The Recent Amendments to C.A.R. 21

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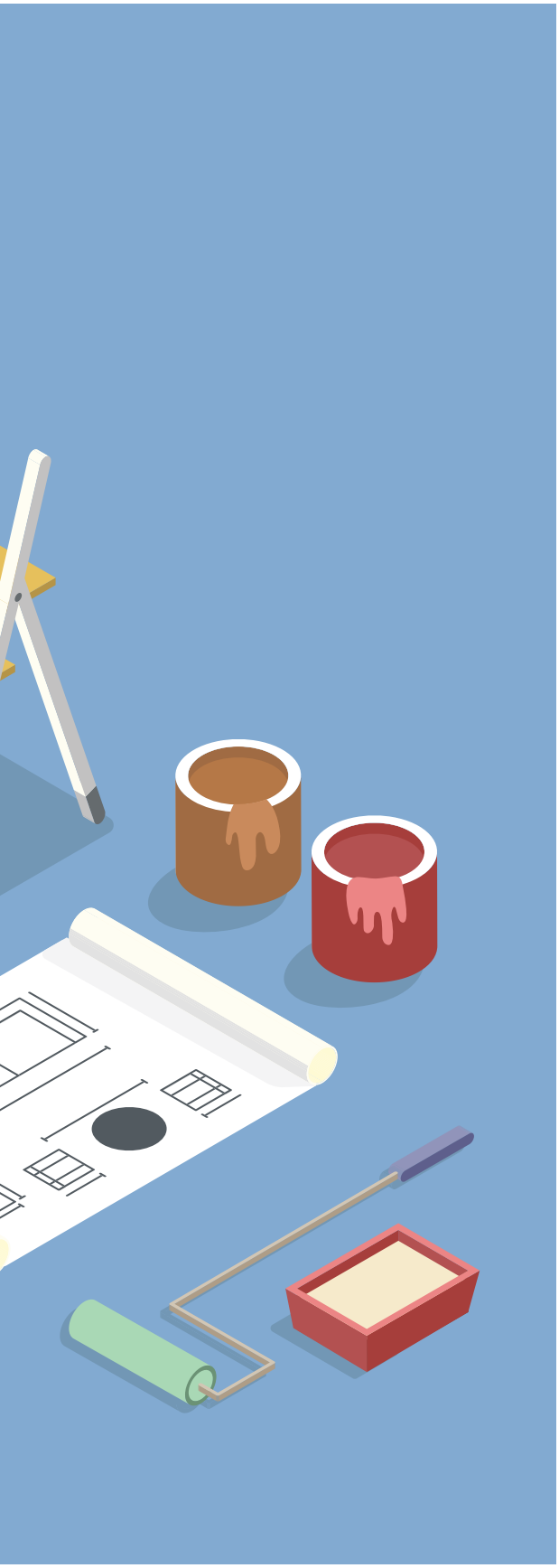

This article discusses and explains the reasons for the Supreme Court's recent amendments to C.A.R. 21, which governs original proceedings.

In 2014, the Colorado Supreme Court asked the Rules of Appellate Procedure Committee (the committee) to revise and recommend changes to the Colorado Appellate Rules (C.A.R. or Rules) to make them more accessible, reader-friendly, and transparent.[1] Since then, the Supreme Court has revised nearly all the Rules, but until recently, C.A.R. 21 (Rule 21), which governs original proceedings in the Supreme Court, remained largely unchanged since it was repealed and readopted in 1998.[2] On May 16, 2024, the Supreme Court approved revisions to Rule 21 in connection with its effort to update the Rules to assist practitioners and litigants (the full text of amended Rule 21 is in the appendix). Most of the Supreme Court's changes are non-substantive and intended to clarify the rule, but several changes are substantive. Practitioners should be aware of all these changes.

To that end, this article provides an overview of the recent changes to Rule 21. It begins with some brief background information regarding the rule, and then discusses, in turn, the amendments to the rule's structure, the procedures for filing a petition, the required supporting documents, and the provisions concerning dispositions of Rule 21 petitions without an opinion.

Background

Rule 21 implements the Supreme Court's general superintending authority over all Colorado courts by empowering the Court with original jurisdiction to issue remedial writs under article VI, section 3 of the Colorado Constitution.[3] Original proceedings in the Supreme Court are distinct from appeals. Unlike an appeal, which is filed to correct an error in an underlying judgment, an original proceeding is designed to either (1) test whether a court is proceeding without jurisdiction or in excess of its jurisdiction, or (2) review alleged abuses of discretion by lower courts or tribunals when an appellate remedy would be inadequate.[4]

An original proceeding is not a substitute for an appeal. Rather, it is an extraordinary, discretionary remedy that takes the form of a special mandate from the Supreme Court and is addressed to a specific individual, official body, or tribunal. It may also be used to restrain or compel a court to act in a certain manner.

Despite the robust case law explaining that Rule 21 is an extraordinary and seldom-granted remedy, the Supreme Court has seen an uptick in the number of original proceedings, even though the number of orders to show cause remains low.[5] After exploring this issue and soliciting input from people and organizations familiar with original proceedings,[6] the committee recognized that Rule 21 did not clearly highlight its extraordinary nature or limited applicability. As a result, many litigants, and especially pro se litigants, thought that Rule 21 was a viable option for relief, only to realize that the Court seldom issues orders to show cause. Many of these litigants reported that they would have pursued other options had they known about the exclusive nature of the remedy afforded by Rule 21.

Based on the feedback received, the committee concluded that Rule 21 should be revised and simplified to address these concerns.

Amendments to the Rule's Structure

For readability and accessibility, the committee recommended clarifying the rule's structure. Before the recent amendments, Rule 21 contained several important provisions that were often missed by parties (particularly pro se litigants)

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because of its arguably complex structure. To alleviate this concern, and to clarify up front that Rule 21 is a rule of last resort and limited availability, the Supreme Court divided old subsection (a) into three different topics: (1) the court's original jurisdiction under the Colorado Constitution, (2) the extraordinary nature and limited availability of relief, and (3) the different forms of writs subject to the rule. The Rule now clarifies that if petitioners cannot meet the threshold procedural requirements, particularly the unavailability of an alternate remedy, the Supreme Court will not consider the merits of the petition. These changes are designed to make would-be petitioners pause and ensure that the issues raised in their petitions satisfy all of the requirements of subsections (a)(1)–(3).

The committee also received comments regarding Rule 21's antiquated language, specifically the use of the phrase “rule to show cause” throughout. The committee researched the origin of this phrase but could not identify any constitutional provision or statute that used “rule” instead of “order” to show cause. The committee also researched counterpart rules in other states implementing their courts' original jurisdiction and found that Colorado's use of “rule” was unique. Most other states refer to the initiating document in an original proceeding as a “petition to show cause” or a “petition for a writ to show cause.”

Accordingly, the committee recommended changing “rule to show cause” to “order to show cause” throughout Rule 21. To avoid potential reference and citation problems, the committee clarified in the comments to the amendments that the word change does not affect the rule's substance or the relief available under Rule 21. Rather, the terms are interchangeable, and parties can continue to rely on case law that refers to a “rule to show cause.”

Several parties also inquired about the forms of writs subject to Rule 21. Many would-be petitioners understandably do not know what writs for mandamus, quo warranto, injunction, or prohibition are. The committee acknowledged that referencing these writs was perhaps archaic, but because the language in Rule 21(a)(3) is derived from and parallels article VI, section 3 of the Colorado Constitution, the committee was reluctant to recommend a change to this wording.

Although the terms therefore remain unexplained, the following sentence is important: “The petitioner need not designate a specific form of writ when seeking relief under this rule.” As long as no other viable appellate remedy is available and a petitioner can articulate that the lower court is acting without jurisdiction or in excess of its jurisdiction, or that the court has abused its discretion, the Supreme Court will consider the petition.

Filing a Petition

The committee also received comments from the Supreme Court clerk's office that petitions were often being filed or formatted incorrectly because many petitioners were overlooking the requirements set forth in the prior version of Rule 21(b), (c), and (d). Previously, these subsections covered fees, docketing the petition, naming the respondents, service, and the contents of the petition. To simplify the rule and to provide increased guidance, the Supreme Court restructured these provisions and added specific headings.

Thus, new subsection (b) discusses how to initiate an original proceeding and refers to subsection (e)(1), which provides clear directions on whom to list as a respondent. Subsection (b) also clarifies that if the petitioner seeks a writ of mandamus or prohibition directed to a lower court, then the proposed respondents must be the lower court plus all parties in the underlying proceeding (other than the petitioner). The Supreme Court added this clarification to ensure, consistent with due process, that all parties in the underlying proceeding are aware of the petition.

The Supreme Court also created a separate heading for filing fees, which is now covered in subsection (c). That subsection clarifies that C.A.R. 12, which governs filing fees and waivers, applies to original proceedings. Petitioners have always been able to seek filing-fee waivers, but petitioners sometimes overlooked that fact. By referencing C.A.R. 12, the Court intended to increase access to justice and clarify that, in appropriate circumstances, parties may apply for filing-fee waivers in original proceedings.

Revised subsection (d) governs the form, caption, and title of the petition. Subsection (d)(1) clarifies that unless otherwise provided, a petition for an order to show cause and all documents filed under the rule are subject to the word limits contained in C.A.R. 28(g) and the formatting requirements of C.A.R. 32. At the request of the Supreme Court clerk's office, subsection (d)(2) also distinguishes between the

caption of the original proceeding and the title of the initiating proceeding. Many parties have conflated the two, which has caused confusion.

The caption is simply the name of the case. If there is no underlying proceeding, then, as specified in subsection (d)(2)(A), the caption contained in the petition should read, "*In Re [Petitioner v. Proposed Respondent(s)]*." If there is an underlying proceeding, then, per subsection (d)(2)(B), the caption must be the full, exact, and unmodified caption given by the lower court in the underlying proceeding: "*In Re [Caption of the Underlying Proceeding]*."

Even if the caption in the underlying case does not include one of the proposed respondents, the underlying caption should still be used to avoid confusion and enable the Supreme Court clerk's office to properly docket the original proceeding. If the proposed respondents differ from or are not included in the caption, then the petitioner may explain the discrepancy in the contents of the petition, consistent with subsection (e)(1). Finally, only one case may be listed as the underlying proceeding in a caption.

In contrast, subsection (d)(2)(C) governs the title given to the *pleading* initiating an original proceeding. To avoid confusion, the Supreme Court has clarified that the petition must be titled, "Petition for Order to Show Cause Pursuant to C.A.R. 21." This change is to assist the clerk's office by ensuring that a document intended to be filed as an original proceeding is processed and docketed correctly.

Other than explaining the identity of the petitioner and the proposed respondents in subsection (e)(1), the Supreme Court did not amend the "content of the petition" section in Rule 21. The petitioner still has the burden of showing why the court should order a respondent to show cause why the relief requested should not be granted.

At the request of the Supreme Court clerk's office, the Court also added subsection (f) to clarify that the petitioner (and not the Court) has the burden of serving the petition on the proposed respondents, including the lower court or tribunal if it is a proposed respondent, as well as every party in the underlying proceeding if one exists. Petitioners must comply with the service requirements of C.A.R. 25, and if the case is filed through the Court's E-Filing system, each party must be served in the Supreme Court and not via the lower court.

Amendments to Supporting Documents

While most of the foregoing changes to Rule 21 are non-substantive, the Supreme Court's changes to subsection (g), concerning supporting documents, are substantive and warrant special attention. These changes fall into two categories.

> "The Supreme Court thus limited the required supporting documents to those necessary for a complete understanding of the narrow issue before the Court."

The first set of changes to subsection (g) is intended to promote efficient filing and organization. It is important to remember that an original proceeding has no preexisting "record" and is not subject to C.A.R. 10. Instead, the parties are responsible for collecting and submitting all documents and exhibits that are "necessary for a complete understanding of the proceeding."

Previously, parties needed to include documents "adequate to permit review," but due to the lack of specificity in that phrase, parties often filed large numbers of supporting documents, many of which were irrelevant to the issues presented. The Supreme Court thus limited the required supporting documents to those necessary for a complete understanding of the narrow issue before the Court. Subsection (g)(2) further requires all supporting documents to be organized within an appendix. For ease of Court review, the appendix must contain an index or table of contents referencing the page numbers of the supporting documents.

The Supreme Court issued the second set of changes contained in subsection (g) in the summer of 2023, but many parties have continued to overlook them. These changes, which appear in subsections (g)(4)–(5), concern the submission of supporting documents that must be sealed or suppressed.[7] Because the parties are responsible for providing the Court with all supporting documents, they are also responsible for identifying which supporting documents should be sealed or suppressed.

Notably, a document that was sealed or suppressed in an underlying proceeding is *not* automatically sealed or suppressed in the Supreme Court. Instead, the burden is on the party filing the supporting document to show that the document contains information that should be excluded from public access. If so, the party must file a motion asking the Supreme Court to seal or suppress the documents and include the reasons for doing so. The filing party must also certify that it has reviewed all supporting documents filed to determine if any of them should be sealed or suppressed.

New subsection (g)(6) clarifies that, if an original proceeding is included among the case types listed in Chief Justice Directive 05-01 § 4.60(b), it is unnecessary to file a motion to suppress because these classes of cases are already inaccessible to the public.[8] But if a party also wants the document to be sealed (as distinct from suppressed), which would limit access to judges, court staff, and other authorized Judicial Department staff, then the party must file a motion to seal.

Dispositions Issued Without an Opinion

Finally, subsection (o) is new and clarifies that if the Supreme Court discharges its order to show cause or makes it absolute without an opinion, then the Court's order will be unpublished and may not be cited as precedent. The Court made this change to clarify that orders disposing of an original proceeding without an opinion have no precedential value. It was needed because some petitioners were attempting to claim precedential value by citing orders that, unbeknownst to the Supreme Court, were being published by third parties.

Similarly, the changes to subsection (p) clarify that if a Rule 21 petition was denied without explanation or if the order to show cause was discharged or made absolute without an opinion, then no petition for rehearing may be filed. The reason for this change is that without an opinion, the parties cannot state with particularity each point of law or fact the Supreme Court allegedly overlooked or misapprehended, as required by C.A.R. 40(a)(2).

Conclusion

Although the Supreme Court's amendments to Rule 21 have lengthened the prior rule to some extent, except for the changes to subsections (g), (o), and (p), the amendments are generally non-substantive. The amendments improve the rule's clarity and readability, reflect the current practices of the Supreme Court clerk's office, and emphasize for practitioners the narrow and extraordinary nature of the relief provided by Rule 21. CL


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NOTES

1. The Rules are in chapter 32 of the *Colorado Revised Statutes Annotated, Court Rules Book 2*.

2. The revisions were effective January 1, 1999.

3. Article VI, section 3 provides in relevant part that the "supreme court shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction, and such other original and remedial writs as may be provided by rule of court with authority to hear and determine the same." Colo. Const. art. VI, § 3.

4. *See, e.g., People v. Vanness*, 458 P.3d 901, 904 (Colo. 2020) (noting that relief under Rule 21 is discretionary and may be exercised when an appellate remedy would be inadequate, a party may otherwise suffer irreparable harm, or a petition raises issues of significant public importance that the Supreme Court has not yet considered).

5. In fiscal year 2020, there were 207 original petitions filed. *See Colorado Judicial Branch Annual Statistical Report, Fiscal Year 2023* 5 tbl. 3. *See* https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Annual_Statistical_Reports/2023/FY2023%20Annual%20Report%20FINAL.pdf. In fiscal year 2023, there were 234 original petitions filed, but the Supreme Court only issued an order to show cause in 32 of them. *See* https://www.coloradojudicial.gov/supreme-court/supreme-court-protocols?topic=78&wrapped=true.

6. The committee solicited input from the Supreme Court clerk's office, self-represented litigant coordinators, the Public Defender's Office, the Attorney General's Office, practitioners, and legal clinic volunteers.

7. Although parties tend to use the terms "sealed" and "suppressed" interchangeably, they mean different things under Chief Justice Directive 05-01. A "sealed court record" means any record accessible only to judges, court staff, and other authorized Judicial Department staff. C.J.D. 05-01 § 3.07. A "suppressed court record" means any court record that is accessible only to judges, court staff, parties to the case (and, if represented, their attorneys), or other authorized Judicial Department staff. C.J.D. 05-01 § 3.08.

8. The following case classes and types are not publicly accessible: adoption, dependency and neglect, judicial bypass, juvenile delinquency, mental health, paternity, relinquishment, truancy, and certain probate-protected proceedings. C.J.D. 05-01 § 4.60(b)(1)–(9).

APPENDIX

Rule 21. Original Proceedings in the Supreme Court

(a) In General.

(1) *Original Jurisdiction Under the Constitution.* This rule applies only to the original jurisdiction of the supreme court to issue writs as provided in Section 3 of Article VI of the Colorado Constitution and to the exercise of the supreme court's general superintending authority over all courts as provided in Section 2 of Article VI of the Colorado Constitution.

(2) *Extraordinary Nature and Availability of Relief.* Relief under this rule is extraordinary in nature and is a matter wholly within the discretion of the supreme court. Such relief will be granted only when no other adequate remedy is available, including relief available by appeal, under C.R.C.P. 106, or under Crim. P. 35.

(3) *Forms of Writs Subject to this Rule.* Petitions for writs of habeas corpus, mandamus, quo warranto, injunction, prohibition, and other forms of writs cognizable under the common law are subject to this rule. The petitioner need not designate a specific form of writ when seeking relief under this rule.

(b) Initiating an Original Proceeding. The petitioner must file a petition for an order to show cause specifying the relief sought and requesting the court to issue to one or more proposed respondents, as set forth in subsection (e)(1), an order to show cause why the relief requested should not be granted.

(c) Docket Fees. Upon the filing of a petition under this rule, the petitioner must pay to the clerk of the supreme court the docket fee of $225.00 and must comply with C.A.R. 12.

(d) Form, Caption, and Title of the Petition.

(1) *Form.* Unless otherwise provided, the petition and all documents filed under this rule must comply with the requirements of C.A.R. 28(g) for opening briefs and C.A.R. 32.

(2) *Caption and Title.*

(A) If there is no underlying proceeding, the petition must be captioned, "In Re [Petitioner v. Proposed Respondent(s)]."

(B) If there is an underlying proceeding, the petition must use the full, exact, and unmodified caption given by the lower court or tribunal in the underlying proceeding, "In Re [Caption of Underlying Proceeding]." Only one case may be listed as the underlying proceeding in the caption.

(C) The petition must be titled "Petition for Order to Show Cause Pursuant to C.A.R. 21."

(e) Contents of the Petition. The petitioner has the burden of showing that the court should issue an order to show cause. To enable the court to determine whether to issue an order to show cause, the petition must set forth in sufficient detail the following:

(1) the identity of the petitioner and of the proposed respondent(s), together with, if applicable, their party status in the underlying proceeding (e.g., plaintiff, defendant, etc.). The proposed respondent(s) must be the real party (or parties) in interest against whom relief is sought. When a petition seeks a writ of mandamus or prohibition directed to a court or tribunal, the proposed respondents must be the lower court or tribunal, if appropriate, and all parties to the underlying proceeding other than the petitioner;

(2) the identity of the court or other underlying tribunal, the case name and case number or other identification of the underlying proceeding, if any, and identification of any other related proceeding;

(3) the ruling, action, or failure to act complained of and the relief being sought;

(4) the reasons why no other adequate remedy is available;

(5) the issues presented;

(6) the facts necessary to understand the issues presented;

(7) argument and points of authority explaining why the court should issue an order to show cause and grant the relief requested;

(8) a list of supporting documents, or an explanation of why supporting documents are not available; and

(9) the names, addresses, telephone numbers, and e-mail addresses (if any) of all parties to the underlying proceeding; or, if a party is represented by counsel, the attorney's name, address, telephone number, and email address (if any).

(f) Service. The petitioner must serve the petition on every party and proposed respondent and on the lower court or tribunal. All documents filed under this rule must be served in accordance with C.A.R. 25. If a case is filed through the court's E-System, E-Service on a party must be completed in the supreme court case; the supreme court will not accept service of documents made in the underlying proceeding or in the lower court.

(g) Supporting Documents.

(1) Proceedings initiated under this rule are not subject to C.A.R. 10.

(2) A petition must be accompanied by a separate, indexed appendix of available supporting documents necessary for a complete understanding of the issues presented. The appendix must include an index or table of contents of the supporting documents with page numbers noting where the documents appear. If the supporting documents are unavailable, the petition must explain why they are unavailable, consistent with subsection (e)(8).

(3) In cases involving an underlying proceeding, the following documents must be included in the appendix:
(A) the order or judgment from which relief is sought if applicable;
(B) documents and exhibits submitted in the underlying proceeding that are necessary for a complete understanding of the issues presented; and
(C) a transcript of the proceeding leading to the underlying order or judgment if available.
(4) The filing party is responsible for reviewing all supporting documents, including any attachments, exhibits, and appendices, to determine if the document contains information that should be excluded from public access pursuant to Chief Justice Directive 05-01 section 4.60. Any supporting document filed by a party that is not accessible to the public pursuant to Chief Justice Directive 05-01 section 4.60 must be accompanied by a motion to suppress or seal as prescribed in subsection (g)(4). The filing party must certify compliance with this subsection as directed by C.A.R. 32(h).
(5) Any document submitted as sealed or suppressed pursuant to Chief Justice Directive 05-01 sections 3.07 and 3.08 must be filed as a separate supporting document and must be accompanied by a motion for leave to file the document as sealed or suppressed. The motion must:
(A) identify with particularity the specific document containing sensitive information;
(B) explain why the sensitive information cannot reasonably be redacted in lieu of filing the entire document as sealed or suppressed;
(C) articulate the substantial interest that justifies depriving the public of access to the document; and
(D) cite any applicable rule, statute, case law, or prior court order sealing or suppressing the document.
(6) Original proceedings involving the specific case types listed in Chief Justice Directive 05-01 section 4.60(b)(1)-(9) are not accessible to the public. Unless a party intends to seal the proceeding pursuant to subsection (g)(5), it is unnecessary to file a motion to suppress the proceeding.

(h) Stay.
(1) *Pending a Decision to Issue an Order to Show Cause.* The filing of a petition under this rule does not stay any underlying proceeding or the running of any applicable time limit. If the petitioner seeks a temporary stay in connection with the petition pending the court's determination whether to issue an order to show cause, a stay ordinarily must be sought first from the lower court or tribunal. If a request for stay below is impracticable, not promptly ruled upon, or is denied, the petitioner may file a separate motion for a temporary stay in the supreme court supported by accompanying materials justifying the requested stay.
(2) *Upon Issuance of an Order to Show Cause.* Issuance of an order to show cause by the supreme court automatically stays all underlying proceedings until final determination of the original proceeding in the supreme court unless the court, acting on its own, or upon motion, lifts the stay in whole or in part.

(i) No Initial Responsive Pleading to Petition Allowed. Unless requested by the supreme court, no responsive pleading to the petition may be filed prior to the court's determination of whether to issue an order to show cause.

(j) Ruling on the Petition.
(1) *Denial.* The court may deny the petition without explanation and without an answer by any respondent.
(2) *Issuance of an Order to Show Cause.* The court may issue an order to show cause. The clerk will serve the order on all persons ordered or invited by the court to respond and on the lower court or tribunal in the underlying proceeding.

(k) Response to Order to Show Cause.
(1) The court in its discretion may invite or order any party, including a party in the underlying proceeding, to respond to the order to show cause within a fixed time. Any party in the underlying proceeding may request permission to respond to the order to show cause but may not respond unless invited or ordered to do so by the court. Those ordered by the court to respond are the respondents.
(2) The response to an order to show cause must comply with the requirements of C.A.R. 28(g) for answer briefs and with C.A.R. 32.
(3) Two or more respondents may respond jointly.

(l) Reply to Response to Order to Show Cause. The petitioner may submit a single reply brief within the time fixed by the court. A reply must comply with the requirements of C.A.R. 28(g) for reply briefs and with C.A.R. 32.

(m) Amicus Briefs. Any amicus curiae may file a brief only by leave of the court after a case number has been assigned. A brief submitted by an amicus curiae must comply with C.A.R. 29(a), (b), (c), (d), (f), and (g).
(1) *Before Ruling on a Petition.* Before the court rules on a petition an amicus curiae may tender a brief with a motion for leave to file supporting a petitioner, but the court may act on a petition at any time after the petition is filed, including before the submission of an amicus brief.
(2) *After Issuing an Order to Show Cause.* If the court issues an order to show cause, an amicus brief supporting a petitioner must be filed within seven days after the issuance of the show cause order, or such other time as the court may order for the submission of amicus briefs. An amicus brief supporting a respondent must be tendered by the deadline for the respondent's response, or such other time as the court may order for the submission of amicus briefs. An amicus curiae that does not support either party must file its brief no later than seven days after the issuance

of an order to show cause, or such other time as the court may order for the submission of amicus briefs.

(3) *No Reconsideration.* The filing of an amicus brief within the deadlines established by this rule but after the court has acted on a petition is not a ground for reconsideration of the court's decision to issue an order to show cause or deny a petition.

(n) No Oral Argument. There will be no oral argument unless ordered by the court.

(o) Disposition of an Order to Show Cause. The court in its discretion may discharge the order or make it absolute, in whole or in part, with or without opinion. Orders issued without an opinion will not be designated for official publication by the court and will remain unpublished. Unpublished orders may not be cited as precedent.

(p) Petition for Rehearing. A petition for rehearing may be filed only when the court has issued an opinion discharging the order to show cause or making the order absolute. Any petition for rehearing may be filed in accordance with C.A.R. 40(c)(2). No petition for rehearing may be filed after denial of a petition without explanation, if the order was discharged without opinion, or if the order was made absolute without opinion.

COMMENT

2024 Amendment

Except for the revisions made to subsection (g), most of the rule revisions to C.A.R. 21 are not substantive. The amendments were made for clarity, readability, and to reflect the current practices of the supreme court clerk's office.

To parallel the language of original jurisdiction rules in other states, the term "rule to show cause" was replaced with "order to show cause." The change in terminology does not affect the substance of the rule or the relief requested or granted by the rule. Parties may continue to rely on case law referring to a "rule to show cause," as the terms "rule to show cause" and "order to show cause" are used interchangeably.

The court may dispose of an order to show cause with or without an opinion. Any ruling made without an opinion will be unpublished and may not be cited as precedent. Parties may file a petition for rehearing only if the court issues an opinion.