

**Colorado Supreme Court Advisory Committee on the Rules of Civil Procedure**  
**June 28, 2019 Minutes**

A quorum being present, the Colorado Supreme Court Advisory Committee on the 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 Steven Bernard	x	
Judge Karen Brody	x	
Chief Judge (Ret.) Janice Davidson	x	
Damon Davis	x (phone)	
David R. DeMuro	x	
Judge Paul R. Dunkelman	x (phone)	
Judge J. Eric Elliff	x (phone)	
Judge Adam Espinosa	x (phone)	
Peter Goldstein		x
Lisa Hamilton-Fieldman	x	
Michael J. Hofmann	x (phone)	
Richard P. Holme	x	
Judge Jerry N. Jones	x	
Judge Thomas K. Kane	x	
Cheryl Layne	x	
John Lebsack	x	
Bradley A. Levin	x	
David C. Little	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 (phone)	
Jose L. Vasquez	x	
Judge Juan G. Villaseñor	x (phone)	
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
Jeremy Botkins	x	

## **I. Attachments & Handouts**

- June 28, 2019 agenda packet.

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

- The January 25, 2019 minutes were approved as presented;
- Judge Berger introduced new member Judge Karen Brody from the Denver District Court;
- The supreme court approved the committee's proposed changes to C.R.C.P. 80 and 380; and
- After talking to subcommittee chair Brent Owen, Judge Berger disbanded the C.R.C.P. 69 subcommittee due to lack of consensus for change.

## **III. Present Business**

### **A. Colorado Municipal Court Rules of Procedure 204, 210, 212, 216, 223, 237, 241, 243, 248, and 254**

Judge Berger introduced Judge Frick, chair of the municipal court rules subcommittee, to discuss the proposed changes to the municipal court rules. Judge Berger thanked the subcommittee for their helpful report to the committee. Judge Frick provided a background of the municipal court rules, explained the breadth of municipal courts throughout Colorado, and noted that the rules haven't been substantively changed since 1988.

Judge Frick introduced the subcommittee's proposed changes to rule 204. The committee voted unanimously to approve this rule proposal assuming the service of process language is updated.

Judge Frick turned to rule 210 concerning general advisement requirements for a first appearance in court. One guest was concerned that the proposed rule does not list exact procedures. The committee discussed the possibility of combining rule 210 with rule 223. Bradley Levin pointed out some linguistic concerns.

Richard Holme asked whether the criminal rules committee is involved with these proposed rule changes. Judge Berger explained that when this subcommittee was set up by then Chief Justice Rice, it was given to this committee. Ben Vinci suggested it might be beneficial to have both the civil and criminal rule committees look at these proposed rule changes. Judge Berger asked that the committee continue the discussion in order to provide information to the subcommittee but stated that rule approval would not be helpful at this point.

Regarding rule 223, Lisa Hamilton Fieldman was concerned about written advisements in light of the fact that some pro se litigants may not be able to read.

Regarding rule 241, Judge Brody noted that the language in the rule doesn't comport with the relevant statute, C.R.S. 16-3-301.

Judge Frick then introduced the proposed changes to rule 254 and stated that the changes are designed to incorporate the idea that in the absence of the applicability of a municipal court rule, a judge can rely on other rules. John Lebsack commented that the proposed rule incorporates a reference to the civil rules, but that the civil rules do have conflicts within them. Judge Frick stated that this rule was purposely kept vague as it is solely for guidance.

Judge Berger will meet with Justice Gabriel to determine the role this committee will play in proposing changes to the municipal court rules, and he noted that he appreciates all the work done on this large project.

#### B. “Must” and “Shall” in the Civil Rules

Judge Webb spoke for the subcommittee. He explained that a majority of the subcommittee favors replacing *shall* with *must*. Such an undertaking is not a simple project of blindly replacing all the appearances of *shall* with *must* in the rules because there are likely some situations when the replacement is at best awkward. Judge Webb continued that *shall* is routinely condemned by authorities on legal writing, and it can have a variety of interpretations; there are good reasons to replace *shall* with *must*. The minority subcommittee's opinion is that everyone knows what *shall* means in the civil rules. The subcommittee all agreed that 1. This should be a contemplative project for each instance that the word *shall* appears in the rules; 2. If *shall* is left in the rules, then a comment should be added; and 3. If going forward, all instances of *shall* will be changed to *must*, then it should all be changed at one time.

Judge Berger noted that when the federal civil rule committee was going through the process of modernizing their rules, there was a strong consensus that this committee would not conduct a wholesale rewrite of these rules. Judge Berger suggested the possibility of adopting a standard practice of changing *shall* to *must* when other changes are made to rules so that eventually, there will be no *shall* in the rules. Judge Webb responded that the subcommittee unanimously thought doing so was ill-advised. David DeMuro noted that he was in the minority of the subcommittee. He prefers to stay with *shall* but doesn't see this is a huge deal. In his view, *shall* is archaic.

The committee explored whether a comment to the rules or a change to rule 110 could provide clarification on the *must* vs. *shall* issue. Mr. Vinci noted that if pro se parties' access to justice is a consideration, then perhaps the *must* and *shall* issue should be cleaned up in the rules, as comments would not provide the necessary clarification for a pro se party. Ms. Hamilton Fieldman commented that you'd have to put a comment on every rule where *shall* appears to provide the necessary clarification. Judge Berger stated that if you add a new rule or comment, you may be opening an issue that has been settled in the law for years. Judge Web responded that a comment could acknowledge this controversy, state that changing all instances of *shall* to *must* was considered and

rejected, and finally, assert that precedent concerning the usage of *shall* remains in effect. Judge Zenisek commented that the conversation exemplifies why this should be indefinitely tabled.

A motion was taken and seconded to indefinitely table this conversation. By a vote of 17-8 (2/3 majority), it passed.

#### **C. C.R.C.P. 16.2(e)(10)**

Judge Berger noted that during the March email vote on proposed changes to this rule, the *must/shall* issue came up and Judge Berger terminated the vote for the committee to further discuss this proposed rule change in person. Judge Davidson raised the issue that the supreme court recently granted certiorari on a case that deals with this rule. Judge Davidson's concern is not with the 5-year issue that is properly clarified, but that the changes to other language in the rule might be impacted; she suggested either not touching the rule because the supreme court will issue an opinion on this rule or just attack the 5-year cutoff. Judge Jones contended that the cert grant dealt only with matters omitted from the rule and he did not think anything they granted cert on is related to the changes proposed in this rule change.

The committee voted overwhelmingly to send the proposed changes to the supreme court. Judge Jones accepted a friendly amendment to replace two instances of *must* with *do* and *does*. The committee voted unanimously to approve these changes. Finally, Judge Webb reminded the committee that it had determined that the word *shall* in the rules should not be changed to *must* on a prospective basis. The committee unanimously approved to change two instances of *must* in the proposal to *shall*.

#### **D. Colorado Rules for Magistrates**

Judge Berger explained that he wanted to have a preliminary discussion as to whether the committee should take up a significant project of proposing changes to the magistrate rules. Judge Berger continued that the rules can be a nightmare for judges, magistrates, and most importantly, pro se parties. Judge Berger doesn't know if there is a good fix to improve the rules, but he wants the committee to consider trying.

Lee Sternal commented that it is becoming too easy to avoid hiring lawyers and that pro se parties should be required to be indigent. Judge Jones commented that it is not just pro se parties who have problems with the rules. He also noted that the court of appeals keeps having to issue published opinions to explain the rules.

Judge Romano shared his belief that changing rules will be very complex and time consuming. Ms. Hamilton Fieldman said that judge shopping goes on due to these rules as they currently exist.

Judge Berger will take volunteers to serve on a subcommittee.

## **E. C.R.C.P. 4 + 304**

Mr. DeMuro reminded the committee that at the last meeting, the committee directed him to come up with proposals to highlight in the civil rules that unsworn declarations may be used in the place of a sworn declaration for affidavits. These proposed rule changes aren't a change in policy, but rather, an attempt to publicize the statutory change to the bench and bar.

Damon Davis noted that very few people in his office know about that statutory change. He stated that adding the language to rules 108 and 408 is the simplest option.

The committee discussed adding language to rule 121 1-15, #2, and John Palmeri noted that practitioners might look there more often. Ms. Hamilton Fieldman mentioned the existence of affidavit requirements in rules 241 and 245, and that if the committee is trying to apply the language across the rules, then those rules would need to be changed as well. Mr. DeMuro stated that the purpose of the rule change would be to give publicity to the statute.

The committee unanimously voted to propose Mr. DeMuro's suggested changes to C.R.C.P. 108 and 408 to the supreme court.

## **F. JDF 601**

This issue was raised by Judge Weishaupl from the 18<sup>th</sup> Judicial District Court. Judge Weishaupl shared via email to Judge Berger that her court is receiving more and more cases filed that are associated with other cases, but people are not required to list them as such. Judge Weishaupl suggested modifying the civil cover sheet so that civil lawyers must list associated cases. Judge Berger noted that there is such a requirement in federal court.

Bradley Levin stated that having a good definition of what constitutes a related case is important. He told the committee that in federal courts, this definition has changed over time. Ms. Hamilton Fieldman advised that sanctions be considered for failing to list related cases.

Judge Berger will form a subcommittee to deal with this issue.

## **G. JDF 105**

This question was received from the SCAO support desk. JDF 105 indicates that a clerk can serve documents by regular mail, but the SCAO better business practice and training materials say that people shall be served by certified mail or personal service. Court services will return with a proposal for the committee to consider.

## **H. Title 12 Citations in the Civil Rules**

The governor recently signed HB 19-1172, which completes the reorganization of Title 12 of the Colorado Revised Statutes. The civil rules contain several references to statutes in Title 12. Kathryn Michaels will draft the proposed changes using Jeremy Botkins' guidelines for the committee to consider at the next meeting.

## **I. County Court Rules 307, 341, and 412**

Tabled until September.

## **IV. Future Meetings**

September 27, 2019

November 22, 2019

The Committee adjourned at 4:04 p.m.