

**Colorado Supreme Court Advisory Committee on the Rules of Civil Procedure  
September 27, 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:

<b>Name</b>	<b>Present</b>	<b>Not Present</b>
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
Judge J. Eric Elliff	x	
Judge Adam Espinosa	x	
Peter Goldstein	x (phone)	
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 (phone)	
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 (phone)	
Stephanie Scoville	x	
Lee N. Sternal	x	
Magistrate Marianne Tims	x	
Jose L. Vasquez	x	
Judge Juan G. Villaseñor	x	
Ben Vinci	x	
Judge John R. Webb	x	
J. Gregory Whitehair	x	
Judge Christopher Zenisek	x (phone)	
<b>Non-voting Participants</b>		
Justice Richard Gabriel, Liaison	x	
Jeremy Botkins	x	

**I. Attachments & Handouts**

- Sep 27, 2019 agenda packet.

**II. Announcements from the Chair**

- The June 28, 2019 minutes were approved as presented.

**III. Present Business**

**A. JDF 601**

Subcommittee Chair Bradley Levin stated that the subcommittee had met to talk about how to connect related case filings in state district courts. He explained that there is related case doctrine in the federal courts, but that it has changed over time. Currently, Colorado lacks a statewide rule on the topic and instead jurisdiction-specific local rules often govern. Mr. Levin explained that Denver District Court has a form that can be filled out to connect related cases and Jefferson County has a multiple filings provision that talks about related cases; meanwhile, other counties have nothing. In considering these issues, the first question the subcommittee has is whether there should be a standardized rule. Then, the question is how one would find out about it. Another issue the subcommittee raised in their initial discussions is what happens if a defendant knows about a related case. Mr. Levin said there can also be issues about what constitutes a related case. Within the subcommittee, there was a vigorous discussion whether pending cases in other districts are related. Mr. Levin ended by stating that the subcommittee will meet again and present a proposal to the greater committee soon, likely at the next meeting.

**B. Colorado Rules for Magistrates**

Subcommittee Chair Magistrate Tims shared that the subcommittee has met twice and, in those discussions, decided that the biggest problems in the magistrate rules deal with consent. Magistrate Tims reported that the subcommittee is still determining the best way to tackle this project.

Judge Berger commented that this is a big and difficult venture and continued that it raises questions as to whether certain actions may be taken by a judicial officer who did not go through the constitutional appointment to become a judge. Judge Berger told the subcommittee that there is no time limit on this project, but that hopefully next year they will come up with something.

Justice Gabriel mentioned to the subcommittee that before finalizing any proposals, they should coordinate with other rules committees. Judge Berger said he will make sure that happens.

### **C. JDF 105**

The committee discussed revised form JDF 105. Judge Berger shared that currently, clerks review these filings and make redactions if there is private information within the filled-out forms.

Judge Jones commented that the Criminal Rules Committee is currently looking at sealing and suppressing documents with the goal of coming up with standards. If that is successful, the standards might be spread to other committees, including this one.

Judge Berger will talk to court services over at SCAO to see if they have any requirements about how this is triggered. Tabled until November.

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

Jeremy Botkins shared that the proposed changes presented today are to update statute references from the last two sessions of the legislature after certain sections were reorganized. Judge Berger stated that the need to change forms when statutes move around is why it is a best practice to avoid placing statutory citations into rules, except when unavoidable. The committee voted unanimously to approve these forms for consideration by the supreme court.

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

The committee discussed the proposed changes to rule 341. Subcommittee chair Ben Vinci shared that the goal of this proposal is to get cases moving along. The committee explored the proposal's use of the phrase *due diligence*. A motion overwhelmingly passed to have the subcommittee reconsider the language in the proposal.

Next, the conversation turned to proposed changes to rule 412. Mr. Vinci introduced Denver County Court Judge Campbell and Denver County Court Self-Represented Litigant Coordinator Jordan Sagle. Judge Campbell stated that there is a real need to protect privileged information and the court does not feel that they have enough authority at this point to protect the information of people who come into their courtrooms. Mr. Sagle shared that there is no statutory mechanism to seal civil cases in county court. He continued that people sometimes come to the courthouse and file protection orders or evictions that have no basis. These matters remain on that defendant's permanent record for the rest of their lives, impacting greatly their ability to obtain a job or lease a home. The purpose of this draft of rule 412 is to give county court judges the ability to limit or seal a case in some way.

Judge Jones commented that he has met with Chief Justice Coats about this issue, and that the Chief wants to start the process of creating rules in this area with the criminal rules committee. Once that committee comes up with a new rule, it can spread to other committees. Judge Jones continued that any recommendation to adopt a new rule in this area would be dead on arrival at this time.

After several committee members discussed the urgent need for a rule on this topic, Judge Berger offered to write a letter to Chief Justice Coats to start a conversation regarding this issue. Professor Mueller suggested the letter mention the immediacy of a remedy needed. Judge Berger will also reach out to the Chair of the Criminal Rules Committee, Judge Dailey, to discuss this issue. Judge Berger will also circulate a draft of his letter to the Chief Justice with Judge Campbell, Mr. Vinci, and Judge Jones.

The committee then turned to the proposed draft of rule 307. The subcommittee is going to take back this draft to further consider the language.

#### **F. C.R.C.P. 304**

Judge Berger stated that the committee will wait to review this until 4(m) is considered.

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

Judge Berger shared that he facilitated a group of district court judges a few weeks ago at the judicial conference and received largely positive responses to the new 16.1 rule. Judge Berger went on to state that some defendants are filing a motion in limine to prohibit a plaintiff from arguing that the damages were more than \$100,000 at trial. The committee discussed, and then Judge Berger stated that he is not suggesting the committee consider proposing to change the rule.

#### **H. C.R.C.P. 263**

Judge Berger stated that in an email included in the packet, Judge Moss brought forth the issue that currently there is a civil rule requiring silence in the Supreme Court Library, but the rule is not strictly followed. Stephanie Scoville commented that Chief Justice Coats recently issued a decorum order to address issues that may occur when members of the public use the building. She queried whether the rule is a tool that the librarians use to control noise in the library.

Judge Jones shared that he is a regular library patron and that the rule requiring silence is not honored. Judge Jones has experienced issues with people in the library tapping things on the table loudly or listening to music; he continued that no one whispers in the library anymore. Several other members noted the value of keeping the rule based on the authority it provides to the librarians.

A motion to take no action on the rule passed unanimously.

#### **I. C.R.C.P. 103**

This issue came to the committee from Bob Connelly, a retired Colorado attorney. The legislature passed a bill during the last session that impacts rule 103. The new statutes do not apply until October 2020, so there is time to change the rule.

Judge Berger directed Jose Vasquez to chair a subcommittee taking up this issue.

**J. C.R.C.P. 8(c)**

Judge Berger stated that currently, rule 8(c) allows discharge in bankruptcy as an affirmative defense. Federal courts have removed this from their rule and have held that bankruptcy charges are self-effectuating. Judge Berger suggested that the committee discuss amending rule 8(c) to say that it isn't an affirmative defense under bankruptcy law.

A motion to set up a subcommittee and not limit it to just the bankruptcy issue in rule 8(c) passed overwhelmingly.

**K. C.R.C.P. 4(m)**

Judge Jones brought this issue to the committee after running into this working on a case. The committee discussed delay reduction orders and how they do not satisfy the notice requirements of rule 4(m). Judge Jones is concerned that perhaps courts are sending a message that these orders are suggestions and aren't enforceable. He is also concerned that as a practical matter, the 63-day deadline is meaningless. Judge Jones stated that there are drawbacks to a change. He has heard that litigants should get this secondary notice, and there also might be unintended consequences.

Judge Zenisek stated that this procedure is needed for docket management in trial courts because a lot of cases don't move forward. Judge Elliff concurred and stated that flexibility is vital for district court judges.

Judge Berger stated that the court is sensitive to two things: not having widely disparate delay reduction orders and the fact that different districts administer their business differently than others. He also stated that if the supreme court adopts a rule and there's an inconsistency in local practice, then the rule controls.

Judge Berger created two subcommittees to deal with these issues. First, a subcommittee will determine an appropriate rule change proposal for 4(m). A second subcommittee will take up the broader question on conflicts between litigation orders and local rules.

**L. Expert Disclosures, Stock Case Management Orders, and Telephone Testimony**

Damon Davis brought these issues to the committee by way of a letter. He suggested the committee consider updating rules 16 and 26. Judge Berger shared that Mr. Holme has an ongoing list of things to be changed about these rules and that next year the committee can look at this.

**M. Colorado Municipal Court Rules of Procedure**

Tabled until November.

- N. Richard Holme shared that at the next meeting he is going to propose adding a subpart to rule 56 allowing judges to have oral conferences prior to the filing of motions.

**IV. Future Meetings**

November 22, 2019

The Committee adjourned at 3:47 p.m.