

**Colorado Supreme Court Advisory Committee on the Rules of Civil Procedure  
June 23, 2017 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 or excused from the meeting were:

<b>Name</b>	<b>Present</b>	<b>Excused</b>
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	
Richard P. Holme	X	
Judge Jerry N. Jones	X	
Judge Thomas K. Kane	X	
Debra Knapp	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	
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	
<b>Non-voting Participants</b>		
Justice Allison Eid, Liaison	X	
Jeannette Kornreich		X

## I. Attachments & Handouts

- A. June 23, 2017 agenda packet
- B. Supplemental Material – Rule 121 §1-15 memo

## II. Announcements from the Chair

- The March 31, 2017 minutes were approved with one correction. In subsection III. (E), in the second sentence “langue” was corrected to “language”;
- C.R.C.P. 16.1 and JDF 601 have been posted for comment, and comments are due September 5, 2017, and;
- Due to time constraints, Judge Frick has resigned from the committee. She enjoyed her service and sends the committee her best.

## III. Business

### A. C.R.C.P. 53

Judge Zenisek began and reminded the committee that Rule 53 was posted for public comment and the court received one comment. The subcommittee reviewed the comment and unanimously recommends one change. The subcommittee recommends the comment to Rule 53 be amended; specifically, the first sentence will be a reference to C.R.C.P. 122, and the second sentence will be struck. The committee was in favor of the subcommittee’s proposal, with one additional amendment: in the first sentence, the parenthetical information would be struck and the title of Rule 122 will be inserted. The amended rule was adopted unanimously, and Judge Berger will resubmit the rule to the supreme court.

### B. C.R.C.P. 57(j) & Fed. R. Civ. P. 5.1

Passed to September 29, 2017 meeting.

### C. C.R.C.P 121 § 1-15

Judge Jones began, and reminded the committee that at the January 27, 2017, meeting, the committee approved three subcommittee recommendations. However, the committee asked the subcommittee to draft illustrative exception language to the duty to confer in subsection 8. The subcommittee presented its amendment, and acknowledged that the use of “impracticable” in the draft was a point of extensive discussion, but ultimately it was the word the subcommittee settled on. The committee discussed the use of the word “impracticable” and a straw vote was taken to remove the word; the committee voted 16:10 to remove it. There was a motion to amend subsection 8, as follows:

**8. Duty to Confer.** Unless a statute or rule governing the motion provides that it may be filed without notice, moving counsel and any self-represented party shall confer with opposing counsel and any self-represented parties before filing a motion. The requirement of self-represented parties to confer and the requirement to confer with self-represented parties shall not apply to any incarcerated person, or any self-represented party as to whom the requirement is contrary to court order or statute, including, but not limited to, any person as to whom contact would or precipitate a violation of a protection or restraining order. The motion

shall, at the beginning, contain a certification that the movant in good faith has conferred with opposing counsel [and any self-represented parties](#) about the motion. If the relief sought by the motion has been agreed to by the parties or will not be opposed, the court shall be so advised in the motion. If no conference has occurred, the reason why, [including all efforts to confer](#), shall be stated.

The motion was adopted 20:4. Judge Berger will submit the rule to the supreme court.

**D. C.R.C.P. 58 & 59**

Judge Jones described issues surrounding Rules 58 and 59. The committee agreed that a subcommittee needed to be set-up to study the issues. The subcommittee will follow-up at the September meeting.

**E. C.R.C.P. 80**

The subcommittee was studying how districts handle issues surrounding Rule 80. It visited with a court reporter and received information about costs, as well as information about For The Record (FTR), a court recording system. The subcommittee will continue to meet and follow-up when they have a recommendation.

**F. C.R.C.P. 107**

Lisa Hamilton-Fieldman stated that the subcommittee is studying the issue and will follow-up at the September meeting.

**G. Consideration of detailed rules governing the making and opposition to summary judgment motions**

Judge Berger received a suggestion from Judge Freyre asking if the committee had any interest looking into whether a statewide rule regarding the content of summary judgment motions, similar to what some federal judges require, should be adopted. The district court judges on the committee were opposed to the idea because summary judgment motions differ from one another based on the underlying basis for the motion. Also, the committee didn't believe this would save time or expense. After discussion, the consensus was that standing summary judgment orders don't work well in practice and the committee does not want to pursue this. There was a motion to table this indefinitely that passed unanimously.

**H. C.R.C.P. 16 & 26**

Damon Davis brought three issues to the committee as outlined in his letter.

1. C.R.C.P. 16(b)(1) states that a case is at issue when, "all parties have been served and all pleadings permitted by C.R.C.P. 7 have been filed or defaults or dismissals have been entered against all non-appearing parties..." Mr. Davis had a situation where a party appeared by filing a C.R.C.P. 12 motion and was dismissed on that motion, and there was a problem getting the other party acknowledge that the case was at issue. Other members hadn't experienced a problem here, and the committee thought that Rule 16 should not be amended at this time. The

committee agreed that the extensive changes in 2015 need more time to play out, and it was too soon to make an amendment here.

2. CRCP 16(f)(3)(I); here, what if a claim or defense is pled, but it is not listed either as an issue for trial or as being withdrawn or resolved? There is an ambiguity here, and a potential for gamesmanship, where a party can fail to list a claim or defense, hoping it'll be overlooked, and then spring it on the other party at trial. The committee discussed this at length, and a motion was made to amend the subsection in the following way:

**I. STATEMENT OF CLAIMS AND DEFENSES.** The parties shall set forth a brief description of the nature of the case and a summary identification of the claims and defenses remaining for trial. ~~Any claims or defenses set forth in the pleadings which will not be at issue at trial shall be designated as “withdrawn” or “resolved.”~~ Any claim or defense not listed in the Trial Management Order is presumptively withdrawn.

During discussion, there was a motion to table the amendment that passed 16:0; ultimately, the committee agreed that the extensive changes in 2015 need more time to play out, and it was too soon to make an amendment here.

3. C.R.C.P. 26(a)(2)(B)(II); here, there may be some confusion on how the subsection applies, because parties are moving to strictly limit non-retained experts to what is contained in their written reports. For instance, a motion is filed to limit a doctor to what is in his or her medical records, even if the doctor has additional opinions formed during the course of treatment. Some trial courts are granting these motions and limiting non-retained experts. Mr. Davis is suggesting a variation of language, written by Richard Holme in a Colorado Lawyer article, be added to Rule 26's comment. The committee approved 13:6 the concept of adding similar language to the comment. Mr. Holme offered to draft some language for the committee to consider.

#### **I. C.R.C.P. 69**

Brent Owen submitted a letter recommending the committee consider a revision to Rule 69, which has inconsistent practices and antiquated language. The committee was in favor of creating a subcommittee to study the rule.

#### **IV. Future Meeting**

September 29, 2017

The Committee adjourned at 3:55 p.m.

*Respectfully submitted,  
Jenny A. Moore*