

ACLU of Colorado and Colorado's State Court Administrator's Office Draft Proposed  
Amendments to Colorado Rules of Criminal Procedure

December 17, 2013

*Proposed Amendments in Bold*

Rule 4.1 County Court Procedure—Misdemeanor and Petty Offense—Warrant or Summons Upon Complaint

(e)(5) Upon imposition of any fine, restitution, or other form of monetary payment in open court, the court shall instruct the defendant orally or in writing that if at any time the defendant is unable to make the monetary payment, the defendant has the right to appear before the court to present evidence of inability to pay the monetary amount due and to request waiver of monetary payment to the extent permitted by law, imposition of a payment plan, and/or modification of an existing payment plan.

(f) Failure to Appear. If a person upon whom a summons or summons and complaint has been served pursuant to this Rule fails to appear in person or by counsel at the place and time specified therein, a bench warrant may issue for his arrest **for failure to appear**. In the case of a penalty assessment notice, if the person to whom a penalty assessment notice has been served pursuant to this Rule fails to appear in person or by counsel and fails to pay the specified fine at the specified time and place, a bench warrant may issue for his arrest **for failure to appear**.

Rule 32(g) Proceedings in the Event of Failure to Pay

(1) Upon imposition of any fine, restitution, or other form of monetary payment in open court, the court shall instruct the defendant orally or in writing that if at any time the defendant is unable to make the monetary payment, the defendant has the right to appear before the court **if he does not have the ability to pay** ~~to present evidence of inability to pay the monetary amount due and~~ to request waiver of monetary payment, **imposition arrangement** of a payment plan, modification of an existing payment plan, or **imposition arrangement** of a payment alternative.

~~(2)~~ (2) If a defendant fails to timely pay a court-imposed fine, restitution, or other form of monetary payment, the court may refer the case to collections, may direct collections to create or modify a payment plan, may waive all or a portion of the fines and costs if permitted by statute, may impose a payment alternative, may consider a motion to impose a suspended sentence or revocation of probation, and/or, if appropriate, may institute proceedings for contempt of court pursuant to Rule 107 of Colorado Rule of Civil Procedure or Rule 407 of Colorado Rules of County Court Civil Procedure. ~~No warrant shall issue for the defendant's arrest for failure to comply with the court's order to pay money unless the court has afforded the defendant due process of law to include notice and opportunity to be heard regarding the ability to pay, no warrant shall issue for the defendant's arrest for failure to comply with the court's order to pay money.~~ **first found the defendant in contempt of court for failure to pay. Under no circumstances shall the court issue a warrant for failure to pay money.**

~~(2) (3) Notwithstanding any other applicable rule or statute, the~~ The court shall not find the defendant in contempt, nor revoke probation, nor reinstate a suspended sentence, for failure to comply with an order to pay money, unless the court has provided all procedural protections mandated by due process of law and determined on the record that the defendant has the ability to pay the money owed ~~is able to comply with the order without manifest hardship to the defendant or the defendant's dependents~~, and that the defendant has not made a good faith effort to comply with the order to pay.

(3) In the event the defendant does not have the ability to pay, the court may not order the defendant incarcerated.

Comment: A defendant ~~and a defendant's dependents~~ should be considered unable to pay to suffer manifest hardship if they he would be deprived of funds needed for basic living necessities such as food, shelter, clothing, necessary medical expenses, or child support. The United States Supreme Court has set out a simple framework for assessing ability to pay, albeit in the context of contempt proceedings. *See Turner v. Rogers*, 131 S.Ct. 2507, 2519 (2011). That framework requires: “(1) notice to the defendant that his “ability to pay” is a critical issue...; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status,; and (4) an express finding by the court that the defendant has the ability to pay.” In implementing this Rule, courts shall ensure that the *Turner* standards are met.

In determining whether the defendant is able to comply with an order to pay money, ~~without manifest hardship to the defendant or the defendant's dependents~~, the court shall consider (1) defendant's present employment, unearned income and living expenses; (2) defendant's outstanding debts and liabilities, secured and unsecured; (3) whether the defendant has qualified for and is receiving any form of public assistance; (4) availability and convertibility, without undue financial hardship to the defendant or the defendant's dependents, of any personal or real property owned; and (5) any other circumstances that would impair the defendant's ability to pay. ~~There shall be a rebuttable presumption of factors that may indicate an manifest hardship inability to pay include~~ if the defendant: (1) receives public assistance, defined as Food Stamps, Temporary Assistance for Needy Families, Medicaid, Supplemental Security Income (SSI) benefits, or resides in public housing; or (2) earns less than 200 percent of the applicable Federal Poverty Guideline.

Nothing in this Rule prevents the court from directing collections employees to gather financial information about defendant, institute payment plans, modify payment plans, or advise the court on defendant's ability to pay. Nothing in this rule prevents the court from initiating or continueing those collection efforts that do not include incarceration.