AGENDA

COLORADO SUPREME COURT
COMMITTEE ON THE
RULES OF CIVIL PROCEDURE

Friday, May 18, 2018 1:30 p.m.
Ralph L. Carr Colorado Judicial Center
2 E.14th Ave., Denver, CO 80203
Third Floor, Court of Appeals Full Court Conference Room

I. Call to order

II. Approval of January 26, 2018 minutes [Pages 1 to 4]

III. Announcements from the Chair

A. Passing of former chair Dick Laugesen on March 13, 2018
B. C.R.C.P. 16.1—Supreme court adopted amendments recommended by the Committee, effective for cases filed on or after September 1, 2018
C. Membership changes
    i. Resignation of Jenny Moore and her appointment as the Administrator of the Office of Language Access of the Colorado Judicial Branch
        1. Reception for Jenny in Chief Justice's chambers
        2. Chairs of Supreme Court Committees took Jenny to lunch two weeks ago to thank her for her work
        3. Temporary support by Supreme Court staff attorney J.J. Wallace
    ii. District Judge Fred Gannett of the Fifth Judicial District resigned from Committee in preparation of his retirement and move to Africa
    iii. Replaced by District Judge Paul Dunkelman of the Fifth Judicial District
    iv. Skip Netzorg decided not to serve an additional term on the Committee due to other commitments

IV. Looking Forward—The Committee's Workload and possible changes to the Committee's meeting schedule

V. Present Business

A. C.R.C.P. 107—(Lisa Hamilton-Fieldman)—Status report

B. Comment to C.R.C.P. 26—(Richard Holme) [Pages 5 to 6]

C. C.R.C.P. 69—(Brent Owen)—Status report

D. C.R.C.P. 16—Suggestion regarding TMO witness list requirements—(Damon Davis)—Status Report

E. C.R.C.P. 121 § 1-26—request for amendment to signature requirements to rule—(Cheryl Layne) [Pages 7 to 10]

F. C.R.C.P. 80 & 380—(Judge Espinosa) —Update [Pages 11 to 38]

G. C.R.C.P. 16.2(e)(10)—*In re Marriage of Runge*, 2018 COA 23M (February 22, 2018)—(Judge Jones) [Pages 39 to 50]

H. C.R.C.P. 47—Alternate Jurors in Multiparty Civil Case—Possible conflict between section 13-71-142, C.R.S. 2017 and C.R.C.P. 47(b), raised by District Judge Willian Herringer—(Judge Elliff) [Pages 51 to 52]

I. C.R.C.P. 121 §1-14(1)(f)—Default Judgments—problems relating to electronic evidence of debt—email string initiated by District Judge Ed Moss and referred to Justice Gabriel—(Judge Berger) [Pages 53 to 56]

J. C.R.C.P. 106—Unintended use of rule to obtain interlocutory appeals in county court criminal cases—(Judge Jones)

VI. New Business

VII. Adjourn—**Next meeting is June 22, 2018 at 1:30 pm in 3rd Floor COA Full Court Conference Room**

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, 95683535, followed by # key.

Colorado Supreme Court Advisory Committee on the Rules of Civil Procedure
January 26, 2018 Minutes

A quorum being present, the Colorado Supreme Court Advisory Committee on Rules of Civil Procedure was called to order by Judge Michael Berger at 1:30 p.m., in the 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 (Ret.) Janice Davidson	X	
Damon Davis		X
David R. DeMuro	X	
Judge J. Eric Elliff	X	
Judge Adam Espinosa	X	
Judge Fred Gannett		X
Peter Goldstein	X	
Lisa Hamilton-Fieldman	X	X
Michael J. Hofmann	X	
Richard P. Holme	X	
Judge Jerry N. Jones	X	
Judge Thomas K. Kane	X	
Cheryl Layne	X	
John Lebsack	X	
Judge Cathy Lemon	X	
Bradley A. Levin	X	
David C. Little	X	
Chief Judge Alan Loeb	X	
Professor Christopher B. Mueller	X	
Gordon "Skip" Netzorg		X
Brent Owen	X	
John Palmeri	X	
Judge Sabino Romano	X	
Stephanie Scoville	X	
Lee N. Sternal	X	
Magistrate Marianne Tims		X
Jose L. Vasquez	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	

I. Attachments & Handouts

January 26, 2018 agenda packet

II. Announcements from the Chair

- New members, Mike Hofmann, John Palmeri, and Jeremy Botkins, introduced themselves;
- The September 29, 2017 minutes were approved as submitted; and
- Rules 120, 53, 121 § 1-15, 16 and the accompanying forms, were adopted on Dec. 7, 2017, effective as stated in the order. Rule 16.1 and JDF 601 were set for a public hearing. Judge Berger and Richard Holme will make a presentation and anyone else interested may sign up to speak with the clerk of the supreme court.

III. Business

A. C.R.C.P. 6 & 59

Judge Jones reminded the committee that this has been in front of the committee multiple times. The subcommittee has proposed changes to Rules 6(b) and 59(a), located on pages 15-16 of the agenda packet. A member asked if the court can still act on its own motion. The amendment was not intended, nor did the committee think that it in any way stifled the court's ability to act. There was a motion to adopt the subcommittee's proposed amendment to Rule 59(a) that passed 23:1. There was a motion to adopt the subcommittee's Rule 6(b) proposal that passed 23:0.

B. C.R.C.P. 107

Tabled to March 30, 2018 meeting.

C. Need for civil practitioner representation on a Public Access Committee subcommittee dealing with redaction of court filed documents

Judge Jones, chair of the Public Access Committee, said that he's looking for civil practitioners to serve on the committee. The committee is recommending a change to CJD 05-0, where attorneys would be required to redact information that shouldn't be publicly available. Currently in state courts, the clerk's office takes care of redaction. If anyone is interested, please contact Judge Jones.

D. Comment to C.R.C.P. 26

Richard Holme stated that on page 17 there is an amendment to comment 18. The amendment is to clarify that non-retained experts are testifying because of their personal involvement as treating physicians, accountants, police officers, etc. They are there because they are personally involved, not because they are not retained experts, so they shouldn't be required to submit a report unless the witness is asked to provide a different opinion or weigh-in on causation. A committee member stated that most doctors or police officers won't do this and an amendment like this may have unintended consequences. The committee discussed the change and took a straw vote on the concept of the amendment that passed 23:1. Mr. Holme will draft a final version of the comment for the committee to consider at the next meeting.

E. Memorandum and minor changes to C.R.C.P. 16, 26, and 121 § 1-15

Mr. Holme began and stated that the recommended changes came from a working group that surveyed district court judges around the state regarding the 2015 Improving Access to Justice proposal. The suggestions are marked in the Agenda Packet at pages 19-21. The committee discussed the proposed amendments, but agreed that it is too early to make any changes. They recommended district court judges keep a catalog of issues and collect more comments. The committee voted to table the issue.

F. Fixing discrepancy in existing C.R.C.P. 26 Re expert depositions

The proposed change to Rule 26 addresses whether a party has an automatic right to take the deposition of non-retained expert. There are two proposed changes on page 23 of the agenda packet; one would give parties an automatic right to depose non-retained experts and the other doesn't. The committee thought the automatic right to depose non-retained experts is the standard now, and that the committee shouldn't depart from it. There was a motion to allow the automatic right to depose non-retained and retained experts, option #2 on page 23 of the agenda packet, that passed 23:1.

G. C.R.C.P. 69

Tabled to March 30, 2018 meeting.

H. C.R.C.P. 58(a) & 79

The subcommittee reviewed the requirement that a written, signed, and dated judgment must be entered under Rule 58(a). This requirement can lead to delay and uncertainty. *See Estate of Casper v. Guarantee Tr. Life Ins. Co.*, 2016 COA 167, (*cert. granted* No. 17SC2 June 26, 2017). The subcommittee looked at various amendments, but decided there were no good alternatives. For now, the subcommittee is recommending tabling this and perhaps considering it in the future. The committee agreed.

I. Procedure for appeals from municipal courts

Judge Berger received an email from Judge Moss regarding municipal appeals; specifically, why there are no page limits on municipal court appeals. Judge Berger asked the committee if it should take up the issue. Judge Romano is in the 17th with Judge Moss, and offered to speak to Judge Moss about his concerns. The committee thought this was the best court of action and, if necessary, Judge Romano will follow-up with the committee.

J. Suggestion regarding TMO witness list requirements

Tabled to March 30, 2018 meeting.

K. C.R.C.P. 121 section 1-26; electronic signatures

Judge Berger received an email regarding C.R.C.P. 121 §1-26. Specifically, whether an original physical signature must be made and a copy maintained by the filing party, or whether the filing party need only maintain the pleading with a printout of the attorney's name, with the "/s/" symbol or an electronic signature. There was a fair amount of discussion, so the committee decided a subcommittee should be formed to study the issue.

L. C.R.C.P. 80 & 380

The subcommittee is still conferring, but they will follow-up when they have a recommendation regarding C.R.C.P. 380.

M. Judicial Department Forms

Justice Gabriel provided an update about the committee's charge regarding the Judicial Department Forms. Issues impacting all forms will be monitored and addressed by the State Court Administrator's Office. The committee or any individual is welcome to comment, but suggested changes may not be adopted.

IV. Future Meeting

March 30, 2018

The Committee adjourned at 3:20 p.m.

Respectfully submitted,
Jenny A. Moore

Proposed Revisions to C.R.C.P. 26(a)(2)(B)(II) – Comment 18.

The Civil Rules Committee proposes the insertion of some additional language in Comment [18] of C.R.C.P. 26 relating to requirements for expert disclosures for non-retained experts. The Committee has received copies of motions and orders limiting opinion testimony by treating physicians unless they have prepared full expert reports as required from retained experts. Although those motions and orders presently predate the 2015 revisions to Rule 26, they are being pressed upon some trial courts now as being good law. The argument seems to be that if an opinion goes beyond what is in the medical records (or whatever records the non-retained expert keeps), it converts the expert into a retained expert. There also seems to be an argument that if the doctor/expert forms an opinion they were not required to form as part of their job, then offering that opinion converts them into a retained expert. In other words, if a doctor has an opinion on causation formed during treatment, but did not have to form that opinion to provide treatment, then offering the opinion makes the doctor a retained expert. This same line of argument could apply to police officers, in-house accountants, auto repair mechanics or any other type of non-retained experts.

This limitation and requirement is contrary to what the Committee thinks is the clear meaning of existing Rule 26(a)(2)(B)(II) and Comments [18] and [21]. Such limitations and requirements certainly violate the intent of the Committee when it was preparing the 2015 amendments to Rule 26(a)(2)(B)(II). The Committee believes that it could be several years before an appellate case would raise this issue for a judicial determination. Because the Committee believes these rulings are so clearly contrary to the intent of the Rule, it requests the Court to amend Comment [18] to limit the mischief that could occur in the interim.

The Committee believes a modest change to Comment [18] should clarify any possible confusion. (*See* Holme, *New Pretrial Rules for Civil Cases – Part II: What is Changed*, 44 *The Colorado Lawyer*, 111, 118 (July 2015).

Proposed revisions to Comment [18] to Rule 26.

[18] Expert disclosures.

Retained experts must sign written reports much as before except with more disclosure of their fees. The option of submitting a "summary" of expert opinions is eliminated. Their testimony is limited to what is disclosed in detail in their report. Rule 26(a)(2)(B)(I).

"Other" (non-retained) experts must make disclosures that are less detailed. Many times, a lawyer has no control over a non-retained expert, such as a treating physician or police officer, and thus the option of a "statement" must be preserved with respect to this type of expert, which, if necessary, may be prepared by the lawyers. **For example, in addition to the opinions and diagnoses reflected in a plaintiff's medical records, a treating physician may have reached an opinion as to the cause of those injuries based upon treating the patient. Those opinions may not have been noted in the medical records but if sufficiently disclosed in a written report or statement as described in Comment [21], below, such opinions may be offered at trial without the witness having first prepared a full, retained expert report.** In ~~either~~ **any** event, the expert testimony is to be limited to what is disclosed in detail in the disclosure. Rule 26(a)(2)(B)(II).

wallace, jennifer

From: layne, cheryl
Sent: Tuesday, March 20, 2018 11:19 AM
To: moore, jenny
Subject: RE: docs to circulate?
Attachments: FW: civil rules committee; History of Signature Provision.pdf

Good Morning Jenny,

The committee meet on March 2, 2018 and John withdraw his previous request to change the electronic signature after reading the history. Everyone else that attended the phone conference agreed with him, that it fit. It was a short meeting. Cheryl

Cheryl A. Layne
Clerk of Court Douglas and Elbert Combined Courts
cheryl.layne@judicial.state.co.us
Douglas : **4000 Justice Way , STE 2009,Castle Rock, CO 80109**
Elbert: **PO Box 232, 751 Ute Avenue, Kiowa CO 80117**
Office: 720.437.6211 Cell: 720-480-9840

From: moore, jenny
Sent: Tuesday, March 20, 2018 11:12 AM
To: layne, cheryl
Subject: docs to circulate?

Hi Cheryl,
Is there anything you'd like circulated with the 3/30 Civil Rules Committee materials?
Thanks,
Jenny A. Moore
Rules Attorney
Colorado Supreme Court

wallace, jennifer

From: moore, jenny
Sent: Thursday, February 8, 2018 1:58 PM
To: layne, cheryl
Subject: FW: civil rules committee
Attachments: History of Signature Provision.pdf

Hi Cheryl,
Please see the attachment and the emails below.
Thanks,
Jenny

From: berger, michael
Sent: Thursday, February 08, 2018 1:56 PM
To: moore, jenny <jenny.moore@judicial.state.co.us>
Subject: FW: civil rules committee

Jenny, please forward this email and the attachment to the chair and members of the subcommittee that we appointed on this subject.

From: John Lebsack [mailto:JLebsack@wsteele.com]
Sent: Thursday, February 8, 2018 1:52 PM
To: berger, michael <michael.berger@judicial.state.co.us>
Subject: civil rules committee

Mike-
At the last meeting, I made some comments about electronic signatures. Since then, I reviewed the history of Rule 121 on that topic. Summary attached. I should have done that before I said anything. My comments were based on prior versions of the rule. The current version adequately deals with the problems I talked about at the meeting. I don't think reconsideration of the rule is needed.

John Lebsack | attorney
WHITE AND STEELE
600 17th Street, Suite 600N
Denver, Colorado 80202
Direct 303-824-4309
Main 303-296-2828
Email jlebsack@wsteele.com

History of Signature Provisions of C.R.C.P. 121, Section 1-26

Created by Rule Change 2000(5)

9. A printed copy of an E-Filed or E-Served Document with original signatures shall be maintained by the filing party and made available for inspection by other parties or the court upon request.

Amended by Rule Change 2003(8)

9. A printed copy of an E-Filed or E-Served Document with original signatures shall be maintained by the filing party and made available for inspection by other parties or the court upon request., but shall not be filed with the court. Where these rules require a party to maintain a document, affidavit or paper, the filer is required to maintain the document for a period of two years after the final resolution of the action, including the final resolution of all appeals.

Repealed and Readopted by Rule Change 2005(13)

7. Filing Party to Maintain the Signed Copy–Paper Document Not to Be Filed–Duration of Maintaining of Document: A printed or printable copy of an E-Filed or E-Served document with original or scanned signatures shall be maintained by the filing party and made available for inspection by other parties or the court upon request, but shall not be filed with the court. When these rules require a party to maintain a document, the filer is required to maintain the document for a period of two years after the final resolution of the action, including the final resolution of all appeals.

Rule Change 2012(10) [current language]

1. Definitions:

(a) through (e) [NO CHANGE]

(f) Signatures: ~~S/ Name: A symbol representing the signature of the person whose name follows the "S/" on the electronically or otherwise signed form of the E-Filed or E-Served document.~~

(I) ELECTRONIC SIGNATURE: AN ELECTRONIC SOUND, SYMBOL, OR PROCESS ATTACHED TO OR LOGICALLY ASSOCIATED WITH AN ELECTRONIC RECORD AND EXECUTED OR ADOPTED BY THE PERSON WITH THE INTENT TO SIGN THE E-FILED OR E-SERVED DOCUMENT.

(II) SCANNED SIGNATURE: A GRAPHIC IMAGE OF A HANDWRITTEN SIGNATURE.

***

7. Filing Party to Maintain the Signed Copy - Paper Document Not to Be Filed Duration of Maintaining of Document: A printed or printable copy of an E-Filed or E-Served document with original, ELECTRONIC, or scanned signatures shall be maintained by the filing party and made available for inspection by other parties or the court upon request, but shall not be filed with the court. When these rules require a party to maintain a document, the filer is required to maintain the document for a period of two years after the final resolution of the action, including the final resolution of all appeals. FOR DOMESTIC RELATIONS DECREES, SEPARATION AGREEMENTS AND PARENTING PLANS, ORIGINAL SIGNATURE PAGES BEARING THE ATTORNEYS, PARTIES', AND NOTARIES' SIGNATURES MUST BE SCANNED AND E-FILED. FOR PROBATE OF A WILL, THE ORIGINAL MUST BE LODGED WITH THE COURT.

8. Documents Requiring E-Filed Signatures: ~~For domestic relations decrees, separation agreements and parenting plans, original signature pages bearing the attorneys', parties', and notaries' signatures must be scanned and E-filed.~~ For ~~all other~~ E-Filed and E-Served documents, signatures of attorneys, parties, witnesses, notaries and notary stamps may be ~~in S/Name~~ AFFIXED ELECTRONICALLY OR DOCUMENTS WITH SIGNATURES OBTAINED ON A PAPER FORM SCANNED~~.~~ ~~typed form to satisfy signature requirements, once the necessary signatures have been obtained on a paper form of the document. For probate of a will, the original must be lodged with the court.~~

Rule Changes 2011(18), 2013(04), 2015(07)

(changes to Section 1-26 but no change to signature section)

MEMORANDUM

TO: Colorado Supreme Court Civil Rules Committee

FROM: Subcommittee on C.R.C.P. 80

DATE: May 10, 2018

RE: C.R.C.P. 80 and C.R.C.P. 380

The subcommittee on C.R.C.P. 80 was convened in 2017 to consider whether the subcommittee should recommend amending C.R.C.P. 80.[1] Specifically, the subcommittee was created to address an issue that arose in a rural jurisdiction where an attorney demanded the court appoint a court reporter in a District Court criminal trial despite the lack of court reporters in that rural area and despite the availability of other electronic recording means to keep the record. The attorney relied on the interplay between Crim. P. 55(e) and C.R.C.P. 80(a).

On September 29, 2017, the subcommittee recommended modifying C.R.C.P. 80 to update the language of the rule and to also make the requirement of the use of a court reporter discretionary with the court.[2] The Civil Rules Committee voted to repeal C.R.C.P. 80 based on the comprehensive plan for managing court reporters set forth in C.J.D. 05-03.[3] The Civil Rules Committee voted to simply include a comment after C.R.C.P. 80 indicating the rule was repealed based on C.J.D. 05-03 being more complete and comprehensive on the issue. The subcommittee was tasked with recommending language for the comment to C.R.C.P. 80. The subcommittee recommends the following comment to C.R.C.P. 80:

> 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.

Subsequently, the Civil Rules Committee requested that the subcommittee consider whether the recommendation to repeal C.R.C.P. 80 requires modification or repeal of the corresponding County Court Rule of Civil Procedure 380.[4] The subcommittee considered the recommendation to repeal C.R.C.P. 80 and the recommendation for a comment referencing C.J.D. 05-03 and the effect each might have on C.R.C.P. 380.

The subcommittee determined that C.J.D. 05-03 applies only to District Court matters. Further, the subcommittee determined that court reporters are no longer used in county courts in Colorado and that proceedings in county court are recorded electronically, which is consistent with the mandate for electronic recording in C.R.C.P. 380(a). However, the

---

[1] A copy of C.R.C.P. 80 is attached as Exhibit 1.
[2] A copy of the subcommittee's initial proposed C.R.C.P 80 is attached as Exhibit 2.
[3] A copy of C.J.D. 05-03, as amended on January 11, 2018, is attached as Exhibit 3.
[4] A copy of C.R.C.P. 380 is attached as Exhibit 4.

subcommittee recommends that the language of C.R.C.P. 380 be updated to reflect the use of electronic recording in each part of the rule. Specifically, C.R.C.P. 380(c) should be updated to remove the references to a reporter or a reporter's notes. A copy of the subcommittee's recommendation for amendment of C.R.C.P. 380(c) is attached as exhibit 5.

West's Colorado Revised Statutes Annotated
West's Colorado Court Rules Annotated
Colorado Rules of Civil Procedure
Chapter 9. Court Administration

C.R.C.P. Rule 80

RULE 80. REPORTER; STENOGRAPHIC REPORT OR TRANSCRIPT AS EVIDENCE

Currentness

(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.

Notes of Decisions (10)

Rules Civ. Proc., Rule 80, CO ST RCP Rule 80
Current with amendments received through February 1, 2018

Exhibit 1

End of Document

RULE 80. REPORTER; STENOGRAPHIC REPORT OR TRANSCRIPT AS EVIDENCE

(a) Reporter. In each judicial district, the Chief Judge, or the assigned trial judge, referee, or master in consultation with the Chief Judge, has discretion to order that testimony be recorded by a court reporter. The reporter's 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 or otherwise recorded is admissible in evidence at a later trial or hearing, it may be proved by the transcript thereof duly certified by the person who reported or transcribed 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 prescribed by supreme court directive or by the Colorado Judicial Department, Records Retention Manual. 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.

Exhibit 2

Chief Justice Directive 05-03
Amended July 2015
Amended March 2017
Amended November 2017
Amended January 2018

SUPREME COURT OF COLORADO
OFFICE OF THE CHIEF JUSTICE

Management Plan for Court Reporting and Recording Services

Background

An accurate record of all court proceedings is an essential requirement of due process of law and is required by Article VI and Article II, Section 25 of the Colorado Constitution.

This plan is adopted to promote the effective use of court reporters and electronic record operators (ERO) in the Colorado Judicial Branch and is applicable to all official court reporters, all personnel, and contract court reporters or transcribers employed by the Colorado Judicial Branch or under employment contract with the Colorado Judicial Branch. This plan does not apply to court reporters hired by a litigant to provide services as an independent contractor in a civil case unless explicitly stated.

The preferred method of making an accurate record of court proceedings is with the assistance of a realtime certified court reporter; therefore, all proceedings conducted before a district court judge may be reported by a court reporter using a stenotype machine on a "realtime" basis. An electronic record operator using digital electronic sound recording equipment can record proceedings. This provision shall in no way prohibit a judge or magistrate from operating the equipment needed to make an accurate record of any proceeding. Realtime court reporting is the standard in Colorado courts.

Pursuant to this directive, the chief judge of each judicial district shall determine which methods of recording court proceedings are to be used based upon current economic issues, availability of reporters, and other relevant factors.

I. RESPONSIBILITIES OF CHIEF JUDGE

A. Prioritization of Reported vs. Recorded Cases

Each district shall establish a case-type priority that shall be reported, if district resources permit, by court reporters.

B. Prioritization of Felony Cases

When a judicial district assigns a court reporter to report a proceeding that requires the taking of testimony in a class one or two felony case, the court reporter shall be at a minimum a Registered Professional Reporter (RPR) if an RPR certified reporter is available. Districts without an RPR court reporter should contact the State Court Administrator's Office for assistance.

C. Prioritization of Death Penalty Cases

In a death penalty case, Realtime reporting shall be used. If reasonable attempts to locate or appoint a Realtime reporter have been made without success, districts without Realtime reporting capability should contact the State Court Administrator's Office for assistance. A reporter reporting a death penalty case shall be, at a minimum, RPR certified. Should Realtime equipment failures or personnel emergencies occur, other court reporting methods may be used in extreme circumstances for the shortest amount of time possible.

Exhibit 3

D. Supervision of Court Reporters/Recorders

The chief judge is ultimately responsible for the administration of any court reporting services in her or his district as well as the timeliness of the production of transcripts whether on appeal or for other purposes. This responsibility may be delegated at the discretion of the chief judge.

1. All reporters (current and future) who are employees shall be under the direction and management of the chief judge of each district. Some of the functions assigned to the chief judge may be delegated, but the chief judge has the ultimate authority and responsibility for the supervision of court reporters and the implementation and enforcement of this plan.
2. All court reporters, except managing court reporters, shall be non-exempt from the Fair Labor Standards Act and shall provide timesheets of hours worked each workweek on a monthly basis to their supervisors.
3. The chief judge shall ensure that all judges provide court reporters regularly scheduled breaks during the workday.
4. The chief judge shall have the sole authority to assign or reassign court reporters and electronic recorder operators to courtrooms as necessary and appropriate in his or her discretion.
5. The chief judge shall have the authority to hire and designate court reporters and electronic recorder operators (including contract staff); however, each chief judge shall develop policies and procedures for hiring that include the district judges and any staff designated by the chief judge. The chief judge shall have the sole authority to reassign, correct, discipline or terminate court reporters and electronic recorder operators.
6. The chief judge shall be the ultimate supervisor of the district's managing court reporter, if appointed. The duty to supervise the district's managing court reporter may be delegated, in part, by the chief judge. The person supervising the managing court reporter shall have the following duties and may delegate these duties to the managing court reporter including but not limited to the following:
   a. Investigating complaints of improper state-paid transcript billings. All court reporters/transcribers must take necessary measures to assure that authorized transcript rates are charged and transcripts are in proper form. (See Appendix A for rates and Appendix C for information required to be included on all billings.)
   b. Monitoring the timeliness of the transcription of the record, or such parts thereof, as a judge, party or attorney may request. This applies to the transcript being prepared by a court reporter, transcriber, or outside firm preparing transcripts on behalf of the court.
   c. Monitoring transcripts produced by transcription services to assure compliance with the transcript format and fee requirements of this Chief Justice Directive (CJD) or applicable contract.
   d. Preserving the audio records (tape, digital or other electronic), court reporter transcripts or notes according to the current Colorado Judicial Department Retention and Disposition Schedules.

E. Managing Court Reporter

1. Each district with two or more court reporters shall have a managing court reporter selected in a manner designated by the chief judge, or the chief judge shall assign these duties to administrative staff.
2. Districts may elect to rotate the responsibilities of the managing court reporter among all reporters on a regular basis.
3. The managing court reporter shall be an exempt employee under the supervision of the chief judge or designee.
4. The managing court reporter shall be responsible to:
   a. Assign and reassign court reporters and EROs within the district for the purpose of distributing fairly and equitably the workload and transcript preparation of all court reporting services and transcribers, with goals of minimizing travel and assuring the lowest overall cost to the Colorado Judicial Branch and State of Colorado.
   b. Supervise the business relationship among attorneys, litigants, other parties, and court reporters/EROs/transcribers.
   c. Develop a form to monitor and keep a record of transcript orders and requests and, if necessary, tape and/or digital recording orders and requests made in district court. In larger districts this portion of the workload may be distributed between the managing court reporter and other administrative staff.
   d. Coordinate any transcript requests involving court reporters who no longer work for the Colorado Judicial Branch or work in another district.
   e. Report to the chief judge on a monthly basis any late or deficient transcripts.
   f. Maintain certification records for all court reporters within a district.
   g. Hire substitute court reporters. Court reporters may not hire substitute reporters at their own expense. The district administrator or designee at the state's expense must hire all substitutes.
   h. Generate the appellate query of late transcripts and provide a report to the chief judge or designee on a monthly basis.

F. Cross-Training and Backup

To assure that the needs of the judicial district are met, the chief judge or designee shall provide cross-training for the EROs and court reporters so that they can perform work for any division. EROs and court reporters may be assigned to cover other division work as may be necessary.

G. Grand Jury

The costs associated with providing a Court Reporter for grand jury proceedings including transcript fees shall be the responsibility of the district and shall be billed to the applicable Colorado Judicial Department accounting codes for grand jury expenses.

II. COURT REPORTER RESPONSIBILITIES

A. RPR Certification

1. All court reporters hired shall be RPR certified unless the district is unable to hire an acceptable certified reporter within three months of posting the position. If the district hires a non-certified reporter, that reporter must become RPR certified within two years of hire. Non-certified reporters may be used on a per case basis if certified reporters are not available.

2. All certified court reporters must maintain certification by completing three continuing education units (CEUs) every three years and maintaining certification status with National Court Reporters Association (NCRA).
3. Current Colorado Certified Shorthand Reporters (CSRs) must obtain RPR certification and must take the RPR certification exam at least once per year until certification is obtained.
4. Current court reporters who are uncertified will be placed on a performance plan to assist the reporter in obtaining certification and must take the RPR certification exam at least once per year until certification is obtained.
5. Failure to obtain or maintain RPR certification may be grounds for corrective or disciplinary action in accordance with the Colorado Judicial System Personnel Rules.

B. Realtime Certification

1. Realtime reporting can help to alleviate the problems of late transcripts; assist trial judges in deciding issues faster by seeing and keeping the Realtime notes for review and having text files for their use for the preparation of their orders; allow reporters to get the bulk of transcript work done as they are reporting; and enable all reporting staff to be at the same or similar level of skill. All court reporters must obtain and maintain NCRA's Registered Professional Reporter status and must attain official status as a Colorado Certified Realtime Reporter by meeting one of the following requirements by passing the:

    a. NCRA Certified Realtime Reporter (CRR) test with 96 percent accuracy; or
    b. NCRA CRR test with 94 percent accuracy (the Colorado standard); or
    c. NCRA Certified Broadcast Captioner (CBC) / Certified CART Provider (CCP) skills test with 96 percent accuracy; or
    d. NCRA CBC/CCP test with 94 percent accuracy (the Colorado standard); or
    e. Federal Certified Realtime Reporter (FCRR) test with 96 percent accuracy
    f. FCRR test with 94 percent accuracy (the Colorado standard); or
    g. Colorado Realtime Certified Reporter (CRCR) test with 96 percent accuracy; or
    h. CRCR test with 94 percent accuracy (the Colorado standard)

2. Current court reporters who do not have Realtime certification as described in II.B.1. of this CJD must apply for waiver to certification once per year. In order for waivers to be approved, the court reporter must demonstrate at least one testing attempt per year to maintain employment.
3. Failure to obtain or maintain CRR certification may be grounds for corrective or disciplinary action in accordance with the Colorado Judicial System Personnel Rules

C. Conduct of Court Reporter

1. The court reporter shall present him or herself to the judge in charge of the proceedings in accordance with the assignment made by the chief judge or designee.
2. The reporter shall observe, comply with, and be bound by all of the assigned judge's instructions in matters affecting the composition of the record, the marking of exhibits and maintenance of the evidence, the public or private nature of the proceeding, the adjournment of the proceeding to other times or places, the appropriate demeanor of the reporter, and other like matters.

3. The court reporter shall report by appropriate equipment all of the proceedings that he or she attends.
4. The court reporter shall take all the testimony, rulings, exceptions, oral instructions, and other proceedings during the trial of any cause, and in such causes as the court may designate.
5. The court reporter is not required to report or transcribe .WAV files or other audio or video recordings submitted or presented as part of the record.

D. Records to be Maintained by Court Reporters

1. In order to permit the routine audit and inspection of records, court reporters shall maintain accurate, legible, and up-to-date records of their transcript orders, invoices, and transcript payments.
2. Extension of time for transcripts must be obtained from the court pursuant to the appropriate rule. The chief judge or designee shall be advised in writing by the reporter or transcriber at any time the reporter or transcriber requests an extension of time on any transcript. These written records shall be maintained at the direction of the chief judge. Court reporters shall provide the chief judge and designee a copy of any request for an extension to provide an appellate record prior to submitting the affidavit to the appellate court.

III. ELECTRONIC RECORDING OPERATORS RESPONSIBILITIES

A. Conduct of Electronic Record Operator

1. The ERO shall present himself or herself to the judge in charge of the proceedings in accordance with the assignment made by the chief judge or designee.
2. The ERO shall observe, comply with, and be bound by all of the assigned judge's instructions in matters affecting the composition of the record, the marking of exhibits and maintenance of the evidence, the public or private nature of the proceeding, the adjournment of the proceeding to other times or places, the appropriate demeanor of the ERO(s), and other like matters.
3. The ERO shall record with appropriate equipment all of the proceedings that he or she attends.
4. The ERO shall record all the testimony, rulings, exceptions, oral instructions, and other proceedings during the trial of any cause, and in such causes as the court may designate.

B. Records to be Maintained by EROs

1. In order to permit the routine audit and inspection of records, EROs shall maintain accurate, legible, and up-to-date records of their transcript orders, invoices, transcript payments, expenses and attendance in court.
2. Extension of time for transcripts must be obtained from the court pursuant to the appropriate rule. The chief judge or designee shall be advised in writing by the transcriber at any time the transcriber requests an extension of time on any transcript. These written records shall be maintained at the direction of the chief judge. Transcribers shall provide the chief judge and designee a copy of any request for an extension to provide an appellate record prior to submitting the affidavit to the appellate court.

IV. COURT REPORTERS HIRED BY LITIGANTS IN CIVIL CASES

A. Scope

Court reporters hired by a party in a civil case are not Colorado Judicial Department employees. Such individuals may provide services through a company or individually to party(ies) in a civil case.

B. Hiring and Per Page Rates

The party(ies) are responsible for the court reporter's page rate and for paying any associated fees based on the negotiated page rate. The court will not set the court reporter's page rate for parties in civil cases.

C. Official File

The court may, but is not required to, order the privately hired court reporter's notes and subsequent transcript to serve as the official record of the court in place of an electronic record in which event the court reporter's notes and dictionary will become the property of the Colorado Judicial Department.

D. Objections to Creation of the Official Record

If a party objects to the creation of the official record or per page rate negotiated, the court reporter's notes shall not serve as the official record. The objecting party shall make such objections at least seven working days prior to the commencement of the proceeding, at which time the Court shall determine the method for recording the official transcript for the proceeding.

E. Rates for the Court

Transcripts ordered by the Court from a privately retained court reporter will be paid for by the Colorado Judicial Department, and are subject to Appendix A regardless of rates negotiated between the parties.

V. TRANSCRIPTS

A. Persons Authorized to Prepare Transcripts from Electronic Recordings

1. Contract transcript service companies may prepare transcripts, as determined by each judicial district policy.
2. If a judicial district enters into an agreement with a transcript service company, such contract must be in the format prescribed by the State Court Administrator.
3. Non-court reporter Colorado Judicial Branch employees shall not be allowed to transcribe court transcripts outside working hours unless the employee is a member of an independent contracting firm that provides contract transcript services as a company that has been selected by the district to prepare transcripts. This is in compliance with the requirements of the Fair Labor Standards Act, PERA rules, and IRS regulations regarding the issuance of a 1099 and W-2 to the same employee.
4. If non-court reporter Colorado Judicial Branch employees prepare transcripts from electronic recordings during established working hours, this task shall be included in the individual's normal work assignment and compensation and such individual shall not be paid the per-page rate,§13-5-128, C.R.S.

B. Compensation

1. Total Compensation

   The total compensation package offered to court reporters shall be established in accordance with the Colorado Judicial System Personnel Rules and Annual Compensation Plan. Base salary, benefits, paid time off, and paid time off prorated for part-time employees for continuing education required to maintain certification shall be provided to classified court

reporters, as well as variable pay, such as per page rates. When determining the total compensation package of court reporters, consideration shall also be made for expenditures incurred by court reporters on equipment, software, employment of scopists and proofreaders used during the course of business conducted for the state. Appendix F of this CJD provides a more exhaustive list of items, which should be taken into consideration in the determination of fair and equitable compensation for court reporters.

a. Court reporters are eligible for promotional increases for obtaining certification under the following conditions:
   (i) In instances where the difference in compensation midpoint between the Court Reporter's current job class and the job class the Court Reporter will promote to is more than 5%, the Court Reporters shall receive a promotional increase for attaining the certification in accordance with the Colorado Judicial System Personnel Rules.
   (ii) In instances where the difference in the compensation midpoint between the Court Reporter's current job class and the job class the Court Reporter will promote to is less than 5%, a 4% pay increase will be given for attaining certification.

2. Transcripts requested by judges
   a. Colorado Judicial Branch court reporters and other employees who prepare transcripts as part of their regular duties shall provide transcripts requested by and used only by the judge or magistrate who presided over the matter or the chief judge and shall not be paid the transcript page rate in addition to their regular salary. These employees shall be allowed to prepare transcripts requested by judicial officers during work hours.
   b. Court reporters and transcribers who are not Colorado Judicial Branch employees shall be considered "substitutes" and shall be compensated the state-paid transcript rate to prepare a transcript requested by and used only by the judge or magistrate who presided over the matter or the chief judge. The judicial district shall be responsible for compensation of the "substitute" court reporter or transcriber if not paid by the parties in a civil case as described in Section IV above.
3. State-Paid Transcripts
   a. State-paid transcripts are all transcripts requested by judicial officers, the district attorney, public defender, the Office of the Child's Representative and its contract attorneys , pro se indigent criminal defendants or advisory counsel representing an indigent criminal defendant, the Attorney General's Office, the Office of the Alternate Defense and its contract attorneys the Office of Respondent Parents' Counsel and its contract attorneys. Colorado Judicial Branch court reporters who prepare transcripts as a normal part of their job and compensation shall be allowed to prepare state-paid transcripts during work hours.
   b. Copy costs for state-paid transcripts are eliminated and the original per-page cost applies in accordance with Appendix A of this directive. The court reporter shall provide a state-purchased disk or may email a PDF or other word-searchable protected version of the transcript to an attorney or party requesting a copy of a transcript.
4. Private-Paid Transcripts
   a. Private-paid transcripts are all transcripts requested by all parties, attorneys, media and entities not listed in 3 (a) above.
   b. Colorado Judicial Branch court reporters and other employees who prepare transcripts shall <u>not be allowed</u> to use state time, equipment, supplies or copiers to prepare private-

paid transcripts; except that a court reporter may prepare private-paid transcripts during regular working hours in the following circumstances:
i) Criminal transcripts requested by non-state paid attorneys
ii) Juvenile court transcripts requested by non-state paid attorneys
iii) Transcripts prepared for cases on appeal
iv) Transcripts of an oral ruling of a trial court ordered for the preparation of the written order at the request of the trial court.

c. The original per page rate and copy rates are applied as defined in Appendix A.
d. Court reporters shall delineate the fees for originals and copies separately in all transcript invoices.

5. Non-Appellate Transcripts
The full price may be charged only if the independent contractor delivers the transcript within the time frame agreed upon, including any extensions that have been authorized by the chief judge.
6. Appellate Transcripts
In accordance with §13-5-128, C.R.S., the shorthand reporter of a court of record shall be compensated for preparation of the original and copies of the **transcript** of notes at such rates described in this policy.

The full price may be charged only if the transcript is delivered within the time frame prescribed by the chief judge of the district court or the appellate court. A transcript delivered within the time allowed by a timely extension granted for good cause pursuant to Colorado Rules of Appellate Procedure (C.A.R.) 10(c)(2) is entitled to full payment. The appellate court may extend the due date for a transcript and order the reduced rate if the "good cause" requirement is not met. (See Appendix D for computation of transcript delivery dates and reductions in per page rates for late transcripts.)

C. Hourly or Daily Transcripts
Unless otherwise ordered by the trial judge assigned to the case, there shall be no hourly or daily transcripts delivered to any party or attorney. If any person desires such services, he or she must seek permission of the court to have a Realtime court reporter present for a hearing or trial.

D. Unedited Transcripts
The use of an unedited transcript as a working document shall be permitted if allowed and approved by the trial judge and the court reporter. Such transcript shall not be the official record of the court unless so certified by the court reporter. The rate for the unedited transcript shall be applied according to Appendix A. Unedited transcripts shall include the disclaimer, Uncertified Transcript Disclaimer, in Appendix G.

E. Ordering of Transcripts, Tapes or Digital Recording Disks
Each district shall determine and post on the Colorado Judicial Branch website a policy that outlines the procedures for that particular district for ordering of transcripts, tapes or digital recording disks.

1. Transcripts may be ordered from the court following the procedure below.
a. The requesting party should use the request forms for transcript of a hearing or trial approved by the State Court Administrator. Blank forms can be procured from the clerk

of the court or district administrator as set forth by each district. The completed form should be sent to the address listed on the form for the appropriate district.

b. Persons ordering transcripts will be contacted directly by the court reporter or transcriber concerning payment of the appropriate fees. Transcripts will not be started and the time limits stated for delivery of transcripts will not commence until satisfactory arrangements are made with the transcriber for the payment of required fees.

c. It is the requestor's responsibility to properly pay or obtain a court order approving waiver of the fees in ordering transcripts. The requestor also must obtain and the reporter or transcriber must produce a dated receipt for the payment. This is to avoid any dispute as to the date, manner of payment and whether payment has in fact been made.

2. Copies of all or part of tapes or digital records (CD-ROM) may be ordered in those districts that are able to provide this service. The court may, based upon each district's policy, reproduce tapes or create CDs on its own duplicating equipment and may sell copies of electronic sound recording tapes made. The district may sell a whole or partial copy of the proceeding if available on CD, disk or tape to the public at the prevailing rate prescribed by this CJD. The rate shall be that rate in effect at the time of ordering.

   a. Orders for copies should be submitted to the court on the request forms for tapes or CDs approved by the SCAO. Blank forms can be obtained from the clerk of the court or district administrator as set forth by each district. The completed form should be sent to the address that is listed on the form for the appropriate district.

   b. Copies of tapes or CDs shall not be used as the official record for purposes of appeal, motions or other court proceedings. Only certified transcripts by reporters or authorized transcribers shall be used as the official records of court proceedings.

   c. In those districts that do not provide this service, parties shall request a transcript using the procedure outlined in V(E)(1) above.

3. Districts shall not accommodate requests to listen to recorded proceedings (tapes or CDs).

F. Standards for the Production of Transcripts

The following standards apply to the production of all transcripts for Colorado courts:

1. All transcripts shall be produced in the format required by this CJD (Appendix B).
2. No court reporter/transcriber employed by the Colorado Judicial Branch shall charge fees for transcripts of official proceedings that exceed those set forth in this CJD, except as approved by the chief judge in writing for extraordinary circumstances.
3. Each court reporter/transcriber is required to certify on each invoice that the fees charged and page format used conform to this CJD.
4. If transcripts of proceedings are prepared by contract transcription services and paid for by the state:

   a. All format, delivery time schedule, and fee requirements adopted by this CJD apply as if the transcript was produced by one of the court's reporters or other Colorado Judicial Branch employee unless the contract entered into provides otherwise.

   b. The transcriber designated to transcribe the proceedings recorded by electronic sound recording shall clearly specify on the billing or invoice and the transcript cover page that the proceedings which were transcribed were recorded on an electronic recording, and shall clearly certify the transcript as follows: "I (we) certify that the foregoing is a correct

transcript from the electronic sound recording of the proceedings in the above-entitled matter."[Signature of transcriber and date].

c. Each transcriber may charge and collect fees for transcripts requested at rates prescribed by this CJD.

5. Appellate transcripts may be provided in electronic format as part of an electronic record submitted pursuant to C.A.R. 10. In criminal cases, an electronic transcript may be provided as part of an electronic record where electronic records are available.

G. Time Limits for Delivery of Transcripts

1. Original transcripts ordered by judicial officers shall be provided to the judicial officer within the time prescribed by the order.
2. All transcripts of official proceedings prepared for the purpose of appeal shall be delivered to the ordering party, if a copy is requested, and the original filed with the clerk of court within the prescribed time limits of the Colorado Rules of Appellate Procedure.
3. Extension of time for appellate transcripts must be sought from the court pursuant to the appropriate rule.

H. Distribution of Transcripts

1. At the request of the ordering party, a non-appellate transcript may be provided in electronic format, if the reporter or transcriber agrees.
2. For state-paid transcripts, the court reporter shall provide the transcript in PDF or other word-searchable protected format to the party requesting a copy of a transcript. Replacement copies shall be made available in accordance with the fee structure below for both state-paid and private-paid requests. The intent of this provision is for only one state agency to pay for the transcript; therefore, copy costs for state-paid copy requests shall not apply. If the state agency requests the first copy, copy costs for private parties shall be in accordance with Appendix A.
3. Any requests for transcripts from persons or entities who are not parties to the case must be forwarded to the district administrator or chief judge prior to the court reporter agreeing to arrangements to furnish a copy. No court reporter or transcriber shall create a distribution list for anyone other than parties or attorneys of record.

VI. OWNERSHIP, CUSTODY, USE, RETENTION AND FILING OF THE NOTES AND ELECTRONIC RECORDINGS

A. The notes of all court reporters:

1. Shall remain property of the Colorado Judicial Branch controlled by the chief judge or designee to ensure transcripts may be prepared by another reporter, if and when necessary;
2. Shall be retained by the appropriate court for a period prescribed by the Colorado Judicial Department Retention and Disposition Schedules; AND
3. Are not public records.

B. The work of all court reporters shall be readable and shall remain in the ultimate control of the chief judge or designee so that another reporter, if necessary, can read the notes of a court reporter.

C. Each court reporter shall be required to sign a statement (Appendix E) acknowledging the ownership of the notes and of the dictionary provision below.

1. When a court reporter leaves the employment of the Colorado Judicial Branch, the court reporter shall provide the chief judge with paper or electronic notes and a copy of his or her dictionary for the cases they have done while a state employee prior to the reporter's last day of employment.
2. The court reporter leaving employment with the branch shall be given a right of first refusal regarding preparation of any outstanding transcripts on those cases so long as:
   a. The Court Reporter provides the district with the reporter's address, phone number and other contact information and keeps that information current with the district administrator and chief judge, and
   b. The Court Reporter does not have more than one outstanding appeal transcript beyond the 180 day allotted time frame.
3. In the event that another court reporter must prepare any such outstanding transcripts, that court reporter shall not use the departing court reporter's dictionary for any purpose other than preparation of the outstanding transcripts.

D. During the trial or the taking of other matters on the record, the paper or electronic notes shall be considered the property of the Colorado Judicial Branch, even though in custody of the reporter, judge or clerk.

E. After the trial and review or appeal period, the reporter shall list, date and index all of the notes and shall properly pack them for storage. The court shall store such records.

F. There shall be no additional charges for securing the record of a proceeding and for transporting the record to the clerk of court. The costs of these services are included in the schedule of rates for transcripts.

G. During the period of retention, paper or electronic notes shall be made available to the reporter of record, or to any other reporter or person the court may designate.

H. An electronic PDF or other word-searchable protected format version of any final transcripts prepared in all criminal and juvenile cases by any court reporter or transcriber shall be filed with the court.

I. Copies of these transcripts may be obtained from the court reporter at the rates designated within Appendix A herein.

J. The court may provide additional copies of these state-paid transcripts without any additional expense to the attorney general, district attorney, public defender, Office of the Child's Representative, pro se indigent criminal defendant or advisory counsel representing an indigent criminal defendant, Alternate Defense Counsel and state-paid respondents' attorneys in dependency and neglect cases. If a court reporter is no longer a full-time, part-time or contract employee of the Colorado Judicial Branch, individuals may obtain copies of these transcripts at the rate set forth in the Colorado Judicial Department Fiscal Rules by contacting the district administrator of the district.

VII. TRANSCRIPT BACKLOGS

The chief judge or designee is authorized to take necessary steps to reduce backlog transcript, tape, or disk copy production delays. Such steps may include, but are not necessarily limited to the following:

A. Adjusting the workload of the court reporter or transcriber to reduce backlogs.

B. Terminating a contract with an outside vendor of transcription services and/or adding contract vendors of transcription services.

VIII. APPELLATE TRANSCRIPTS

All transcripts in appellate cases shall be uploaded to the Court of Appeals or Supreme Court as read-only PDF documents.

CJD 05-03 is amended and adopted effective January 11, 2018.

/s/
Nancy E. Rice, Chief Justice

APPENDIX A

Below are transcript fee rates for the preparation and transcription of court proceedings. Additionally, in accordance with V(B)(6)of this directive, and pursuant to §13-5-128, C.R.S., the shorthand reporter of a court of record shall be compensated for preparation of the original and copies of the transcript of notes at such rates described in this policy.

	Original Per Page	Copy to State Agency per Page**	Copy to Non-State Agency Party per Page	Each Add'l Copy to Non-State Agency Party or Non-Party Per Page
State-paid Ordinary Transcript	$3.00	$.00	$.75	$.75
Private-paid Ordinary Transcript (Private paid original) (within 11 days and up to 30 calendar days, or as agreed upon by the requesting party and transcriber)	$3.00	$.75	$.75	
Expedited Transcript (10 calendar days)	$3.75	$.00	$.75	$.75
Daily Transcript (Prior to normal opening of court the following day)	$5.25	$.00	$1.00	$1.00
Unedited Transcript (Rough draft, unedited, non-certified)	$.75 per page per agency. If ordered by two agencies, limit $1.25 per page	$0.00	$1.25	$1.25
Hourly	$6.25	$1.25	$1.25	$1.25

****State agency as defined in V.B.3.a (excluding judicial officers).**

REPLACEMENT OR ADDITIONAL CD'S OF TRANSCRIPTS (Applies to transcripts prepared by a court reporter where the per-page costs have already been paid in accordance with the fee structure above.)
$35

REDUCED RATES
Reduced rates for late delivery to the appellate court may apply. The rate for a late transcript, which would be billed at the ordinary rate if submitted on time, is 90% of the ordinary rate if 10 days or less; 75% if 11 to 30 days late and 50% if more than 30 days late.

A transcript ordered on an "expedited" basis shall be billed at the "ordinary" rate if not delivered within 10 days.

The above rates are applicable to each page of transcript, excluding the certification page, which must be at the end of each volume of transcript.

DEFINITIONS OF METHOD OF TRANSCRIPTION

ORDINARY: Appellate transcripts shall be delivered within time prescribed by C.A.R. 10(c)(2). Any other transcripts shall be prepared within 30 days from the date when the requesting party and the reporter agree on arrangements for the transcript or a mutually agreed upon time frame outside the 30 days that is reasonable and meets the needs of the requesting party.

EXPEDITED: Transcript to be delivered within 10 days from the date when the requesting party and the reporter agree on arrangements for the transcript. When transcripts are delivered on or after the 11th day after the arrangements for the transcript, the ordinary transcript rates shall apply.

DAILY: Transcript to be delivered following adjournment and prior to normal opening hour of court on following morning whether or not it is a court workday.

HOURLY: Transcript, ordered under unusual circumstances, to be delivered within 2 hours of adjournment.

UNEDITED: Daily rough draft, unedited, non-certified transcript, which is not an official transcript.

PARTIAL: If the appellate court has previously received a partial transcript and the entire transcript is later ordered the reporter must put the entire transcript in sequential order in one document before it is sent to the appellate court.

Appendix B

STANDARDS FOR TRANSCRIPT PREPARATION

The standards for transcript preparation by all court reporters, including court reporters hired by litigants in civil cases, are:

Paper:
Size-Standard letter size, 8 ½ x 11
Weight- Not less than 13#
Paper shall be line numbered, 1 to 25, with no fewer than 25 typed lines
Type size- No fewer than nine or ten characters to the typed inch
Ink color- black

Margins:
a) Typed margins shall start one inch from the top and no more than one and three-quarters inches from the left of the page. A justified left margin is used throughout.
b) The right margin shall be no more that three-eighths inch.
c) The lower margin will be set by line 25.

Binding: Transcripts shall be bound at the left. Binding shall be in daily volumes, approximately one inch thick.

Title pages: Prepare in accordance with attached sample, using plain language.

Page numbering: Official page numbering for transcripts shall be at the upper right, above line 1. Reporters shall ensure that page numbering is consecutive within each volume. If more than one volume is required, the reporter may number all volumes under a consecutive number sequence, or may begin each volume with page 1. Since citations will be by volume, one, and line number, the beginning number for each volume is no longer critical.

Parenthetical and exhibit markings: Begin no more than 15 spaces from the left-hand margin, with carry-over line to begin not more than 15 spaces from the left margin, with carry-over lines to begin no more than 15 spaces from the left-hand margin.

Quoted material: Begin no more than 15 spaces from the left-hand margin, with carry-over lines to begin no more than 10 spaces from the left-hand margin.

Colloquy material: Begin no more than fifteen spaces from the left-hand margin, with carry-over colloquy to the left-hand margin.

Question and Answer: Each question and answer to begin on a separate line. Each question and answer to begin no more than five spaces from the left-hand margin with no more than five spaces from the Q and A to the text. Carry-over Q and A lines to begin at the left-hand margin.

Electronic: Electronic transcripts standards adopted by the appellate courts pursuant to C.A.R. 10 apply.

All appellate transcripts shall be delivered to the trial court appeal clerk at least 2 working days prior to the date the record is due in the appellate court.

SAMPLE

DISTRICT COURT BOULDER COUNTY COLORADO 1777-6th Street Boulder, CO 80306	
Petitioner,	
and	
Respondent,	*FOR COURT USE ONLY* Case No. Division 2
For Petitioner:	
For Respondent:	

The matter came on for hearing on , before the HONORABLE Judge's Full Name, Judge of the District Court, and the following proceedings were had.

(Recorded and Transcribed)

APPENDIX C

INFORMATION REQUIRED TO BE INCLUDED ON ALL BILLINGS

1. Name of Client (Actual person ordering and paying for transcript)
2. Date Ordered
3. Date Delivered
4. Case Name and number
5. Number of Pages
6. Number of Copies
7. Type of Delivery Schedule
8. Discount
9. Refunds
10. Total Due
11. Certification of Reporter or Transcription Firm of Compliance with Fee and Transcript Format Prescribed by CJD

APPENDIX D

COMPUTATION OF TRANSCRIPT DELIVERY DATES

Transcripts delivery dates are computed from:

a. The date on which satisfactory financial arrangements for payment are made, except for transcripts to be paid for by the State of Colorado or free copies ordered by a judge;

b. The date on which the appropriate Transcript Order is received by the reporter/transcriber when the transcript is to be paid for by the State of Colorado;

c. The date on which the court order is provided to the reporter/transcriber when a judicial officer has ordered a transcript.

APPENDIX E COURT REPORTER ACKNOWLEDGMENT

(Concerning Stenographic and Electronic Notes)

_____ Judicial District

I acknowledge that all stenographic and electronic notes produced by me during the time I am employed by the Colorado Judicial Department are the property of the ____ Judicial District.

I will regularly back up all electronic notes as directed by the Chief Judge or designee. If I produce paper notes, I will maintain them in a secure location and in an organized fashion according to local policy.

Should I leave the employment of the Colorado Judicial Department, I will ensure that all the electronic notes for the cases I have reported while a state employee are properly lodged on the server or that I have provided a backup copy on CD. I also will ensure that a current copy of my dictionary is on the server, with a backup copy on CD, and that all docket sheets are current as required by local policy. I will provide verification of same to the Chief Judge, District Administrator or Managing Court Reporter.

I understand that I will be given first right of refusal regarding preparation of any transcripts on those cases I have reported so long as I provide the District with my address, phone number and other contact information and keep that information current with the Managing Court Reporter, District Administrator or Chief Judge, and provided I do not have more than one outstanding appeal transcript beyond the 180 day allotted timeframe.

Dated this ____ day of _____, 20 .

_____
Official Court Reporter

APPENDIX F

COURT REPORTER TOTAL COMPENSATION

The compensation package for court reporters in the judicial system is based upon two components: salary paid by the Colorado Judicial Branch and income generated from the production of transcripts. Transcription preparation is part of the court reporters' essential functions upon which they are annually evaluated. This method of payment adequately compensates court reporters for their status as professionals and also takes into consideration the costs borne by court reporters. Court reporters provide their own computerized equipment and Realtime software to produce the record owned by judicial and simultaneously provide the instantaneous (Realtime) feed for the immediate use and benefit of court and counsel. Upon request, court reporters are then responsible for transcribing their stenographic and electronic notes on their own equipment to produce the final transcript, which is provided to the court at no cost. Court reporters, as a result, incur additional costs in order to ensure accurate and timely transcripts by employing support staff (i.e. scopists and proofreaders). As professionals, the court reporters are also required at their own expense to obtain and maintain Colorado Judicial Branch mandated certifications, which require membership in professional organizations and yearly continuing education credits. By providing this compensation package, the Colorado Judicial Department reaps the benefit of state-of-the art advances in computer technology, but the expense is not taken from the state budget instead it is covered by the per page rate (see Appendix A) paid in part by private parties. Requiring reduced fees for non-judicial department state agencies (reduced by the elimination of copies for state agencies) serves to control and limit the transcript requests for nonessential proceedings. **This type of compensation package strikes a fair balance among the Colorado Judicial Department, court reporters, and litigants.** This method of payment also creates a built-in incentive for the timely preparation of transcripts and prevents unnecessary backlogs in our appellate courts; while at the same time attracts and maintains qualified employees within our state. Realtime court reporting also complies with ADA requirements, when requested.

As an example of Court Reporter unreimbursed expenses, which are borne by a typical reporter include:

Steno machine and yearly maintenance contract of which covers parts, cleaning & loaner;
Computer Aided Transcription software and annual support contract,
Support and software upgrades;
Realtime software and annual license fee;
Personal Computer;
Proofreaders;
Scopists;
Annual Professional Memberships;
Continuing Education Seminars, plus travel expenses;
Testing Fees, plus travel expenses;
Expenses vary per reporter.

Court Reporters own and maintain their court reporting equipment including hardware and software. The listed equipment is owned and used by the court reporter for the benefit of judicial in producing the record owned by judicial and for providing Realtime for court and counsel.

APPENDIX G

UNCERTIFIED TRANSCRIPT DISCLAIMER

The following transcript(s) of proceedings, or any portion thereof, is being delivered *UNEDITED AND UNCERTIFIED* by the official court reporter at the request of the ordering party.

The purchaser agrees not to distribute this uncertified and unedited transcript in any form (written or electronic). This is an unofficial transcript, which should NOT be relied upon for purposes of verbatim citation of proceedings and should not be filed as an attachment to any court pleadings. The judge in this case will be provided a copy of these rough draft proceedings.

This transcript has not been checked, proofread, or corrected. It is a draft transcript, NOT a certified transcript. As such, it may contain computer-generated mistranslations of stenotype code or electronic transmission errors, resulting in inaccurate or nonsensical word combinations, or untranslated stenotype symbols which cannot be deciphered by non-stenotypists. Corrections will be made in the preparation of the certified transcript resulting in differences in content, page and line numbers, punctuation, and formatting.

This realtime uncertified and unedited transcript contains no appearance page, certificate page, index, or certification.

West's Colorado Revised Statutes Annotated
West's Colorado Court Rules Annotated
Rules of County Court Civil Procedure
Chapter 25. Colorado Rules of County Court Civil Procedure (Refs & Annos)

C.R.C.P. Rule 380

RULE 380. REPORTER; STENOGRAPHIC REPORT OR TRANSCRIPT AS EVIDENCE

Currentness

(a) A record of the proceedings and evidence at trials in the county court shall be maintained by electronic devices except as such record may be unnecessary in certain proceedings pursuant to specific provisions of law.

(b) Whenever the testimony of a witness at a trial or hearing which was recorded by electronic devices or by stenographic means is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported or transcribed the testimony, or by the judge.

(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, Records 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.

Credits

Amended eff. Jan. 1, 1989.

Rules Civ. Proc., County Court Rule 380, CO ST CTY CT RCP Rule 380
Current with amendments received through February 1, 2018

Exhibit 4

End of Document

Proposed C.R.C.P. 380(c)

(c) 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 or company the court may designate for purposes of transcribing the record. During the trial or the taking of other matters on the record, and after trial during the appeal period, the recordings shall be considered the property of the state, even though in the custody of the judge or clerk.

Redline of Proposed C.R.C.P. 380(c)

(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 Retention Manual~~, Records 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 or company the court may designate for purposes of transcribing the record. During the trial or the taking of other matters on the record, and after trial during the appeal period, 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.~~

Exhibit 5

2018 WL 1007956
Colorado Court of Appeals,
Div. I.

IN RE the MARRIAGE OF Barbara RUNGE, Appellant,
and
David Allen Runge, Appellee.

Court of Appeals No. 16CA1492
|
Announced February 22, 2018

Synopsis

Background: Ex-wife moved to discover and allocate assets that ex-husband allegedly misrepresented or did not disclose in the proceedings surrounding their separation agreement. The District Court, Boulder County, Bruce Langer, J., granted ex-husband's motion to dismiss. Ex-wife appealed.

Holdings: The Court of Appeals, Furman, J., held that:

[1] "plausibility" standard from *Warne v. Hall*, 373 P.3d 588, did not apply to ex-wife's motion, and

[2] ex-wife failed to state sufficient grounds to trigger a post-marriage-dissolution-decree allocation of undisclosed or misstated assets.

Affirmed.

Richman, J., specially concurred and filed opinion.

Taubman, J., dissented and filed opinion.

Court of Appeals No. 16CA1492, Boulder County District Court No. 10DR1467, Honorable Bruce Langer, Judge

Attorneys and Law Firms

Robert E. Lanham, P.C., Robert E. Lanham, Boulder, Colorado, for Appellant

Litvak Litvak Mehrtens and Carlton, P.C., Ronald D. Litvak, John C. Haas, Denver, Colorado, for Appellee

Opinion

Opinion by JUDGE FURMAN

¶ 1 In this post-dissolution of marriage dispute between Barbara Runge (wife) and David Allen Runge (husband), wife moved under C.R.C.P. 16.2(e)(10) to discover and allocate assets that she alleged husband did not disclose or misrepresented in the proceedings surrounding their 2011 separation agreement. Husband moved to dismiss wife's motion. In a written order, the district court granted husband's motion to dismiss, ruling that wife's motion did not state sufficient grounds to trigger discovery and allocation of assets under the rule.

¶ 2 On appeal, wife challenges the district court's order. She contends that the district court erred by (1) not applying the "plausibility" standard, which was announced in *Warne v. Hall*, 2016 CO 50, 373 P.3d 588, when granting husband's motion to dismiss; and (2) ruling that she did not state sufficient grounds in her motion. She also contends that the court should have at least allowed her to conduct discovery to prove her allegations.

¶ 3 We conclude that the *Warne* "plausibility" standard does not apply to the dismissal of a motion under C.R.C.P. 16.2(e)(10). We also agree with the district court that wife's motion did not state sufficient grounds to trigger an allocation of assets or discovery under the rule. Accordingly, we affirm the district court's order.

¶ 4 As an initial matter, husband contends that the district court lacked subject matter jurisdiction under C.R.C.P. 16.2(e)(10) because the five-year period during which it may reallocate assets expired the day after wife moved for such relief. We disagree.

¶ 5 C.R.C.P. 16.2(e)(10) establishes a five-year period where the court retains jurisdiction to "allocate" material assets or liabilities that were not allocated as part of the original decree. It does not, however, limit the court's jurisdiction to rule on timely motions if the five-year period expires before the ruling. Therefore, the majority concludes that the district court had jurisdiction to rule on the motion because wife's motion was timely—it was filed within the five-year period under the rule. C.R.C.P. 16.2(e)(10).

***2** ¶ 6 Because we affirm the court's dismissal of wife's motion, this opinion does not decide whether the court would have had jurisdiction to allocate assets if it had granted wife's motion. The separate concurring opinion of Judge Richman concludes that the district court retained jurisdiction to both rule on the motion and allocate assets if necessary. The dissent of Judge Taubman concludes that the district court's jurisdiction to consider the motion was lost as soon as the five-year period expired.

I. The Separation Agreement

¶ 7 The parties, with assistance of counsel, entered into a separation agreement in 2011 to end their twenty-seven-year marriage. They requested that the district court find the agreement to be fair and not unconscionable, and incorporate it into the dissolution decree. The court did so.

¶ 8 Four years and 364 days later, wife moved to reopen the property division provisions of the agreement under C.R.C.P. 16.2(e)(10), contending that husband did not disclose and had misrepresented assets during the dissolution case.

¶ 9 In response, husband moved to dismiss wife's request, arguing that she had not sufficiently alleged facts showing either material omissions or misrepresentations. He also argued in his reply that the district court lacked subject matter jurisdiction under the rule because the five-year period during which it may reallocate assets expired the day after wife moved for such relief.

¶ 10 The district court rejected husband's jurisdictional argument, but it granted his motion to dismiss, ruling that wife had not made a sufficient showing under C.R.C.P. 16.2 that husband had failed to provide material information.

II. C.R.C.P. 16.2

[1] ¶ 11 The purpose of C.R.C.P. 16.2 is to provide uniform case management procedures and to reduce the negative impact of adversarial litigation in domestic relations cases. *See* C.R.C.P. 16.2(a); *In re Marriage of Schelp*, 228 P.3d 151,

155, 157 (Colo. 2010); *In re Marriage of Hunt*, 2015 COA 58, ¶ 9, 353 P.3d 911. The rule imposes heightened affirmative disclosure requirements for divorcing spouses and allows dissolution courts to reallocate assets in the event that material misstatements or omissions were made by a spouse. *See Schelp*, 228 P.3d at 155; *Hunt*, ¶ 9; *see also* C.R.C.P. 16.2(e).

[2] ¶ 12 Regarding disclosure, the rule imposes a special duty of candor on divorcing spouses, which includes "full and honest disclosure of all facts that materially affect their rights and interests." C.R.C.P. 16.2(e)(1); *see Schelp*, 228 P.3d at 156. In discharging this duty, "a party must affirmatively disclose all information that is material to the resolution of the case without awaiting inquiry from the other party." C.R.C.P. 16.2(e)(1); *see Schelp*, 228 P.3d at 156. The rule requires certain mandatory financial disclosures, which are specified in the appendix to the rule, and a sworn financial statement with supporting schedules. *See* C.R.C.P. 16.2(e)(2) & app. form 35.1; *Hunt*, ¶¶ 13-15. It further imposes a general duty on the parties "to provide full disclosure of all material assets and liabilities." C.R.C.P. 16.2(e)(10); *see Hunt*, ¶ 17.

¶ 13 And, as relevant here, C.R.C.P. 16.2(e)(10) provides that,

> [i]f 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.

See Schelp, 228 P.3d at 156; *Hunt*, ¶ 17.

III. *Warne* Plausibility Standard

***3** **[3]** ¶ 14 We first address wife's contention that the district court erred by not applying the "plausibility" standard, which was announced in *Warne v. Hall*, 2016 CO 50, 373 P.3d 588, when granting husband's motion to dismiss. We conclude that the *Warne* plausibility standard governing motions to dismiss under C.R.C.P. 12(b)(5) does not apply to wife's motion under C.R.C.P. 16.2.

[4] ¶ 15 We review de novo whether the district court applied the correct standard in dismissing wife's motion. *See Ledroit Law v. Kim*, 2015 COA 114, ¶ 47, 360 P.3d 247.

[5] ¶ 16 Under the "plausibility" standard from *Warne*, a complaint must "state a claim for relief that is plausible on its face" to avoid dismissal under C.R.C.P. 12(b)(5) for failure to state a claim. *Warne*, ¶¶ 1, 5 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)). But, we conclude that C.R.C.P. 12(b)(5) does not apply here, and, thus, neither does the *Warne* standard. We reach this conclusion for two reasons.

¶ 17 First, husband did not cite C.R.C.P. 12(b)(5) as authority for his motion to dismiss, nor did the parties argue a C.R.C.P. 12(b)(5) standard to the district court.

[6] ¶ 18 Second, by its express terms, C.R.C.P. 12(b)(5) applies to a defense "to a claim for relief in any *pleading*" when that defense asserts a "failure to state a claim upon which relief can be granted." (Emphasis added.) "A motion is not a pleading." *People v. Anderson*, 828 P.2d 228, 231 (Colo. 1992) (quoting *Capitol Indus. Bank v. Strain*, 166 Colo. 55, 58, 442 P.2d 187, 188 (1968)).

¶ 19 Indeed, C.R.C.P. 7(a) identifies the pleadings in an action as the complaint and answer, a reply to a counterclaim, an answer to a cross-claim, a third-party complaint and answer, and a reply to an affirmative defense. *See In re Estate of Jones*, 704 P.2d 845, 847 (Colo. 1985) (defining pleadings as "the formal allegations by the parties of their respective claims and defenses"). The rule distinguishes a pleading from a motion, defining a motion as an "application to the court for an order." C.R.C.P. 7(a), (b)(1); *see Winterhawk Outfitters, Inc. v. Office of Outfitters Registration*, 43 P.3d 745, 747-48 (Colo. App. 2002) (distinguishing under C.R.C.P. 7 a "motion," meaning a written or oral request for the court to

make a particular ruling or order, from a "pleading," which includes the complaint, answer, and reply in a case); *see also* § 14-10-105(1), (3), C.R.S. 2017 (Colorado rules of civil procedure apply to dissolution proceedings and the pleadings in such cases shall be denominated as provided in those rules except that the initial pleading shall be denominated a petition and the responsive pleading shall be denominated a response); *cf. In re Marriage of Plank*, 881 P.2d 486, 487 (Colo. App. 1994) (noting that pleadings in a dissolution case include the petition and response and, therefore, spouse's post-dissolution motion for writ of garnishment was not a new "action" but rather a motion ancillary to the original dissolution action).

¶ 20 Accordingly, because wife's motion was not a pleading and husband's motion to dismiss was not pursuant to C.R.C.P. 12(b)(5), we conclude that the district court did not err by not applying the *Warne* standard.

IV. Wife's Allegations

[7] ¶ 21 We next address whether wife stated sufficient grounds in her motion to trigger an allocation of undisclosed or misstated assets under C.R.C.P. 16.2(e)(10). We conclude that she did not. Thus, we also conclude that further proceedings were not required.

***4 [8]** ¶ 22 We review de novo the district court's interpretation of C.R.C.P. 16.2 in determining the sufficiency of wife's allegations. *See Hunt*, ¶ 10.

¶ 23 Wife contends that husband omitted certain business entities and interests from his sworn financial statements and the separation agreement. She also contends that he misrepresented (1) the value of his primary business interest, Tax Law Solutions, by stating that the value was "unknown"; and (2) the amount of mortgage debt on the marital residence, which he asserted was $1.4 million.

¶ 24 But, the record reflects that before the parties entered into the separation agreement, husband advanced funds for wife to hire an accounting expert to investigate their financial circumstances; he gave the accountant and wife, through her attorney, voluminous documents, including personal and business bank statements, trust documents, records concerning his offshore interests, and his own accounting expert's report; and he and his expert testified and were cross-examined at length at the temporary orders hearing.

¶ 25 Nothing in C.R.C.P. 16.2(e) limits a court's consideration of the parties' sworn financial statements or their separation agreement when determining the adequacy of financial disclosures. To the contrary, the rule requires specific financial disclosures, with which husband certified compliance, and imposes a general duty to disclose "all facts that materially affect" the parties' rights and interests and "all material assets and liabilities." C.R.C.P. 16.2(e)(1)-(2), (10). Hence, as the district court did, we consider all forms of husband's pre-decree disclosure, including his retaining accounting experts, the documentation provided to wife and her expert, and the information testified to at the 2011 temporary orders hearing.

¶ 26 In doing so, we conclude that *Hunt*, on which wife relies, is materially distinguishable from the present case. In *Hunt*, it was undisputed that the husband had failed to disclose certain specific items that are listed for mandatory disclosure in the appendix to C.R.C.P. 16.2—three years of personal and business financial statements, loan applications and agreements, and appraisals—before the parties entered into their memorandum of understanding (MOU) to resolve their dissolution case. *See Hunt*, ¶¶ 13-15; *see also* C.R.C.P. 16.2(e)(2) & app. form 35.1. A division of this court held that because the husband admittedly did not disclose the required items, the district court had erred in not granting the wife's C.R.C.P. 16.2(e)(10) motion to reopen the MOU's property division. *Hunt*, ¶¶ 15-18. But, the division further noted that but for the husband having violated the disclosure requirements of the rule, the wife "would have been bound by her

decision to enter into the MOU, acknowledging the uncertain value" of his business interest. *Id.* at ¶ 19; *see also id.* at ¶¶ 31 -36 (Jones, J., specially concurring) (emphasizing the narrowness of *Hunt* 's holding).

¶ 27 Wife does not allege that husband failed to disclose any specific item mandated under the rule, and husband certified, as the rule requires, that he had provided all such items. *See* C.R.C.P. 16.2(e)(2), (7). Instead, as the district court noted, wife asserts her suspicions and speculations that husband "likely" failed to disclose and misrepresented material assets. For example, she argues in her opening brief that "[i]t is at least plausible, if not very likely, that Husband failed to provide ... information that would presumably have given [her] the opportunity to make a more informed decision" when entering into the separation agreement. And, she describes the affidavits she obtained from husband's colleagues as "rais[ing] significant concerns" regarding his "assets and business practices." Such vague assertions are not sufficient to trigger an allocation of omitted or misstated assets under C.R.C.P. 16.2(e)(10) in light of the information wife had pre-decree.

***5** ¶ 28 For example, at the February 14, 2011, temporary orders hearing, wife's attorney admitted while cross-examining husband that they had received "an awful lot of documents" from him, as had their accounting expert. Wife further described two boxes of documents that had been produced at a meeting at husband's accounting expert's office with wife and her expert.

¶ 29 And, at the same 2011 hearing, wife's attorney acknowledged in opening statement that the parties' dissolution case was going to be complicated because there were between thirty and fifty entities that husband owns or in which he has an interest. The attorney further stated that he planned to schedule "a couple of depositions" in order to "look into [husband's offshore] trust in much greater detail," acknowledging that "I do have copies" of the trust documents. The attorney also stated, looking at husband's exhibit showing that Tax Law Solutions generated over $2 million in revenue in 2009 and $1.6 to $1.8 million in 2010, "[t]hat [it] is going to take a lot of time to value." He also noted that the exhibit listed fifty-six other entities to which husband had some connection, that this was "not a simple case," and that the case was "going to take a lot of time."

¶ 30 Yet, with the extensive documentation husband provided in hand and armed with her own accounting expert to analyze that extensive documentation, wife nonetheless chose to enter into the separation agreement only a month after the temporary orders hearing. She presumably did not wait to (1) value Tax Law Solutions as her attorney intended to do; (2) allow her expert to review husband's trust documents, which her attorney confirmed they received; or (3) investigate husband's other business entities or interests, including those offshore, which they knew existed and concerning which husband testified they had documents. She chose instead to sign the separation agreement that allocated the marital residence debt free plus $1,100,000 in cash to her and allocated all of husband's business interests to him.

¶ 31 We acknowledge that C.R.C.P. 16.2(e)(1)-(2) does not impose a duty on wife to conduct discovery to obtain required financial information from husband. *See Schelp*, 228 P.3d at 156; *Hunt*, ¶ 14. But, wife's own attorney stated at the hearing that a lot of documentation had been produced; that he planned to look into that information in greater detail, conduct discovery, and obtain a valuation of husband's primary business interest; and that the case was complicated and was going to take a lot of time to litigate. Nonetheless, wife instead chose to enter into the separation agreement shortly thereafter. We do not interpret C.R.C.P. 16.2(e)(10) as permitting a reallocation of assets under these circumstances.

[9] ¶ 32 Essentially, in her "motion regarding undisclosed assets," wife requested to conduct the discovery into and analysis of husband's financial and business interests that her attorney had planned to do and the analysis that could have been done by her attorney and accounting expert in 2011 before the separation agreement was signed. We agree with the district court that C.R.C.P. 16.2(e)(10) was not intended to create a right for an ex-spouse to conduct discovery into the other spouse's assets post-decree. Nothing in the plain language of the rule indicates such a result, which would contravene established public policy in family law cases. *See Mockelmann v. Mockelmann*, 121 P.3d 337, 340 (Colo. App. 2005) (noting that allowing divorced parties "to perpetuate disputes long after the entry of permanent orders" is "counter

to the strong public policy favoring the finality of judgments" in family law actions). Nor does the rule permit a spouse to revalue assets that were disclosed pre-decree. *See Hunt*, ¶ 19.

***6 [10]** ¶ 33 We must interpret the rules of civil procedure consistent with principles of statutory construction, according to the plain and ordinary meanings of the words used. *See* § 2-4-101, C.R.S. 2017; *Hiner v. Johnson*, 2012 COA 164, ¶ 13, 310 P.3d 226. Hence, we may not "judicially legislate" by reading the rule "to accomplish something the plain language does not suggest, warrant or mandate." *Scoggins v. Unigard Ins. Co.*, 869 P.2d 202, 205 (Colo. 1994).

¶ 34 The remedy created by the C.R.C.P. 16.2(e)(10) is extraordinary and also very narrow. Under the rule, the court retains jurisdiction for a period of five years after a dissolution decree is entered "to allocate material assets or liabilities, the omission or non-disclosure of which materially affects the division of assets and liabilities." C.R.C.P. 16.2(e)(10). The rule says nothing about "reopening" a case for the purpose of allowing discovery, as wife requested in her motion. Thus, in our view, neither the language of the rule nor *Hunt* rescues wife from the consequences of her own decision to settle her dissolution case without fully evaluating the information that husband had provided to her pre-decree.

¶ 35 We are not persuaded by wife's arguments that husband's pre-decree disclosures of the value of Tax Law Solutions as "unknown" and of $1.4 million in mortgage debt on the marital home were misleading. Regarding the value of Tax Law Solutions, the rule requires disclosure of material "facts," "information," and "assets and liabilities." *See* C.R.C.P. 16.2(e)(1), (10). It does not mandate that husband provide his opinion of the value of a disclosed asset. *See Shirley v. Merritt*, 147 Colo. 301, 307, 364 P.2d 192, 196 (1961) ("Value is, of course, a matter of opinion and not of fact....").

¶ 36 Again, the present situation is unlike that in *Hunt*, where the spouse had failed to disclose existing *pre-decree* appraisals of his business and loan applications stating a value for his interest in the business. *See Hunt*, ¶¶ 12-15. Wife instead merely speculates here that husband "likely" misrepresented the value of Tax Law Solutions because an appraisal done two years *after* the decree indicated that the business was worth nearly $5 million.

¶ 37 C.R.C.P. 16.2 addresses pre-decree disclosures, omissions, and misrepresentations. Obviously, husband could not have disclosed or omitted a valuation opinion that did not exist pre-decree. Nor could he have misrepresented value based on such an opinion. A 2013 valuation is not relevant to determining the value of Tax Law Solutions for purposes of the 2011 dissolution. *See* § 14-10-113(5), C.R.S. 2017 (property shall be valued for purposes of disposition on dissolution at the time of the decree or the hearing on disposition, whichever is earlier); *see also In re Marriage of Nevarez*, 170 P.3d 808, 813 (Colo. App. 2007).

¶ 38 And, wife knew that the 2011 value of Tax Law Solutions was presented as "unknown" when she signed the separation agreement. At the temporary orders hearing just one month earlier, wife's own attorney had emphasized on the record the need to value that particular asset and the time it would take to do so. Thus, unlike the spouse in *Hunt*, wife *is* bound by her decision to enter into the separation agreement without ever obtaining a pre-decree valuation for husband's primary business. *See Hunt*, ¶ 19.

***7** ¶ 39 Regarding the mortgage on the marital home, the record reflects that wife was well aware before entering into the separation agreement that this mortgage was not an arm's length transaction because husband had an ownership interest in the mortgage company, Meridian Trust. Wife testified at the 2011 hearing that husband had told her that they "needed a mortgage deduction" so he had set up a trust to loan money to them. She described the mortgage as "not a real mortgage" because husband effectively makes the payments to himself. The circumstances of this mortgage were not undisclosed or misrepresented. Rather, according to wife's own testimony, husband told her about them. Thus, wife's allegations regarding these circumstances are not sufficient to trigger the undisclosed asset allocation remedy under C.R.C.P. 16.2(e)(10).

V. Conclusion

¶ 40 The district court correctly determined that wife did not allege a sufficient basis for it to allocate misstated or omitted assets under C.R.C.P. 16.2(e)(10). The rule was not intended to protect a party from choosing, perhaps unwisely, to settle a dissolution case after acknowledging the complexity of and before fully evaluating the information provided by the other party. Nor does it provide for post-decree discovery into an ex-spouse's assets. We will not extend the plain language of the rule or the disposition in *Hunt* to permit such discovery or to compel an allocation of assets under the circumstances here.

¶ 41 The order is affirmed.

JUDGE RICHMAN specially concurs.

JUDGE TAUBMAN dissents.

JUDGE RICHMAN, specially concurring.

¶ 42 I concur with Judge Furman that wife's request to reopen the dissolution proceeding was correctly denied by the court. However, unlike Judge Furman, I believe we must consider husband's argument that the court lost subject matter jurisdiction under C.R.C.P. 16.2(e)(10). *See In re Estate of Hossack*, 2013 COA 64, ¶ 11, 303 P.3d 565 (if a court lacks subject matter jurisdiction, any judgment it renders is void). Because I disagree with husband's position that the court lost jurisdiction to consider wife's motion five years after the date of the decree, I conclude that the order is valid and vote to affirm the district court's order.

¶ 43 As noted by Judge Furman, wife filed her request to reopen four years and 364 days after the permanent orders were entered. Husband contends that the court lost jurisdiction when five years passed—the day after the motion was filed.

¶ 44 Husband's argument relies on the particular language of the retention provision, specifically that "the court shall retain jurisdiction" for a five-year period after the decree. C.R.C.P. 16.2(e)(10). According to husband, under the plain language of the provision, the court's jurisdiction to reallocate assets immediately ended when this five-year period expired, regardless of wife's pending motion at the time. He argues that had the supreme court intended jurisdiction to extend beyond five years upon the filing of a motion within that period, it would have so stated, as other statutes of limitation do. *See, e.g.*, §§ 13-80-101(1), -102(1), C.R.S. 2017 (providing that certain types of civil actions must "be commenced within" the particular limitations period). I am not persuaded.

¶ 45 We review de novo the legal issue of whether the district court had subject matter jurisdiction to consider wife's motion. *See Egelhoff v. Taylor*, 2013 COA 137, ¶ 23, 312 P.3d 270.

¶ 46 "A court's acquisition of subject matter jurisdiction depends on the facts existing at the time jurisdiction is invoked, and a court ordinarily does not lose jurisdiction by the occurrence of subsequent events, even if those events would have prevented acquiring jurisdiction in the first place." *Thomas v. Fed. Deposit Ins. Corp.*, 255 P.3d 1073, 1081 (Colo. 2011); *see Secrest v. Simonet*, 708 P.2d 803, 807 (Colo. 1985) (jurisdiction once acquired over a defendant was not then lost after he was removed from the territory). *But cf. People in Interest of M.C.S.*, 2014 COA 46, ¶¶ 14-17, 327 P.3d 360 (holding that because juvenile court jurisdiction is limited by statute—both at the time a dependency and neglect petition is filed *and* at the time a child is adjudicated—to children under the age of eighteen, the court lost its jurisdiction to adjudicate when the child turned eighteen after the petition was filed but before adjudication).

***8** ¶ 47 The district court's jurisdiction to reallocate the parties' assets under C.R.C.P. 16.2(e)(10) was properly invoked when wife moved for that relief within five years from the date of the decree. And, having been properly invoked, the court's jurisdiction was not then lost when the court did not rule on the motion until after the five-year period had expired. *See Secrest*, 708 P.2d at 807; *cf. Nickerson v. State*, 178 So.3d 538, 538-39 (Fla. Dist. Ct. App. 2015) (finding subject matter jurisdiction to order restitution under similarly worded Florida statute—providing that a court retains jurisdiction for purposes of ordering restitution for up to five years from a defendant's release—when the court's jurisdiction was invoked within the five-year period even though it did not act within that period).

¶ 48 In support of this conclusion, I note that in *Schelp*, the supreme court commented that the jurisdiction retention provision supplanted the application of "C.R.C.P. 60(b)'s six-month window, which formerly operated as a bar for such retained jurisdiction." *In re Marriage of Schelp*, 228 P.3d 151, 156 (Colo. 2010). C.R.C.P. 60(b) expressly sets a period of 182 days from the date of the filing of the motion, and does not require a decision on the motion within six months as husband argues.

¶ 49 Husband's proposed interpretation of C.R.C.P. 16.2(e)(10) would produce uncertain and absurd results and frustrate the rule's stated purpose to create uniformity in domestic relations cases. *See* C.R.C.P. 16.2(a). Under his interpretation, the deadline for a party to move for relief under the rule would be uncertain and would necessarily depend on the state of the docket in the particular jurisdiction. It would be impossible for a party to predict when a realistic filing deadline for such a motion might be. I would not adopt such an interpretation. *See* § 2-4-201(1)(c), C.R.S. 2017 (statute is presumed to intend a just and reasonable result); *In re Marriage of Hunt*, 2015 COA 58, ¶¶ 22-23, 353 P.3d 911 (refusing to interpret C.R.C.P. 16.2 in a manner requiring an absurd or unreasonable result or frustrating one of its stated goals); *see also Schwankl v. Davis*, 85 P.3d 512, 516-17 (Colo. 2004).

¶ 50 Finally, I question the efficacy of the suggestion in Judge Taubman's dissent that a nunc pro tunc order could be employed in a case where the district court was not given sufficient time to address a motion to reopen. In *Dill v. County Court*, 37 Colo. App. 75, 77, 541 P.2d 1272, 1273 (1975), a division of the court of appeals concluded that a nunc pro tunc judgment may not be used "to circumvent the time requirements of the rules of procedure" and resurrect an appeal that was untimely filed. In *Mark v. Mark*, 697 P.2d 799, 801 (Colo. App. 1985), *overruled by Robbins v. A.B. Goldberg*, 185 P.3d 794 (Colo. 2008), our court cited *Dill* for the proposition that "a trial court may not regain jurisdiction, once it has been lost, by purporting to act in the past" through a nunc pro tunc judgment.

¶ 51 Although *Goldberg*, the case cited by Judge Taubman to support the use of a nunc pro tunc judgment, overruled *Mark*, it did not address *Dill*. And in *People v. Sherrod*, 204 P.3d 466, 469 (Colo. 2009), the supreme court cited *Dill* in discussing "whether nunc pro tunc orders can cure jurisdictional defects," but ultimately did not decide that question.

¶ 52 I thus question whether use of a nunc pro tunc judgment could would allow a district court to decide a motion to reopen after the five-year jurisdictional period has run, as suggested by Judge Taubman.

JUDGE TAUBMAN, dissenting.

¶ 53 In my view, the threshold—and dispositive—question in this case is whether the trial court had subject matter jurisdiction under C.R.C.P. 16.2(e)(10) to consider the motion of Barbara Runge (wife) to reopen the marital property division entered four years and 364 days earlier in her dissolution of marriage action. Because I believe that rule provides the trial court with subject matter jurisdiction to consider such motions for up to five years from the date of permanent orders, I disagree with Judge Furman and Judge Richman rejecting the argument of David Allen Runge (husband) that the trial court had lost subject matter jurisdiction to consider wife's motion. I also disagree with Judge Richman's conclusion that the trial court had jurisdiction to rule on wife's motion.

***9** ¶ 54 Barbara and David Allen Runge divorced in 2011. The decree of dissolution was entered on April 22, 2011. One day shy of five years later, on April 21, 2016, wife filed a motion to reopen the property portions of the dissolution decree under C.R.C.P. 16.2(e)(10). In her motion, wife made general allegations that husband had either hidden or undervalued assets. The record provides no explanation for wife's decision to file her motion one day shy of the five-year jurisdictional provision of that rule. The district court ruled that it had jurisdiction to consider wife's motion, but ultimately dismissed her motion after concluding that wife "ha[d] not made a sufficient showing" that husband failed to provide material financial information.

¶ 55 "[S]ubject matter jurisdiction concerns the court's authority to deal with the class of cases in which it renders judgment, not its authority to enter a particular judgment in that class." *Minto v. Lambert*, 870 P.2d 572, 575 (Colo. App. 1993). "Whether a court possesses ... jurisdiction is generally only dependent on the nature of the claim and the relief sought." *Trans Shuttle, Inc. v. Pub. Utils. Comm'n*, 58 P.3d 47, 50 (Colo. 2002). "[I]n determining whether a court has subject matter jurisdiction, it is important to distinguish between cases in which a court is devoid of power and those in which a court may have inappropriately exercised its power." *SR Condos., LLC v. K.C. Constr., Inc.*, 176 P.3d 866, 869-70 (Colo. App. 2007). If a court acted when it was devoid of power, it acted without jurisdiction and any judgment rendered is void. *In re Marriage of Stroud*, 631 P.2d 168, 170 (Colo. 1981).

¶ 56 Rule 16.2(e)(10) requires that, at the outset of a dissolution of marriage action, the parties must "provide full disclosure of all material assets and liabilities." If such financial disclosures contain "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."

¶ 57 Rule 16.2 was promulgated in 2005 in an effort to reform the "procedure for the resolution of all issues in domestic relations cases." C.R.C.P. 16.2(a); *see also In re Marriage of Schelp*, 228 P.3d 151, 155 (Colo. 2010). Rule 16.2 sets forth comprehensive disclosure and discovery requirements and allows for tailored case management. *See generally* C.R.C.P. 16.2(a). The rule was "the culmination of five years of pilot projects statewide and two years of drafting by a subcommittee of the Supreme Court Standing Committee on Family Issues." David M. Johnson et al., *New Rule 16.2: A Brave New World*, 34 Colo. Law. 101, 101 (Jan. 2005). It was drafted with significant input from "the Bench and Bar." *Id.*

¶ 58 As Judge Richman notes, the *Schelp* court stated that Rule 16.2(e)(10) "renders inactive" C.R.C.P. 60(b), "which formerly operated as a bar" to retained jurisdiction by requiring that parties in most circumstances file a post-decree challenge within six months. *Schelp*, 228 P.3d at 156. Thus, Rule 16.2(e)(10) supplanted Rule 60(b) in the context of post-decree challenges based on nondisclosure of material assets or liabilities. *See id.* Significantly, Rule 60(b) set a *filing* deadline whereas Rule 16.2(e)(10) states that the court "shall retain jurisdiction" for five years after the entry of a final decree or judgment. *Compare* C.R.C.P. 60(b), *with* C.R.C.P. 16.2(e)(10).

¶ 59 On appeal, husband asserts that Rule 16.2(e)(10) strips a court of jurisdiction to consider a post-decree challenge based on financial nondisclosure five years after the date of the decree. That is, husband contends the rule imposes a limit on a district court's jurisdiction. In response, wife contends that the rule imposes a mere filing deadline, and does not require the court to act within the five-year window. In other words, wife views the rule as a claims processing provision. I agree with husband's reading of Rule 16.2(e)(10) and would therefore conclude that the district court lost jurisdiction to consider wife's motion the day after she filed it.

***10** ¶ 60 Rules of statutory construction apply to the interpretation of rules of civil procedure. *Watson v. Fenney*, 800 P.2d 1373, 1375 (Colo. App. 1990). Thus, the primary task in construing a rule is to ascertain and to give effect to the intent of the adopting body. *Id.* To discern that intent, a court should look first to the language of the rule, giving words and phrases their plain and ordinary meanings. *See People v. Dist. Court*, 713 P.2d 918, 921 (Colo. 1986). If the language of a rule is clear, there is no need to resort to other rules of construction. *Watson*, 800 P.2d at 1375.

¶ 61 I consider the meaning of Rule 16.2(e)(10) plain: a district court retains *jurisdiction* to reopen a dissolution decree for five years after the decree's entry. Once five years have passed since the date of permanent orders, the court loses jurisdiction under Rule 16.2(e)(10) to consider a motion to reopen a property division in a dissolution of marriage case. No Colorado case law contradicts this reading of the rule, and in fact some cases support my interpretation. *See generally Schelp*, 228 P.3d at 156 ("The five-year retention provision states that for any disclosures made under the new [Rule 16.2], the court shall retain *jurisdiction* for a period of five years after the entry a decree to reallocate assets and liabilities.") (emphasis added).

¶ 62 Although Judge Furman appears to apply a plain meaning interpretation of Rule 16.2(e)(10), I disagree with his construction of the rule. In his interpretation, a trial court may consider a motion to reallocate marital assets or liabilities whenever it is filed, but only retains jurisdiction for five years from the date of permanent orders if it intends to grant the motion. This novel interpretation was not argued by the parties or addressed by the trial court. Further, I am not aware of any decision considering a trial court's subject matter jurisdiction which has held that a jurisdictional limit applies to the granting of a motion, but not to its denial.

¶ 63 I have three concerns about Judge Furman's interpretation. First, it does not alert litigants that the five-year period in Rule 16.2(e)(10) applies only when a court intends to grant a motion to reallocate marital assets and liabilities. Second, it does not account for other language in this rule that the five-year provision does not limit other remedies that may be available to a party. Thus, a litigant filing a motion to reallocate marital assets more than five years after the date of permanent orders would not know whether to pursue such motion under Rule 16.2(e)(10) or pursue some other remedy. Indeed, my guess is that after the five-year period has elapsed, a litigant would never file a motion under this rule.

¶ 64 Third, Judge Furman's construction of Rule 16.2(e)(10) rests on the assumption that a trial court will be able to decide a motion under that rule without affording the moving party an opportunity to conduct discovery. Here, wife moved for discovery to assist her in proving the allegations contained in her motion. In this case, as in many others, discovery may be necessary to establish whether an initial disclosure of assets and liabilities contained material misstatements or omissions. While a trial court may be able to rule in some cases that a motion to reallocate assets and liabilities is insufficient on its face, in my view most cases will require that some discovery be undertaken.

¶ 65 While Judge Richman concludes that the district court had jurisdiction because wife filed her motion within five years of the date of the decree, I disagree with that interpretation as well, for several reasons. First, as I have already noted, the plain language of Rule 16.2(e)(10) is phrased in terms of the district court's jurisdiction and makes no mention of a date by which a party must file a motion to reopen. I would give effect to the rule's plain language.

***11** ¶ 66 Second, when we consider the meaning of rules, "inclusion of certain items implies the exclusion of others." *Beeghly v. Mack*, 20 P.3d 610, 613 (Colo. 2001). I would conclude that the express inclusion of the word "jurisdiction" in Rule 16.2(e)(10) implies that the supreme court rejected phrasing the rule as imposing a filing deadline. In contrast, other procedural rules require that a party file a motion within a certain window. *See* C.A.R. 4(a) (requiring that parties file notice of appeal "within 49 days of the date of the entry of the judgment, decree, or order from which the party appeals"); C.R.C.P. 59(a) ("Within 14 days of entry of judgment as provided in C.R.C.P. 58 or such greater time as the court may allow, a party may move for post-trial relief."); C.R.C.P. 60(b) (requiring that motion for relief from a judgment or order "shall be made within a reasonable time, and for [certain enumerated claims] not more than 182 days after the judgment, order, or proceeding was entered or taken"); *see also* §§ 13-80-101(1), -102(1), C.R.S. 2017 (requiring that civil actions be "commenced within" certain statutes of limitations periods); *cf. In re Fisher*, 202 P.3d 1186, 1198 (Colo. 2009) (concluding that C.R.C.P. 251.19(a), which requires that attorney discipline hearing board "shall prepare" an opinion within fifty-six days of a hearing, does not state that the board "loses jurisdiction to rule on a matter if the opinion is not issued within" that timeframe). Thus, where the Colorado Supreme Court has intended to create a filing deadline, it has done so. It did not do so here.

¶ 67 Third, I believe that reading Rule 16.2(e)(10) as creating a five-year jurisdictional window is in keeping with the intent of revised Rule 16.2 as a whole. *See Dist. Court*, 713 P.2d at 921 ("To reasonably effectuate the legislative intent, a statute must be read and considered as a whole."). In light of the rule's rigorous mandatory disclosure scheme, *see generally* C.R.C.P. 16.2(e); *see also* C.R.C.P. 16.2 app. form 35.1, I believe that the supreme court envisioned less frequent post-decree challenges to property divisions in permanent orders. Thus, a five-year cap on a district court's jurisdiction to reopen decrees strikes me as a sensible limitation, as well as a significant expansion of the prior limitations of Rule 60(b).

¶ 68 Fourth, I do not think that my interpretation of Rule 16.2(e)(10) would lead to the "uncertain and absurd results" that Judge Richman envisions. He concludes that, if the rule's plain meaning were given effect, parties would be forced to predict an appropriate date to file a motion to reopen based on a district court's ability to decide such motion within the five-year jurisdictional period. However, I do not believe reading Rule 16.2(e)(10) as imposing a jurisdictional limit would engender such uncertainty. [1] In the event that parties discover grounds for reopening a decree when the five-year window has almost run, they can file motions requesting a district court to decide the matter during the five-year period it retains jurisdiction.

[1] On the contrary, Rule 16.2(e)(10) should encourage parties to file motions to reopen a property division sufficiently in advance of the jurisdictional deadline to permit the district court to timely rule. Further, as in *Robbins v. A.B. Goldberg*, 185 P.3d 794 (Colo. 2008), the parties can advise the court as necessary of the impending jurisdictional deadline.

¶ 69 Moreover, in my view, the supreme court has set forth an appropriate remedy for situations in which a district court does not decide a matter within the jurisdictional window despite being given sufficient time to do so. In *Robbins v. A.B. Goldberg*, the supreme court stated that C.R.C.P. 54(h)'s requirement that "[a] revived judgment must be entered within twenty years after entry of the original judgment" "was not intended to deprive litigants of a judgment simply because of court delays." 185 P.3d 794, 795-96 (Colo. 2008). Thus, the *Robbins* court held that, if court delay caused the court to lose jurisdiction, the appropriate remedy was an entry of judgment nunc pro tunc as of a date within Rule 54(h)'s twenty-year window. *Id.* at 797; *see also Perdew v. Perdew*, 99 Colo. 544, 547, 64 P.2d 602, 604 (1937) (providing that a judgment nunc pro tunc may be entered "where the cause was ripe for judgment and one could have been entered at the date to which it is to relate back, provided [any] failure is not the fault of the moving party").

***12** ¶ 70 Rule 16.2(e)(10) does "not limit other remedies that may be available to a party by law." Thus, in the event a party files a motion under Rule 16.2(e)(10) but "court congestion or other administrative delays prevent a court from considering [the] matter before [the] legal deadline," a judgment nunc pro tunc as of a date within the five-year window would be appropriate. [2] *Robbins*, 185 P.3d at 796. However, that remedy is not appropriate here, where wife does not offer any reason for filing her motion only one day before the jurisdictional deadline and where wife did not alert the court to its imminent loss of jurisdiction.

[2] Although absence of jurisdiction typically acts as an absolute restriction on a court's power to hear a matter, there are exceptions to that seemingly hard and fast rule. Exhaustion of administrative remedies is a jurisdictional prerequisite to bringing a suit challenging an administrative action, but there are several exceptions to that jurisdictional bar. *City & Cty. of Denver v. United Air Lines, Inc.*, 8 P.3d 1206, 1213 & n.11 (Colo. 2000) (summarizing exceptions, including futility and waiver by the agency). Similarly, timely filing of a notice of appeal is ordinarily a jurisdictional prerequisite to appellate review, but certain exceptions allow for appellate review even in the case of untimely filing. *See generally In re C.A.B.L.*, 221 P.3d 433, 438-40 (Colo. App. 2009).

¶ 71 Finally, I disagree with wife's contention, made during oral argument, that the use of the term "jurisdiction" in Rule 16.2(e)(10) was "an example of poor drafting" by the Supreme Court Civil Rules Committee. As I have stated, I find the meaning of the rule plain, and the extensive drafting process that led to its enactment suggests that some forethought led to the use of the word "jurisdiction" in Rule 16.2(e)(10). *See generally* Johnson et al., 34 Colo. Law. at 101. Even if interpreting Rule 16.2(e)(10) according to its plain meaning would lead to a result not intended by the supreme court,

"we are not a board of editors" tasked with rewriting the Rules of Civil Procedure when their meaning is clear. *McGihon v. Cave*, 2016 COA 78, ¶ 11, —P.3d ——, ——.

¶ 72 Accordingly, I would vacate the district court's order dismissing wife's motion on the basis that the district court lacked jurisdiction to consider the motion. Because I would vacate the order rather than affirm on the merits, I respectfully dissent.

All Citations

--- P.3d ----, 2018 WL 1007956, 2018 COA 23M

wallace, jennifer

From: berger, michael
Sent: Friday, February 2, 2018 9:21 AM
To: elliff, j. eric
Cc: moore, jenny
Subject: RE: Alternate Jurors in Multiparty Civil Case

Yes. I will put it on the March agenda. I have a vague recollection of some discussion about this or a related problem in 47, but I can't remember any details about it. It could have occurred years ago, or yesterday.

Jenny, please add this to the March agenda.

From: elliff, j. eric
Sent: Friday, February 2, 2018 8:55 AM
To: berger, michael <michael.berger@judicial.state.co.us>
Subject: FW: Alternate Jurors in Multiparty Civil Case

Mike:

Is this possibly something our committee should look at (understanding we can't alter the statute)?

Eric

J. ERIC ELLIFF
JUDGE
DENVER DISTRICT COURT, SECOND JUDICIAL DISTRICT
CITY AND COUNTY BUILDING, COURTROOM 215
1437 BANNOCK STREET
DENVER, COLORADO 80202

From: herringer, william
Sent: Friday, February 02, 2018 8:48 AM
To: District Judges <districtjudges@judicial.state.co.us>
Subject: Alternate Jurors in Multiparty Civil Case

I have a multiparty civil PLA/products liability case going to trial in the near future. There are two plaintiffs (a husband and wife) and four defendant's, three of the defendants are aligned to together (business, landowner and employee) and forth defendant is the manufacturer of the product involved in the injury. It is a six day trial, so I was intending on seating at least one alternate.

CRCP 47(b) says that if there are one or two alternates each **side** is entitled to one extra peremptorary challenge. § 13-71-142 says that if an alternate juror is seated each **party** is entitled to and additional peremptory challenge. The case law clearly states that for the rule a "side" is plaintiffs and defendants, not parties. So the two plaintiffs would share one extra peremptory challenge and the same for the four defendants. But as the statute says party, and I would expect that the statute would control, meaning the plaintiff would each get an extra peremptory challenge and the defendants would get four.

Has anyone addressed this conflict between the rule and the statute? If so how did you handle it?

Thanks,

William L. Herringer
District Court Judge

Sixth Judicial District
1060 East Second Avenue
Durango, Colorado 81301
970.385.6136

wallace, jennifer

From: gabriel, richard
Sent: Thursday, March 29, 2018 10:10 AM
To: berger, michael
Cc: moore, jenny
Subject: FW: Civil Rules Amendment? CRCP 121 §1-14(1)(f)default judgments

Please see below. FYI.

Rich

Richard L. Gabriel
Justice, Colorado Supreme Court
2 East 14th Avenue
Denver, Colorado 80203
(720) 625-5440
richard.gabriel@judicial.state.co.us

From: moss, edward
Sent: Thursday, March 29, 2018 10:06 AM
To: gabriel, richard
Subject: Civil Rules Amendment? CRCP 121 §1-14(1)(f)default judgments

Justice,
Please pass along this email string to the civil rules committee for consideration.
Thanks!
Ed

Edward C. Moss
District Court Judge
1100 Judicial Center Dr.
Brighton, CO 80601-8872
Direct: 303-654-3248

From: neiley, john
Sent: Thursday, March 29, 2018 9:58 AM
To: moss, edward
Subject: RE: How does a lawyer "file" an electronic promissory note for a default judgment

I see the problem, but it's really one of proof isn't it? I would look to the foreclosure and UCC cases and statutes by analogy and reason that if the borrower can satisfy you as to the terms of the note and the fact of default and the amount owed, and the plaintiff's standing to sue, you can substitute the affidavit or other proof for the original or

electronic version of the note – having said that, I have never had to deal with purely electronic obligations – I have seen plenty of affidavits and copies though relating to missing originals.

John F. Neiley
District Court Judge
Ninth Judicial District

109 8th Street, Suite 403
Glenwood Springs, CO 81601
(970)928-3097
john.neiley@judicial.state.co.us

From: moss, edward
Sent: Thursday, March 29, 2018 9:52 AM
To: neiley, john <john.neiley@judicial.state.co.us>
Subject: RE: How does a lawyer "file" an electronic promissory note for a default judgment

John,
We aren't dealing with real estate under Title 38.

Under the UCC, CRS 4-3-309 indicates that enforcement of the "lost" note is allowed when the plaintiff "was in possession.. when the loss of possession occurred." In that case, a lost instrument bond can be purchased. But:

1. Where the defaulting borrower had possession of the original paper, how do we know that the paper is lost? …and anyway, the lender never had possession.
2. Where there was no paper version, but only electronic, how can one say the electronic version was "lost"?

From: taylor, todd
Sent: Thursday, March 29, 2018 9:24 AM
To: moss, edward
Subject: RE: How does a lawyer "file" an electronic promissory note for a default judgment

I agree that it is a problem. We have been requiring plaintiffs to file indemnifications in this instance. It seems like a rule change may be in order to address the shift to electronic documents.

That said, I dealt with a case yesterday where the plaintiff brought suit on a written promissory note and when we received the original it was stamped with a notation of a judgment entered in a previous case.

I am curious to find out what you learn and how you decide to deal with this issue. If you're willing, please share your results.

Todd

Todd Taylor
District Court Judge
19th Judicial District
P.O. Box 2038

Greeley, CO 80632
(970) 475-2540
todd.taylor@judicial.state.co.us

From: neiley, john
Sent: Thursday, March 29, 2018 9:33 AM
To: moss, edward
Subject: RE: How does a lawyer "file" an electronic promissory note for a default judgment

Creditors can rely on affidavits and lost instrument bonds to deal with lost notes, so as long as they provide adequate proof that they stand as a qualified holder I think you're fine. If the foreclosing creditor cannot find the original, then an affidavit that it has been lost together with a lost instrument bond will suffice. § 38-38-101(1)(b). However, an exception to this requirement is recognized if the foreclosing holder is a "qualified holder." defined at § 38-38-100.3(20) to include many different categories of holders, including large institutional lenders and servicers. Qualified holders may submit a copy of the note instead of the original or a lost instrument bond, provided they also file an affidavit stating that they are indeed a qualified holder and that the copy of the note is a true and accurate copy. § 38-38-101(1)(b)(II).

These are the foreclosure statutes but the UCC also addresses the lost instrument case at 3-309

John F. Neiley
District Court Judge
Ninth Judicial District

109 8th Street, Suite 403
Glenwood Springs, CO 81601
(970)928-3097
john.neiley@judicial.state.co.us

From: moss, edward
Sent: Thursday, March 29, 2018 8:57 AM
To: District Judges <districtjudges@judicial.state.co.us>
Subject: How does a lawyer "file" an electronic promissory note for a default judgment

Colleagues,

This is a more and more common issue is default judgments – and I don't understand what to do.

Defendant takes out a loan. The promissory note is either:

1. entirely electronic and the borrower signs on an ipad so there never is a paper original; or
2. the borrower signs a paper note, has it notarized, and emails the scanned image to the lender – so there is a paper original but only the borrower ever had it – and the borrower is in default.

CRCP 121 §1-14(1)(f) provides that if the default action is on a promissory note "the original note shall be presented to the court in order that the court may make a notation of the judgment on the face of the note."

What is your judicial district doing about this issue?

Edward C. Moss

District Court Judge
1100 Judicial Center Dr.
Brighton, CO 80601-8872
Direct: 303-654-3248