AGENDA
COLORADO SUPREME COURT
RULES OF JUVENILE PROCEDURE COMMITTEE
Friday, December 1, 2023, 9:00 AM
Videoconference Meeting via Webex

I. Call to Order

II. Chair's Report
   A. Minutes of 10/6/2023 meeting **[pages 2–6]**

III. New Business
   A. Recognition of Service (Justice Gabriel & Judge Welling)
   B. Drafting Subcommittee (Judge Welling & Judge Furman)
      1) Memo and Proposal on Disclosure and Discovery Rule **[pages 7–11]**
      2) Memo from OCR **[pages 12–14]**
         1. Reference material **[pages 15-70]**
      3) Memo from ORPC [will be circulated separately]
   C. Gendered Pronouns in Rules (Judge Welling)
      1) Memo from Judge Jones, Chair of C.R.C.P. committee **[pages 71–76]**

IV. Old Business
   A. ICWA Rules Proposal (Judge Furman)
      1) Rules Proposal Out for Public Comment
   B. New Legislation Subcommittee (Melanie Jordan)
   C. Requiring ex parte emergency removal hearings to be on the record (Z Saroyan)
   D. New Members (Judge Welling)

V. Adjourn

2024 Meeting Schedule: February 2; April 5; June 7; August 9; October 4; December 6

Colorado Supreme Court Rules of Juvenile Procedure Committee
Minutes of October 6, 2023 Meeting

I. Call to Order

The Rules of Juvenile Procedure Committee came to order around 9:00 AM via videoconference. Members present or excused from the meeting were:

Name	Present	Excused
Judge Craig Welling, Chair	X	
Judge (Ret.) Karen Ashby		X
David P. Ayraud		X
Jennifer Conn	X	
Traci Engdol-Fruhwirth	X	
Judge David Furman	X	
Magistrate Randall Lococo	X	
Judge Priscilla J. Loew		X
Judge Ann Gail Meinster		X
Trent Palmer		X
Josefina Raphael-Milliner		X
Professor Colene Robinson	X	
Zaven "Z" Saroyan	X	
Judge Traci Slade	X	
Anna Ulrich	X	
Pam Wakefield	X	
Abby Young	X	
Non-voting Participants		
Justice Richard Gabriel, Liaison		X
Terri Morrison		X
J.J. Wallace	X	
Special Guests: Melanie Jordan, ORPC & Sheri Danz, OCR		

Meeting Materials:

(1) Draft Minutes of 8/4/2023 meeting
(2) Emails Re 2023 Legislation Impacting Respondents and Draft Rules with Suggested Updates
(3) Email Re Recording Ex Parte Removal Hearings
(4) Memo Re Removing Factual Basis From Admission or Denial Rule
(5) Youth in Court Memo & Proposed Rule
(6) New Order to Interview or Examine Child; Investigation Proposal, Memo and Previous Proposal

Chair's Report

A. The 8/4/23 meeting minutes were approved without amendment.

II. New Business

A. **Recognition of Service**

Tabled until the December meeting.

B. **ORPC Proposals to Address 2023 Legislative Changes**

Melanie Jordan, Policy Director at ORPC, explained that there have been several 2023 legislative changes that have potential impacts to rules: HB23-1024 (Placement with Family and Kin); SB23-039 (Incarcerated Parents); and HB-1027 (Family Time). Some are small tweaks (suggestions provided in the draft rules packet provided). She briefly outlined the suggested changes in the packet. She also pointed to more comprehensive changes that involve new things that are not addressed in the rules, e.g., family time.

After her presentation a committee member asked how she would like to move forward. Melanie suggested: 1) approving the proposal for the small changes and 2) form a subgroup to look at comprehensive changes.

Sheri Danz added that the 1038 subcommittee determined that a rule on hearings is important. She believed focusing on a rule on hearings could frame the discussion because the new legislation affecting ORPC and OCR both seem to impact hearings. A committee member stated that she does not oppose forming a subcommittee, but reminded the committee that the drafting subcommittee's complete focus is on discovery right now, so any involvement by the drafting subcommittee must wait.

As a way to move forward, the chair suggested forming a subcommittee (involving the same people as were on the 1038 subcommittee, provided they are available), to first review the proposal in the packet, which could then go to the drafting subcommittee. Then, as a second step, have the subcommittee look at the constellation of legislation to see if there are holes in the rules. He believed it would be useful for the subcommittee to try to reach consensus on whether rules are appropriate or necessary. If there is a split, the subcommittee can come back to the big committee for philosophical direction. If there is a consensus, undertake drafting of new rules. Magistrate Lococo, Z, Abby Young, and Anna Ulrich volunteered for "New Legislation" subcommittee. The chair asked Melanie to take the lead on the subcommittee, and she agreed.

C. **Requiring Ex Parte Emergency Removal Hearings to Be Recorded**

Z indicated that some jurisdictions, like Weld County, are making FTR records of ex parte hearings and believes this is a good idea. His preference would be to have a mandatory rule or, if not mandatory, make it required absent good cause.

Magistrate Lococo went through his jurisdiction's (Weld) process for emergency removals. A phone call initiates the process. A judicial officer is found. If it's during business hours, then the hearing is held via Webex (occasionally, it's in person). Then paperwork is done, and a shelter hearing is set. These hearings sometimes happen at night, in which case, there is no record. If it's a night or weekend, it's only done over the phone and the paperwork follows the morning of the next business day.

Anna Ulrich was concerned that some jurisdictions, particularly rural ones, do not have access to FTR from their computers and need clerk assistance to make records. Abigail Young indicates that, just this week, in her court (Denver Juvenile), judges have been given computer access to FTR, but she indicates that this is only because she has staffing shortages. Other judicial officer members indicate that they do not have similar access.

One member noted that sometimes a verbal order is given, but no case is filed. In this instance, there is no record of the hearing because there's no case in which to place a minute order or scheduled event showing that there was a hearing. There is no paper trail at all.

One judicial officer mentioned that, because the statute authorizes verbal orders, he felt that requiring a record or a written order doesn't comport with the statute. Recognizing that he's just one voice on the committee, forming a subcommittee and drafting a rule seems unnecessary to him and analogizes to a police officer taking someone into custody. The judicial officer members indicate that there are wide differences throughout the state in procedures.

Other members were ambivalent about the need for a rule but felt that a rule should not increase delay for removing children where time is of the essence.

The chair recommended authorizing Z to look into the matter further and continue to develop it to give a consensus report to the committee to see if it should be pursued further. In the meantime, anyone can offer Z feedback.

III. Old Business

A. ICWA Rules Proposal

The Colorado Supreme Court has put the proposed rules out for comment. Written feedback is due Nov. 30th. A public hearing is set for Dec. 12th. If you would like to speak at the public hearing, sign up by Nov. 30th.

B. Drafting Subcommittee

1) Update

As he mentioned last time, the Chair explained that the subcommittee is currently entirely focused on discovery. He believed that the rule may be ready for the December meeting.

2) Memo Re Removing (d) (Waiver of Factual Basis) from Admission or Denial Rule

Anna provided a reintroduction to this issue. To recap, waiver of factual basis is common practice, but not expressly authorized by statute. The committee was letting the issue simmer since the discussion at the last meeting. Z would like waiver of factual basis expressly authorized by the rule. Others felt remaining silent in the rule maintains the status quo. The committee reviewed the draft rule and considered the recommendation to remove (d).

A member moved to vote to adopt the recommendation. It was seconded. The question was called. The motion passed with one dissenting vote. The recommendation to remove an express authorization to waive the factual basis was adopted.

C. HB22-1038 Review of Draft Rules Subcommittee

1) Memo on Youth in Court

Sheri Danz drew the committee's attention to the memo on p. 80 of the packet to provide background on the issues. Namely, children now have the right to attend and fully participate in all hearings. Because this is a significant shift, the feeling was that a rule to guide implementation would be important. OCR has also put training and practice standards into place to ensure their attorneys are advocating for and advancing this right.

She directed the committee's attention to the overview, which is placed before the proposed rule. The overview reflects what the committee thought was important in thinking about children and youth in court. The overview includes two areas not covered by the proposed rule that the subcommittee identified that may need updating to include children and youth in court: advisements and hearings.

2) Proposed Rule

Sheri summarized the proposed rule on "Children and Youth Attendance and Participation in Court" and the commentary. She also mentioned that (d) on separate hearings applies to more parties than just children. She wanted to highlight that point so that the committee may consider including that portion of the rule somewhere else. For example, in a rule on hearings.

The chair noted that there's more commentary than usual. The subcommittee included the commentary because it's there to assist embrace of this big shift.

A motion was made and seconded to approve the rule for inclusion in the draft rules packet and to send to the drafting subcommittee. Discussion of the motion included thanking Sheri for her leadership on this rule. The question was called. The motion passed unanimously.

D. Subcommittee to redraft Order to Interview or Examine the Child; Investigation.

Anna Ulrich recapped the issue. She explained that this rule fills procedural holes in section 19-3-308, C.R.S. (2023). Because the court can order jail for noncompliance with its order, the subcommittee felt that, to protect due process rights, the statement to the court to secure the order should be sworn. In reviewing the options presented, the committee came to consensus that option 1 with the "good cause" language was the better option. The committee felt that this broader language, which echoed section 19-3-308(b)(3) (stating "upon good cause shown"), was the preferable course.

A motion was made to adopt option 1 with "must" instead of should. The motion was seconded. A brief discussion was held mostly thanking the subcommittee for their thorough work. The statute was very confusing, and the subcommittee did a good job wrestling with it. The vote was called, and the motion passed unanimously.

Other announcements:

2024 Meeting Schedule: The chair recommended keeping Webex because it helps facilitate greater participation. J.J. will send out the 2024 Webex invites.

Committee membership: There has been some turnover on committee. In December, think about where we can find additional members to ensure the representation we need.

IV. Adjourn

The meeting adjourned around 10:30 AM. The next meeting is December 1st at 9 AM via Webex. 2024 Meeting Schedule: February 2; April 5; June 7; August 2; October 4; December 6.

Respectfully Submitted,

J.J. Wallace
Staff Attorney, Colorado Supreme Court

Memorandum

To: C.R.J.P. Committee
From: C.R.J.P. Drafting Subcommittee
Re: Proposed
Date: 12/1/2023

The Drafting Subcommittee offers the following rule to the C.R.J.P. committee for approval. The proposal reflects the consensus of the subcommittee. However, the subcommittee was unable to reach agreement on three issues and defers those issues to the C.R.J.P. committee:

I. Should the presumptive limits on discovery (number of oral depositions; written depositions; requests for admission; interrogatories; & requests for production) be tied to the entire case or tied to each contested hearing?

II. What should the limits be on the total number of: oral depositions; written depositions; requests for admission; interrogatories; & requests for production allowed?

III. In (i)(4) (Oral Depositions), the subcommittee agrees that a party would need a court order to take any child's or youth's deposition. The committee also agrees that it's not in the best interests of children under 12 to be deposed. The subcommittee cannot agree about:
- whether there should be an express presumption that taking a deposition of a child or youth (age 12+) is not in that child's or youth's best interests; or
- whether the rule should be silent and not express such presumption to children or youth (age 12+)?

Disclosure and Discovery in Dependency and Neglect Cases

(a) Purposes of this Rule.

(1) Dependency and neglect cases are unique civil cases requiring an intricate balance of the important and interrelated rights and interests of parents, legal guardians and/or legal custodians; children and youth; and the government.

(2) In light of the purposes of the Children's Code and to avoid unnecessary delay, dependency and neglect cases require a particularized approach to discovery, which is reflected in this rule.

(3) This rule provides a uniform procedure for resolution of all disclosure and discovery issues in dependency and neglect cases in a manner that furthers the purposes of the Children's Code.

(b) **Active Case Management**. It is incumbent upon the court to actively manage dependency and neglect cases to eliminate delay, including actively monitoring disclosures and discovery.

(c) **Persons Exempted from Disclosures and Discovery.** (1) Non-parties, and (2) alleged or presumptive parents, guardians, or custodians whose legal rights have not been established are exempted from obtaining and providing disclosures and discovery, unless the court orders otherwise. Guardians ad litem are not required to produce discovery unless ordered by the court for good cause shown.

(d) **Other Case Participants.** Upon request and consistent with the purposes outlined in subsection (a), the court may authorize other case participants to engage in or be subject to disclosures and discovery.

(e) **Automatic Disclosures.**

(1) **Before an Initial Hearing Pursuant to Section 19-3-403, C.R.S.** All parties must disclose to all other parties as soon as practicable, but no later than prior to the commencement of an initial hearing pursuant to 19-3-405, C.R.S., all exhibits it intends to introduce in its case in chief at the initial hearing.

(2) No later than the first appearance after the initial hearing pursuant to section 19-3-405, C.R.S. Parties must disclose:

(A) any information and documentation related to a parent's, child's, or other family member's potential Native American heritage, including but not limited to tribal identity cards;

(B) information relevant to jurisdictional determinations under the Uniform Child-custody Jurisdiction and Enforcement Act, C.R.S. 14-13-101, et seq.; and

(C) information about any parentage, custody, guardianship, child support, or protection order cases, and any other court case relevant to the court's jurisdiction.

(3) Parents must disclose relative information pursuant to section 19-3-403(3.6)(a)(I).

(f) **Disclosures on Written Request.**

(1) **By Petitioner**. At any time and upon written request, the petitioner must disclose to the requesting respondent or child, through their guardian ad litem or counsel for youth, the following items related to the case in its possession, custody, or control. Disclosures must be made no later than 21 days after the request is made, or such other time as the parties agree or the court determines reasonable. Written notice of any of the following items that are not disclosed and a brief explanation of the reason for withholding them must be given by the petitioner to the requesting respondent or child, through their guardian ad litem or counsel for youth. Nothing in this rule prevents the court from prohibiting or limiting disclosure of the items listed below for good cause.

(A) Safety and risk assessments;

(B) All TRAILS entries, including Record of Contact ("ROC") notes, and handwritten notes;

(C) Confirmation of county referrals to service providers;

(D) All reports and notes from family or team decision meetings convened by or on behalf of the department;

(E) Family time assessments, reports, and notes;

(F) Law enforcement reports;
(G) Photographs and videos;
(H) Forensic interviews; and
(I) When permitted under state and federal law or when an appropriate waiver of privilege or confidentiality has been provided:
(I) All court ordered evaluations, treatment records, and service provider notes of any child or respondent;
(II) Educational, medical, dental, mental health, substance abuse, and domestic violence documents and information; and
(III) Any item in the file of the department if requested with specificity.

(2) **By Respondents.** Upon written request by the petitioner or the child through their guardian ad litem or counsel for youth, respondents must disclose to requesting parties the following documents that are in the respondent's possession: a copy of the child's birth certificate, a copy of the child's social security card, and information related to Medicaid or health insurance coverage. These disclosures must be made no later than 21 days after the request is made or such other time as the parties agree or the court orders.

(g) Disclosures for a Contested Trial or Hearing. Except for hearings governed by subsection (e) of this rule, parties and others required by the court in accordance with law must disclose the following no later than 7 days before a contested trial or hearing, or at such other time as the court orders:

(1) Names, addresses, and telephone numbers of all witnesses who will or may be offered at the contested trial or hearing and a short summary of their anticipated testimony;
(2) Curricula vitae, résumé, or statement of the qualifications of each witness who will or may be offered as an expert;
(3) Written reports of witnesses who will or may be offered as an expert. If no written report has been prepared, a summary of any expert witness's opinion that will be introduced at the contested trial or hearing; and
(4) A list of all other evidence intended to be presented at the contested trial or hearing. Copies of evidence that will or may be offered at the contested trial or hearing must be provided if not previously disclosed.

(h) Other Disclosures. Other disclosures may be obtained and provided as ordered by the court.

(i) Discovery.

(1) **Scope.**
(A) Discovery may be obtained and provided regarding any matter not privileged, relevant to any matter presented to the court for resolution in the case, and proportional to the needs of the case.
(B) Guardians ad litem and children under 12 are not required to produce discovery unless ordered by the court for good cause shown.

(2) **Resolution of Discovery Disputes.** Discovery disputes must be resolved as quickly and informally as possible. Before bringing a discovery dispute to the court, including a request for protection orders, the parties must confer or attempt to confer in good faith to resolve the dispute. If a discovery dispute is brought to the attention of the

court, the court must exercise due diligence to resolve the discovery dispute within 48 hours, or as soon as practicable.

(3) **Deadlines.** Unless otherwise agreed to by the parties or ordered by the court:
   (A) all oral depositions and depositions by written examination shall be completed at least 21 days before a contested hearing; and
   (B) all requests for admissions, interrogatories, and requests for production shall be propounded at least 35 days before a contested hearing.

(4) **Oral Depositions.** Throughout a case, a party may take depositions of up to four persons. Depositions of incarcerated individuals or repeat depositions of the same person must not occur without court order. It is presumed that depositions of children or youth are not in their best interests and require a court order supported by good cause shown. Each deposition must be limited to two hours.

(5) **Depositions by Written Examination.** Throughout a case, a party may take # depositions by written examination for the purposes of obtaining or authenticating documents.

(6) **Requests for Admission.** A party may serve on each party no more than 20 discrete requests for admissions.

(7) **Interrogatories**. Throughout a case, a party may serve on each party no more than 20 discrete interrogatories.

(8) **Requests for Production**. Throughout a case, a party may serve on each party no more than 20 discrete requests for production of documents.

(9) **Protective Orders**. For good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
   (A) that the disclosure or discovery not be had;
   (B) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place or the allocation of expenses;
   (C) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
   (D) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;
   (E) that discovery be conducted with no one present except persons designated by the court; and
   (F) that a deposition, after being sealed, be opened only by order of the court.

(10) **Expansion or Limitation for Good Cause.** The trial court may limit or expand discovery for good cause considering factors such as the purposes of the Children's Code, the complexity of the case, the importance of the issues at stake, the parties' alternative access to the relevant information, the importance of discovery in resolving the issues before the juvenile court, and whether the burden or delay associated with the proposed discovery outweighs its likely benefits.

(j) Duty to Supplement Disclosures and Discovery. Unless expressly waived by the receiving party, parties who have provided disclosures or discovery must supplement disclosures or discovery when such parties learn that previously-provided disclosures or discovery are incomplete or incorrect in some material respect and the additional or corrective information has not otherwise been made known to the other parties from other

disclosures or discovery. The duty to supplement or correct extends to the production of expert reports disclosed pursuant to these rules. Unless expressly waived by the receiving party, updated disclosures and discovery must be provided as soon as reasonably practicable.

(k) Sanctions and Other Remedial Measures. The court may exercise its discretion to impose sanctions and other remedial measures for disclosure and discovery violations in a manner consistent with the purposes outlined in subsection (a).

COMMENT

[1] Notwithstanding the adoption of this rule, informal information sharing between parties should continue to occur. This rule is not intended to impede those informal practices.

[2] This rule should not be used to justify an extension beyond statutory timeframes except as authorized by statute.

[3] The court may utilize a standing Case Management Order but should tailor it to address the specific circumstances of each case.

[4] Good cause findings for expanding or limiting discovery should be made with specificity and on the record. A juvenile court should be cautious in limiting discovery. *See Silva v. Basin W., Inc.*, 47 P.3d 1184, 1188 (Colo. 2002) ("We liberally construe discovery rules to eliminate surprise at trial, discover relevant evidence, simplify issues, and promote the expeditious settlement of cases."); *Cameron v. Dist. Ct. In & For First Jud. Dist.*, 193 Colo. 286, 290, 565 P.2d 925, 928 (1977) (discovery rules "should be construed liberally to effectuate the full extent of their truth-seeking purpose.").

[5] Courts should consider modifying discovery timeframes from those set forth in this rule to comply with expedited timeframes, such as those involving adjudicatory hearings.

[6] When feasible and appropriate, aligned parties should coordinate and consolidate their discovery requests and responses.

[7] When determining sanctions for discovery or disclosure violations, courts are encouraged to consider the facts and circumstances of each case, taking care to avoid unnecessary delay or disproportionate penalties that may impair the ability of any party to fairly present a case or defense.

MEMORANDUM

TO: Juvenile Rules Committee
FROM: Anna Ulrich, Staff Attorney, Office of the Child's Representative
RE: Proposed Disclosure and Discovery Rule: OCR Position Statement
DATE: November 27, 2023

I. THE OCR APPROACH

At the request of the Office of Respondent Parent Counsel, the Juvenile Rules Committee directed the current C.R.J.P. Drafting Subcommittee to prioritize the discovery rule in its work. In its work on the Drafting Subcommittee, OCR has attempted to approach the process with a spirit of collaboration. While having a uniform discovery rule, beyond disclosures, was not a priority for the OCR and does raise some concerns, OCR deferred to the work of the previous drafting subcommittee and the varying perspectives of other stakeholders on the current Drafting Subcommittee, who see a need for a discovery rule that specifically authorizes disclosures, interrogatories (ROGs), requests for admission (RFAs), request for production of documents (RPDs), and depositions. Thus, OCR approached the process with a specific focus on protecting children and youth from discovery requests that are unduly burdensome, unreasonable, or have significant implications for timely permanency. *See* C.J.D. 04-06 § (V)(D)(1)(c).

In order to provide background and context to the Drafting Subcommittee, OCR reviewed discovery rules from three other states with client-directed youth counsel provided by J.J. Wallace. *See* Ex. A, Sample Discovery Rules. The analysis demonstrated that Colorado's proposed discovery rule is substantially more detailed than other states. Further, in reaching out to practitioners in these states, OCR learned that, while disclosures were commonplace in these case types, the use of traditional discovery processes was very limited and almost never directed towards children or youth. The OCR reported this research to the Drafting Subcommittee.

II. ADOPTION OF THE DISCLOSURE AND DISCOVERY RULE

Outside of the remaining issues to be decided by the Juvenile Rules Committee, discussed in Section III of this memo below, the OCR has no objection to the Juvenile Rules Committee promulgating the proposed Disclosure and Discovery Rule as a stand-alone rule prior to the adoption of the rules package. The OCR also has no objection to the Juvenile Rules Committee directing the Drafting Subcommittee to conduct additional work to finalize the language and formatting of the proposed rule; and/or to formulate the specific language on the outstanding issues discussed below once the Juvenile Rules Committee has made substantive determinations on the items.

III. OUTSTANDING ISSUES

As for the remaining issues to be decided by the Juvenile Rules Committee, the OCR offers the following perspective on each:

I. Should the presumptive limits on discovery (number of oral depositions; written depositions; requests for admission; interrogatories; & requests for production) be tied to the entire case or tied to each contested hearing?

The OCR believes there should be some limits on discovery for the duration of the case. It is important to note that, in a particular D&N case, there can be numerous contested hearings (shelter, adjudication, disposition, placement, permanency planning, APR/Guardianship, termination, etc). If the discovery limits reset with each contested hearing, a D&N case could easily become bogged down with excessive discovery requests. Options to address this concern include: 1) cap the discovery requests for the case total, as the current proposed rules do; 2) cap the discovery requests to pre- and post-adjudication; or 3) list the various hearing types in the rule and propose a certain number of discovery requests for each hearing type. The OCR's preference is to limit the parties' discovery requests per case, noting that under the current proposed rule, the court may expand or limit discovery for good cause shown.

II. What should the limits be on the total number of: oral depositions; written depositions; ROGs, RFAs, RPDs?

The OCR believes that setting a default limit on the amount of discovery is an arbitrary endeavor which does not account for case-specific needs. However, because the proposed rule allows a court to limit or expand discovery for good cause, the OCR does not have a strong objection to the inclusion of this type of default provision. The OCR simply requests that the Juvenile Rules Committee consider the overarching purposes of the Children's Code, including a focus on timely resolution that serves the child's best interests, in determining what type of baseline amount of discovery should be permitted. *See* C.R.S. § 19-1-102(1)(c).

For instance, if the Juvenile Rules Committee decides to tie the limits on discovery to the *entire case*, as the current draft rules do, the OCR believes the prior drafting subcommittee's proposal of 4 oral depositions; 20 discrete RFAs; 20 discrete ROGs; and 20 discrete RPDs was a fair proposal. If the Juvenile Rules Committee decides to tie the limits of discovery to *each hearing*, the OCR would propose a similar reduction in the number of discrete discovery requests (such as 1 oral deposition per hearing, and 5 of each: ROGs/RFAs/RPDs). It is worth noting that D&N cases are currently operating under a default of zero ROGs/RFAs/RPDs absent court order (per C.R.C.P. 16(a) and 26(a)), so even the proposal of 20 each per case will be a significant shift in practice for many districts.

III. In (i)(4) (Oral Depositions), the subcommittee agrees that a party would need a court order to take any child's or youth's deposition. The committee also agrees that it's not in the best interests of children under 12 to be deposed. The subcommittee cannot agree about:

- *whether there should be an express presumption that taking a deposition of a child or youth (age 12+) is not in that child's or youth's best interests; or*
- *whether the rule should be silent and not express such presumption to children or youth (age 12+)?*

The OCR proposes that the Juvenile Rules Committee consider retaining the following sentence from the existing draft discovery rule in the current oral deposition section: "It is presumed that depositions of children are not in their best interests and require a court order supported by good cause shown." Clearly, depositions are the most invasive, stressful, and potentially traumatic form of discovery that could be imposed on a child or youth. A rule which requires parties seeking to depose a child or youth overcome a presumption that this procedure is not in the child/youth's best interests comports with the

purposes of the Children's Code.[1] These purposes and their inherent protections apply regardless of the child or youth's age (youth ages 12-18 are still considered children under the Children's Code, C.R.S. § 19-1-103(21)).[2]

A best interest determination is particularly important give the current proposed Comment [4], which provides: "A juvenile court should be cautious in limiting discovery." Because this comment, based in civil rather than dependency caselaw, might be understood by some courts as encouraging expansive discovery orders, it is imperative that the rule contain an explicit presumption that depositions of children and youth are not in their best interests to continue to align these rules with the purposes of the Children's Code. *See* Fn 1, supra. If parity between parties is the primary concern of the Juvenile Rules Committee with this approach, OCR would propose that the rule provides that a deposition of <u>any</u> party requires a court order based upon a finding of good cause.

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[1] Although the purposes of the Children's Code as described in C.R.S. § 19-1-102 are multi-faceted, taking the purposes together as a whole, the clear intent of the Children's Code is to ensure that children's best interests are the primary focus of all actions taken under the Code. "The overriding purpose of the Children's Code is to protect the welfare and safety of children in Colorado by providing procedures through which their best interests can be ascertained and served." *A.M. v. A.C.*, 296 P.3d 1026, 1030 (Colo. 2013) (citing *L.G. v. People*, 890 P.2d 647, 654 (Colo. 1995); *see also People in Interest of S.N.,* 329 P.3d 276, 279 (Colo. 2014). "To carry out these purposes, the provisions of [the Children's Code] shall be liberally construed to serve the welfare of children and the best interests of society." C.R.S. § 19-1-102(2).

[2] Currently, the default is that depositions of parties in D&N cases necessitate a court order. *See* C.R.C.P. 16(a), 26(a). Nothing in the statutory language of HB 22-1038, or its legislative history, indicates that this legislation was intended to subject youth 12 and up to depositions or other invasive discovery practices. Ch. 92, secs. 1-37, 2022 Colo. Sess. Laws, 430, 434-5 ("HB 22-1038"). Instead, the clear purpose of the legislation was to increase youth's voice and participation in these matters without punishing them for such participation. *See id*.

MEMORANDUM

TO: Judge Jerry N. Jones, Chair of the Colorado Civil Rules Committee

FROM: Subcommittee Re Gendered Pronouns

DATE: July 31, 2023

RE: Request for Guidance on Next Steps Re Gendered Pronouns

The Colorado Civil Rules Committee's Subcommittee Re Gendered Pronouns is at a point in our work where we would like to obtain your guidance on how best to proceed. The Subcommittee has arrived at the following two "best fix" approaches to accomplish the universal revision of all gendered pronouns currently set forth in the Colorado Rules of Civil Procedure:

FIRST APPROACH: FEDERAL RULES COMMITTEE APPROACH

The first approach generally tracks the fix adopted by the Federal Civil Rules Committee. Specifically, in referring to the generic term "party" they appear to default to "it." For example:

> Fed. R. Civ. P. 4(i)(4) *Extending Time.*
>
> The court must allow a *party* a reasonable time to cure *its* failure to:….
>
> Fed. R. Civ. P. 8(b)(1) *In General.*
>
> In responding to a pleading, a *party* must: (A) state in short and and plain terms *its* defenses to each claim asserted against *it*; and (B) admit or deny the allegation asserted against *it* by an opposing *party*.

When referring to less generic terms like "plaintiff" or "third-party plaintiff" they appear to use either "it" or to repeat the same less generic terms "plaintiff" and "third-party plaintiff," depending on which is most clear for the particular provision. For example:

> Fed. R. Civ. P. 4(a)(1)(E) *Contents.*
>
> A summons must…notify the *defendant* that a failure to appear and defend will result in a default judgment against the *defendant* for the relief demanded in the complaint;

Fed. R. Civ. P. 14(a)(1) *Timing of the Summons and Complaint.*

A defending party may, as a *third-party plaintiff*, serve a summons and complaint on a nonparty who is or may be liable to *it* for all or part of the claim against *it*. But the *third-party plaintiff* must, by motion, obtain the court's leave if it files the third-party complaint more than 14 days after serving *its* original answer.

This first approach would afford the subcommittee some flexibility in revising the gendered pronouns rather than universally adopt the non-gendered catch all "it," for purposes of clarity. Here are a couple examples of how this first fix would apply to the Colorado Rules of Civil Procedure, showing the revision in redline format:

C.R.C.P. 14(a) *When Defendant May Bring in Third Party.*

At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to ~~him~~it for all or part of the plaintiff's claim against ~~him~~it. The third-party plaintiff need not obtain leave to make the service if ~~he~~ it files the third-party complaint not later than 14 days after ~~he~~it serves his original answer. Otherwise ~~he~~the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make ~~his~~its defenses to the third party plaintiff's claim as provided in Rule 12 and ~~his~~ its counterclaim against the third-party plaintiff and cross claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert ~~his~~ its defenses as provided in Rule 12 and its~~his~~ counterclaim and cross claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this Rule against any person not a party to the action who is or may be liable to it~~him~~ for all or part of the claim made in the action against the third-party defendant.

C.R.C.P. 14(b) *When Plaintiff May Bring in Third Party.*

When a counterclaim is asserted against a plaintiff, ~~he~~the plaintiff may cause a third party to be brought in under circumstances which under this Rule would entitle a defendant to do so.

C.R.C.P. 8(b) *Defenses; Forms of Denials*.

A party shall state in short and plain terms ~~his~~its defenses to each claim asserted and shall admit or deny the averments of the adverse party. If ~~he~~a party is without knowledge or information sufficient to form a belief as to the truth of an averment, ~~he~~it shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, ~~he~~the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, ~~he~~the pleader may make ~~his~~its denials as specific denials of designated averments or paragraphs, or ~~he~~the pleader may generally deny all the averments except such designated averments or paragraphs as ~~he~~it expressly admits; but, when ~~he~~the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, it~~he~~ may do so by general denial subject to the obligations set forth in Rule 11.

SECOND APPROACH: WA/MN RULES COMMITTEE APPROACH

The second approach generally tracks what the Civil Rules Committees of states like Washington and Minnesota have adopted. Generally, they do not use "it" or "its." Rather, when referring to less generic terms like "plaintiff" or "third-party plaintiff" they appear to repeat the same less generic terms "plaintiff" and "third-party plaintiff." For example:

Wash. CR 8(b). *Defenses; form of denials.*

A *party* shall state in short and plain terms the defenses to each claim asserted and shall admit or deny the averments upon which the *adverse party* relies. If a *party* is without knowledge or information sufficient to form a belief as to the truth of an averment, the *party* shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a *pleader* intends in good faith to deny only a part or a qualification of an averment, the *pleader* shall specify so much of it as is true and material and shall deny only the remainder. Unless the *pleader* intends in good faith to controvert all the averments of the preceding pleading, the *pleader* may make denials as specific denials of designated averments or paragraphs, or the *pleader* may generally deny all the averments except such designated averments or paragraphs as the *pleader* expressly admits; but, when the *pleader* does so intend to controvert all its averments, the *pleader* may do so by general denial subject to the obligations set forth in rule 11.

Wash. CR 14(a)[1] *When defendant may bring in third party.*

At any time after commencement of the action a *defending party*, as a *third party plaintiff*, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the *defending party* for all or part of the *plaintiff's* claim against the *defending party*. The *third party plaintiff* need not obtain leave to make the service if the *third party plaintiff* files the third party complaint not later than 10 days after the *third party plaintiff* serves an original answer. Otherwise the *third party plaintiff* must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third party complaint, hereinafter called the *third party defendant*, shall make defenses to the *third party plaintiff's* claim as provided in rule 12 and ***his*** counterclaims against the *third party plaintiff* and cross claims against other *third party defendants* as provided in rule 13. The *third party defendant* may assert against the *plaintiff* any defenses which the *third party plaintiff* has to the *plaintiff's* claim. The *third party defendant* may also assert any claim against the *plaintiff* arising out of the transaction or occurrence that is the subject matter of the *plaintiff's* claim against the *third party plaintiff*. The *plaintiff* may assert any claim against the *third party defendant* arising out of the transaction or occurrence that is the subject matter of the *plaintiff's* claim against the *third party plaintiff*, and the *third party defendant* thereupon shall assert defenses as provided in rule 12 and counterclaims and cross claims as provided in rule 13. Any party may move to strike the third party claim, or for its severance or separate trial. A *third party defendant* may proceed under this rule against any person not a party to the action who is or may be liable to the *third party defendant* for all or part of the claim made in the action against the *third party defendant*.

Minn. R. Civ. P. 8.02 *Defenses; Form of Denials.*

A *party* shall state in short and plain terms any defenses to each claim asserted and shall admit or deny the averments upon which the *adverse party* relies. If a *party* is without knowledge or information sufficient to form a belief as to the truth of an averment, the *party* shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. A *pleader* who intends in good faith to deny only a part or to qualify an averment shall specify so much of it as is true and material and shall deny only the remainder. Unless the *pleader* intends in good faith to controvert all the averments of the preceding pleading, the *pleader* may make denials as specific denials of designated averments or paragraphs, or may generally deny all the averments except such designated averments or paragraphs as the *pleader* expressly admits. However, a *pleader* who intends to

[1] The Subcommittee's assessment is that Rules such as 14 and 19 will be among the most challenging to revise. While this second approach results in some considerable verbosity in Rule 14, the approach is unlikely have the same result in the majority of the rules.

controvert all its averments may do so by general denial subject to the obligations set forth in Rule 11.

This second approach avoids the awkward, if not insensitive, use of "it" to refer back to people, but may perhaps be less clear and wordy. Here are a couple examples of how this second fix would apply to the Colorado Rules of Civil Procedure, showing the revision in redline format:

C.R.C.P. 14(a) *When Defendant May Bring in Third Party.*

At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to ~~him~~the defending party for all or part of the plaintiff's claim against ~~him~~the defending party. The third-party plaintiff need not obtain leave to make the service if ~~he~~the third-party plaintiff~~-~~ files the third-party complaint not later than 14 days after ~~he~~the third-party plaintiff serves ~~his~~the third-party plaintiff's original answer. Otherwise ~~he~~the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall *make* ~~his~~ the third-party defendant's defenses to the third-party plaintiff's claim as provided in Rule 12 and ~~his~~ the third-party defendant's counterclaim against the third-party plaintiff and cross claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall *assert* ~~his~~ the third-party defendant's defenses as provided in Rule 12 and ~~his~~the third-party defendant's counterclaim and cross claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this Rule against any person not a party to the action who is or may be liable to ~~him~~the third-party defendant for all or part of the claim made in the action against the third-party defendant.

C.R.C.P. 14(b) *When Plaintiff May Bring in Third Party.*

When a counterclaim is asserted against a plaintiff, ~~he~~the plaintiff may cause a third party to be brought in under circumstances which under this Rule would entitle a defendant to do so.

C.R.C.P. 8(b) *Defenses; Forms of Denials*.

> A party shall state in short and plain terms ~~his~~the party's defenses to each claim asserted and shall admit or deny the averments of the adverse party. If ~~he~~a party is without knowledge or information sufficient to form a belief as to the truth of an averment, ~~he~~the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, ~~he~~the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, ~~he~~the pleader may make ~~his~~the pleader's denials as specific denials of designated averments or paragraphs, or ~~he~~the pleader may generally deny all the averments except such designated averments or paragraphs as ~~he~~the pleader expressly admits; but, when ~~he~~the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, ~~he~~the pleader may do so by general denial subject to the obligations set forth in Rule 11.

GUIDANCE REQUESTED

As between these two "best fix" options and the process moving forward, the Subcommittee would appreciate your direction as to the following:

1. Would you like the Subcommittee to first present these two "best fix" approaches through the foregoing summary examples to the broader Committee for their consideration and vote? After which vote, the Subcommittee would proceed to revise the entirety of the C.R.C.P. per the selected approach, and ultimately present to the Committee the fully revised set of the C.R.C.P. for their review and approval. This would essentially be a two vote / two meeting process.

2. Or, would you like the Subcommittee to select from the two "best fix" approaches (with input from you and others, if any, you deem important to include in that initial selection), and proceed to revise the entirety of the C.R.C.P., after which the Subcommittee would present to the Committee the fully revised set of the C.R.C.P. for their review and approval. This would essentially be a one vote / one meeting process.

3. Also, are other Committees considering similar revisions to other sets of Colorado rules or forms, in addition to the C.R.C.P.? If so, are other Committees following one of these approaches or a different approach? And before the Committee invests substantial effort in these revisions, should the Committee seek guidance as to whether any uniform standards will be articulated for revisions to court rules generally?