

**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:

<b>Name</b>	<b>Present</b>	<b>Not Present</b>
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
<b>Non-voting Participants</b>		
Justice Richard Gabriel, Liaison	x	
Jeremy Botkins	x	

## **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 litem (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 1<sup>st</sup> 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.

#### **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.