

**Colorado Supreme Court Advisory Committee on the Rules of Civil Procedure  
October 27, 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	
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 Richard Gabriel, Liaison	X	

**I. Attachments & Handouts**  
October 27, 2017 agenda packet

## **II. Announcements from the Chair**

- The September 29, 2017 minutes were approved as submitted;
- Justice Eid wanted to be at the meeting today, because this will likely be her last meeting, but yesterday the Senate Judiciary Committee approved her nomination and a vote in front of the senate will likely be held on Thursday. Friday or Monday of the following week she will be sworn in as a judge on the 10<sup>th</sup> Circuit Court of Appeals. Justice Gabriel is our new liaison. He had another meeting scheduled this afternoon, but he will be here as soon as it's over to officially introduce himself; and
- The C.R.C.P. 79 & 379 subcommittee was formed at the last meeting, and Judge Webb is chair.

## **III. Business**

### **A. Judicial Department Forms**

Judge Berger introduced three guests, Mr. Jacque Machol, private practitioner, Steven Vasconcellos, Senior Court Programs Manager at SCAO, and Claire Walker, Court Services Manager at SCAO, and began with some background information related to the Judicial Department Forms (JDF).

The forms were locked down, meaning they were posted in a non-editable format, so users couldn't modify them. At some point in the past, copyright notices were added, and recently, in response to the forms being locked down, checkboxes were added. Now, the user of the form must check one of two checkboxes indicating that the JDF has or has not been modified. If the JDF has been modified, the copyright and JDF number at the bottom of the form must be removed. Ben Vinci and Mr. Machol sent objections related to the checkboxes and copyright notice to Judge Berger and their emails are included in the agenda packet. Also, Judge Berger met with the Counsel to the Chief Justice and received some background information related to the forms. Judge Berger believed the committee should take this up, because some forms are amended by this committee and others are amended by SCAO. What, if any, role should this committee have on forms that relate to the civil rules? At this point, Judge Berger turned discussion over to Mr. Vasconcellos.

Mr. Vasconcellos stated that there are many forms online available for litigants that are maintained by SCAO in conjunction with the Legal Team. The forms cover different types of filings, and most forms are for domestic relations, whereas district civil has very few forms. Although some attorneys do use them, the primary intended customer for the forms are self-represented litigants, and forms have grown to offer procedural guidance to self-represented parties. The trial bench has been concerned that the forms appear to be a specific JDF, but have been altered. For instance, a form is filed stating that it is JDF X, but because certain subsections of the form have been deleted or modified, it isn't JDF X as published by the judicial department. The trial bench has asked that there be an indication on the form alerting the judge that it has been modified.

Not long after the forms were locked down, the Probate Rules Committee was formed, and it and the probate bar were very vocal that they wanted the forms unlocked.

Ultimately, SCAO agreed, but if the probate forms were going to be unlocked, then so must all other forms. As a compromise, the checkboxes emerged to show a trial judge that the form been modified, while enabling the forms to be posted in an editable format. The checkboxes are not mandatory and filings will not be rejected if the checkboxes are not marked. Court Services trains trial court staff statewide, and the checkboxes will not be reviewed by the clerk's office, they are only for the judicial officer. The Chief Justice's office, the Probate Rules Committee, SCAO Court Services, and Legal Team were involved, but the change and issues surrounding the change could have been better communicated.

A member stated that some of the rules refer to the forms, so if a rule refers to a form it should be amended by the committee. Another member pointed out that some rules impact forms, and when the rules are amended the forms must also be changed, so the rules and forms are consistent. Another member asked if the supreme court wanted the committee to weigh-in on this, and the consensus from the Chief Justice's counsel was no. Another member asked if checkboxes don't affect filing, then why is the committee discussing them? Another member stated that forms attached to the rules should be amended by the committee, but global issues aren't for the committee. A member suggested we have an open dialog with SCAO to discuss changes and that while the committee should communicate better with SCAO, the Civil Rules Committee doesn't want to get in the forms business.

There were a few questions and comments about the copyright. A member asked if the JDFs been filed with the copyright office? Another member asked why publicly used forms are being copyrighted? Most members thought that the copyright symbol at the bottom of the forms should be removed. Mr. Vasconcellos doesn't have information related to when copyright notices were added to the forms, except that they were on the forms before the checkboxes were added.

There was a motion to recommend removal of the parenthetical information in the second checkbox that passed 24:0. Judge Berger paused committee discussion to introduce Justice Gabriel, the committee's new liaison justice. Justice Gabriel stated that he is always available and very happy to be working with the committee. Judge Berger asked if the committee should establish a standing subcommittee that would have some interface with SCAO regarding the forms; while the committee wasn't interested in doing that it agreed that Mr. Vinci's County Court Rules subcommittee will be the liaison for the county court forms and Greg Whitehair will be the liaison for the Domestic Relations forms.

## **B. County Court Jurisdiction**

Judge Berger reminded the committee that it proposed a county court jurisdictional increase from the current amount of \$15,000 to \$35,000. The proposed increase was posted for public comment and the county court bench worried that the increase would dramatically increase their workload. Also, there were concerns that an increase in county court jurisdiction could increase default judgments, which may adversely affect many self-represented parties proceeding in county court. Subcommittee chair, Judge Davidson,

stated that Court Services did workload studies and it thought \$35,000 was appropriate and workable and that county courts have the personnel to absorb the increase. In August, Judge Berger appeared before the Court Services Committee to discuss the recommendation, and the committee endorsed it. A motion to reaffirm that the committee stands by its proposal to increase county court jurisdiction to \$35,000 and that the increase is consistent with other rule changes in the last two years aimed at access to justice and the just and efficient resolution of cases passed 23:1.

### **C. C.R.C.P. 16.1**

Rule 16.1 was posted for public comment and CDLA submitted the only comment received. Richard Holme's response to CDLA is embedded in the letter on pages 23-24 of the agenda packet. If the committee approves Mr. Holme's response, Judge Berger will write a letter to Justice Gabriel retransmitting the proposed change to the supreme court. Mr. Holme stated that CDLA is concerned with things the committee already discussed, but that a comment could be drafted in the way they recommend.

There was a motion to amend the comment as suggested by CDLA, with one amendment: in the second sentence insert "may" before "impose". Some members thought that the committee shouldn't make any additional changes to the comment, because the comment, with no additional amendment, allows trial judges to be tougher and force complete disclosure. The comment, with no additional amendment, is in-line with the spirit of simplified procedure and it shouldn't be changed. Based on discussion, the motion to amend the comment was withdrawn.

Another amendment was offered, but it wasn't in response to the CDLA's letter; the committee decided that it was only considering amendments in response to CDLA's letter, so the amendment was withdrawn. A motion to adopt no new changes in response to CDLA's letter and resubmit Rule 16.1 to the supreme court passed 21:2.

### **D. Letter stating concerns about *Catholic Health Initiatives Colorado v Eric Swennson Assoc's, Inc.*, (2017 CO 94)**

Mr. Holme brought this to the committee, because he is concerned with the negative implications of *Swennson*, to include the assumption that Rule 37(c) always controls decisions whether expert testimony should be limited or precluded. Mr. Holme's memorandum and recommended revisions are on pages 34-41 of the agenda packet.

Judge Berger was hesitant to bring this up, because as a committee of the supreme court, he wasn't sure if it's appropriate to debate the opinions of the court. A member stated he agreed with Judge Berger and there may be unintended consequences of amending rules in response to an opinion. Another member asked why would the court adopt rule changes that would overturn an opinion? The committee generally agreed that any action would be inappropriate. There was a motion to take no action in response to the opinion that passed 18:4.

**E. C.R.C.P. 6 & 59**

Judge Jones reminded the committee that at the last meeting the committee narrowly approved a recommendation to adopt, in concept, changes to Rules 6 & 59 that mirror their federal counterparts. The subcommittee's report is on pages 44-45, but the memo on pages 46-51 is solely Judge Jones's work. Rule 60 does not need to be amended, because it doesn't say anything about extensions of time, but Rule 62(a) provides an automatic stay for 14 days. He looked at the federal rules and their automatic stays are 14 days, but he wants to raise this as the only potential additional change for the committee to consider. There was a motion to adopt the proposal on pages 44-45, and discussion on the motion began.

A member stated that she will be voting against the proposal. She believes that the committee shouldn't do anything, because if there is a problem, where is the data supporting it? The anecdote about parties losing their right to file under Rule 59 is not supported. Not allowing for extensions is harsh and courts will still encounter situations where an extension should be granted. Also, a change here could have unforeseen consequences with other rules and procedures. Alternately, another member stated that at some point, the case needs end; twenty-eight days with no extensions will allow things to end, and there must be finality to file an appeal. Twenty-eight days is an appropriate time frame for most cases, and rules should be drafted for common circumstances, not rare situations. The time frame has been a federal rule for 80 years and they haven't experienced the problems discussed. A vote was taken, and the motion failed 7:15. Hearing no motion, the subcommittee offered to draft a fallback or compromise language and present at the next meeting.

**F. C.R.C.P. 26**

Tabled to November 17, 2017 meeting.

**G. C.R.C.P. 107**

Tabled to November 17, 2017 meeting.

**IV. Future Meeting**

November 17, 2017

The Committee adjourned at 3:45 p.m.

*Respectfully submitted,  
Jenny A. Moore*