

AGENDA

COLORADO SUPREME COURT COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Friday, September 28, 2018 1:30 p.m.
Ralph L. Carr Colorado Judicial Center
2 E. 14th Ave., Denver, CO 80203

Fourth Floor, Supreme Court Conference Room

- I. Call to order
- II. Approval of May 18, 2018 minutes [Pages 1 to 5]
- III. Announcements from the Chair
 - A. New Supreme Court staff person
- IV. Present Business
 - A. C.R.C.P. 69—(Brent Owen) Status Update
 - B. C.R.C.P. 16.2(e)(10)— (Judge Jones & Lisa Hamilton-Fieldman)
 - C. C.R.C.P. 47—Alternate Jurors in Multiparty Civil Case—Possible conflict between section 13-71-142, C.R.S. 2017 and C.R.C.P. 47(b), raised by District Judge William Herring—(Judge Elliff) Passed to October
 - D. C.R.C.P. 121 §1-14(1)(f)—Default Judgments—problems relating to electronic evidence of debt—(Judge Kane) Status Update
 - E. C.R.C.P. 106—Unintended use of rule to obtain interlocutory appeals in county court criminal cases—(Judge Jones)
 - F. C.R.C.P. 17(c)—GAL issue from CBA committee via Mr. David Kirch—(Judge Jones) [Pages 6 to 12]
- V. Adjourn—**Next meeting is October 26, 2018 at 1:30 pm in the COURT OF APPEALS ALL COURT CONFERENCE ROOM ON THE 3RD FLOOR.**

Michael H. Berger, Chair
michael.berger@judicial.state.co.us
720 625-5231

Conference Call Information:

Dial (720) 625-5050 (local) or 1-888-604-0017 (toll free) and enter the access code, 93362519, followed by # key.

**Colorado Supreme Court Advisory Committee on the Rules of Civil Procedure
May 18, 2018 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 at the meeting were:

Name	Present	Not Present
Judge Michael Berger, Chair	X	
Chief Judge (Ret.) Janice Davidson		X
Damon Davis	X	
David R. DeMuro	X	
Judge Paul R. Dunkelman		X
Judge J. Eric Elliff		X
Judge Adam Espinosa	X	
Peter Goldstein	X	
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	
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	
Brent Owen	X	
John Palmeri	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	
Non-voting Participants		
Justice Richard Gabriel, Liaison	X	
Jeremy Botkins	X	
J.J. Wallace	X	

I. Attachments & Handouts

May 18, 2018 agenda packet & supplement

II. Approval of the January 26, 2018 Minutes

The minutes were approved with two corrections: (1) change “court” to “course” in section III(I) and (2) add a “1” after the “0” to clarify the reference to CJD 05-01 in section III(C).

III. Announcements from the Chair

- Passing of former chair Dick Laugesen on March 13, 2018
- C.R.C.P. 16.1—Supreme court adopted amendments recommended by the committee, effective for cases filed on or after September 1, 2018
- Membership changes
 - i. Resignation of Jenny Moore and her appointment as the Administrator of the Office of Language Access of the Colorado Judicial Branch
 - ii. Temporary support by Supreme Court staff attorney J.J. Wallace
 - iii. District Judge Fred Gannett of the Fifth Judicial District resigned from Committee in preparation of his retirement and move to South Africa
 - iv. Replaced by District Judge Paul Dunkelman of the Fifth Judicial District
 - v. Skip Netzorg decided not to serve an additional term on the Committee due to other commitments
- Committee terms now finish at the end of the calendar years

IV. Meeting Schedule

Judge Berger noted that two regular meetings have been cancelled in the last six months. He believes that the committee’s present workload does not seem to require meeting as often as in the past. In setting next year’s meeting schedule, he will set only 4-5 meetings for the year, which is consistent with the other rules committees.

The meeting on June 22nd may be cancelled. Judge Berger will let the committee members know the status of the meeting in early June.

In mentioning the committee’s recent big projects, Justice Gabriel related that the legislature took up county court jurisdiction during the last session and raised the jurisdictional limit for county court civil cases to \$25,000. The \$25,000 limit was a compromise and, as part of the legislation, a one-year study period was added to examine how things go and to determine if further changes should be considered.

V. Present Business

A. C.R.C.P. 107 Lisa Hamilton-Fieldman

Lisa Hamilton-Fieldman recounted that the committee received a letter asking whether C.R.C.P. 107 should be changed to allow defendants of remedial contempt to ask for attorney fees if the contempt is unsuccessful.

Ultimately, she recommends taking no further action on the issue. She (1) worries that there may be a chilling effect in allowing an award of attorney fees, especially in the most common contempt case types, civil protection orders and family law cases; (2) feels there is limited applicability because attorney fees may only be awarded in remedial cases and are already available under section 13-17-102 (frivolous, groundless, or vexatious); and (3) believes it will be difficult to fit any change into the language of the rule.

There was no objection to taking no further action.

B. Comment to C.R.C.P. 26 Richard Holme

Richard Holme recapped the discussion from last meeting that led to the proposed comment: many people expressed concern that more and more non-retained experts were being held to retained expert standards based on case law for the old rule, which was not the intent of the new rule. He felt a comment was appropriate to curb such practices because relying on case law to offer similar instruction would take years. He drafted proposed language to be added to the second paragraph of comment 18 (in the agenda packet at p. 6:

A motion was made and seconded to adopt the language as it is proposed. The motion passed 16-2.

C. C.R.C.P. 69 Brent Owen

Brent Owen reminded the committee that a subcommittee was formed to consider whether Rule 69 is antiquated and whether it should be updated to match the federal rule. He stated that the subcommittee has met, and subcommittee members seemed to be in favor of following the federal rule. The subcommittee will have a proposal to the committee soon.

D. C.R.C.P. 16-Suggestion regarding TMO witness list requirements Damon Davis

Damon Davis raised an issue about witness lists requirements for trial management orders (TMOs): the current rule requires counsel to estimate the cross-examination time of the opposing party, which can be difficult and, if the estimate is inaccurate, can result in a loss of time.

Mr. Davis spoke with colleagues, who didn't see it as a huge issue. He offered two examples of different approaches: a complicated approach used by Judge Brimmer in the federal court or a simple approach where each party puts in their own estimated times before submitting the final TMO. Judge Berger suggested a third approach: he reminded the committee that they had agreed to not make minor changes to Rule 16 for a while.

The committee agreed to follow the third approach. However, Judge Berger will keep the issue about witness lists in his notebook so that when the committee takes a more comprehensive look at Rule 16, the issue will be included.

E. C.R.C.P. 121 § 1-26-Request for amendment to signature requirements to the rule Cheryl Lane

Cheryl Lane explained there do not appear to be any issues with the current rule. The committee agreed and will take no further action.

F. C.R.C.P. 80 & 380 Judge Espinosa

Judge Espinosa recapped that, last fall, the committee agreed to recommend repealing Rule 80 and adding a comment referring to CJD 05-03, which sets out the best practices for court reporters. The subcommittee met and drafted proposed language for the comment (included on p. 11 of the agenda packet).

In examining the similar rule for county court, the committee asked the subcommittee to see if any of the language needed to be updated. The subcommittee met and agreed that the language of Rule 380(c) should be updated to reflect use of electronic recording and to remove references to a reporter's notes. The proposed changes to the rule were included in the agenda packet on p. 38.

A motion was made and seconded to adopt: (1) the recommendation to repeal Rule 80 and add the comment as proposed by the subcommittee; and (2) the amended language of Rule 380(c) as proposed by the subcommittee.

The motion passed unanimously.

G. C.R.C.P. 16.2(e)(10)- *In re Marriage of Runge*, 2018 COA 23M (February 22, 2018) Judge Jones

Judge Jones explained that a recent court of appeals opinion pointed out a problem in C.R.C.P. 16.2(e)(10) and its language setting out a timeline to reopen a domestic relations cases. The opinion reached three different conclusions about the language of the rule.

He asked the committee if anyone remembers discussing the rule when it was adopted in 2005. One member recalled that there was a separate committee that drafted Rule 16.2, and it was presented to the civil rules committee fully-formed. Another member recalled that the intent of that portion of the rule was tied to being misled and giving the aggrieved party time to discover having been misled. The committee reached a consensus that, consistent with other civil rules, the five-year timeframe is in the nature of a filing deadline.

A motion was made and seconded agreeing that the language of the rule should be corrected to reflect the filing deadline and the committee appointed Judge Jones and Lisa Hamilton-Fieldman (and at least one domestic practitioner TBD) to take up the issue and offer a suggested fix to the committee.

The motion passed unanimously (including a woof! woof! in agreement by a special guest on the phone).

H. C.R.C.P. 47(b) -Alternative Jurors in a Multiparty Civil Case Judge Elliff

The committee agreed that if the statute uses “party,” then the rule should match the statute. See § 13-71-142.

A motion was made seconded to draft a proposed rule substituting the word “party” for “side.” The motion passed unanimously and a draft reflecting the change will be presented to the committee at the next meeting for a vote.

I. C.R.C.P. 121 § 1-14(1)(f) Default Judgments—problems relating to electronic evidence of debt

Judge Berger explained that the committee had received an email chain expressing difficulty trial judges were having dealing with electronic promissory notes, which are not mentioned in the default judgment local rule.

The committee felt the issue was worth examining further and decided to form a subcommittee.

The following people signed up to be on the subcommittee, which will be chaired by Judge Kane: Judge Zenisek & Jose Vasquez.

J. C.R.C.P. 106-Unintended use of rule to obtain interlocutory appeals in county court criminal cases.

Judge Jones summarized the concerns he outlined in his memo. Other members expressed their experiences with C.R.C.P. 106 being used as an inappropriate interlocutory appeal mechanism, which resulted in substantial delays in county court criminal cases. Another member also expressed the same concerns for municipal appeals and referred to *Town of Frisco v. Baum*, 90 P.3d 845 (Colo. 2004). The committee agreed to form a subcommittee to further explore the issue.

The following people signed up to be on the subcommittee, to be chaired by Judge Jones: Judge Espinosa; Lisa Hamilton-Fieldman; Dave Little; Brent Owen; Stephanie Scoville; Lee Sternal; Judge Romano; Judge Zenisek

VI. The Committee adjourned at 2:48 p.m.

*Respectfully submitted,
J.J. Wallace*

CRCP 17(c)

(1) Whenever a minor or adult has a fiduciary representative such as a guardian, conservator, special conservator, or other like fiduciary, such representative may sue or defend on behalf of the minor or adult. Only a guardian, conservator, special conservator or next friend shall be authorized to bring or defend a legal action on behalf of a minor or adult in need of protection. If a minor does not have a fiduciary representative, or such representative fails to act, a next friend may also sue or defend on behalf of the minor.

(2) Adults in Need of Protection. Any party, counsel or the court, *sua sponte*, shall have the right to raise the issue of whether a guardian ad litem, guardian, conservator or special conservator should be appointed for an adult involved in a legal proceeding where it is alleged that such adult:

- (a) Lacks the intellectual capacity to communicate with counsel;
- (b) Is mentally impaired so as to be incapable of understanding the nature and significance of the proceeding;
- (c) Is incapable of making critical decisions or is incapable of comprehending the issues involved in making critical decisions;
- (d) Is unable to communicate with counsel about the meaning of decisions;
- (e) Is incapable, because of a mental impairment, of weighing the advice of counsel or directing counsel on the particular course to pursue in his or her own interest; or
- (f) There is evidence sufficient to show the adult party is not mentally

competent to effectively participate in the proceeding or whose condition fluctuates intermittently between significant mental impairment and normalcy.

An adult for whom a guardian ad litem is appointed based on the above provision shall for all purposes of this Rule 17 be deemed an adult in need of protection.

(3) A court may appoint a guardian ad litem, or a guardian, conservator or special conservator for an adult in need of protection. If the court appoints a guardian, conservator or special conservator under this rule, the appointment shall be made in accordance with the requirements for such appointment contained within 15-14-101, *et. seq.*, and the Colorado Probate Code. It shall not be necessary to appoint a guardian ad litem if the court determines that the appropriate appointment is a guardian, conservator or special conservator.

(4) If a guardian ad litem is appointed for an adult in need of protection, the court may appoint the guardian ad litem to:

- (a) Recommend whether it is necessary to appoint a guardian, conservator or special conservator;
- (b) Recommend whether the appointment of an attorney to represent the adult in need of protection is warranted;
- (c) Whether or not a fiduciary appointment is recommended or made, investigate the interests of the adult in need of protection and issue a written report and recommendations regarding the best interests of the adult in need of protection with respect to the specific issues before the court affecting the best interests of the adult in need of protection;
- (d) Confer with the adult in need of protection, family, friends,

advisors, and treatment providers, and any others necessary to determine the adult's in need of representation level of ability to participate in the proceeding in his or her best interests. The guardian ad litem shall have access to all relevant information regarding the adult in need of protection in compliance with the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other privacy laws, without further order, authorization or release. Relevant information includes, but is not limited to the following records, reports, and evaluations: medical, psychiatric, psychological, drug, alcohol, law enforcement, social services, school, financial, and estate planning;

- (e) Whether or not a fiduciary appointment is recommended or made, file additional reports and recommendations, or other pleadings as the guardian ad litem determines necessary to promote, preserve and protect the best interests of the adult in need of protection, as necessary in furtherance of the guardian ad litem's duties, or requesting instructions from the court;
- (f) If requested by any party, a guardian ad litem shall be subject to examination in court as to his or her recommendations unless ordered otherwise by the court; or
- (g) Such other duties not inconsistent with this rule.

(5) A guardian ad litem for an adult in need of protection is not a fiduciary and is not appointed to act as an attorney for an adult in need of protection.

(6) In an action *in rem* it shall not be necessary to appoint a guardian ad litem, guardian, conservator or special conservator for any unknown person. If such appointment is made, such person shall be deemed an adult in need of protection for all purposes of this Rule 17, C.R.C.P.

(7) The duties of a guardian ad litem for an adult shall be as specified in the court's order of appointment. Because a guardian ad litem is not a fiduciary, a guardian ad litem does not have the authority to perform the following actions:

- (a) To execute settlement agreements which are binding on the adult in need of protection.
 - (b) To retain experts except as are necessary to perform court designated duties. If any expert is to be retained, the guardian ad litem shall specifically request that such retention be authorized in the order of appointment or in a supplemental order.
 - (c) To access and provide financial documentation to parties in preparation for litigation unless the court determines the guardian ad litem's assistance with gathering documents would not unduly burden the guardian ad litem and would materially assist with the resolution of the matter pending before the court.
 - (d) To assist and make decisions in any trial preparation and strategy and to assist in securing witnesses at trial.
 - (e) To make decisions regarding the retention of counsel and/or experts for the adult in need of protection.
 - (f) To testify in the place of the adult in need of protection.
 - (g) To prepare and/or sign any legal documents including, by way of example and not limitation, a sworn financial statement, separation agreement and parenting plan in a dissolution of marriage action.
 - (h) To act as an attorney or fiduciary for the adult in need of protection.
- (8) In any action involving an adult in need of protection for whom a

fiduciary has been appointed in which the court considers requests for approval of a proposed settlement of claims, the court shall consider the relevant provisions of Rule 62 of the Colorado Rules of Probate Procedure. In actions where the court considers requests for approval of a proposed settlement of claims for an adult in need of protection for whom a fiduciary has not been appointed, the court shall include provisions in its order to safeguard the settlement funds for the sole benefit of the adult in need of protection or shall refer the proposed settlement to the probate court or the district court sitting in probate.

(9) Nothing in this Rule 17 shall be deemed to cause a guardian ad litem to be a legal representative for purposes of C.R.S. §13-81-101, *et seq.* or to change the operation of any ethical rule, Chief Justice Directive or statute relating to a guardian ad litem that is inconsistent with this Rule 17. This rule shall apply to a guardian ad litem for a minor only to the extent not otherwise governed by statute and/or Chief Justice Directive.

PROPOSED CHANGES – C.R.C.P. RULE 17

The committee drafting these changes began meeting in the fall of 2014 after being established by then CBA President, Charlie Garcia. The committee was asked to explore and recommend potential clarifications, whether statutory, rule, or otherwise, through consultation with stakeholders regarding application of the Sorensen case, in light of CRCP Rule 17(c).

The committee consisted of members of the following sections of the Colorado Bar Association: Family Law, Trust & Estate, Elder Law, Juvenile Law, Litigation, and Ethics. Additionally, a representative from CTLA participated. Several members of the Family Law section took the lead in individual sub-committee projects, including drafting revisions to CRCP Rule 17.

After extensive discussion, analysis, and research, it was determined that the best way to proceed was through changes to CRCP Rule 17(c), which, although antiquated, specifically dealt with the representation in legal proceedings of minors and other persons in need of protection.

Among other changes, the proposed revised CRCP Rule 17(c):

- (1) incorporates the Sorensen test with respect to the need for a GAL,
- (2) provides a list of permissible duties and roles that might be assigned by a court to a GAL, and
- (3) specifies duties that should not be performed by a GAL, and instead provides for these roles to be performed by a court appointed fiduciary. Court appointment would often involve appointment of a special conservator appointed by a court of probate jurisdiction.

The proposed rule addresses the concerns of GAL's who were being asked to perform duties that should instead be performed by fiduciaries or attorneys. The ability to appoint a GAL to determine if there needs to be a fiduciary appointed, is an important option recognized by the rule changes.

The proposed rule reflects the conclusion that GAL's should neither be a fiduciary nor be involved in signing documents such as sworn financial statements or settlement agreements. It is intended to avoid GALs being asked to perform actions that might effectively deny the litigant important due process protections. The rule provides maximum flexibility to fashion the type of appointment and assistance specific to each case. The rule allows for the possibility that a GAL appointment, without more, will be sufficient to bring the litigation to a conclusion, but it also gives a GAL authority to seek further orders where appropriate, including the appointment of a Special Conservator. A Special Conservator can be appointed for the limited and specific purposes of acting for the litigant in matters such as entering settlement agreements, retaining and/or directing legal counsel, and signing other legally binding documents, with the scope of powers of the Special Conservator tailored by a court of probate jurisdiction to the specific situation and defined by the request for the appointment and order of appointment. The committee gave extensive consideration to how best to provide for the needs of an impaired individual in litigation without exacerbating the costs or causing undue delay and in so doing, ultimately concluded that where the appointment of a Guardian and/or Conservator is necessary and appropriate, the procedures and protections provided to the impaired individuals in the current statutes should not be circumvented. While the GAL has the duty to act in the best interest of the litigant minor or person in need of protection, the GAL does not assume the more extensive duties, risks, and possible liabilities that otherwise could cause a potential GAL to decline the appointment and that are more appropriately performed by a court appointed fiduciary.

Attorneys from several different areas of the practice of law have been asked to review the proposed rule and add specific GAL functions they believe would be helpful in their area of practice. A companion order will be drafted to give more guidance and assistance to the courts in the appointment of GAL's, by addressing their need, role, the scope of their duties, their compensation, and other instructions and issues relevant to their appointment.

The proposed rule is intended to operate in a fashion that least intrudes upon the rights of a party involved in litigation, when that party needs special protection because of diminished capacity or other factors, while expediting and facilitating the litigation process by the use of GALs.

Section (1) of the proposed revised CRCP Rule 17(c) follows the current rule regarding representation of minors in need of protection by fiduciaries or next friends in legal proceedings and adults in need of protection by fiduciaries. The balance of the rule governs GALs for adults and for minors as to whom C.R.S. §19-1-111 and Chief Justice Directive 04-06 are not applicable.