January 16, 2022

MEmorandum

TO: Criminal Rules Committee

FROM: Matthew S. Holman, on behalf of the SB21-271 Subcommittee

RE: Proposed Civil Infraction Rules

Introduction

 The SB21-271 Subcommittee was tasked with developing a set of civil infraction rules setting forth procedures for the newly classified civil infractions found in Senate Bill 21-271. In developing these proposed rules, the subcommittee looked to the Colorado Rules for Traffic Infractions as a template, and the subcommittee adapted language from these traffic rules, the Colorado Rules of Criminal Procedure, existing statutory provisions, and new statutory provisions in SB21-271.

 These proposed rules are not yet complete. For example, proposed Rule 3 (Definitions) has been purposely left to be completed following the development of the other rules to see what terms need defining. Several other rules presented questions that the subcommittee thought would benefit from a larger discussion with the entire Criminal Rules Committee. Two proposed rules, Rule 10 (Dismissal Before Final Hearing) and Rule 12 (Judgment After Final Hearing), include bracketed comments for discussion.

 This memo includes (1) a brief summary of key provisions of the Bill, (2) the subcommittee’s draft of the proposed Colorado Rules for Civil Infractions, and (3) comments and questions identified by the subcommittee.

Senate Bill 21-271

 Senate Bill 21-271 includes several sections relevant to the procedures for civil infraction cases. Among them are Sections 165, 167, 168, 188, 189, and 737.

 Section 165 and Section 167 set forth two, slightly different procedures for charging a civil infraction. Section 165, §16-2-104 and §16-2-109, provides for issuance and service of a “summons and complaint” by a peace officer or by a county court. Section 167, §16-2-201(1), on the other hand, provides that the arresting officer may give the person a “penalty assessment notice” and release the person upon its terms. (As will be discussed in Comments and Questions below, it is possible that the penalty assessment notice procedure will be eliminated by future legislation.)

 Section 168, §16-2.3-101, and a parallel statute in Section 737, §42-4.1-1708.5, create key procedures for civil infractions. These include: (1) a requirement that civil infraction adjudications be held before a magistrate or a county judge acting as a magistrate; (2) the burden of proof is beyond a reasonable doubt; (3) a district attorney may enter into a civil infraction case for purposes of negotiating a plea, but a district attorney shall not represent the state at hearing conducted in civil infraction matters; (4) an appeal from a civil infraction matter must be taken to the district court; and (5) a civil infraction defendant may collaterally attack a judgment within six months, subject to exceptions such as justifiable excuse or excusable neglect.

 Sections 187 and 189 provide, upon conviction, for a penalty and for restitution. Section 187, §18-1.3-503(1.6), provides that the penalty for a civil infraction is a fine of not more than $100, unless otherwise provided by statute. And a peace officer may apply the penalty assessment procedure in §16-2-201 for the payment of a fine in a civil infraction case. Section 189, §18-1.3-603(1), requires that every order of conviction in a civil infraction case shall include consideration of restitution.

 Section 803, provides the Bill’s effective date of March 1, 2022.

Draft of Colorado Rules of Civil Infractions

**Rule 1: Scope and Purpose**.

These rules govern the procedure in the determination of civil infractions. They are intended to provide for the just determination of civil infractions, and are to be construed to secure simplicity in procedure, fairness in administration, and elimination of unjustifiable expense and delay.

**Rule 2: Application**.

These rules apply to all proceedings alleging a civil infraction in the State of Colorado. These rules do not apply to municipal ordinances or charter violations. To the extent these rules do not cover a particular topic, consultation to Colorado’s Rules of Criminal Procedure may be instructive to determination of a fair and just procedure. The county court has jurisdiction over an alleged civil infraction, and the county court has jurisdiction over a civil infraction committed by a juvenile.

**Rule 3: Definitions (TBD)**.

**Rule 4: Commencement of Action**.

(a) Issuance of a summons and complaint for civil infraction. A summons and complaint may be issued by a peace officer when present or with probable cause when not present. A copy shall be filed with the county court where the civil infraction is alleged to have occurred, and copy of to be provided to the District Attorney with jurisdiction in that county.

(b) Service. Summons may be issued by a county court in a prosecution for a civil infraction by giving a copy to the defendant personally, or by leaving the summons at his domicile or place of abode with a person over 18 years of age residing therein, or by mailing a copy to the defendant’s last known address.

(c) Content. The summons and complaint issued shall include the following: (1) the name of the defendant, (2) the name of the civil infraction alleged, (3) citation to the civil infraction alleged, (4) a brief description of the civil infraction, including but not limited to the date of infraction and approximate location, and (5) direct the defendant of when and where to appear in county court.

(d) In matters alleging a civil infraction in combination with a criminal offense, the Rules of Criminal Procedure shall apply to the commencement of actions.

**Rule 5. Plea Bargain**

The District Attorney or the District Attorney’s deputy may, in the District Attorney’s Discretion, enter civil infraction cases for the purpose of attempting to negotiate a plea or a stipulation to pretrial diversion or deferred judgment and sentence but shall not be required to so enter by any person, court or law. The District Attorney shall not represent the state at hearings conducted by a County Court Magistrate or County Court Judge acting as a Magistrate on civil infraction matters.

**Rule 6. Payment Before Appearance**

(a) The clerk of the court shall accept payments of a penalty assessment notice by a defendant without an appearance before the County Court Magistrate or before a County Court Judge acting as a Magistrate, if payment is made before the time scheduled for the first appearance.

(b) At the time of payment, the defendant shall sign a waiver of rights and acknowledgement of guilt, as set forth in Form\_\_\_\_in the appendix to these rules, and agree to pay court ordered restitution, if applicable.

Form \_\_\_\_

WAIVER OF RIGHTS AND ADDMISSION OF GUILT OR LIABILITY UNDER COLORADO RULES FOR CIVIL INFRACTIONS

 You have been accused of violating the civil infraction laws of the State of Colorado. A simplified procedure is available for the payment of the penalty assessment if you voluntarily admit your guilt or liability after being advised of the following rights.

You have the right to:

1. Be represented by an attorney at your own expense;

2. Remain silent because any statement you make may be used against you;

3. Deny the allegations against you and have a hearing, at which the allegations must be proven beyond a reasonable doubt;

4. Testify at your own choosing, subpoena witnesses present evidence and cross-examine witnesses for the state;

5. Appeal a judgment against you.

Admission of Guilt or Liability

I have read or been advised of the rights described above. I hereby waive those rights and voluntarily admit my guilt of liability.

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Date Signature

**Rule 7. First Hearing**

(a) If the defendant has not previously acknowledged guilt or liability and paid the penalty assessment, the defendant shall appear before the County Court Magistrate or County Court Judge acting as a Magistrate at the time scheduled for the first hearing.

(b) The defendant may appear in person or by counsel, who shall enter an appearance in the case. However, if an admission of guilt or liability is entered, the Magistrate or County Court Judge acting as a Magistrate may require the presence of the defendant for the assessment of the penalty.

(c) If the defendant appears in person, the County Court Magistrate or County Court Judge acting as a Magistrate shall advise the defendant in open court of the following:

(1) The nature of the infraction alleged in the charging document;

(2) The penalty and docket fee that may be assessed;

(3) The consequences of a failure to appear at any subsequent hearing;

(4) The right to be represented by an attorney at the defendant’s expense;

(5) The right to deny the allegations and to have a hearing before the County Court Magistrate or County Court Judge acting as a Magistrate.

(6) The right to remain silent because any statement made by the defendant may be used against the defendant;

(7) Guilt or liability must be proven beyond a reasonable doubt;

(8) The right to testify, subpoena witnesses, present evidence, and cross-examine any witnesses for the state;

(9) Any answer must be voluntary and not the result of undue influence or coercion on the part of anyone; and

(10) An admission of guilt or liability constitutes a waiver of the foregoing rights and right to appeal.

(d) The defendant personally or by counsel shall answer the allegations in the charging document either by admitting guilt or liability or by denying the allegations.

(e) If the defendant admits guilt or liability, the County Court Magistrate or County Court Judge acting as a Magistrate shall enter judgment and assess the appropriate penalty and docket fee after determining that the defendant understood the matters set forth in Rule 7 (c) and has made a voluntary, knowing, and intelligent waiver of rights.

(f) If the defendant denies the allegations, the matter shall be set for final hearing, and the defendant and officer shall be notified.

**Rule 8. Discovery**

(a) Discovery shall not be available prior to a final hearing.

(b) At the time of the final hearing, the defendant is entitled to inspect all documents prepared by the officer which the officer intends to use in the presentation of evidence.

**Rule 9. Subpoena.**

(a) A subpoena shall be issued only for the attendance of a witness or for the production of documentary evidence at final hearing.

(b) A subpoena shall be issued in any county within the state either by the clerk of court at the request of the filing officer or the defendant, or issued by counsel who has entered an appearance in the case or by the magistrate who conducts the final hearing.

(c) The service of a subpoena shall be by first class mail or by email, if the person to whom it is directed waives personal service, as provided in Form B in the appendix to these rules. No fees or mileage need be tendered with service by mail.

(d) If the person to whom a subpoena is directed does not waive personal service, the issuance and service of a subpoena shall be as provided in Rule 345, C.R.C.P., except as otherwise provided in this rule.

**Rule 10. Dismissal Before Final Hearing.**

(a) Except as provided in Rule 15, the charges shall be dismissed with prejudice if the officer fails to appear at the final hearing.

(b) The charges shall be dismissed if the final hearing is not held within three months from the defendant’s denial of the allegations [alternative: from the date of the first hearing].

**Rule 11. Final Hearing.**

(a) The hearing of all cases shall be informal, the object being to dispense justice promptly and economically. The magistrate shall ensure that evidence shall be offered and questioning shall be conducted in an orderly and expeditious manner and according to basic notions of fairness. Those basic notions of fairness are illustrated by the Colorado Rules of Evidence which shall serve as a guide to the magistrate and parties but shall not be strictly applied. The magistrate may call and question any witness consistent with the magistrate’s obligation to be an impartial fact finder favoring neither the state nor the defense.

(b) The order of proceedings at the hearing shall be as follows:

(1) Before commencement of the hearing, the magistrate shall briefly describe and explain the purposes and procedures of the hearing.

(2) The filing police officer shall offer sworn testimony and evidence to the facts concerning the alleged infraction. After such testimony, the magistrate and the defendant or counsel may cross-examine the officer.

(3) Thereafter, the defendant may offer sworn testimony and evidence and shall answer questions, if such testimony is offered, as may be asked by the magistrate. The defendant is not required to testify and the fact that the defendant does not testify may not be considered or used in any way by the magistrate.

(4) If the testimony of additional witnesses is offered, the order of testimony and the extent of questioning shall be within the discretion of the magistrate. No officer or other testifying witness, with the exception of the defendant, may question any other witness.

(5) Upon the conclusion of such testimony and examination, the magistrate may further examine or allow examination and rebuttal testimony and evidence as deemed appropriate.

(6) At the conclusion of all testimony and examination, the defendant or counsel shall be permitted to make a closing statement.

(c) The Colorado Rules of Evidence shall serve as a guide to the basic notions of fairness which are to govern these hearings but shall not be strictly applied to hearings under these rules.

**Rule 12. Judgment After Final Hearing.**

(a) If all elements of a civil infraction are proven beyond a reasonable doubt, the magistrate shall find the defendant guilty or liable and enter appropriate judgment.

(b) If any element of a civil infraction is not proven beyond a reasonable doubt, the magistrate shall dismiss the charge and enter appropriate judgment, provided, however, that the magistrate may find the defendant guilty of or liable for a lesser included civil infraction, if based on the evidence offered every element of the lesser infraction has been proven beyond a reasonable doubt, and enter appropriate judgment.

(c) If the defendant is found guilty or liable, the magistrate shall assess the appropriate penalty and the docket fee.

(d) The judgment shall be satisfied upon payment to the clerk of the total amount assessed as set forth above.

(e) If the defendant fails to satisfy the judgment in the time allowed, such failure shall be treated as a default under section \_\_\_. The provisions of Rule 16 (d) and (e) shall apply to a default under this rule.

(f) In no event shall a bench warrant be issued for the arrest of any person who fails to appear for a final hearing pursuant to these rules. Entry of judgment and assessment of the penalty and surcharge pursuant to this Rule shall constitute the sole penalties for failure to appear for the final hearing. [This language all taken directly from 42-4-1710, the statute regarding failure to pay traffic infraction fines following conviction.]

**Rule 13. Appeal**

Appeal procedure shall be according to section 13-6-504, C.R.S. and Rule 37, Crim. P.

**Rule­ 13.5­. Postjudgment Remedies**

(a) Every person against whom a judgment is entered is entitled as a matter of right to make an application for postjudgment review upon grounds that are properly the basis for collateral attack on the validity of the judgment.

(b) One applying for postjudgment review shall file a motion in the court that imposed the judgment and penalty. The motion shall allege, in good faith, one or more grounds for challenging the validity of the judgment.

(c) A collateral attack shall be commenced within six months of the entry of judgment. Any motion for postjudgment review filed outside this six-month period shall allege facts which, if true, would establish an exception to the time limit listed in either §16-2.3-101(5)(b) or §42-4-1708.5(5)(b).

(d) The court shall promptly review a motion seeking postjudgment review. In conducting such review, the court shall consider, among other things, whether the motion is timely under the provisions of §16-2.3-101 or §42-5-1708.5.

(e) The court may grant or deny relief without holding a hearing by entering written findings. The court may grant a hearing if the court determines that a hearing is necessary. After such a hearing, the court shall enter oral or written findings either granting or denying relief.

**Rule 14. Venue**

Venue shall be as provided by statute.

**Rule 15. Continuances**

Continuances may be granted upon a showing of good cause by the officer, the officer’s supervisor, or the defendant.

**Rule 16. Default**

(a) If the defendant fails to appear for any hearing, the magistrate shall enter judgment against the defendant.

(b) The amount of the judgment shall be the appropriate penalty assessed after a finding of guilt or liability, the docket fee, and any additional costs assessable under these rules.

(c) The magistrate may set aside a judgment entered under this rule on a showing of good cause or excusable neglect by the defendant. A motion to set aside the judgment shall be made to the court not more than seven calendar days after entry of judgment.

(d) The defendant may satisfy a judgment entered under this rule by paying the clerk and providing proof of compliance with any additional court orders.

(e) No warrant shall issue for the arrest of a defendant who fails to appear at a hearing or fails to satisfy a judgment.

**Rule 17. Effective Date**

These rules take effect March 1, 2022, and shall apply to civil infractions alleged to have been committed on or after that date.

**Rule 18. Title**

These rules shall be known and cited as the Colorado Rules for Civil Infractions, or C.R.C.I.

Comments and Questions in General

 Do we need rules? That question came up more than once among the subcommittee members. Could the procedural statutes, standing alone, provide sufficient guidance in these matters? The subcommittee didn’t settle on a definitive answer to these questions. Instead, we elected to pose them for consideration by the Rules Committee.

 That said, there would seem to be several benefits to adopting a formal set of rules for civil infractions. Presenting the relevant procedures in one set of rules, with references to relevant statutes, could provide a useful roadmap for the parties and the courts. And, where the statutes don’t provide guidance, a set of rules would avoid any confusion over what existing rules – criminal, civil, traffic – should be relied upon in civil infraction matters. A formal set of rules, then, could promote consistency in these adjudications and help safeguard the rights of defendants and of other participants in these adjudications.

 Assuming that civil infraction rules should be adopted, below are comments and questions related to the creation of these rules.

 One factor to be considered in creating a set of civil infraction rules is the possible enactment of amendatory legislation during the current legislative session. For example, Senior Assistant Legal Counsel Kyle Sauer, from the Office of the State Court Administrator, informed the subcommittee that the penalty assessment notice procedures might be eliminated from civil infraction procedures for practical reasons. The possibility of such legislation favors building some flexibility into any rules that would be adopted by March 1, 2022. And any future legislation may require amendments to the rules.

Comments and Questions Concerning Specific Proposed Rules

 **(1) Definition of magistrate:** The statutes refer to the case taking place before a county court magistrate or a county judge acting as a magistrate. The proposed rules use varying terms (some mention both the magistrate and the judge, others mention just the magistrate).

 Possible fix: Provide a definition of “magistrate” that encompasses both the magistrate and the judge, and change the rest of the rules to just refer to “magistrate.”

 **(2) Definition of officer:** The proposed rules would also benefit from a definition of “officer.”

 **(3) Confusion between the terms charging document, summons and complaint, and penalty assessment notice:** The proposed rules refer to the document that commences an action as a “summons and complaint” (Rule 4), a “penalty assessment notice” (Rule 6), or a “charging document” (Rule 7). This is partly the fault of the statutes and partly the language taken from the Traffic Rules. This issue is also impacted by the possibility that Mr. Sauer raised: that the penalty assessment notice procedure may be eliminated by a legislative amendment.

 Possible fix: In Rule 3, provide a definition of “charging document” that includes “summons and complaint” and “penalty assessment notice;” and substitute those phrases in Rules 4 and 6 with “charging document.”

 **(4) Questions related to proposed Rule 12:** Three matters in Rule 12 may need addressing – costs and fees, a blank for a statutory section in Rule 12(e) related to defaults, and the issue of restitution.

 (a) Costs and Fees: Rule 12(c) does not include court costs as part of the judgment, should it? Are there costs and fees that may be assessed in civil infraction matters? *Compare* proposed Rule 16(b): “any additional costs assessable under these rules,” and Traffic Infraction Rule 12(c): “any additional costs authorized by section 13-6-122(1), C.R.S. …”

 (b) Default in Rule 12(e): The proposed rule leaves a blank for a statutory section number. Is there a statutory cite that should go here? *Compare* Traffic Infraction Rule 12(e), which cites §42-4-1710 (3) or (4).

 Also, in a related matter, §16-11-101.6 addresses payment on the day of assessment and the imposition of an additional time payment fee for late payment. Does this belong in Rule 12?

 (c) Restitution: Should restitution be addressed in Rule 12? Would a reference to consideration of restitution pursuant to §18-1.3-603, C.R.S. be sufficient? Note that proposed Rule 6(b) (Payment Before Appearance), briefly addresses restitution but in a different context.

 **(5) Parenthetical comments in Rules 10 and 12.**

Rule 10(b): Proposed Rule 10(b) provides alternative time frames for dismissal of a civil charge where a final hearing has not yet been held: “The charges shall be dismissed if the final hearing is not held within three months from the defendant’s denial of the allegations [alternative: from the date of the first hearing].” Which one should be adopted?

 Rule 12(f): “In no event shall a bench warrant be issued for the arrest of any person who fails to appear for a final hearing pursuant to these rules. Entry of judgment and assessment of the penalty and surcharge pursuant to this Rule shall constitute the sole penalties for failure to appear for the final hearing. [This language all taken directly from 42-4-1710, the statute regarding failure to pay traffic infraction fines following conviction.]”

 Section 42-4-1710 concerns traffic infractions. Is there a statute that covers civil infractions or defaults in general that would apply here?

 Also, the first part of proposed Rule 12 requires a finding of proof beyond a reasonable doubt to enter a judgment. So, does 12(f) require that the court find proof beyond a reasonable doubt in the defendant’s absence?