of marriage, legal separation, or invalidity of marriage, to provide full disclosure of all material assets and liabilities. If a disclosure contains a misstatement or omission materially affecting the division of assets or liabilities, any party may file and the court must consider and rule on a motion seeking to reallocate assets and liabilities based on such a misstatement or omission, provided that the motion is filed within 5 years of the final decree or judgment. The court must deny any such motion that is filed under this paragraph more than 5 years after the final decree or judgment. ~~If the disclosure contains misstatements or omissions, the court shall retain jurisdiction after the entry of a final decree or judgment for a period of 5 years to allocate material assets or liabilities, the omission or non-disclosure of which materially affects the division of assets and liabilities.~~ The provisions of C.R.C.P. 60 ~~shall~~ must not bar a motion by either party to allocate such assets or liabilities pursuant to this paragraph. This paragraph ~~shall~~ must not limit other remedies that may be available to a party by law.

(f) – (j) [NO CHANGE]

COMMITTEE COMMENT [NO CHANGE]

Rule 16.2. Court Facilitated Management of Domestic Relations Cases and General Provisions Governing Duty of Disclosure

(a) – (e)(9) [NO CHANGE]

(e)(10) As set forth in this section, it is the duty of parties to an action for decree of dissolution of marriage, legal separation, or invalidity of marriage, to provide full disclosure of all material assets and liabilities. If a disclosure contains a misstatement or omission materially affecting the division of assets or liabilities, any party may file and the court must consider and rule on a motion seeking to reallocate assets and liabilities based on such a misstatement or omission, provided that the motion is filed within 5 years of the final decree or judgment. The court must deny any such motion that is filed under this paragraph more than 5 years after the final decree or judgment. The provisions of C.R.C.P. 60 must not bar a motion by either party to allocate such assets or liabilities pursuant to this paragraph. This paragraph must not limit other remedies that may be available to a party by law.

(f) – (j) [NO CHANGE]

COMMITTEE COMMENT [NO CHANGE]

West's Colorado Revised Statutes Annotated
West's Colorado Court Rules Annotated
Rules for Magistrates
Chapter 35. Colorado Rules for Magistrates

C.R.M. Rule 1

RULE 1. SCOPE AND PURPOSE

Currentness

These rules are designed to govern the selection, assignment and conduct of magistrates in civil and criminal proceedings in the Colorado court system. Although magistrates may perform functions which judges also perform, a magistrate at all times is subject to the direction and supervision of the chief judge or presiding judge.

Credits
Amended eff. Sept. 12, 1991. Revised eff. Jan. 1, 2000.

Notes of Decisions (2)

Magistrates Rule 1, CO ST MAG Rule 1
Current with amendments received through April 15, 2019.

End of Document

West's Colorado Revised Statutes Annotated
West's Colorado Court Rules Annotated
Rules for Magistrates
Chapter 35. Colorado Rules for Magistrates

C.R.M. Rule 2

RULE 2. APPLICATION

Currentness

These rules apply to all proceedings conducted by magistrates in district courts, county courts, small claims courts, Denver Juvenile Court and Denver Probate Court, as authorized by law, except for proceedings conducted by water referees, as defined in Title 37, Article 92, C.R.S., and proceedings conducted by masters governed by C.R.C.P. 53.

Credits
Amended eff. Sept. 12, 1991. Revised eff. Jan. 1, 2000.

Notes of Decisions (1)

Magistrates Rule 2, CO ST MAG Rule 2
Current with amendments received through April 15, 2019.

End of Document

West's Colorado Revised Statutes Annotated
West's Colorado Court Rules Annotated
Rules for Magistrates
Chapter 35. Colorado Rules for Magistrates

C.R.M. Rule 3

RULE 3. DEFINITIONS

Currentness

The following definitions shall apply:

(a) Magistrate: Any person other than a judge authorized by statute or by these rules to enter orders or judgments in judicial proceedings.

(b) Chief Judge: The chief judge of a judicial district.

(c) Presiding Judge: The presiding judge of the Denver Juvenile Court, the Denver Probate Court, or the Denver County Court.

(d) Reviewing Judge: A judge designated by a chief judge or a presiding judge to review the orders or judgments of magistrates in proceedings to which the Rules for Magistrates apply.

(e) Order or Judgment: All rulings, decrees or other decisions of a judge or a magistrate made in the course of judicial proceedings.

(f) Consent:

(1) Consent in District Court:

(A) For the purposes of the rules, where consent is necessary a party is deemed to have consented to a proceeding before a magistrate if:

(i) The party has affirmatively consented in writing or on the record; or

(ii) The party has been provided notice of the referral, setting, or hearing of a proceeding before a magistrate and failed to file a written objection within 14 days of such notice; or

(iii) The party failed to appear at a proceeding after having been provided notice of that proceeding.

(B) Once given, a party's consent to a magistrate in a proceeding may not be withdrawn.

(2) Consent in County Court:

(A) When the exercise of authority by a magistrate in any proceeding is statutorily conditioned upon a waiver of a party pursuant to C.R.S. section 13-6-501, such waiver shall be executed in writing or given orally in open court by the party or the party's attorney of record, and shall state specifically that the party has waived the right to proceed before a judge and shall be filed with the court.

(B) Once given, a party's consent to a magistrate in a proceeding may not be withdrawn.

(3) Consent in Small Claims Court:

(A) A party will be deemed to accept the jurisdiction of the Small Claims Court unless the party objects pursuant to C.R.S. section 13-6-405 and C.R.C.P. 511(b).

(B) Once given, a party's consent to a magistrate in a proceeding may not be withdrawn.

Credits
Amended eff. Sept. 12, 1991. Revised eff. Jan. 1, 2000. Amended eff. July 1, 2005; Jan. 1, 2012.

Magistrates Rule 3, CO ST MAG Rule 3
Current with amendments received through April 15, 2019.

End of Document

C.R.M. Rule 4

RULE 4. QUALIFICATIONS, APPOINTMENT, EVALUATION AND DISCIPLINE

Currentness

The following rules shall apply to all magistrates and proceedings before magistrates:

(a) To be appointed, a magistrate must be a licensed Colorado attorney with at least five years of experience, except in Class "C" or "D" counties the chief judge shall have the discretion to appoint a qualified licensed attorney with less than 5 years experience to perform all magistrate functions.

(b) All magistrates shall be attorneys-at-law licensed to practice law in the State of Colorado, except that in the following circumstances a magistrate need not be an attorney:

(1) A magistrate appointed to hear only Class A and Class B traffic infractions in a county court;

(2) A county court judge authorized to act as a magistrate in a small claims court;

(3) A county court judge authorized to act as a county court magistrate.

(c) All magistrates shall be appointed, evaluated, retained, discharged, and disciplined, if necessary, by the chief or presiding judge of the district, with the concurrence of the chief justice.

(d) Any person appointed pursuant to these rules as a district court, county court, probate court, juvenile court, or small claims court magistrate may, if qualified, and in the discretion of the chief or presiding judge, exercise any of the magistrate functions authorized by these rules.

Credits
Amended eff. Sept. 12, 1991. Revised eff. Jan. 1, 2000.

Magistrates Rule 4, CO ST MAG Rule 4
Current with amendments received through April 15, 2019.

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C.R.M. Rule 5

RULE 5. GENERAL PROVISIONS

Currentness

(a) An order or judgment of a magistrate in any judicial proceeding shall be effective upon the date of the order or judgment and shall remain in effect pending review by a reviewing judge unless stayed by the magistrate or by the reviewing judge. Except for correction of clerical errors pursuant to C.R.C.P. 60(a), a magistrate has no authority to consider a petition for rehearing.

(b) A magistrate may issue citations for contempt, conduct contempt proceedings, and enter orders for contempt for conduct occurring either in the presence or out of the presence of the magistrate, in any civil or criminal matter, without consent. Any order of a magistrate finding a person in contempt shall upon request be reviewed in accordance with the procedures for review set forth in rule 7 or rule 9 herein.

(c) A magistrate shall have the power to issue bench warrants for the arrest of non-appearing persons, to set bonds in connection therewith, and to conduct bond forfeiture proceedings.

(d) A magistrate shall have the power to administer oaths and affirmations to witnesses and others concerning any matter, thing, process, or proceeding, which is pending, commenced, or to be commenced before the magistrate.

(e) A magistrate shall have the power to issue all writs and orders necessary for the exercise of their jurisdiction established by statute or rule, and as provided in section 13-1-115, C.R.S.

(f) No magistrate shall have the power to decide whether a state constitutional provision, statute, municipal charter provision, or ordinance is constitutional either on its face or as applied. Questions pertaining to the constitutionality of a state constitutional provision, statute, municipal charter provision, or ordinance may, however, be raised for the first time on review of the magistrate's order or judgment.

(g) For any proceeding in which a district court magistrate may perform a function only with consent under C.R.M. 6, the notice--which must be written except to the extent given orally to parties who are present in court--shall state that all parties must consent to the function being performed by the magistrate.

(1) If the notice is given in open court, then all parties who are present and do not then object shall be deemed to have consented to the function being performed by the magistrate.

(2) Any party who is not present when the notice is given and who fails to file a written objection within 7 days of the date of written notice shall 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.

Credits

Amended eff. Jan. 1, 1991; Sept. 12, 1991; Feb. 3, 1994. Order revising rule corrected Nov. 9, 1999. Revised eff. Jan. 1, 2000. Amended eff. July 1, 2000. Corrective order eff. June 27, 2000. Amended eff. July 1, 2005; May 25, 2017, effective July 1, 2017.

Notes of Decisions (4)

Magistrates Rule 5, CO ST MAG Rule 5
Current with amendments received through April 15, 2019.

End of Document

C.R.M. Rule 6

RULE 6. FUNCTIONS OF DISTRICT COURT MAGISTRATES

Currentness

(a) Functions in Criminal Cases: A district court magistrate may perform any or all of the following functions in criminal proceedings:

(1) No consent necessary:

(A) Conduct initial appearance proceedings, including advisement of rights, admission to bail, and imposition of conditions of release pending further proceedings.

(B) Appoint attorneys for indigent defendants and approve attorney expense vouchers.

(C) Conduct bond review hearings.

(D) Conduct preliminary and dispositional hearings pursuant to C.R.S. sections 16-5-301(1) and 18-1-404(1).

(E) Schedule and conduct arraignments on indictments, informations, or complaints.

(F) Order presentence investigations.

(G) Set cases for disposition, trial, or sentencing before a district court judge.

(H) Issue arrest and search warrants, including nontestimonial identifications under Rule 41.1.

(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) Any other function authorized by statute or rule.

(2) Consent necessary:

(A) Enter pleas of guilty.

(B) Enter deferred prosecution and deferred sentence pleas.

(C) Modify the terms and conditions of probation or deferred prosecutions and deferred sentences.

(D) Impose stipulated sentences to probation in cases assigned to problem solving courts.

(b) Functions in Matters Filed Pursuant to Colorado Revised Statutes Title 14 and Title 26:

(1) No Consent Necessary

(A) A district court magistrate shall have the power to preside over all proceedings arising under Title 14, except as described in section 6(b)(2) of this Rule.

(B) A district court magistrate shall have the power to preside over all motions to modify permanent orders concerning property division, maintenance, child support or allocation of parental responsibilities, except petitions to review as defined in C.R.M. 7.

(C) A district court magistrate shall have the power to determine an order concerning child support filed pursuant to Section 26-13-101 et seq.

(D) Any other function authorized by statute.

(2) Consent Necessary: With the consent of the parties, a district court magistrate may preside over contested hearings which result in permanent orders concerning property division, maintenance, child support or allocation of parental responsibilities.

(c) Functions in Civil Cases: A district court magistrate may perform any or all of the following functions in civil proceedings:

(1) No consent necessary

(A) Conduct settlement conferences.

(B) Conduct default hearings, enter judgments pursuant to C.R.C.P. 55, and conduct post-judgment proceedings.

(C) Conduct hearings and enter orders authorizing sale, pursuant to C.R.C.P. 120.

(D) Conduct hearings as a master pursuant to C.R.C.P. 53.

(E) Hear and rule upon all motions relating to disclosure, discovery, and all C.R.C.P. 16 and 16.1 matters.

(F) Conduct proceedings involving protection orders pursuant to C.R.S. Section 13-14-101 et seq.

(G) Any other function authorized by statute.

(2) Consent Necessary: A magistrate may perform any function in a civil case except that a magistrate may not preside over jury trials.

(d) Functions in Juvenile Cases: A juvenile court magistrate shall have all of the powers and be subject to the limitations prescribed for juvenile court magistrates by the provisions of Title 19, Article 1, C.R.S. Unless otherwise set forth in Title 19, Article 1, C.R.S., consent in any juvenile matter shall be as set forth in C.R.M. 3(f)(1).

(e) Functions in Probate and Mental Health Cases:

(1) No consent necessary:

(A) Perform any or all of the duties which may be delegated to or performed by a probate registrar, magistrate, or clerk, pursuant to C.R.P.P. 4 and C.R.P.P. 5.

(B) Hear and rule upon petitions for emergency protective orders and petitions for temporary orders.

(C) Any other function authorized by statute.

(2) Consent Necessary

(A) Hear and rule upon all matters filed pursuant to C.R.S. Title 15.

(B) Hear and rule upon all matters filed pursuant to C.R.S. Title 25 and Title 27.

(f) A district court magistrate shall not perform any function for which consent is required under any provision of this Rule unless the oral or written notice complied with Rule 5(g).

Credits

Amended eff. Jan. 1, 1991; Sept. 12, 1991. Revised eff. Jan. 1, 2000. Amended eff. Nov. 6, 2003; July 1, 2005; Jan. 11, 2007; Oct. 14, 2010; May 25, 2017, effective July 1, 2017; Sept. 11, 2018.

Notes of Decisions (14)

Magistrates Rule 6, CO ST MAG Rule 6
Current with amendments received through April 15, 2019.

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C.R.M. Rule 7

RULE 7. REVIEW OF DISTRICT COURT MAGISTRATE ORDERS OR JUDGMENTS

Currentness

(a) Orders or judgments entered when consent not necessary. Magistrates shall include in any order or judgment entered in a proceeding in which consent is not necessary a written notice that the order or judgment was issued in a proceeding where no consent was necessary, and that any appeal must be taken within 21 days pursuant to Rule 7(a).

(1) Unless otherwise provided by statute, this Rule is the exclusive method to obtain review of a district court magistrate's order or judgment issued in a proceeding in which consent of the parties is not necessary.

(2) The chief judge shall designate one or more district judges to review orders or judgments of district court magistrates entered when consent is not necessary.

(3) Only a final order or judgment of a magistrate is reviewable under this Rule. A final order or judgment is that which fully resolves an issue or claim.

(4) A final order or judgment is not reviewable until it is written, dated, and signed by the magistrate. A Minute Order which is signed by a magistrate will constitute a final written order or judgment.

(5) A party may obtain review of a magistrate's final order or judgment by filing a petition to review such final order or judgment with the reviewing judge no later than 14 days subsequent to the final order or judgment if the parties are present when the magistrate's order is entered, or 21 days from the date the final order or judgment is mailed or otherwise transmitted to the parties.

(6) A request for extension of time to file a petition for review must be made to the reviewing judge within the 21 day time limit within which to file a petition for review. A motion to correct clerical errors filed with the magistrate pursuant to C.R.C.P. 60(a) does not constitute a petition for review and will not operate to extend the time for filing a petition for review.

(7) A petition for review shall state with particularity the alleged errors in the magistrate's order or judgment and may be accompanied by a memorandum brief discussing the authorities relied upon to support the petition. Copies of the petition and any supporting brief shall be served on all parties by the party seeking review. Within 14 days after being served with a petition for review, a party may file a memorandum brief in opposition.

(8) The reviewing judge shall consider the petition for review on the basis of the petition and briefs filed, together with such review of the record as is necessary. The reviewing judge also may conduct further proceedings, take additional evidence, or order a trial de novo in the district court. An order entered under 6(c)(1) which effectively ends a case shall be subject to de novo review.

(9) Findings of fact made by the magistrate may not be altered unless clearly erroneous. The failure of the petitioner to file a transcript of the proceedings before the magistrate is not grounds to deny a petition for review but, under those circumstances, the reviewing judge shall presume that the record would support the magistrate's order.

(10) The reviewing judge shall adopt, reject, or modify the initial order or judgment of the magistrate by written order, which order shall be the order or judgment of the district court.

(11) Appeal of an order or judgment of a district court magistrate may not be taken to the appellate court unless a timely petition for review has been filed and decided by a reviewing court in accordance with these Rules.

(12) If timely review in the district court is not requested, the order or judgment of the magistrate shall become the order or judgment of the district court. Appeal of such district court order or judgment to the appellate court is barred.

(b) Orders or judgments entered when consent is necessary. Any order or judgment entered with consent of the parties in a proceeding in which such consent is necessary is not subject to review under Rule 7(a), but shall be appealed pursuant to the Colorado Rules of Appellate Procedure in the same manner as an order or judgment of a district court. Magistrates shall include in any order or judgment entered in a proceeding in which consent is necessary a written notice that the order or judgment was issued with consent, and that any appeal must be taken pursuant to Rule 7(b).

Credits
Amended eff. Sept. 12, 1991. Revised eff. Jan. 1, 2000. Amended eff. July 1, 2005; Jan. 1, 2012; Dec. 31, 2013.

Notes of Decisions (18)

Magistrates Rule 7, CO ST MAG Rule 7
Current with amendments received through April 15, 2019.

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C.R.M. Rule 8

RULE 8. FUNCTIONS OF COUNTY COURT MAGISTRATES

Currentness

(a) Functions in Criminal Cases: A county court magistrate may perform any or all of the following functions in a criminal proceeding:

(1) No consent necessary:

(A) Appoint attorneys for indigent defendants and approve attorney expense vouchers.

(B) Conduct proceedings in traffic infraction matters.

(C) Conduct advisements and set bail in criminal and traffic cases.

(D) Issue mandatory protection orders pursuant to C.R. S. section 18-1-1001.

(E) Any other function authorized by statute.

(2) Consent necessary:

(A) Conduct hearings on motions, conduct trials to court, accept pleas of guilty, and impose sentences in misdemeanor, petty offense, and traffic offense matters.

(B) Conduct deferred prosecution and deferred sentence proceedings in misdemeanor, petty offense, and traffic offense matters.

(C) Conduct misdemeanor and petty offense proceedings pertaining to wildlife, parks and outdoor recreation, as defined in Title 33, C.R.S.

(D) Conduct all proceedings pertaining to recreational facilities districts, control and licensing of dogs, campfires, and general regulations, as defined in Title 29, Article 7, C.R.S. and Title 30, Article 15, C.R.S.

(b) Functions in Civil Cases: A county court magistrate may perform any or all of the following functions in a civil proceeding:

(1) No consent necessary:

(A) Conduct proceedings with regard to petitions for name change, pursuant to C.R.S. section 13-15-101.

(B) Perform the duties which a county court clerk may be authorized to perform, pursuant to C.R.S. section 13-6-212.

(C) Serve as a small claims court magistrate, pursuant to C.R.S. section 13-6-405.

(D) Conduct proceedings involving protection orders, pursuant to C.R.S. sections 13-14-101 et. seq. and conduct proceedings pursuant to C.R.C.P. 365.

(E) Any other function authorized by statute.

(2) Consent necessary:

(A) Conduct civil trials to court and hearings on motions.

(B) Conduct default hearings, enter judgments pursuant to C.R.C.P. 355, and conduct post-judgment proceedings.

Credits
Amended eff. Sept. 12, 1991. Revised eff. Jan. 1, 2000. Amended eff. July 1, 2005.

Magistrates Rule 8, CO ST MAG Rule 8
Current with amendments received through April 15, 2019.

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C.R.M. Rule 9

RULE 9. REVIEW OF COUNTY COURT AND SMALL CLAIMS COURT MAGISTRATE ORDERS OR JUDGMENTS

Currentness

(a) An order or judgment of a county or small claims court magistrate shall be the order or judgment of the county or small claims court.

(b) Any party to a proceeding before a county court magistrate shall appeal an order or judgment entered by the magistrate in that proceeding in the manner authorized by statute or rule for the appeal of orders or judgments of the county court.

(c) Any party to a proceeding before a small claims court magistrate shall appeal an order or judgment entered by the magistrate in that proceeding in the manner authorized by statute or rule for the appeal of orders or judgments of the small claims court.

Credits
Amended eff. Sept. 12, 1991; Jan. 1, 1997. Revised eff. Jan. 1, 2000.

Magistrates Rule 9, CO ST MAG Rule 9
Current with amendments received through April 15, 2019.

End of Document

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C.R.M. Rule 10

RULE 10. PREPARATION, USE, AND RETENTION OF RECORD

Currentness

(a) Record of Proceedings: Except as provided in C.R.C.P. 16.2(c)(2)(e), a verbatim record of all proceedings and trials conducted by magistrates shall be maintained by either electronic devices or by stenographic means. The magistrate shall be responsible for maintaining such record and, in the event of subsequent review, for certifying its authenticity.

(b) Use of the Record: If otherwise admissible, a certified transcript of the testimony of a witness at a trial or other proceeding before a magistrate may be admitted as evidence in a later trial or proceeding.

(c) Custody and Retention of Record: A reporter's notes or the electronic recordings of trial or other proceedings conducted by a magistrate shall be the property of the state, and shall be retained by the appropriate court for a period prescribed in the Colorado Judicial Department Records Management manual. During the period of retention, notes and recordings shall be made available to the reporter of record, or to any other reporter or person the court may designate. During the trial or the taking of other matters on the record, the notes and recordings shall be considered the property of the state, even though in custody of the reporter, judge, or clerk. After the trial and review or appeal period, the reporter shall list, date and index all notes and recordings and shall properly pack them for storage. Where no reporter is used, the clerk of the court shall perform this function. The court shall provide storage containers and space.

Credits
Amended eff. Sept. 12, 1991. Revised eff. Jan. 1, 2000. Amended eff. July 1, 2005.

Magistrates Rule 10, CO ST MAG Rule 10
Current with amendments received through April 15, 2019.

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C.R.M. Rule 11

RULE 11. TITLE OF RULES AND ABBREVIATION

Currentness

The title to these rules shall be Colorado Rules for Magistrates and may be abbreviated as C.R.M.

Credits
Amended eff. Sept. 12, 1991. Revised eff. Jan. 1, 2000.

Magistrates Rule 11, CO ST MAG Rule 11
Current with amendments received through April 15, 2019.

End of Document

michaels, kathryn

From: David DeMuro <ddemuro@vaughandemuro.com>
Sent: Friday, March 8, 2019 4:05 PM
To: berger, michael
Cc: michaels, kathryn
Subject: Civil Rules Advisory Committee
Attachments: Attachment - the UUDA statute.pdf; Proposed rules on affidavits.docx

Dear Judge Berger: I request that the issue of unsworn declarations be placed on the committee's agenda for the March 29, 2019, meeting.

As you know, the issue was discussed at the last two meetings because the Uniform Unsworn Declarations Act (UUDA) took effect in Colorado on October 1, 2018. The UUDA is codified at C.R.S. § 13-27-101 et seq. A copy of the Colorado version of the UUDA is attached.

Under the UUDA, an unsworn declaration that complies with the statute may be used when the "law" requires an affidavit or other sworn declaration, with five limited exceptions. § 13-27-104(2). The term "law" is very broadly defined to include the federal and state constitutions and statutes, court rules, etc. § 13-27-102(2). The Uniform Law Commissioners have explained that this uniform statute is intended to be used in the manner that 28 U.S.C. § 1746 is used in federal courts and agencies (see, UUDA Prefatory Note). Under the uniform statute, the declarant states "under penalty of perjury under the law of Colorado" that the declaration is "true and correct," but no notarization is used or necessary. § 13-27-106. The UUDA does not bar the continued use of affidavits.

At the last meeting, I presented a report where I originally favored making no change in the rules because the statute was effectiveand required no such change. But, you suggested that it may be appropriate to make rule changes so that bench, bar and court employees are aware of the statute. I now support that position. You asked that I return at the next meeting with some proposals for the committee to consider. Therefore, I have also attached to this email three such proposals to highlight the statute: (1) Adopt a new subsection in C.R.C.P. 121 as § 1-27; (2) amend C.R.C.P. 108 on affidavits; and/or (3) amend C.R.C.P. 408 on affidavits. The committee could choose to recommend that the Colorado Supreme Court adopt one, two, all or none of these three proposals, or some modified version of them.

Please let me know if you have any questions about this.

Dave

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Proposed new rule C.R.C.P. 121, §1-27:

When any rule of civil procedure requires an affidavit or other sworn declaration, an unsworn declaration under C.R.S. § 13-27-101 et seq. may be used in its place.

Proposed amendment (underlined) to C.R.C.P. 108 on affidavits:

An affidavit may be sworn to either within or without this state before any officer authorized by law to take and certify the acknowledgement of deeds conveying lands. <u>When any rule of civil procedure requires an affidavit or other sworn declaration, an unsworn declaration under C.R.S. § 13-27-101 et seq. may be used in its place.</u>

Proposed amendment (underlined) to C.R.C.P. 408 on affidavits:

An affidavit may be sworn to either within or without this state before any officer authorized by law to take and certify the acknowledgement of deeds conveying lands. <u>When any rule of civil procedure requires an affidavit or other sworn declaration, an unsworn declaration under C.R.S. § 13-27-101 et seq. may be used in its place.</u>

of such trust records may be reproduced at any time and destroyed at any time, if done in good faith and without wrongful intent. Neither the manner in which an original is destroyed, whether voluntarily or by casualty or otherwise, nor the fact that it may have been destroyed while it was held in a custodial or fiduciary capacity shall affect the admissibility of a reproduction.

Source: L. 57: p. 367, § 1. **CRS 53:** § 52-2-4. **C.R.S. 1963:** § 52-2-4. **L. 87:** Entire section amended, p. 1577, § 16, effective July 10.

ANNOTATION

Law reviews. For article, "One Year Review of Evidence", see 35 Dicta 44 (1958).

13-26-104. Uniform construction. This article shall be so interpreted and construed as to effectuate its general purpose of making uniform the law of those states which enact it.

Source: L. 55: p. 374, § 2. **CRS 53:** § 52-2-2. **C.R.S. 1963:** § 52-2-2.

ARTICLE 27

Uniform Unsworn Declarations Act

Editor's note: This article 27 was added with relocations in 2018. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated. For a detailed comparison of this article 27, see the comparative tables located in the back of the index.

13-27-101.	Short title.	13-27-106.	Form of unsworn declaration.
13-27-102.	Definitions.	13-27-107.	Uniformity of application and construction.
13-27-103.	Applicability.	13-27-108.	Relation to "Electronic Signatures in Global and National Commerce Act".
13-27-104.	Validity of unsworn declaration.		
13-27-105.	Required medium.		

PREFATORY NOTE

Declarations of persons are routinely received in state and federal courts and agencies. Many — but not all — of the declarations are affidavits and other documents sworn to by declarants before notaries public or authorized officials.

Courts and agencies do receive unsworn declarations. Unsworn declarations may be oral or in writing. For example, they may be in the form of:

- testimony given under affirmation rather than oath. See, e.g., Fed. R. Evid. 603 ("a witness must given oath or affirmation to testify truthfully"); Ala. R. Evid. 603 ("every witness [must] declare that the witness will testify truthfully, by oath or affirmation"); Mich. R. Evid. 603 (same); Wash. R. Evid. 603 (same);
- an attested (or witnessed) will. See, e.g., Ala. Code § 43-8-131; Cal. Prob. Code § 6110; Colo. Rev. Stats. § 15-11-502; Tex. Estates Code § 251.051; Va. Code § 64.2-403;
- other unsworn declarations authorized by a state's law or rules. See, e.g., Cal. Civ. Proc. Code § 2015.5; Fla. Stat. § 92.525; Kan. Stats. § 53-601; Va. Code § 8.01-4.3;
- statements made while under a belief of impending death. See, e.g., Fed. R. Evid. 804(b)(2) (statements under belief of imminent death); Ala. R. Evid. 804(b)(2) (statement under belief of impending death); Mich. Laws 767.72 (dying declarations admissible as evidence in manslaughter cases); Ohio R. Evid. 804(b)(2) (statement under belief of impending death); or
- declarations made by an officer of the court. See, e.g., Cox v. State, 279 So. 2d 143, 144-45 (Ala. Crim. App. 1973) ("[I]t was within the judge's judicial discretion as to whether or not he would take the unsworn statement of an officer of his court as evidence.").

In 2008 the Uniform Law Commission completed work on the Uniform Unsworn Foreign Declarations Act (UUFDA), which allows for the use of unsworn declarations under penalty of perjury when made outside the United States. The UUFDA extends to state proceedings the same flexibility that federal courts have had since 1976 under 28 U.S.C. § 1746. However, 28 U.S.C. § 1746 is broader than the UUFDA in

that it also covers unsworn declarations made within the United States. Additionally, while working on the UUF DA, the ULC identified 22 states with existing laws, procedural rules or statutes having a similar effect as 28 U.S.C. § 1746. It is noted in the comments of the UUFDA that the Drafting Committee considered expanding the UUFDA to include unsworn declarations made within the United States but decided against it due to the limited charge of the Committee as well as time and enactability concerns.

Since its promulgation, the UUFDA has been adopted in over 20 states and the District of Columbia. It is under consideration in additional states. Additionally, a number of states have existing or procedural rules that permit the use of unsworn declarations made within the United States.

The Uniform Unsworn Declarations Act (UUDA) affirms the use in state legal proceedings of unsworn declarations made by declarants. Under the UUDA, if an unsworn declaration is made subject to penalties for perjury and contains the information in the model form provided in the act, then the statement may be used as an equivalent of a sworn declaration. The UUDA excludes use of unsworn declarations for depositions, oaths of office, oaths related to self-proved wills, declarations recorded under certain real estate statutes, and oaths required to be given before specified officials other than a notary.

The UUDA will extend to state proceedings the same flexibility that federal — and a number of state — courts and agencies have employed for decades. Since 1976, federal law (28 U.S.C. § 1746) has allowed an unsworn declaration to be recognized and valid as the equivalent of a sworn affidavit if it contained an affirmation substantially in the form set forth in the federal act. The courts, though, have ruled that 28 U.S.C. § 1746 is inapplicable to state court proceedings. Several states also authorize the use of unsworn declarations (e.g., Cal. Civ. Proc. Code § 2015.5; Fla. Stat. § 92.525; Kan. Stats. § 53-601), but the state procedures are not uniform.

Existing state legislation varies significantly in content, scope and form. Enactment of the UUDA harmonizes state and federal treatment of unsworn declarations. Uniformity is important because many matters as to which the use of unsworn declarations is valuable will involve more than one state or jurisdiction. Further, the UUDA will reduce aspects of confusion regarding differences in federal and state litigation practice. The act also eases some of the declarants' burdens in providing important information for state proceedings.

The Uniform Unsworn Declarations Act should be enacted in every state.

13-27-101. Short title. The short title of this article 27 is the "Uniform Unsworn Declarations Act".

Source: L. 2018: Entire article added with relocations, (SB 18-032), ch. 8, p. 154, § 9, effective October 1.

Editor's note: This section is similar to former § 12-55-301 as it existed prior to 2018.

13-27-102. Definitions. In this article 27:

(1) "Boundaries of the United States" means the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, and any territory or insular possession subject to the jurisdiction of the United States.

(2) "Law" includes the federal or a state constitution, a federal or state statute, a judicial decision or order, a rule of court, an executive order, and an administrative rule, regulation, or order.

(3) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(4) "Sign" means, with present intent to authenticate or adopt a record:

(a) To execute or adopt a tangible symbol; or

(b) To attach to or logically associate with the record an electronic symbol, sound, or process.

(5) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(6) "Sworn declaration" means a declaration in a signed record given under oath. The term includes a sworn statement, verification, certificate, and affidavit.

(7) "Unsworn declaration" means a declaration in a signed record that is not given under oath, but is given under penalty of perjury.

Source: L. 2018: Entire article added with relocations, (SB 18-032), ch. 8, p. 154, § 9, effective October 1.

Editor's note: This section is similar to former § 12-55-302 as it existed prior to 2018.

COMMENT

1. The definition of "law" is drafted in an open - ended manner to give it the widest possible application. The term is not ordinarily defined in uniform acts but in this context it is important that judges applying the act be in no doubt about its breadth. The wording is taken from the definition contained in the Revised Model State Administrative Procedure Act.

In most instances, "law" is referring to the law of the enacting state. Section 7 is the exception; in that section, "law" would address the general law on the subject of declarations because the provision encourages interpretation to achieve uniformity in the law.

2. A "record" includes information that is in intangible form (e.g., electronically stored) as well as tangible form (e.g., written on paper). It is consistent with the Uniform Electronic Transactions Act and the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7001 et seq.).

3. The definition of "sign" is broad enough to cover any writing containing a traditional signature and any record containing an electronic signature. It is consistent with the Uniform Electronic Transactions Act and the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7001 et seq.).

13-27-103. Applicability. This article 27 applies to an unsworn declaration by a declarant who at the time of making the declaration is physically located within or outside the boundaries of the United States whether or not the location is subject to the jurisdiction of the United States.

Source: L. 2018: Entire article added with relocations, (SB 18-032), ch. 8, p. 154, § 9, effective October 1.

Editor's note: This section is similar to former § 12-55-303 as it existed prior to 2018.

COMMENT

This act applies to unsworn declarations made by a declarant regardless of where the declarant was located at the time of the declaration. The declaration could have been made within the United States whether within the enacting state or in a different state (even if the location is under the control of another sovereign, such as foreign embassies or consulates or federally recognized Indian lands), or in a foreign country.

13-27-104. Validity of unsworn declaration. (1) Except as otherwise provided in subsection (2) of this section, if a law of this state requires or permits use of a sworn declaration in a court proceeding, an unsworn declaration meeting the requirements of this article 27 has the same effect as a sworn declaration.

(2) This article 27 does not apply to:

(a) A deposition;

(b) An oath of office;

(c) An oath required to be given before a specified official other than a notary public;

(d) A declaration to be recorded pursuant to article 35 of title 38 for the purposes of conveying and recording title to real property or a declaration required to be recorded for purposes of registering title to real property pursuant to article 36 of title 38; or

(e) An oath required by section 15-11-504 for a self-proved will.

Source: L. 2018: Entire article added with relocations, (SB 18-032), ch. 8, p. 154, § 9, effective October 1.

Editor's note: This section is similar to former § 12-55-304 as it existed prior to 2018.

COMMENT

Except as provided in subsection 4(b) of this section, an unsworn declaration meeting the requirements of this act may be used in a state proceeding or transaction whenever other state law authorizes the use of a sworn declaration. Thus, if other state law permits the use of an affidavit, an unsworn declaration meeting the requirements of this act would also suffice. Additionally, if other state law authorizes other substitutes for a sworn declaration, such as an affirmation, then as provided in subsection (a) of this section, an unsworn declaration meeting the requirements of this act could serve as a substitute for an affirmation. Nothing in this act affects the efficacy of sworn declarations. An unsworn declaration is an alternative to a sworn declaration. In perhaps most cases, sworn or notarized declarations may be preferred; unsworn declarations though may be used when necessary or suggested by circumstances.

The use of unsworn declarations is not limited to litigation. Unsworn declarations would be usable in civil, criminal, and regulatory proceedings and settings. However, there are certain contexts in which unsworn declarations should not be used, and these contexts are listed in subsection (b) of this section.

This act does not relieve a party from establishing the necessary foundation for the admission of an unsworn declaration. Authenticity is not addressed in this act.

The authenticity of the declaration must be established in accordance with the law of the enacting state. If authorized by the law of the enacting state, authenticity of written declarations might be established through, for example, testimony of witnesses to the declaration, handwriting experts or lay witnesses familiar with the signature of the declarant, comparison with authenticated specimens, or other recognized methods of authentication. See Fed. R. Evid. 901. Such approaches are commonly acceptable in cases involving attested wills. Although subscribing witnesses are preferred, their testimony is not necessary for authentication of the declaration if its authenticity can be established by other means. See, e.g., Fed. R. Evid. 903; Cal. Prob. Code §§ 8220 - 21, (attested wills may be proved by testimony or deposition to subscribing witness or absent a witness by proof of handwriting and affidavit of person with personal knowledge); Iowa Code § 622.24 (absent testimony of subscribing witness to attested will, execution of will may be proved by other evidence); Mass. Gen. Laws 190B § 3 - 406(a) (due execution of an attested will may be proved by evidence other than testimony of attesting witness); Mich. Comp. Laws § 700.3405(2) (authentication of attested wills by witnesses or other evidence authorized).

As noted in the Legislative Note, an enacting state should ensure that its perjury law includes unsworn declarations. For example, see Ore. Rev. Stats. § 162.065, which provides: "(1) A person commits the crime of perjury if the person makes a false sworn statement or a false unsworn declaration in regard to a material issue, knowing it to be false. (2) Perjury is a Class C felony." See also 11 Del. Code § 1224 (definition of "swears falsely" includes unsworn declarations).

13-27-105. Required medium. If a law of this state requires that a sworn declaration be presented in a particular medium, an unsworn declaration must be presented in that medium.

Source: L. 2018: Entire article added with relocations, (SB 18-032), ch. 8, p. 155, § 9, effective October 1.

Editor's note: This section is similar to former § 12-55-305 as it existed prior to 2018.

COMMENT

Courts and agencies often restrict the medium in which pleadings, motions, and other documents may be filed. This section recognizes that such a restriction is binding on a person seeking to introduce an unsworn declaration.

13-27-106. Form of unsworn declaration. An unsworn declaration under this article 27 must be in substantially the following form:

> I declare under penalty of perjury under the law of Colorado that the foregoing is true and correct.

Executed on the _____ (date) day of _____ (month), _____ (year),

at _____ (city or other location, and state or country)

_____ (printed name)

_____ (signature)

Source: L. 2018: Entire article added with relocations, (SB 18-032), ch. 8, p. 155, § 9, effective October 1.

Editor's note: This section is similar to former § 12-55-306 as it existed prior to 2018.

COMMENT

The form informs the declarant that the declaration is made under penalty of perjury, thereby reminding the declarant of the potential liability it establishes. Section 3 of this act authorizes the use of unsworn declarations regardless of where the declaration was made. The form seeks the location of the declarant at the time of making the declaration which may be helpful for authentication purposes even though location does not affect admissibility.

13-27-107. Uniformity of application and construction. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Source: L. 2018: Entire article added with relocations, (SB 18-032), ch. 8, p. 155, § 9, effective October 1.

Editor's note: This section is similar to former § 12-55-307 as it existed prior to 2018.

COMMENT

This section recites the importance of uniformity among the adopting states when applying and construing the act.

13-27-108. Relation to "Electronic Signatures in Global and National Commerce Act". This article 27 modifies, limits, and supersedes the federal "Electronic Signatures in Global and National Commerce Act", 15 U.S.C. sec. 7001, et seq., but does not modify, limit, or supersede section 101 (c) of that act, 15 U.S.C. sec. 7001 (c), or authorize electronic delivery of any of the notices described in section 103 (b) of that act, 15 U.S.C. sec. 7003 (b).

Source: L. 2018: Entire article added with relocations, (SB 18-032), ch. 8, p. 155, § 9, effective October 1.

Editor's note: This section is similar to former § 12-55-308 as it existed prior to 2018.

COMMENT

This section responds to the specific language of the Electronic Signatures in Global and National Commerce Act and is designed to avoid preemption of state law under that federal legislation.

michaels, kathryn

From: berger, michael
Sent: Monday, June 10, 2019 10:20 AM
To: michaels, kathryn
Subject: FW: Civil Cover Sheet

From: weishaupl, elizabeth
Sent: Thursday, May 30, 2019 11:25 AM
To: berger, michael <michael.berger@judicial.state.co.us>
Subject: RE: Civil Cover Sheet

Yes – just like in federal court. We have been noticing this problem more frequently this year, but I bet it's a state-wide problem.

Elizabeth A. Weishaupl
District Court Judge
Division 402
18th Judicial District
303-645-6884

From: berger, michael
Sent: Thursday, May 30, 2019 11:24 AM
To: weishaupl, elizabeth
Subject: RE: Civil Cover Sheet

Your fix makes sense to me, not only because of the problem you identify in DR cases. Like in federal court, there probably should be a general requirement to identify all related or associated cases so that district courts can manage cases effectively. Thanks for bringing this to the attention to the civil rules committee.

Michael H. Berger

From: weishaupl, elizabeth
Sent: Thursday, May 30, 2019 11:17 AM
To: berger, michael <michael.berger@judicial.state.co.us>
Subject: RE: Civil Cover Sheet

So the issue is this – we are getting more and more cases filed that are associated, but there is no way for us to know whether they are associated or not. As I said there have been a batch that came out of DR. But we also have frequent filers that file multiple law suits arising out of the same incident all over the courthouse. Also, I've had an attorney who filed one law suit within the statute of limitations and then did nothing. Just as it was about to be dismissed for failure to prosecute, he files the exact same lawsuit again, and does not tell us about the initial law suit. There is a very easy fix. On the DR cover sheet that has counsel fill out associated cases. We just add that to the civil cover sheet.

Elizabeth A. Weishaupl

District Court Judge
Division 402
18th Judicial District
303-645-6884

From: berger, michael
Sent: Thursday, May 30, 2019 11:13 AM
To: michaels, kathryn
Cc: weishaupl, elizabeth
Subject: RE: Civil Cover Sheet

Yes, let's add it to the agenda, but the agenda is becoming very large so we might have to defer discussion until our September meeting. But it certainly is worth discussing.

Michael H. Berger, Chair
Supreme Court Civil Rules Committee

From: michaels, kathryn
Sent: Thursday, May 30, 2019 10:59 AM
To: berger, michael <michael.berger@judicial.state.co.us>
Subject: FW: Civil Cover Sheet

Hi Judge Berger,

Shall I add this email below and a PDF of the form in question (JDF 601—confirmed with Judge Wieshaupl) to the June agenda?

Thank you,

Kathryn

From: weishaupl, elizabeth
Sent: Wednesday, May 29, 2019 12:06 PM
To: michaels, kathryn <kathryn.michaels@judicial.state.co.us>
Subject: Civil Cover Sheet

Kathryn – The Civil Judge's in the 18th have a question. We have noticed that there is a new tactic arising out of domestic but winding up in civil. The lawyers file a domestic action and then file a separate 120 trying to foreclose on the marital home or on other debts which the parties or the parties companies may owe – which is a violation of the protection order in the domestic case, but we don't know that a domestic case has been filed.

So our question is – how hard would it be to modify the civil cover sheet so that civil lawyers would have to list "associated cases" just like they do on the DR cover sheet?

Thanks in advance.

Elizabeth A. Weishaupl
District Court Judge
Division 402
18th Judicial District
303-645-6884

☐FORM 1.2. DISTRICT COURT CIVIL (CV) CASE COVER SHEET FOR INITIAL PLEADING OF COMPLAINT, COUNTERCLAIM, CROSS-CLAIM OR THIRD PARTY COMPLAINT AND JURY DEMAND

District Court _____ County, Colorado Court Address: _____ Plaintiff(s): v. Defendant(s):	▲ COURT USE ONLY ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number:
DISTRICT COURT CIVIL (CV) CASE COVER SHEET FOR INITIAL PLEADING OF COMPLAINT, COUNTERCLAIM, CROSS-CLAIM OR THIRD PARTY COMPLAINT AND JURY DEMAND	

1. This cover sheet shall be filed with the initial pleading of a complaint, counterclaim, cross-claim or third party complaint in every district court civil (CV) case. It shall not be filed in Domestic Relations (DR), Probate (PR), Water (CW), Juvenile (JA, JR, JD, JV), or Mental Health (MH) cases. Failure to file this cover sheet is not a jurisdictional defect in the pleading but may result in a clerk's show cause order requiring its filing.

2. Simplified Procedure under C.R.C.P. 16.1 **applies** to this case **unless** (check one box below if this party asserts that C.R.C.P. 16.1 **does not** apply):

   ☐ This is a class action, forcible entry and detainer, Rule 106, Rule 120, or other similar expedited proceeding, **or**

   ☐ This party is seeking a monetary judgment against another party for more than $100,000.00, including any penalties or punitive damages, but excluding attorney fees, interest and costs, as supported by the following certification:

   By my signature below and in compliance with C.R.C.P. 11, based upon information reasonably available to me at this time, I certify that the value of this party's claims against one of the other parties is reasonably believed to exceed $100,000."

   Or

☐ Another party has previously filed a cover sheet stating that C.R.C.P. 16.1 does not apply to this case.

3. ☐ This party makes a **Jury Demand** at this time and pays the requisite fee. See C.R.C.P. 38. (Checking this box is optional.)

Date: _____ **_____**

Signature of Party or Attorney for Party

NOTICE

This cover sheet must be served on all other parties along with the initial pleading of a complaint, counterclaim, cross-claim, or third party complaint.

michaels, kathryn

From: CPR - Court Services Helpdesk
Sent: Friday, May 24, 2019 4:00 PM
To: michaels, kathryn
Cc: faust, christina; siegfried, heather; quirova, david
Subject: FW: Service of Interrogatories

Good Afternoon Kathryn,

We had a question about JDF105 regarding pattern interrogatories for an individual and service. The form indicates the clerk will serve the document by regular mail. However, our BBP and training materials say that they shall be served by certified mail or personal service.

Two questions:

1) Is the form correct and service can be done by regular mail?
2) Should the court be serving these documents? Based on the statute it seems that the courts have the option but are not required to do service:
   369(g) Pattern Interrogatories - Use Automatically Approved. The pattern interrogatories set forth in Appendix to Chapter 25, Form Numbers 7 and 7A are approved, and as part of the judgment order, may be mailed by the clerk or served by the judgment creditor in accordance with rule 304 without any further order of court. Any proposed non-pattern interrogatory must be specifically approved by the court.

Thank you,

COURT SERVICES
Kayla Lipscomb
Court Programs Analyst II
CPR Unit | State Court Administrator's Office
Work: 720-625-5506

From: faust, christina
Sent: Friday, May 24, 2019 3:02 PM
To: CPR - Court Services Helpdesk <CPR@judicial.state.co.us>; siegfried, heather <heather.siegfried@judicial.state.co.us>
Subject: RE: Service of Interrogatories

The case number is 18CV30503 and the form is the Pattern Interrogatories by Individual. (JDF 105). The attorney had asked me why the Certificate of Service states the Court can serve them, if they cannot.

Thank you,

Christina Faust
Division Clerk for
Judge Richard T. Gurley
District Court Judge
125 North Spruce Street/PO Box 20000-5030

Grand Junction, CO 81501
970-257-3666

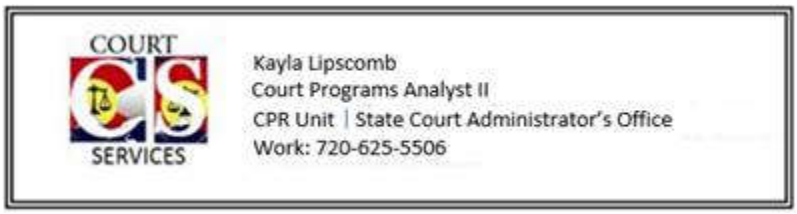
From: CPR - Court Services Helpdesk
Sent: Friday, May 24, 2019 2:49 PM
To: siegfried, heather <heather.siegfried@judicial.state.co.us>
Cc: faust, christina <christina.faust@judicial.state.co.us>
Subject: RE: Service of Interrogatories

Hi Heather,

What kind of interrogatories are you referring to? Can you send me the case number and form you are looking at?

Also, as far as serving the parties on behalf of the attorney, that is not something you should be doing. The attorney has an option in CCE to select service on the parties and pay for it through their account.

Thank you,



From: siegfried, heather
Sent: Friday, May 24, 2019 2:39 PM
To: CPR - Court Services Helpdesk <CPR@judicial.state.co.us>
Cc: faust, christina <christina.faust@judicial.state.co.us>
Subject: Service of Interrogatories

Hi.

Please confirm – based on the interrogatory forms and certificate of mailing, the clerks can send these regular mail to the party as service. Correct?
Also, under the JRM under interrogatories, it states the following:

> If the clerk does service of the Interrogatories through certified mail, the clerk shall collect the fee for the actual charge of the United States postal service for certified mail.

The Plaintiff's atty in the case has e-filed interrogatories and has requested us to serve the party and charge their account. I haven't seen this done before.

Please advise. Thank you in advance.

Heather Siegfried
Unit Supervisor
Mesa County Combined Court

County Court _____ County, Colorado Court Address: _____ Plaintiff(s)/Petitioner(s): v. Defendant(s)/Respondent(s):	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
PATTERN INTERROGATORIES UNDER C.R.C.P. 369(g) - INDIVIDUAL	

The following Pattern Interrogatories are propounded to _____ (name of Judgment Debtor) pursuant to C.R.C.P. 369(g).

Answer all of the questions and each and every part thereof fully and completely. Your answers must be filed with the Court and a copy mailed to the sender no later than 14 days after you receive them. Use a separate sheet of paper, if necessary. Do not use Post Office boxes for any address provided in your answers unless you request and receive permission from the Court.

1. State your home address, business address, home phone, business phone, and date of birth:

Home address: _____

Business address: _____

Home phone: _____ Business phone: _____

Date of Birth: _____

2. If you are employed, state the name, address, and phone number of your employer(s). If more than one employer show additional employers on a separate sheet of paper.

Name of Employer: _____ Phone Number: _____

Address: _____

3. If you have any income from any source other than your employer (for example, rental income, commissions, stock dividends, interest), state the name, address, phone number, amount of income, and dates of payment of the person or business paying you the income.

Name of Payor: _____ Phone Number: _____

Address: _____

Amount of Payments: _____ Dates of Payments: _____

Name of Payor: _____ Phone Number: _____

Address: _____

Amount of Payments: _____ Dates of Payments: _____

4. If you are not employed or have other sources of income, state all sources of money you use to pay your living expenses, including the name, address, telephone number, and amounts. Show additional sources on a separate sheet of paper, if necessary:

Name of Payor: _____ Phone Number: _____

Address: _____

Amount of Payments: $_____ Dates of Payments: _____

Name of Payor: _____ Phone Number: _____

Address: _____

Amount of Payments: $_____ Dates of Payments: _____

5. State whether you own or rent the home you live in, including the amount of rent or house payments you make:

❑Rent _____ (monthly rent payment)
❑Own _____ (monthly house payment)

Name(s) of Owner(s): _____

6. State the name, address, account number and type of account for every financial institution (bank, savings and loan, credit union, brokerage house) where you have an account or where you have signature authority on the account. Provide additional information on a separate sheet of paper, if necessary.

Name: _____

Address: _____

Type of Account: _____ Account Number (last 4-digits): _____

Name: _____

Address: _____

Type of Account: _____ Account Number (last 4-digits): _____

Name: _____

Address: _____

Type of Account: _____ Account Number (last 4-digits): _____

7. If you own or owned during the last four years, or regularly use any automobiles, motorcycles, trucks, RV's, ATV's, Jet skis, boats, or trailers, list the make, model, year, VIN, date of purchase, purchase price, name of owner if only used by you. If you no longer own the vehicle, identify date of sale, sale price, and name and address of purchaser. Provide additional information on a separate sheet of paper, if necessary.

Make: _____ Model: _____ Year: _____ VIN: _____

Purchase Date: _____Price: _____

Sale Date: _____Price: _____ Purchaser: _____

Address of Purchaser: _____

Owner if not you: _____

Make: _____ Model: _____ Year: _____ VIN: _____

Purchase Date: _____Price: _____

Sale Date: _____Price: _____ Purchaser: _____

Address of Purchaser: _____

Owner if not you: _____

8. If you own or owned during the last four years, or use any firearms, list the make, model, serial number, date of purchase, purchase price. If you no longer own the firearm, identify date of sale, sale price, and name and address of purchaser. Provide additional information on a separate sheet of paper, if necessary.

Make: _____ Model: _____ Serial Number: _____

Purchase Date: _____Price: _____

Sale Date: _____Price: _____ Purchaser: _____

Address of Purchaser: _____

Owner if not you: _____

Make: _____ Model: _____ Serial Number: _____

Purchase Date: _____Price: _____

Sale Date: _____Price: _____ Purchaser: _____

Address of Purchaser: _____

Owner if not you: _____

9. If you own or owned during the last four years, or regularly use any personal property NOT DESCRIBED ABOVE for which the purchase prices was $500.00 or more, describe each item by make, model, date of purchase, purchase price, name of owner if only used by you. If you no longer own the item, identify date of sale, sale price, and name and address of purchaser. Provide additional information on a separate sheet of paper, if necessary.

Make: _____ Model: _____ Purchase Date: _____ Price: _____

Sale Date: _____Price: _____ Purchaser: _____

Address of Purchaser: _____

Owner if not you: _____

Make: _____ Model: _____ Purchase Date: _____ Price: _____

Sale Date: _____Price: _____ Purchaser: _____

Address of Purchaser: _____

Owner if not you: _____

Make: _____ Model: _____ Purchase Date: _____ Price: _____

Sale Date: _____Price: _____ Purchaser: _____

Address of Purchaser: _____

Owner if not you: _____

10. State the name, address, and telephone number of your spouse, if you are married and if not, a close relative not living with you, indicating their relationship to you.

Name: _____ Relationship: _____

Address: _____

Phone Number: _____

11. Produce and attach to your answers, copies of the following documents for the last four years:

a. Your federal and state tax returns with all attachments.
b. The deed to or the lease for your home.
c. Your driver's license.
d. Your last pay stub from your employer(s).
e. Your last bank statement(s).

12. If you wish to propose an arrangement to pay the judgment, state the proposed terms:

_____

_____

_____

If your are self-employed, you must also answer the following questions.

13. What is the full name, address, and phone number of the business?

Name: _____ Phone Number: _____

Address: _____

14. What does your business do? _____

15. On a separate sheet of paper, list the name, address and phone number of each business customer during the past three months, including the amount and reason for any money owed, if any.

16. State the name, address, account number and type of account for every financial institution (bank, savings and loan, credit union, brokerage house) where the business has an account. Provide additional information on a separate sheet of paper, if necessary.

Name: _____

Address: _____

Type of Account: _____ Account Number (last 4-digits): _____

Name: _____

Address: _____

Type of Account: _____ Account Number (last 4-digits): _____

17. If the business owns or owned during the last four years, or regularly uses, any personal property for which it paid $500.00 or more, describe each item by make, model, date of purchase, purchase price, name of owner if only used by you. If the business no longer owns the item, identify date of sale, sale price, and name and address of purchaser. Provide additional information on a separate sheet of paper, if necessary.

Make: _____ Model: _____ Purchase Date: _____ Price: _____

Sale Date: _____Price: _____ Purchaser: _____

Address of Purchaser: _____

Owner if not you: _____

Make: _____ Model: _____ Purchase Date: _____ Price: _____

Sale Date: _____Price: _____ Purchaser: _____

Address of Purchaser: _____

Owner if not you: _____

Make: _____ Model: _____ Purchase Date: _____ Price: _____

Sale Date: _____Price: _____ Purchaser: _____

Address of Purchaser: _____

Owner if not you: _____

18. Produce and attach to your answers, copies of the following documents for the business:

a. All bank records for the past three months.
b. All payroll records for the past three months.
c. Current list of the accounts receivable.
d. Profit and Loss Statements for the current and prior year.
e. Current asset list, including the inventory.

Failure to respond fully, accurately and timely to these interrogatories could result in a citation for contempt of court.

❑ By checking this box, I am acknowledging I am filling in the blanks and not changing anything else on the form.

❑ By checking this box, I am acknowledging that I have made a change to the original content of this form.

VERIFICATION

I declare under penalty of perjury under the law of Colorado that the foregoing is true and correct.

Executed on the _____ day of _____, _____, at _____
(date) (month) (year) (city or other location, and state OR country

_____ _____
(Printed name of Judgment Debtor) Signature of Judgment Debtor

CERTIFICATE OF SERVICE BY MAILING
(To be performed by Clerk within three days of filing)

I hereby certify that on _____(date), I mailed a true and complete copy of the *PATTERN INTERROGATORIES UNDER C.R.C.P. 369(g) - INDIVIDUAL* by placing them in the United States Mail, postage pre-paid to the Defendant at the address listed below.

To: _____

_____

_____ _____
Clerk of Court/Deputy Clerk

❑ (If applicable) Plaintiff notified of non-service on _____ (date). Clerk's Initials _____

michaels, kathryn

From: botkins, jeremy
Sent: Thursday, May 16, 2019 8:55 AM
To: michaels, kathryn
Subject: Title 12 citations in the Civil Rules

Good morning Kathryn,

The governor recently signed HB19-1172, which completes the reorganization of the entirety of Title 12. The bill is effective on October 1 of this year. But numerous sections of Title 12 have been relocated over the last couple of years in preparation for this bill. For example, C.R.C.P. 103 and C.R.C.P. 403 each have multiple cites to C.R.S. 12-14-101 et seq., but those provisions were relocated in 2017. So, it may be a good idea for the Civil Rules Committee to assign someone or a subcommittee to update those references and possibly check other statutory references to ensure they are up-to-date.

Thanks!
Jeremy

The governor recently signed HB19-1172, which completes the reorganization of Title 12 of the Colorado Revised Statutes. The bill is effective on October 1 of this year. But numerous sections of Title 12 have been relocated over the past couple of years in preparation for this bill. And the Civil Rules have a number of references to statutes in Title 12. For example, C.R.C.P. 103 and C.R.C.P. 403 each have multiple citations to C.R.S. 12-14-101 et seq., but those provisions were relocated in 2017. Below of are the Title 12 references I've located in the C.R.C.P. that should be updated as a result of the Title 12 reorganization:

C.R.C.P. 103 and
C.R.C.P. 403

Section 1(k)(1)
Section 1(l)(1)
Section 2(g)(1)
Section 4(f)(1)
Section 6(a)(4)

- Reference: section 12-14-101, et seq., C.R.S.
- Replace with: section 5-16-101, et seq., C.R.S.

C.R.C.P. 509(b)(1)

- Reference: article 5 of title 12, C.R.S.
- Replace with: article 93 of title 13, C.R.S.

Rules of Procedure for Judicial Bypass of Parental Notification Requirements

- Numerous references to Title 12, Article 37.5, Part 1
- Replace with Title 13, Article 22, Part 7

michaels, kathryn

From: berger, michael
Sent: Friday, June 7, 2019 3:24 PM
To: michaels, kathryn
Subject: Fw: Proposed rule changes and additions
Attachments: proposed ccrp 412.docx; Rule 307(a).rtf; proposed amendment ccrp 341.docx

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From: Ben Vinci <ben@vincilaw.com>
Sent: Friday, June 7, 2019 2:21 PM
To: berger, michael
Subject: Proposed rule changes and additions

Judge Burger

Attached are Rule changes and additions that have been done by the County Court Civil Rules Committee. Please add these to the June agenda.

LICENSED IN COLORADO, NEBRASKA, WYOMING AND UTAH.

Ben Vinci
Vinci Law Office, LLC
Attorney at Law
2250 South Oneida St. Suite 303
Denver, Co 80224
303 872-1898
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Follow us on Facebook, LinkedIn, and Twitter!

Colorado Court Rules

Colorado Rules of Civil Procedure

Chapter 25. The Colorado Rules of County Court Civil Procedure

As amended through Rule Change 2019(9), effective April 11, 2019

Rule 307. Pleadings and Motions

(a)

Pleadings. There shall be a complaint and an answer which may or may not include a counterclaim. No other pleadings shall be allowed except by order of court or as permitted by these Rules.

(b)

Motions. Repealed.

(c)

Demurrers, Pleas, etc., Abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

(d)

Agreed Case, Procedure. Parties to a dispute which might be the subject of a civil action may, without pleadings, file, in the court which would have had jurisdiction if an action had been brought, an agreed statement of facts. The same shall be supported by an affidavit that the controversy is real and that it is filed in good faith to determine the rights of the parties. The matters shall then be deemed an action at issue and all proceedings thereafter shall be as provided by these rules.

Cite as C.R.C.P. 307

History. (b) repealed, effective April 5, 2010.

Rule 341. Dismissal of Actions.

(a)(1) Subject to the provisions of these rules, an action may be dismissed by the plaintiff upon payment of costs without order of court (i) by filing notice of dismissal at any time before filing or service by the adverse party of an answer, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court an action based on or including the same claim.

(2) By Order of Court. Except as provided in subsection (a)(1) of this Rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal.

(1) By Defendant. For failure of the plaintiff to prosecute or bring the matter to trial with due diligence, or to comply with these rules or any order of court, a defendant may move for dismissal of an action or any claim. After the completion of the plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event that the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render a judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this Rule, other than a dismissal for lack of jurisdiction or failure to file a complaint under Rule 303, operates as an adjudication upon the merits.

(2) By the Court. Actions not prosecuted or brought to trial with due diligence may, upon notice, be dismissed without prejudice unless otherwise specified by the court upon 28 days' notice in writing to all appearing parties or their counsel of record, unless a party shows cause in writing within said 28 days why the case should not be dismissed. If the case has not been set for trial, no activity of record in excess of 6 continuous months shall be deemed prima facie failure to prosecute. Failure to show cause on or before the date set forth in the court's notice shall justify dismissal without prejudice without further proceedings

(c) Dismissal of Counterclaim or Cross Claim. The provisions of this Rule apply to the dismissal of a counterclaim or cross claim, except as provided in Rule 313(e).

Rule 412. Limitation of Access to Court Files.

(a) Nature of Order. Upon motion by any party named in any civil action, the court may limit access to court cases. The order of limitation shall specify the nature of limitation, the duration of the limitation, and the reason for limitation.

(b) When Order Granted. An order limiting access shall not be granted except upon a finding that the harm to the privacy of a person in interest outweighs the public interest.

(c) Application for Order. A motion for limitation of access may be granted, ex parte, upon motion filed with the complaint, accompanied by supporting affidavit or at a hearing concerning the motion.

(d) Review by Order. Upon notice to all parties of record, and after hearing, an order limiting access may be reviewed by the court at any time on its own motion or upon the motion of any person.