AGENDA
COLORADO SUPREME COURT
RULES OF JUVENILE PROCEDURE COMMITTEE
Friday, August 4, 2023, 9:00 AM
Videoconference Meeting via Webex

I. Call to Order

II. Chair's Report
- A. Minutes of 4/7/2023 meeting [pages 2–4]

III. New Business
- A. ICWA Rules proposal [pages 5–15]
- B. Any other new business?

IV. Old Business
- A. Drafting Subcommittee (Judge Welling & Judge Furman)
  1) Update
  2) Letter Re Discovery [pages 16–18]
  3) Memo Re Recommendation to Civil Rules Committee RE C.R.C.P. 10 [pages 19–24]
  4) Memo Re Removing (d) (Waiver of Factual Basis) from Admission or Denial Rule [pages 25–26]
- B. HB22-1038 Review of Draft Rules Subcommittee
  1) Oral Update
- *C.* Subcommittee to redraft Order to Interview or Examine Child (Anna Ulrich & David Ayraud)—*Tabled until October meeting*

V. Adjourn

2023 Meeting Schedule: October 6; December 1

Colorado Supreme Court Rules of Juvenile Procedure Committee
Minutes of April 7, 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	
Ruchi Kapoor		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 Guest: Sheri Danz		

Meeting Materials:
(1) Draft Minutes of 2/3/2023 meeting
(2) Emails on Form Order Appointing CFY & Form Order (clean and redlined)
(3) Updated Memo & Redlined and Clean Rule Proposals on Order to Interview or Examine the Child & Feedback from David Ayraud

Unofficial

II. Chair's Report

A. The 2/3/23 meeting minutes were approved without amendment.

III. Old Business

A. Drafting Subcommittee (Judge Welling and Judge Furman)

Judge Welling reported that the subcommittee continues to make steady progress. As in the past, when issues arise, the subcommittee will bring the issue to the attention of the larger committee. Judge Welling also indicated that the subcommittee continues to have good communication with the 1038 Subcommittee and both groups have avoided duplicating efforts.

B. Proposed ICWA Rules (Judge Furman)

Judge Furman states that the subcommittee is in the process of finalizing the rules.

C. HB22-1038 Right to Counsel for Youth (Anna Ulrich & Special Guest Sheri Danz)

Anna Ulrich explained the reasons behind drafting a form order and the steps that have been taken to create one, which included working closely with ORPC and other stakeholders. The Chair thank everyone for working together. Anna noted that the form order attempts to strike a balance between making sure a CFY or GAL has access to the information they need and making sure a CFY or GAL does not have access to information, such as the private records of parents, that they should not have. Anna asked if any committee members had questions.

One member asked if any trial judges participate in drafting the form order. Anna responded that three different trial judges/magistrates participated. Another member asked whether the child's records, such as medical records, should be automatically available to the CFY for a sixteen-year-old client or whether the sixteen-year-old client should first provide a release. Sheri stated that the form order was drafted to track the exact language of section 19-3-203(4). However, she added that CFYs are trained to offer thorough advisements to their clients on the CFY's role, how the client may direct a CFY, and that the client has the ability to say yes or no to something.

The committee unanimously approved the form order. It was previously determined that the form order should go out as a JDF. Judge Welling and J.J. will assist Sheri and Anna in moving the form toward JDF status.

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Anna also reported that the 1038 committee is continuing its review of the draft rules. She announced that next up is looking at rules to implement youth participating in court hearings. She encouraged any members with experience with youth in court to contact her with feedback.

D. Subcommittee to redraft Rule on Order to Interview or Examine Child (Anna Ulrich)

Anna Ulrich recapped the history of this issue and directed everyone to the meeting materials. David Ayraud gathered some feedback on the proposed draft rule and submitted it for the committee's review. He summarized the feedback. Anna was uncertain of the next steps but suggested that the draft rule be sent back to the subcommittee to consider the feedback. She also asked David to participate in the meeting and asked him to invite any other county attorney willing to participate. The committee approved sending the proposal back to the subcommittee to discuss the feedback.

IV. New Business

The Chair reminded committee members that the June meeting has been cancelled. The next meeting will be the first Friday in August.

V. Adjourn

The meeting adjourned just around 9:38 AM. The next meeting is August 4 at 9 AM via Webex.

Respectfully Submitted,

J.J. Wallace
Staff Attorney, Colorado Supreme Court

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Proposed ICWA Rules

Rule 1. Title of Rules and Definitions

(a) These rules shall be known as the "Colorado Rules of ICWA Procedures."

(1) The Indian Child Welfare Act of 1978 will be referred to throughout these rules as "ICWA."

(2) The Bureau of Indian Affairs will be referred to throughout these rules as the "BIA."

(b) For purposes of these rules, the following definitions apply:

(1) "Active efforts" means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. 25 C.F.R. § 23.2.

(2) "Agency" means a nonprofit, for-profit, or governmental organization and its employees, agents, or officials that performs or provides services to biological parents, foster parents, or adoptive parents to assist in the administrative and social work necessary for foster, preadoptive, or adoptive placements. 25 C.F.R. § 23.102.

(3) "Child custody proceeding" means and includes proceedings involving or seeking a foster care placement of a child, the termination of the parent-child legal relationship, the preadoptive or temporary placement of a child in a foster home or institution after the termination of parental rights but prior to or in lieu of adoptive placement, and the adoptive or permanent placement of a child. The term "child custody proceeding" does not include a placement based upon an act that, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents. 25 U.S.C. § 1903(1).

(4) "Emergency proceeding" means and includes any court action that involves an emergency removal or emergency placement of an Indian child. 25 C.F.R. § 23.2.

(5) "[F]oster care placement" means any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated. 25 U.S.C. § 1903(1)(i).

(6) "Indian child" means an unmarried person who is younger than eighteen years of age and is either (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe and who is the biological child of a member of an Indian tribe. § 19-1-103(83), C.R.S.

(7) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership; or (b) in the case of an Indian child who is a member of

or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the most significant contacts. § 19-1-103(84), C.R.S.

(8) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody, and control has been transferred by the parent of such child. 25 U.S.C. § 1903(6).

(9) "Indian tribe" means an Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the federal government services provided to Indians because of their status as Indians. § 19-1-103(85), C.R.S.

(10) "Involuntary proceeding" means a child custody proceeding in which the parent does not consent of the parent's free will to the foster care, preadoptive, or adoptive placement or termination of parental rights or in which the parent consents to the foster care, preadoptive, or adoptive placement under threat of removal of the child by a state court or agency. 25 C.F.R. § 23.2.

(11) "Parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established. 25 U.S.C. § 1903(9).

(12) "Reservation" means Indian country as defined in 18 U.S.C § 1151 and any lands, not covered under that section, title to which is held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation. 25 C.F.R. § 23.2.

(13) "Status offenses" means offenses that would not be considered criminal if committed by an adult; they are acts prohibited only because of a person's status as a minor (e.g., truancy, incorrigibility). 25 C.F.R. § 23.2.

(14) "Tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe vested with authority over child custody proceedings. 25 U.S.C. § 1903(12).

(15) "Voluntary proceeding" means a child custody proceeding that is not an involuntary proceeding, such as a proceeding for foster care, preadoptive, or adoptive placement that either parent, both parents, or the Indian custodian has, of his, her, or their free will, without a threat of removal by a state agency, consented to for the Indian child, or a proceeding for voluntary termination of parental rights. 25 C.F.R. § 23.2.

COMMENTS

The substantive and procedural requirements of ICWA are set forth in 25 U.S.C. §§ 1901–1963. *See also* § 19-1-126, C.R.S. Related ICWA regulations are set forth in part 23 of title 25 of the Code of Federal Regulations. These Colorado Rules of ICWA Procedures are intended to ensure compliance with ICWA, corresponding state law, and the related ICWA regulations.

Rule 2. Application

These rules apply to all child custody proceedings. Such proceedings may include, but are not limited to, matters brought under the Uniform Dissolution of Marriage Act, the Colorado Probate Code, and the Colorado Children's Code.

COMMENTS

[1] Child custody proceedings to which these rules apply may commonly include cases in which a child may be placed with an agency or a person other than a biological parent or when the action may result in termination of the parent-child legal relationship or otherwise significantly impact the legal relationship between the biological parent and child. Examples include, but are not limited to, adoptions, dependency and neglect cases, allocations of parental responsibilities, cases under the Uniform Parentage Act, guardianship of a minor under the Colorado Probate Code, and delinquency cases solely based on a status offense as outlined in 25 C.F.R. § 23.103(a)(1)(iii).

[2] Multiple child custody proceedings can occur throughout a dependency and neglect case and may include, but are not limited to, shelter hearings, dispositional hearings, temporary or permanent placement hearings, hearings on motions to terminate the parent-child legal relationship, and preadoptive and adoptive placement hearings.

[3] Some of the provisions in these rules, such as Rule 3 (regarding required inquiries) and Rule 10 (regarding placement preferences), apply to voluntary proceedings, but others do not. For additional requirements applicable to voluntary proceedings, *see* 25 U.S.C. § 1913.

Rule 3. Inquiry

(a) The court must ask each participant at each child custody proceeding throughout a case whether the participant knows or has reason to know that any child who is the subject of the proceeding is an Indian child. The court must:

(1) conduct such inquiry at the commencement of the proceeding and ensure that all responses are on the record; and

(2) instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.

(b) A case may include more than one child custody proceeding, and the court must make the inquiry required by section (a) of this rule at each child custody proceeding within a case.

(c) A court may conduct multiple hearings within a child custody proceeding. This rule does not require an inquiry at each such hearing. If, however, a new child custody proceeding (e.g., a proceeding to terminate parental rights or for adoption) is initiated for any child, then the court must inquire as to whether there is reason to know that the child who is the subject of the proceeding is an Indian child.

(d) If the court has sufficient information to determine that the child who is the subject of the proceeding is an Indian child, then the court shall determine the identity of the Indian child's tribe and treat the child as an Indian child.

(e) If there is reason to know the child is an Indian child but the court does not have sufficient evidence to determine that the child is or is not an Indian child, the court must:

(1) Confirm by way of a report, declaration, or testimony included in the record that the petitioning or filing party used due diligence to identify and work with all of the tribes of which there is reason to know the child may be a member, or eligible for membership, to verify whether the child is in fact a member, or a biological parent is a member and the child is eligible for membership; and

(2) Treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an "Indian child."

(f) In any case brought under the Colorado Children's Code, if the court receives information that the child may have Indian heritage but does not have sufficient information to determine that there is reason to know that the child is an Indian child, the court must direct the petitioning or filing party to:

(1) exercise due diligence in gathering additional information that would assist the court in determining whether there is reason to know that the child is an Indian child; and

(2) make a record of the efforts taken to determine whether or not there is reason to know that the child is an Indian child.

COMMENTS

[1] ICWA requirements apply whenever an Indian child is the subject of a child custody proceeding. *See* 25 C.F.R. § 23.103.

[2] For the criteria supporting a reason to know, *see* 25 C.F.R. § 23.107(c) and § 19-1-126(1)(a)(I)–(II), C.R.S.

[3] It is best practice to conduct the required investigation into a child's status early in the case. The results of the investigation help to establish which laws will apply to the case and minimize

the potential for delays or disrupted placements in the future. *See* § 19-1-126(3), C.R.S., and BIA, *Guidelines for Implementing the Indian Child Welfare Act*, § B.1 at 11 (Dec. 2016).

[4] A child may be a member of or may be eligible for membership in more than one tribe, and the inquiries required by this rule must recognize that possibility.

[5] The purpose of the inquiries required by this rule is to identify the tribe or tribes in which the child is a member or may be eligible for membership. The tribes, however, have the exclusive authority to determine whether the child is a member or eligible for membership. To assist in identifying federally recognized tribes, the BIA annually publishes in the Federal Register a list of recognized tribes and their agents for service.

Rule 4. Membership or Eligibility for Membership in Multiple Tribes

(a) If the Indian child is a member or eligible for membership in only one tribe, that tribe must be designated as the Indian child's tribe.

(b) If the Indian child meets the definition of "Indian child" through more than one tribe, deference should be given to the tribe in which the Indian child is already a member, unless otherwise agreed to by the tribes.

(c) If an Indian child meets the definition of "Indian child" through more than one tribe because the child is a member in more than one tribe or the child is not a member of but is eligible for membership in more than one tribe, the court must provide the opportunity in any involuntary child custody proceeding for the tribes to determine which should be designated as the Indian child's tribe.

(1) If the tribes are able to reach an agreement, the agreed-upon tribe should be designated as the Indian child's tribe.

(2) If the tribes are unable to reach an agreement, the state court must designate, for the purposes of ICWA, the Indian tribe with which the Indian child has the more significant contacts as the Indian child's tribe, taking into consideration:

(A) preference of the parents for membership of the child;

(B) length of past domicile or residence on or near the reservation of each tribe;

(C) tribal membership of the child's custodial parent or Indian custodian;

(D) interest asserted by each tribe in the child custody proceeding;

(E) whether there has been a previous adjudication with respect to the child by a court of one of the tribes; and

(F) self-identification by the child, if the child is of sufficient age and capacity to meaningfully self-identify.

(3) A determination of the Indian child's tribe for purposes of ICWA and its related regulations does not constitute a determination for any other purpose.

COMMENTS

This rule is derived from and tracks 25 C.F.R. § 23.109.

Rule 5. Emergency Removal or Placement of Child

(a) In any case involving an emergency removal or placement of an Indian child, the parties must follow the procedures set forth in 25 U.S.C. § 1922 and 25 C.F.R. § 23.113. Before authorizing such emergency removal or placement, the court must make a finding that the emergency removal or placement of an Indian child is necessary to prevent imminent physical damage or harm to the child.

(b) The State authority, official, or agency involved must insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

Rule 6. Notice Required for All Child Custody Proceedings

(a) The petitioning or filing party must disclose in the complaint, petition, commencing pleading, or other pleading seeking placement that is filed with the court whether there is reason to know that the child who is the subject of the proceeding is an Indian child. If there is reason to know that the child is an Indian child, then the petitioning or filing party must identify the Indian child's tribe, if known, and any other information related to Native American ancestry.

(b) If the court knows or has reason to know that the child who is the subject of the proceeding is an Indian child, then the court must verify that the petitioning or filing party sent notice by registered or certified mail, return receipt requested, to the parent or Indian custodian of the Indian child and to the tribal agent of the Indian child's tribe as designated in 25 C.F.R. § 23.12. If no tribal agent has been designated, then the petitioning or filing party must contact the tribe to be directed to the appropriate office or individual to be notified.

(c) Whenever there is reason to know that the child is an Indian child, including cases in which the Indian child's tribe cannot be ascertained, notice must be sent to the appropriate regional director of the BIA by registered or certified mail, return receipt requested, or by personal delivery. The court must ensure that the petitioning or filing party complies with the notice requirements of 25 C.F.R. § 23.111.

(d) If there is reason to know that the child who is the subject of the proceeding is an Indian child, then the petitioning or filing party must identify on the record what efforts have been made to provide the notices referred to in sections (b) and (c) of this rule.

(e) The postal receipts indicating that notice was properly sent by the petitioning or filing party to the parent or Indian custodian of the Indian child and to the Indian child's tribe must be attached to the complaint, petition, commencing pleading, or other pleading seeking placement that is filed with the court; except that, if notification has not been perfected at the time the initial complaint, petition, commencing pleading, or other pleading seeking placement is filed with the court, or if the postal receipts have not been received from the post office at the time of such filing, then the petitioning or filing party must promptly file the postal receipts with the court, upon receipt thereof.

(f) Any responses sent by the tribal agents must promptly be distributed to all parties and filed with the court.

COMMENTS

[1] For guidance on filing notice and return receipts with the court, *see* § 19-1-126(1)(c), C.R.S.

[2] When notice is required pursuant to subsection (e) of this rule, the court should ordinarily advise pro se parties seeking placement of an Indian child of their obligation to send notice and may refer them to any resources that may assist them with such notice.

Rule 7. Intervention

In any proceeding for the foster care placement of or termination of parental rights to an Indian child, the Indian custodian of the child and the Indian child's tribe have a right to intervene at any time, upon written or oral motion filed with the court or made on the record.

COMMENTS

If the child is a member of or eligible for membership in more than one tribe, only one tribe can be designated as the Indian child's tribe. *See* 25 U.S.C. § 1903(5) and 25 C.F.R. § 23.109. For the procedures to be employed when a child is a member of or is eligible for membership in more than one tribe, *see* Rule 4 of these rules.

Rule 8. Transfer

(a) Either parent, the Indian custodian, or the Indian child's tribe may request at any time, orally on the record or in writing, that the court transfer a foster care or termination of parental rights proceeding to the jurisdiction of the child's tribe.

(b) The right to request a transfer is available at any stage in each foster care or termination of parental rights proceeding.

(c) Upon request for transfer, the state court must ensure that the tribal court is promptly notified in writing of the transfer request and that a copy of the notification is provided to all parties to the proceeding. The notification provided by the state court or at its direction to the tribal court may request a timely response regarding whether the tribal court wishes to decline the transfer.

(d) The state court must transfer the child custody proceeding to the tribal court unless the state court determines that transfer is not appropriate because:

(1) either parent objects to the transfer;

(2) the tribal court declines the transfer; or

(3) good cause exists for denying the transfer.

(e) If the state court believes, or if any party asserts, that good cause exists for denying the transfer, then the reasons for that belief or assertion must be stated orally on the record or provided in writing on the record and to the parties to the child custody proceeding.

(f) The basis for any court decision to deny transfer must be stated orally on the record or in a written order.

COMMENTS

[1] For further guidance on transfer to a tribal court, *see* 25 U.S.C. § 1911(b) and 25 C.F.R. §§ 23.115–23.119.

[2] This rule uses both "child custody proceeding" and "foster care or termination of parental rights proceeding." The rule's language follows the federal regulations, 25 C.F.R. §§ 23.115–23.119, which use both phrases.

[3] For guidance regarding what the court must not consider in determining whether good cause exists to deny transfer, *see* 25 C.F.R. § 23.118(c).

Rule 9. Required Evidence and Determinations

(a) A court may not order the foster care placement of an Indian child absent a determination supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(b) A court may not order the termination of parental rights to an Indian child absent a determination supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(c) Before ordering foster care placement or termination of parental rights, a court must also determine that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have been unsuccessful.

(d) A qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's tribe.

(1) A person may be designated by the Indian child's tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's tribe.

(2) The social worker regularly assigned to the Indian child may not serve as a qualified expert witness in child custody proceedings concerning the child.

COMMENTS

[1] Subsections (a) and (b) of this rule track the language of 25 U.S.C. § 1912(e) and (f).

[2] 25 U.S.C. § 1912(d) requires, but does not define, active efforts. *But see* Rule 1 of these rules and 25 C.F.R. § 23.2 for a definition and further guidance regarding active efforts; *see also* BIA, *Guidelines for Implementing the Indian Child Welfare Act*, §§ E.5–E.6 at 42–44 (Dec. 2016).

[3] For guidance regarding who may serve as a qualified expert witness, *see* 25 C.F.R. § 23.122 and BIA, *Guidelines for Implementing the Indian Child Welfare Act*, § G.2 at 53–55 (Dec. 2016).

[4] The testimony of a qualified expert witness is required absent an emergency removal of the child pursuant to 25 U.S.C. § 1922 and Rule 5 of these rules.

[5] The court or any party may request the assistance of the Indian child's tribe or the BIA office serving the Indian child's tribe in locating persons qualified to serve as expert witnesses, *see* 25 C.F.R. § 23.122.

Rule 10. Placement Preferences

(a) The party seeking the placement of the Indian child must:

(1) specify a placement within the placement preferences in 25 U.S.C. § 1915, 25 C.F.R. § 23.130, and 25 C.F.R. § 23.131, or another preferred placement established by resolution by the Indian child's tribe, except as set forth in section (b) of this rule;

(2) inform the court whether the Indian child's tribe has established, by resolution, a different order of preference, and if so, the tribe's preferred order; and

(3) except in the case of an adoptive placement, provide evidence that the proposed placement is the least restrictive placement that

(A) most approximates a family, taking into consideration sibling attachment;

(B) allows the Indian child's special needs (if any) to be met; and

(C) is in reasonable proximity to the Indian child's home, extended family, or siblings.

(4) The court must, where appropriate, also consider the placement preference of the Indian child or Indian child's parent.

(b) If any party asserts that good cause not to follow the placement preferences exists, then the reasons for that belief or assertion must be stated orally on the record or provided in writing to the parties to the child custody proceeding and the court, as provided in 25 U.S.C. § 1915 and 25 C.F.R. § 23.132.

(c) In the case of a voluntary placement requiring court approval, when a consenting parent requests anonymity, the court must give weight to such desire in applying the placement preferences.

COMMENTS

[1] For further guidance regarding placement preferences, *see* 25 C.F.R. §§ 23.130–23.132.

[2] For the factors that a court should consider, and factors that a court may not consider, in making a good cause determination under section (b) of this rule, *see* 25 C.F.R. § 23.132.

[3] For information regarding confidentiality requirements that may apply in voluntary proceedings in which a parent has requested anonymity, *see* 25 C.F.R. § 23.107(d).

Rule 11. Appointment of Counsel

In any removal, placement, or termination proceeding in which the court determines that a parent or Indian custodian of an Indian child is indigent, the parent or Indian custodian has the right to court-appointed counsel. In addition, if the court is not required to appoint counsel for the child pursuant to applicable law, then the court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child.

COMMENTS

For guidance regarding the appointment and payment procedures for court-appointed counsel under titles 12, 13, 14, 15, 19 (adoption and special respondents in dependency and neglect only), 22, 22.5, and 27, C.R.S., *see* CJD 04-05.

OFFICE OF RESPONDENT
PARENTS' COUNSEL

July 12, 2023

Dear Members of the Colorado Rules of Juvenile Procedure Redraft Committee,

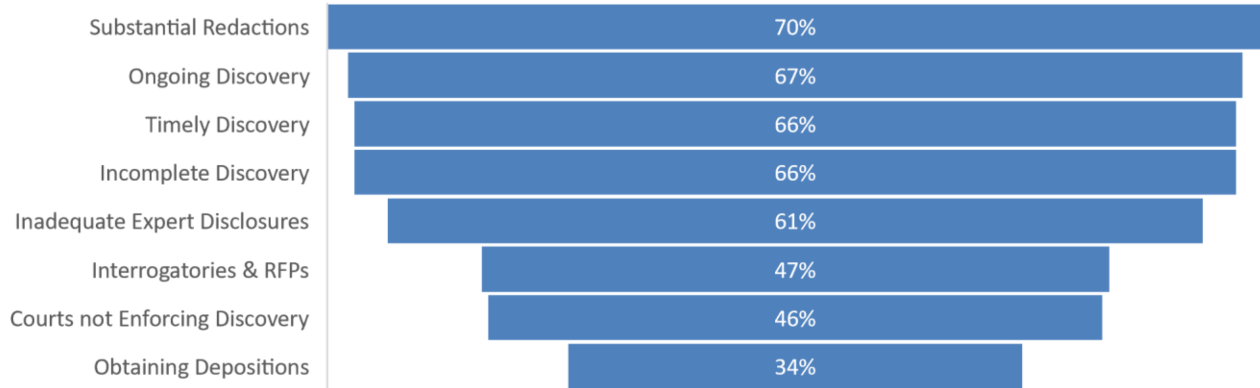
The Office of Respondent Parents' Counsel (ORPC) appreciates the commitment of the Colorado Rules of Juvenile Procedure Redraft Committee to modernize and update the Rules of Juvenile Procedure. However, on behalf of the ORPC, I am reaching out to express our grave concern at the current pace for adopting rules specifically pertaining to discovery in dependency and neglect cases.

Every day, the ORPC handles consults, complaints, and questions from respondent parent counsel (RPC) and other stakeholders about thorny discovery issues, spending substantial staff time and resources addressing these concerns. Our agency consults with 64 different policies about when, how, and what will be made available to parents who are defending against permanent separation from their children.

The Juvenile Procedure Redraft Committee began meeting before the ORPC was formed, almost seven years ago, in 2016. In May 2015, practitioners completed a survey about the Colorado Rules of Juvenile Procedure, with many members expressing that D&N discovery rules were a priority. Just a few months after the formation of our agency, the Redraft Committee considered a detailed proposal from the Discovery Rules Subcommittee on November 4, 2016. A year later, on December 8, 2017, the Discovery subcommittee again presented on revised proposed rules. The full committee liked the shorter rules and make additional proposed changes. At the following meeting, the Discovery Subcommittee provided rules containing the proposed changes. The full committee again provided feedback, and the minutes note that the committee "feels satisfied with the shorter version of the disclosure/discovery rules."

Based on the meeting minutes for the full committee, the discovery rules have not come back before the full committee for any kind of significant review since early 2018. The full committee discussed some additional changes to the discovery rules to align them with other rules at the February 7, 2020 meeting, two years after the initial discovery rules had been accepted by the full committee. More than two years later, on August 5, 2022, the full committee recommended that the 1038 subcommittee review the implications of the proposed discovery rules after HB 22-1038 clarified the role of children as a party to dependency and neglect cases. The 1038 committee has not yet reviewed the discovery rules, and the ORPC is uncertain of the status of review and finalization of these rules overall.

In the 8 years since RPCs were last surveyed about the need for juvenile rules, not much has changed—discovery rules continue to be a priority. In the fall of 2022, we asked RPCs about their challenges with discovery in their jurisdictions, and they reported large and moderate barriers to being effective in their jobs based on discovery issues. Here are some of the results:



At our 2022 fall conference, we held a roundtable on discovery issues. The room was standing room only and was among the most spirited conversation at our conference. Creating discovery rules or legislation is one of the top requests RPCs make of our office.

Here are a few practical examples of discovery challenges RPCs have faced:

- In Mesa County, the county would not provide discovery to RPCs unless a case was set for a contested hearing. This resulted in excessive settings of contested hearings in order to get information clients were statutorily entitled to receive.
- In Boulder County, multiple termination hearings have been continued by up to six months due to delayed discovery.
- A parent completed a hair follicle test that was negative for substances, but that information was not provided in discovery. The parent's rights were terminated and evidence that could have helped them avoid termination was not made available to the court.
- In many jurisdictions, such as the 12th and 1st JDs, depositions and written interrogatories are often denied, preventing the thorough litigation of issues that benefits both the juvenile court and its ability to enter well-informed orders and allow parties to provide effective representation.

In the absence of statewide rules or guidance, each county has adopted its own policies on how parents may obtain the records they are entitled to pursuant to § 19-1-307. Though these policies are required to be maintained by 12 CCR 2509-7.605.24, they were not being maintained until the ORPC requested copies of these policies from CDHS. Only a handful of them meet the requirements of Volume 7. A quick glance at these policies demonstrates how complicated it is to navigate 64 different, incomplete policies for getting access to client files and TRAILS across our state. Such policies create a hodgepodge of litigation, changing outcomes solely based on where a case is brought and creating less fulsome records for appeal.

And, these policies don't cover formal discovery methods, which are also inconsistently available. Some counties, such as El Paso County, address formal discovery in a Case Management Order. As noted above, other counties do

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not permit depositions or use of other formal discovery. A greater number of counties don't have case management orders at all and handle discovery issues on an ad hoc basis.

Respectfully, parents and children cannot wait another two or three years for consistent discovery rules. Our Constitution demands more. As our courts have long acknowledged, the State must provide *procedural* due process when interfering in the *substantive*-due-process-based right to parent. *See, e.g.*, *People in Interest of A.M.*, 2021 CO 14, ¶¶17-18 (citing, *e.g.*, *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982); *Troxel v. Granville*, 530 U.S. 57, 66 (2000)). Our current system denies parents access to basic information needed, and constitutionally required, to defend themselves against the ultimate civil deprivation of rights – termination of parental relationships. We are also losing good lawyers because they are frustrated about not having basic, constitutionally compliant rules that guide them in their roles.

The ORPC requests the Redraft Committee expedite the drafting and adoption of discovery rules for dependency and neglect cases. We cannot continue to tell our lawyers, or parents and families bearing the brunt of this delay, that discovery rules will be adopted within the next year—something we have been saying that for the last six years. While ORPC would prefer to have the Redraft Committee pursue discovery rules on an expedited basis, if that is not possible then the agency may consider pursuing legislation to ensure that parents have constitutionally compliant procedures to access basic information and discovery statewide. We believe the Committee has done critically important work and considered multiple perspectives in the current draft of the discovery rules, and we urge this Committee to expedite that work.

Sincerely,

Melissa Michaelis Thompson, Executive Director

Melanie Jordan, Policy Director

Zaven Saroyan, Appellate Director

Memorandum

To: C.R.J.P. Committee
From: C.R.J.P. Drafting Subcommittee
Re: Proposal to Civil Rules Committee to Incorporate Juvenile in C.R.C.P. 10
Date: 5/10/2023

Background

The Rules of Juvenile Procedure Committee is in the process of overhauling the C.R.J.P. and has developed a draft set of new rules for dependency and neglect cases. The committee formed a smaller subcommittee to scrutinize, edit, and harmonize the draft set of rules. Among the draft rules being reviewed by the subcommittee is a rule substantially similar to C.R.C.P. 10. The subcommittee believes that cross-referencing C.R.C.P. 10 rather than repeating the text of the rule would be a better, more efficient course of action to spell out form requirements for juvenile cases. However, the subcommittee also recommends two additions to C.R.C.P. 10 to ensure that juvenile cases are covered by C.R.C.P. 10.

Recommended Portions of C.R.C.P. 10 to Be Incorporated in the C.R.J.P

Because section 19-3-502, C.R.S. (2022) prescribes the caption and general pleading requirements of a petition in dependency and neglect and there is a separate rule on petitions in the juvenile rules, most of the caption, drafting, and exhibits guidance provided by C.R.C.P. 10 (a)–(c) are unnecessary for the juvenile rules.

The first sentence of C.R.C.P. 10(a) (requiring all filings to have the name of the court, the title of the action, the case number, and a document name) can serve as a model for a juvenile rule, and C.R.C.P. 10(d)–(i), would be helpful to incorporate by cross-reference. Subsection (d) sets out the "General Rule Regarding Paper Size, Format, and Spacing." Subsection (e) and (f) are caption illustrations. Although the illustrations in these subsections use the terms "Plaintiff(s)" and "Defendant(s)," they also say "[Substitute appropriate party designations & names]." Because party designations for dependency and neglect cases are made clear in section 19-3-502(1), these subsections do not need to be altered for juvenile cases. Subsection (i) sets out requirements for court pre-printed or computer-generated forms, which would apply equally in juvenile case types and should be included.

Proposed Juvenile Rule

Except for reports filed pursuant to section 19-1-107, C.R.S., every pleading, motion, E-filed document under C.R.C.P. 121 (1-26), or any other document filed with the court must conform to C.R.C.P. 10(d)–(i) and must contain a caption setting forth the name of the court, the title of the action, the case number, if known to the person signing it, and the name of the document.

Proposed Changes to the Civil Rule

The Drafting Subcommittee recommends asking the Civil Rules Committee to make additions to C.R.C.P. 10(g) and (h), which recognize juvenile courts and the juvenile rules of procedure.

C.R.C.P. 10(g) lists examples of court designations: Appellate; Water; District; County; and City and County. The Juvenile Court, City and County of __________, Colorado is listed among the designations under City and County. The Colorado Constitution creates a juvenile court in Denver. *See* Colo. Const. art. VI, §§ 1, 15. In other jurisdictions, "'juvenile court' means . . . the juvenile division of the district court outside the city and county of Denver." § 19-1-103(89), C.R.S. (2022). Because the Children's Code definition for "juvenile court" authorizes use of the term, these juvenile divisions of district courts commonly refer to themselves as "juvenile courts." But there is no listed designation for a juvenile court in C.R.C.P. 10(g). Thus, the Drafting Subcommittee recommends asking the Civil Rules Committee to include "Juvenile Court" among the court designations listed in C.R.C.P. 10(g).

The Drafting Subcommittee also recommends asking the Civil Rules Committee to include "the Colorado Rules of Juvenile Procedure" in subsection (h), which lists the rules of procedure to which the rule applies.

Redlined Proposed Rule 10. Form and Quality of Pleadings, Motions and Other Documents.

(a) Caption; Names of Parties. Every pleading, motion, E-filed document under C.R.C.P. 121 (1-26), or any other document filed with the court (hereinafter "document") in both civil and criminal cases shall contain a caption setting forth the name of the court, the title of the action, the case number, if known to the person signing it, the name of the document in accordance with Rule 7 (a), and the other applicable information in the format specified by paragraph (d) and the captions illustrated by paragraph (e) or (f) of this rule. In the complaint initiating a lawsuit, the title of the action shall include the names of all the parties to the action. In all other documents, it is sufficient to set forth the name of the first-named party on each side of the lawsuit with an appropriate indication that there are also other parties (such as "et al."). A party whose name is not known shall be designated by any name and the words "whose true name is unknown". In an action in rem, unknown parties shall be designated as "all unknown persons who claim any interest in the subject matter of this action".

(b) Paragraphs; Separate Statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances. A paragraph may be referred to by its paragraph number in all succeeding documents. Each claim founded upon a separate transaction or occurrence, and each defense other than denials, shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) Incorporation by Reference; Exhibits. A statement in a document may be incorporated by reference in a different part of the same document or in another document. An exhibit to a document is a part thereof for all purposes.

(d) General Rule Regarding Paper Size, Format, and Spacing. All documents filed after the effective date of this rule, including those filed through the E-Filing System under C.R.C.P. 121 (1-26), shall meet the following criteria:

(1) Paper: Where a document is filed on paper, it shall be on plain, white, 8 1/2 by 11 inch paper (recycled paper preferred).

(2) Format: All documents shall be legible. They shall be printed on one side of the page only (except for E-Filed documents).

(I) Margins: All documents shall use margins of 1 1/2 inches at the top of each page, and 1 inch at the left, right, and bottom of each page. Except for the caption, a left-justified margin shall be used for all material.

(II) Font: No less than twelve (12) point font shall be used for all documents, including footnotes.

(III)

Case Caption Information: All documents shall contain the following information arranged in the following order, as illustrated by paragraphs (e) and (f) of this rule, except that documents issued by the court under the signature of the clerk or judge should omit the attorney section as illustrated in paragraphs (e)(2) and (f)(2). Individual boxes should separate this case caption information; however, vertical lines are not mandatory.

On the left side:

Court name and mailing address.

Name of parties.

Name, address, and telephone number of the attorney or pro se party filing the document. Fax number and e-mail address are optional.

Attorney registration number.

Document title.

On the right side:

An area for "Court Use Only" that is at least 2 1/2 inches in width and 1 3/4 inches in length (located opposite the court and party information).

Case number, division number, and courtroom number (located opposite the attorney information above).

(3) Spacing: The following spacing guidelines should be followed.

(I)

Single spacing for all:

Affidavits

Complaints, Answers, and Petitions

Criminal Informations and Complaints

Interrogatories and Requests for Admissions

Notices

Pleading forms (all case types)

Probation reports

All other documents not listed in subsection (II) below

(II)

Double spacing for all:

Briefs and Legal Memoranda

Depositions

Documents that are complex or technical in nature
Jury Instructions
Motions
Petitions for Rehearing
Petitions for Writ of Certiorari
Petitions pursuant to C.A.R. 21
Transcripts

(4) Signature Block: All documents which require a signature shall be signed at the end of the document. The attorney or pro se party need not repeat his or her address, telephone number, fax number, or e-mail address at the end of the document.

(e) Illustration of Preferred Case Caption Format:

(1)

Preferred Caption for documents initiated by a party:

<table>
<tr><td>[Designation of Court from subsection (g) below]

Court Address:</td><td rowspan="2"></td></tr>
<tr><td>Plaintiff(s):

v. [Substitute appropriate party designations & names]
Defendant(s):</td></tr>
<tr><td rowspan="2">Attorney or Party Without Attorney:

Name:
Address:

Phone Number:
FAX Number:
E-mail:
Atty. Reg.#:</td><td>▲ COURT USE ONLY ▲</td></tr>
<tr><td>Case Number:

Div: Ctrm.:</td></tr>
<tr><td colspan="2">NAME OF DOCUMENT</td></tr>
</table>

(2)

Preferred Caption for documents issued by the court under the signature of the clerk or judge:

<table>
<tr><td>[Designation of Court from subsection (g) below]

Court Address:</td><td rowspan="2"></td></tr>
<tr><td rowspan="2">Plaintiff(s):

[Substitute appropriate party designations & names]
v.
Defendant(s):</td></tr>
<tr><td>▲ COURT USE ONLY ▲
Case Number:

Div.: Ctrm.:</td></tr>
<tr><td colspan="2">NAME OF DOCUMENT</td></tr>
</table>

(f) Illustration of Optional Case Caption:

(1)
Optional Caption for documents initiated by a party:

<table>
<tr><td>[Designation of Court from subsection (g) below]

Court Address:</td><td rowspan="3">

▲ COURT USE ONLY ▲</td></tr>
<tr><td>Plaintiff(s):

v. [Substitute appropriate party designations & names]
Defendant(s):</td></tr>
<tr><td rowspan="2">Attorney or Party Without Attorney:

Name:
Address:

Phone Number:
FAX Number:
E-mail:
Atty. Reg.#:</td></tr>
<tr><td>Case Number:

Div: Ctrm.:</td></tr>
<tr><td colspan="2">NAME OF DOCUMENT</td></tr>
</table>

(2)
Optional Caption for documents issued by the court under signature of the clerk or judge:

<table>
<tr><td>[Designation of Court from subsection (g) below]

Court Address:</td><td rowspan="2">

▲ COURT USE ONLY ▲</td></tr>
<tr><td rowspan="2">Plaintiff(s):

[Substitute appropriate party designations & names]
v.
Defendant(s):</td></tr>
<tr><td>Case Number:

Div.: Ctrm.:</td></tr>
<tr><td colspan="2">NAME OF DOCUMENT</td></tr>
</table>

(g)Court Designation Examples:

APPELLATE
SUPREME COURT, STATE OF COLORADO
COURT OF APPEALS, STATE OF COLORADO

WATER
DISTRICT COURT, WATER DIVISION ___, COLORADO

DISTRICT
DISTRICT COURT, _____ COUNTY, COLORADO

JUVENILE
JUVENILE COURT, _____ COUNTY, COLORADO

COUNTY

COUNTY COURT, _____ COUNTY, COLORADO

CITY AND COUNTY
COUNTY COURT, CITY AND COUNTY OF _______, COLORADO
PROBATE COURT, CITY AND COUNTY OF _______, COLORADO
JUVENILE COURT, CITY AND COUNTY OF _______, COLORADO
DISTRICT COURT, CITY AND COUNTY OF _______, COLORADO

(h) The forms of case captions provided for in this rule replace those forms of captions otherwise provided for in other Colorado rules of procedure, including but not limited to the Colorado Rules of County Court Procedure, the Colorado Rules of Procedure for Small Claims Courts, the Colorado Rules of Juvenile Procedure, and the Colorado Appellate Rules. These forms of case captions apply to criminal cases, as well as civil cases.

(i) State Judicial Pre-Printed or Computer-Generated Forms. Forms approved by the State Court Administrator's Office (designated "JDF" or "SCAO" on pre-printed or computer-generated forms), forms set forth in the Colorado Court Rules, volume 12, C.R.S., (including those pre-printed or computer-generated forms designated "CRCP" or "CPC" and those contained in the appendices of volume 12, C.R.S.), and forms generated by the state's judicial electronic system, "ICON," shall conform to criteria established by the State Court Administrator's Office with the approval of the Colorado Supreme Court. Such forms, whether preprinted or computer-generated, shall employ a form of caption similar to those contained in this rule, contain check-off boxes for the court designation, have at least a 9-point font, and 1 inch left margin, 1/2 inch right and bottom margins, and at least 1 inch top margin, except that for forms designated "JDF" or "SCAO" the requirement of at least 1 inch for the top margin shall apply to forms created or revised on and after April 5, 2010.

MEMORANDUM

TO: JUVENILE RULES COMMITTEE

FROM: DRAFTING SUBCOMMITTEE

SUBJECT: ADMISSION OR DENIAL RULE

DATE: 6/7/2023

SUMMARY: The Drafting Subcommittee recommends removing (d) of the draft rule on Admission or Denial.

EXPLANATION: The Drafting Committee has begun review of the draft advisement rule, which was modeled on C.R.J.P. 4.2. In reviewing the rule, the Drafting Committee recommended separating out the admission/denial part of the rule from the advisement part of the rule (currently found at C.R.J.P. 4.2(b)–(c)).

In focusing on the admission/denial part of the rule, the Drafting Committee recommends removing subsection (d) from the rule. Subsection (d) is titled "Factual Basis." The subcommittee felt (1) subsection (d) is not required by the statute and (2) subsection (d)'s requirement that "the court must find a factual basis sufficient to support the admission" repeats the requirement in subsection (c) that "the court must determine, in accordance with section 19-3-505(7)(a), C.R.S., at least one allegation of neglect or dependency in the petition is supported by a preponderance of the evidence." The subcommittee thought that stating the same basic idea two different ways may lead to confusion rather than clarity. Although the subcommittee acknowledged that some jurisdictions routinely allow a waiver of the factual basis as a matter of local practice, there was uncertainty about how this practice comports with the requirement that the court find that the petition's allegations were supported by a preponderance of evidence.

One member of the subcommittee pointed out that including subsection (d) may be clearer because it expressly clarifies that a parent may waive the factual basis. For example, if there is a pending criminal case against a parent, waiving the factual basis in the D&N may help the D&N move forward without prejudicing a parent's rights in the criminal case. One option may be for the committee to add the intent of (d) as a comment to the rule.

DRAFT RULE TEXT:

ADMISSION OR DENIAL

(a) Response to the Petition's Allegations. After being advised in accordance with Rule _____, each respondent must admit or deny the allegations of the petition.

(b) Admission.

(1) If a respondent admits the allegations contained in the petition, and if no party demands a jury trial pursuant to section 19-3-202(2), C.R.S., then the court may accept the admission after making the following findings: (1) The respondent understands his or her rights, the allegations contained in the petition, and the effect of the admission; and (2) the admission is voluntary.

(2) Absent a demand for a jury trial pursuant to section 19-3-202(2), C.R.S., the court may accept a written admission to the petition if the respondent has affirmed under oath that he or she understands the advisement and the consequences of the admission and if, based upon such sworn statement, the court is able to make the findings set forth above.

(c) Adjudication. After accepting an admission, unless proceeding under Rule 4.2.5, the court must determine, in accordance with section 19-3-505(7)(a), C.R.S., at least one allegation of neglect or dependency in the petition is supported by a preponderance of the evidence. If so, the court must sustain the petition and make an order of adjudication. The court's determinations pursuant to this subsection (c) must be on the record.

(d) Factual Basis. At the time of admission, the court must find a factual basis sufficient to support the admission, unless the respondent has stipulated or waived a factual basis.

Comment

[1] The language of (b) is intended to allow judicial officers discretion in determining when a case is ripe for entry of an order of adjudication.