

**Colorado Supreme Court Advisory Committee on the Rules of Civil Procedure
May 18, 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 Paul R. Dunkelman		X
Judge J. Eric Elliff		X
Judge Adam Espinosa	X	
Peter Goldstein	X	
Lisa Hamilton-Fieldman	X	
Michael J. Hofmann		X
Richard P. Holme	X	
Judge Jerry N. Jones	X	
Judge Thomas K. Kane	X	
Cheryl Layne	X	
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	
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	
J.J. Wallace	X	

I. Attachments & Handouts

May 18, 2018 agenda packet & supplement

II. Approval of the January 26, 2018 Minutes

The minutes were approved with two corrections: (1) change “court” to “course” in section III(I) and (2) add a “1” after the “0” to clarify the reference to CJD 05-01 in section III(C).

III. Announcements from the Chair

- Passing of former chair Dick Laugesen on March 13, 2018
- C.R.C.P. 16.1—Supreme court adopted amendments recommended by the committee, effective for cases filed on or after September 1, 2018
- Membership changes
 - i. Resignation of Jenny Moore and her appointment as the Administrator of the Office of Language Access of the Colorado Judicial Branch
 - ii. Temporary support by Supreme Court staff attorney J.J. Wallace
 - iii. District Judge Fred Gannett of the Fifth Judicial District resigned from Committee in preparation of his retirement and move to South Africa
 - iv. Replaced by District Judge Paul Dunkelman of the Fifth Judicial District
 - v. Skip Netzorg decided not to serve an additional term on the Committee due to other commitments
- Committee terms now finish at the end of the calendar years

IV. Meeting Schedule

Judge Berger noted that two regular meetings have been cancelled in the last six months. He believes that the committee’s present workload does not seem to require meeting as often as in the past. In setting next year’s meeting schedule, he will set only 4-5 meetings for the year, which is consistent with the other rules committees.

The meeting on June 22nd may be cancelled. Judge Berger will let the committee members know the status of the meeting in early June.

In mentioning the committee’s recent big projects, Justice Gabriel related that the legislature took up county court jurisdiction during the last session and raised the jurisdictional limit for county court civil cases to \$25,000. The \$25,000 limit was a compromise and, as part of the legislation, a one-year study period was added to examine how things go and to determine if further changes should be considered.

V. Present Business

A. C.R.C.P. 107 Lisa Hamilton-Fieldman

Lisa Hamilton-Fieldman recounted that the committee received a letter asking whether C.R.C.P. 107 should be changed to allow defendants of remedial contempt to ask for attorney fees if the contempt is unsuccessful.

Ultimately, she recommends taking no further action on the issue. She (1) worries that there may be a chilling effect in allowing an award of attorney fees, especially in the most common contempt case types, civil protection orders and family law cases; (2) feels there is limited applicability because attorney fees may only be awarded in remedial cases and are already available under section 13-17-102 (frivolous, groundless, or vexatious); and (3) believes it will be difficult to fit any change into the language of the rule.

There was no objection to taking no further action.

B. Comment to C.R.C.P. 26 Richard Holme

Richard Holme recapped the discussion from last meeting that led to the proposed comment: many people expressed concern that more and more non-retained experts were being held to retained expert standards based on case law for the old rule, which was not the intent of the new rule. He felt a comment was appropriate to curb such practices because relying on case law to offer similar instruction would take years. He drafted proposed language to be added to the second paragraph of comment 18 (in the agenda packet at p. 6:

A motion was made and seconded to adopt the language as it is proposed. The motion passed 16-2.

C. C.R.C.P. 69 Brent Owen

Brent Owen reminded the committee that a subcommittee was formed to consider whether Rule 69 is antiquated and whether it should be updated to match the federal rule. He stated that the subcommittee has met, and subcommittee members seemed to be in favor of following the federal rule. The subcommittee will have a proposal to the committee soon.

D. C.R.C.P. 16-Suggestion regarding TMO witness list requirements Damon Davis

Damon Davis raised an issue about witness lists requirements for trial management orders (TMOs): the current rule requires counsel to estimate the cross-examination time of the opposing party, which can be difficult and, if the estimate is inaccurate, can result in a loss of time.

Mr. Davis spoke with colleagues, who didn't see it as a huge issue. He offered two examples of different approaches: a complicated approach used by Judge Brimmer in the federal court or a simple approach where each party puts in their own estimated times before submitting the final TMO. Judge Berger suggested a third approach: he reminded the committee that they had agreed to not make minor changes to Rule 16 for a while.

The committee agreed to follow the third approach. However, Judge Berger will keep the issue about witness lists in his notebook so that when the committee takes a more comprehensive look at Rule 16, the issue will be included.

E. C.R.C.P. 121 § 1-26-Request for amendment to signature requirements to the rule Cheryl Lane

Cheryl Lane explained there do not appear to be any issues with the current rule. The committee agreed and will take no further action.

F. C.R.C.P. 80 & 380 Judge Espinosa

Judge Espinosa recapped that, last fall, the committee agreed to recommend repealing Rule 80 and adding a comment referring to CJD 05-03, which sets out the best practices for court reporters. The subcommittee met and drafted proposed language for the comment (included on p. 11 of the agenda packet).

In examining the similar rule for county court, the committee asked the subcommittee to see if any of the language needed to be updated. The subcommittee met and agreed that the language of Rule 380(c) should be updated to reflect use of electronic recording and to remove references to a reporter's notes. The proposed changes to the rule were included in the agenda packet on p. 38.

A motion was made and seconded to adopt: (1) the recommendation to repeal Rule 80 and add the comment as proposed by the subcommittee; and (2) the amended language of Rule 380(c) as proposed by the subcommittee.

The motion passed unanimously.

G. C.R.C.P. 16.2(e)(10)- *In re Marriage of Runge*, 2018 COA 23M (February 22, 2018) Judge Jones

Judge Jones explained that a recent court of appeals opinion pointed out a problem in C.R.C.P. 16.2(e)(10) and its language setting out a timeline to reopen a domestic relations cases. The opinion reached three different conclusions about the language of the rule.

He asked the committee if anyone remembers discussing the rule when it was adopted in 2005. One member recalled that there was a separate committee that drafted Rule 16.2, and it was presented to the civil rules committee fully-formed. Another member recalled that the intent of that portion of the rule was tied to being misled and giving the aggrieved party time to discover having been misled. The committee reached a consensus that, consistent with other civil rules, the five-year timeframe is in the nature of a filing deadline.

A motion was made and seconded agreeing that the language of the rule should be corrected to reflect the filing deadline and the committee appointed Judge Jones and Lisa Hamilton-Fieldman (and at least one domestic practitioner TBD) to take up the issue and offer a suggested fix to the committee.

The motion passed unanimously (including a woof! woof! in agreement by a special guest on the phone).

H. C.R.C.P. 47(b) -Alternative Jurors in a Multiparty Civil Case Judge Elliff

The committee agreed that if the statute uses “party,” then the rule should match the statute. See § 13-71-142.

A motion was made seconded to draft a proposed rule substituting the word “party” for “side.” The motion passed unanimously and a draft reflecting the change will be presented to the committee at the next meeting for a vote.

I. C.R.C.P. 121 § 1-14(1)(f) Default Judgments—problems relating to electronic evidence of debt

Judge Berger explained that the committee had received an email chain expressing difficulty trial judges were having dealing with electronic promissory notes, which are not mentioned in the default judgment local rule.

The committee felt the issue was worth examining further and decided to form a subcommittee.

The following people signed up to be on the subcommittee, which will be chaired by Judge Kane: Judge Zenisek & Jose Vasquez.

J. C.R.C.P. 106-Unintended use of rule to obtain interlocutory appeals in county court criminal cases.

Judge Jones summarized the concerns he outlined in his memo. Other members expressed their experiences with C.R.C.P. 106 being used as an inappropriate interlocutory appeal mechanism, which resulted in substantial delays in county court criminal cases. Another member also expressed the same concerns for municipal appeals and referred to *Town of Frisco v. Baum*, 90 P.3d 845 (Colo. 2004). The committee agreed to form a subcommittee to further explore the issue.

The following people signed up to be on the subcommittee, to be chaired by Judge Jones: Judge Espinosa; Lisa Hamilton-Fieldman; Dave Little; Brent Owen; Stephanie Scoville; Lee Sternal; Judge Romano; Judge Zenisek

VI. The Committee adjourned at 2:48 p.m.

*Respectfully submitted,
J.J. Wallace*