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## 0252 Committee on Judiciary

Stacks  
52  
Book 6  
No 252

**Report to the Colorado General Assembly:**

**RECOMMENDATIONS FOR 1981  
COMMITTEE ON:**

# **JUDICIARY**



**COLORADO LEGISLATIVE COUNCIL**

**RESEARCH PUBLICATION NO. 252  
December, 1980**

Colorado Legislative  
Council, Committee on the  
Judiciary  
Colorado Legislative Council  
recommendations for 1981

LEGISLATIVE COUNCIL  
OF THE  
COLORADO GENERAL ASSEMBLY

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Vice-Chairman  
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Robert Burford  
Steven Durham  
Bob Leon Kirscht  
Phillip Massari  
Betty Orten

\* \* \* \* \*

The Legislative Council, which is composed of six Senators, six Representatives, plus the Speaker of the House and the Majority Leader of the Senate, serves as a continuing research agency for the legislature through the maintenance of a trained staff. Between sessions, research activities are concentrated on the study of relatively broad problems formally proposed by legislators, and the publication and distribution of factual reports to aid in their solution.

During the sessions, the emphasis is on staffing standing committees, and, upon individual request, supplying legislators with personal memoranda which provides them with information needed to handle their own legislative problems. Reports and memoranda both give pertinent data in the form of facts, figures, arguments, and alternatives.

200  
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10/10/80

**COLORADO LEGISLATIVE COUNCIL  
RECOMMENDATIONS FOR 1981**

*(Colorado Legislative Council)* COMMITTEE ON JUDICIARY.

**Legislative Council  
Report to the  
Colorado General Assembly**

**Research Publication No. 252  
December, 1980**

# COLORADO GENERAL ASSEMBLY



## LEGISLATIVE COUNCIL

ROOM 46 STATE CAPITOL  
DENVER, COLORADO 80203  
839-3521  
AREA CODE 303

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REP. PHILLIP MASSARI

To Members of the Fifty-third Colorado General Assembly:

Submitted herewith are the final reports of the Legislative Council interim committees for 1980. This year's reports of the fourteen committees are contained in nine volumes of research publications (Research Publication Nos. 249 through 257).

Respectfully submitted,

/s/ Senator Fred Anderson  
Chairman  
Colorado Legislative Council

FA/sh

## FOREWORD

The Legislative Council appointed the 1980 interim Committee on Judiciary to study five different areas. The committee held a total of ten meetings during the interim and recommends eleven bills for approval by the General Assembly. This volume contains the Committee on Judiciary's report and recommended bills. The Legislative Council reviewed the recommended bills at its meeting on November 24, 1980, and voted to accept the report and the recommended bills included herein and to transmit them to the 1981 Session of the General Assembly.

The Committee on Judiciary and the staff of the Legislative Council were assisted by Matthew E. Flora of the Legislative Drafting Office in the preparation of the committee's bills.

December, 1980

Lyle C. Kyle  
Director

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LEGISLATIVE COUNCIL  
COMMITTEE ON JUDICIARY

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Principal Analyst

Jim Gottschalk  
Research Associate

The interim Committee on Judiciary was directed by the Legislative Council to conduct a study of five areas pursuant to Senate Joint Resolution No. 26:

- (1) A study on the Commission on Judiciary Qualifications and the rule-making authority delegated to the Colorado Supreme Court.
- (2) A study on the cost of court-appointed counsel and of the public defender system.
- (3) A study to review the publication process for rules and regulations of departments and the judicial branch.
- (4) A study of Colorado laws concerning the care and treatment of the mentally ill, services available and the needs of victims of domestic abuse, and the related criminal laws, including the criminal definition of insanity and the criminal defense of insanity, and to further study the administration of said laws, including commitment procedures and conditions to release.
- (5) A study examining the regulation of condominiums and time-sharing systems.

In order to consider all of the assigned topics, the committee held ten meetings during the interim. A total of eleven bills are recommended by the committee: a Concurrent Resolution pertaining to the Commission on Judicial Qualifications; three bills relating to the study on the cost of court-appointed counsel; two bills concerning the publication process for rules and regulations; and five bills resulting from the study of laws concerning the mentally ill and the criminally insane. The committee devoted one full day meeting to the subject of the regulation of condominiums and time-sharing systems; however, no bills are recommended on this subject. Likewise, no bills are recommended in the area of domestic abuse legislation even though the committee devoted considerable time to this subject. In addition, the committee makes no recommendations concerning the rule-making authority of the Supreme Court.

The purpose of this part of the report is to briefly summarize the bills which the committee recommends for approval. A more detailed description of committee activity and rationale concerning the recommendations is contained in the background report which follows the recommended bills.

## COMMITTEE RECOMMENDATIONS

### The Commission on Judicial Qualifications

Bill 1 -- SUBMITTING TO THE QUALIFIED ELECTORS OF THE STATE OF COLORADO AN AMENDMENT TO SECTION 23 (3) OF ARTICLE VI OF THE CONSTITUTION OF THE STATE OF COLORADO, CONCERNING THE COMMISSION ON JUDICIAL QUALIFICATIONS

This bill makes changes in the composition, procedures, and powers of the Commission on Judicial Qualifications, which is the body responsible for investigating complaints against judges. The name of the commission is changed to the Commission on Judicial Discipline. The composition of the commission is changed from nine members to ten members by the addition of two citizen members and deleting one of the district judges. The appointment of the four citizen members and the two attorney members must be confirmed by the senate. In the case of substantial disinterest or inactivity by a member, such member may be removed by the appointing authority. A special member may be appointed in those cases in which a member has a conflict of interest. The criteria for the removal of a judge are broadened and the alternatives available to the commission for disciplining judges are expanded. The confidentiality of the records of any investigation is lost after a hearing in which grounds for disciplinary action have been found.

### Cost of Court-appointed Counsel

Bill 2 -- CONCERNING LEGAL REPRESENTATION OF INDIGENT PERSONS AT STATE EXPENSE

Currently, the state must appoint counsel for an indigent defendant if there is a possibility that his conviction will result in imprisonment. This bill will require the prosecuting attorney to indicate whether or not he will seek incarceration as part of the penalty if a defendant is convicted of a crime. If the prosecuting attorney decides not to seek a jail term, legal representation need not be provided for the defendant at state expense.

Bill 3 -- CONCERNING THE RECOUPMENT OF ATTORNEY FEES AND COSTS IN CASES OF STATE-SUPPLIED OR COURT-APPOINTED COUNSEL

This bill requires the state controller to institute collection proceedings against those persons who have been supplied with state-funded counsel when such persons are able to repay all or part of such expense.

Bill 4 -- CONCERNING THE FUNDING FOR EXPENSES OTHER THAN ATTORNEY FEES IN CASES OF COURT-APPOINTED COUNSEL

Attorneys who are appointed by the court to defend indigent persons are paid a fixed hourly rate established by the supreme court. This bill allows attorneys to be reimbursed for other professional costs, such as the use of paralegals, computer time, investigators, and other reasonable costs incurred.

Criminal Insanity and Mental Illness

Bill 5 -- CONCERNING PROCEDURES FOR THE CARE AND TREATMENT OF THE MENTALLY ILL

This bill extends the time limits for court filing for certification of those mentally ill patients requiring short-term treatment. The time limit for review of this certification by the court is also extended. The certification filed with the court may contain a request, in which any person can intervene as a copetitioner, that a specific legal disability be imposed or a legal right be deprived. In addition, the bill grants the court the power to require a patient to accept medical treatment or have the medical treatment forcibly administered. In any mental health proceeding, communications between a patient and staff may be admitted into evidence and are not subject to the traditional patient-doctor privilege. All proceedings for certification from a state institution will be conducted by the attorney general or his representative. An appropriation to the attorney general's office is made for this purpose.

Bill 6 -- CONCERNING SHORT-TERM CARE AND TREATMENT OF THE MENTALLY ILL

This bill provides that a mentally ill person may be certified for short-term treatment prior to a hearing under certain conditions. Where a mentally ill person is certified for short-term treatment, a hearing before the court must be held. If, after the hearing, a person is found to be mentally ill, the court must issue an order for short-term care and treatment for a term of no more than three months. The court may also discharge the patient for whom the treatment was sought, or enter any other order that it deems appropriate.

Bill 7 -- CONCERNING THE CONDITIONAL RELEASE OF MENTALLY ILL PERSONS COMMITTED UNDER CIVIL PROCEEDINGS

This bill provides specific procedures under which a mentally ill person under civil commitment may be conditionally released. Such procedures include the recommendation for release by the chief officer of the institution in which the patient was held; specified conditions for release; a hearing, if deemed necessary, by the court; and procedures for revocation of a patient's conditional release. Additionally, the Department of Institutions is charged with the responsibil-

ity of monitoring and treating patients who are on conditional release and enforcing the terms of such release.

Bill 8 -- CONCERNING PROCEDURES IN THE CRIMINAL INSANITY STATUTES

This bill provides that a defendant who has been committed to the Department of Institutions because he was found to be not guilty of a crime because of insanity may not request a release hearing within one year subsequent to a previous hearing.

Bill 9 -- CONCERNING CONDITIONAL RELEASE FROM CONFINEMENT AFTER A VERDICT OF NOT GUILTY BY REASON OF INSANITY

Where a criminal defendant has been found not guilty by reason of insanity, committed to the Department of Institutions, and granted conditional release, this bill provides for revocation of the release if the defendant has violated any of its conditions. After a preliminary hearing, the court may revoke the defendant's conditional release and recommit him to the Department of Institutions. Within thirty days after the preliminary hearing a final hearing must be held during which the defendant is afforded the opportunity to offer testimony and to cross-examine witnesses. After the final hearing the court must either recommit the defendant or reinstate the original conditional release order. The bill also provides that any conditions of a defendant's release automatically expire five years from the date they were imposed.

Publication of Rules and Regulations

Bill 10 -- CONCERNING PUBLICATIONS RELATING TO RULES AND REGULATIONS OF AGENCIES OF THE EXECUTIVE BRANCH

This bill establishes the Code of Colorado Regulations and the Colorado Register as the sole official publication of rules and regulations of executive branch agencies. The code and register is to contain, in addition to the rules and regulations, notices of rule-making, and attorney general's opinions, references to court opinions and recommendations of the Legal Services Committee and other items which the editor deems relevant. Any copy of the rule and regulation that is supplied by an executive agency to the public must be in the same format as the rule appears in the code or the register. The bill further directs that the General Assembly will provide a copy of the code and register for principal departments, the office of governor and lieutenant governor, appropriate legislative agencies, and the counties.

Bill 11 -- MAKING A SUPPLEMENTAL APPROPRIATION TO THE DEPARTMENT OF ADMINISTRATION FOR ALLOCATION OF THE DIVISION OF PURCHASING

This bill appropriates \$15,750 to the Division of Purchasing to enable the counties to keep the Code of Colorado Regulations up to date.

Bill 1

HOUSE CONCURRENT RESOLUTION NO.

1 SUBMITTING TO THE QUALIFIED ELECTORS OF THE STATE OF COLORADO AN  
2 AMENDMENT TO SECTION 23 (3) OF ARTICLE VI OF THE  
3 CONSTITUTION OF THE STATE OF COLORADO, CONCERNING THE  
4 COMMISSION ON JUDICIAL QUALIFICATIONS.

---

Resolution Summary

(Note: This summary applies to this resolution as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Changes the name of the commission on judicial qualifications to the commission on judicial discipline. Provides that the size of the commission shall be ten instead of nine and alters the makeup of the commission. Provides for removal of commission members and appointment of special members. Expands the powers of the commission to impose sanctions against justices or judges and changes the point in commission proceedings at which confidentiality is lost.

---

5 Be It Resolved by the House of Representatives of the  
6 Fifty-third General Assembly of the State of Colorado, the Senate  
7 concurring herein:

8 SECTION 1. At the next general election for members of the  
9 general assembly, there shall be submitted to the qualified  
10 electors of the state of Colorado, for their approval or

1 rejection, the following amendment to the constitution of the  
2 state of Colorado, to wit:

3 Section 23 (3) of article VI of the constitution of the  
4 state of Colorado is amended to read:

5 Section 23. Retirement and removal of justices and judges.

6 (3) (a) (I) There shall be a commission on judicial  
7 ~~qualifications~~ DISCIPLINE. It shall consist of:

8 ~~(i)~~ (A) ~~Three~~ TWO judges of district courts and two judges  
9 of county courts, each selected by the supreme court for a  
10 four-year term;

11 ~~(ii)~~ (B) Two citizens admitted to practice law in the  
12 courts of this state, ~~none~~ NEITHER of whom shall be a justice or  
13 judge, who shall have practiced in this state for at least ~~10~~ TEN  
14 years and who shall be appointed by ~~majority-action-of~~ the  
15 governor, ~~the-attorney-general;-and-the-chief--justice~~ WITH THE  
16 CONSENT OF THE SENATE, for a four-year term EACH; and

17 ~~(iii)~~ (C) ~~Two~~ FOUR citizens, none of whom shall be a  
18 justice or judge, active or retired, nor admitted to practice law  
19 in the courts of this state, who shall be appointed by the  
20 governor, WITH THE CONSENT OF THE SENATE, for a four-year term  
21 EACH.

22 (II) ALL TERMS OF MEMBERS OF THE COMMISSION ON JUDICIAL  
23 QUALIFICATIONS SHALL TERMINATE ON DECEMBER 31, 1982. THEREAFTER,  
24 NEW SELECTIONS AND APPOINTMENTS TO THE COMMISSION ON JUDICIAL  
25 DISCIPLINE SHALL BE MADE AS PROVIDED IN SUBPARAGRAPH (I) OF THIS  
26 PARAGRAPH (a), AND ANY MEMBER WHOSE TERM IS TERMINATED EARLY BY



1 THIS SUBPARAGRAPH (II) MAY BE RESELECTED OR REAPPOINTED TO  
2 SUCCEED HIMSELF ON THE COMMISSION.

3 (III) Whenever a member selected under ~~subdivision-(i)~~  
4 SUB-SUBPARAGRAPH (A) OF SUBPARAGRAPH (I) OF THIS PARAGRAPH (a)  
5 ceases to be a member of the commission or judge of the court  
6 from which he was selected, his membership shall forthwith  
7 terminate and the supreme court shall select a successor for a  
8 ~~four-year-term~~ THE REMAINDER OF SUCH TERM; and whenever a member  
9 appointed under ~~subdivision---~~(ii) SUB-SUBPARAGRAPH (B) OF  
10 SUBPARAGRAPH (I) OF THIS PARAGRAPH (a) ceases to be a member of  
11 the commission or ceases to be an attorney admitted to practice  
12 law in the courts of this state or becomes a justice or judge of  
13 any court of record, his membership shall forthwith terminate and  
14 the governor, ~~attorney--general;-and-chief-justice;-by-majority~~  
15 ~~action~~ WITH THE CONSENT OF THE SENATE, shall appoint a successor  
16 for ~~a--four-year-term~~ THE REMAINDER OF SUCH TERM; and whenever a  
17 member appointed under ~~subdivision-(iii)~~ SUB-SUBPARAGRAPH (C) OF  
18 SUBPARAGRAPH (I) OF THIS PARAGRAPH (a) ceases to be a member of  
19 the commission or becomes a justice or judge of any court of  
20 record or an attorney admitted to practice law in the courts of  
21 this state, his membership shall forthwith terminate and the  
22 governor, WITH THE CONSENT OF THE SENATE, shall appoint a  
23 successor for ~~a-four-year-term~~ THE REMINDER OF SUCH TERM. ANY  
24 MEMBER OF THE COMMISSION MAY BE REMOVED BY THE APPOINTING OR  
25 SELECTING AUTHORITY BY REASON OF SUBSTANTIAL DISINTEREST OR  
26 SUBSTANTIAL INACTIVITY, EITHER OF WHICH INTERFERES WITH THE

1 PERFORMANCE OF THE COMMISSION. IF A MEMBER OF THE COMMISSION  
2 IS DISQUALIFIED TO ACT IN ANY MATTER PENDING BEFORE THE  
3 COMMISSION FOR THE SAME REASON THAT WOULD DISQUALIFY A JUSTICE OR  
4 JUDGE FROM DECIDING A MATTER PENDING BEFORE SUCH JUSTICE OR  
5 JUDGE, THE COMMISSION OR THE ORIGINAL APPOINTING OR SELECTING  
6 AUTHORITY MAY APPOINT OR SELECT A SPECIAL MEMBER TO SIT ON THE  
7 COMMISSION EXCLUSIVELY FOR THE PURPOSE OF DECIDING THAT MATTER.  
8 No member of the commission shall receive any compensation for  
9 his services as such but shall be allowed his necessary expenses  
10 for travel, board and lodging, and any other expenses incurred in  
11 the performance of his duties as such, to be paid by the supreme  
12 court from its budget to be appropriated by the general assembly.

13 (b) A justice or judge of any court of record of this  
14 state, in accordance with the procedure set forth below IN  
15 PARAGRAPHS (b) TO (d) OF THIS SUBSECTION (3), may be removed for  
16 willful misconduct in office, or willful or persistent failure to  
17 perform his duties, or intemperance, CORRUPTION IN OFFICE, GROSS  
18 PARTIALITY IN OFFICE, OPPRESSION IN OFFICE, VIOLATION OF ANY  
19 CANON OF THE COLORADO CODE OF JUDICIAL CONDUCT, CONVICTION OF A  
20 FELONY, OR OTHER GROUNDS AS MAY BE SPECIFIED BY THE GENERAL  
21 ASSEMBLY, or he may be retired for disability interfering with  
22 the performance of his duties, which is, or is likely to become,  
23 of a permanent character. The commission on judicial  
24 qualifications DISCIPLINE may, after such investigation as the  
25 commission deems necessary, order a hearing to be held before it  
26 concerning the removal, or retirement, SUSPENSION WITH OR WITHOUT

1 PAY, CENSURE, REPRIMAND, OR DISCIPLINE of a justice or a judge,  
2 or the commission may in its discretion request the supreme court  
3 to appoint three special masters, who shall be justices or judges  
4 of courts of record, to hear and take evidence in any such matter  
5 and to report thereon to the commission. If, after hearing or  
6 after considering the record and report of the masters, the  
7 commission finds good cause therefor it shall recommend to the  
8 supreme court the removal, or retirement, SUSPENSION WITH OR  
9 WITHOUT PAY, CENSURE, REPRIMAND, OR DISCIPLINE, as the case may  
10 be, of the justice or judge AND MAY RECOMMEND THAT THE COSTS OF  
11 ITS INVESTIGATION AND HEARING BE ASSESSED AGAINST SUCH JUSTICE OR  
12 JUDGE.

13 (c) The supreme court shall review the record of the  
14 proceedings on the law and facts and in its discretion may permit  
15 the introduction of additional evidence and shall order removal,  
16 or retirement, SUSPENSION WITH OR WITHOUT PAY, CENSURE,  
17 REPRIMAND, OR DISCIPLINE, as it finds just and proper, or wholly  
18 reject the recommendation. Upon an order for retirement, the  
19 justice or judge shall thereby be retired with the same rights  
20 and privileges as if he retired pursuant to statute. Upon an  
21 order for removal, the justice or judge shall thereby be removed  
22 from office and his salary shall cease from the date of such  
23 order. On the entry of an order for retirement or for removal,  
24 his office shall be deemed vacant.

25 (d) (I) PRIOR TO A FINDING BY THE COMMISSION THAT GROUNDS  
26 EXIST FOR DISCIPLINARY ACTION AGAINST ANY JUSTICE OR JUDGE, a11

1 papers filed with and proceedings before the commission on  
2 judicial ~~qualifications~~ DISCIPLINE or masters appointed by the  
3 supreme court, pursuant to this section, shall be confidential,  
4 and the filing of papers with and the giving of testimony before  
5 the commission or the masters PRIOR TO SUCH FINDING shall be  
6 privileged; but no other publication of such papers or  
7 proceedings shall be privileged in any action for defamation;  
8 except that:

9 (i) (A) The record filed by the commission in the supreme  
10 court continues privileged and upon such filing loses its  
11 confidential character; and

12 (ii) (B) A writing which was privileged prior to its filing  
13 with the commission or the masters does not lose such privilege  
14 by such filing.

15 (II) The supreme court shall by rule provide for procedure  
16 under this section before the commission on judicial  
17 ~~qualifications~~ DISCIPLINE, the masters, and the supreme court. A  
18 justice or judge who is a member of the commission or supreme  
19 court shall not participate in any proceedings involving his own  
20 removal or retirement.

21 (e) Nothing herein contained IN THIS SECTION shall be  
22 construed to have any effect on article XIII of this  
23 constitution.

24 SECTION 2. Each elector voting at said election and  
25 desirous of voting for or against said amendment shall cast his  
26 vote as provided by law either "Yes" or "No" on the proposition:

1 "An amendment to section 23 (3) of article VI of the constitution  
2 of the state of Colorado, concerning the commission on judicial  
3 qualifications."

4 SECTION 3. The votes cast for the adoption or rejection of  
5 said amendment shall be canvassed and the result determined in  
6 the manner provided by law for the canvassing of votes for  
7 representatives in Congress, and if a majority of the electors  
8 voting on the question shall have voted "Yes", the said amendment  
9 shall become a part of the state constitution.

Bill 2

A BILL FOR AN ACT

1 CONCERNING LEGAL REPRESENTATION OF INDIGENT PERSONS AT STATE  
2 EXPENSE.

---

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Provides that a prosecuting attorney shall indicate whether or not he will seek incarceration as part of the penalty upon conviction of certain crimes and that, if incarceration is not sought for these crimes, legal representation need not be provided at state expense nor shall the defendant be incarcerated if found guilty of such crimes.

---

3 Be it enacted by the General Assembly of the State of Colorado:

4 SECTION 1. Article 5 of title 16, Colorado Revised Statutes  
5 1973, 1978 Repl. Vol., is amended BY THE ADDITION OF A NEW PART  
6 to read:

7 PART 5

8 INCARCERATION

9 16-5-501. Prosecuting attorney - incarceration - legal  
10 representation and supporting services at state expense. Except  
11 as otherwise provided, at the commencement of any criminal

1 prosecution for a misdemeanor, petty offense, or municipal code  
2 violation, the prosecuting attorney shall indicate whether or not  
3 he will seek incarceration as part of the penalty upon conviction  
4 of a crime for which the defendant has been charged. If the  
5 prosecuting attorney does not seek incarceration as part of such  
6 penalty, legal representation and supporting services need not be  
7 provided for the defendant at state expense, and no such  
8 defendant shall be incarcerated if found guilty of the charges  
9 against him.

10 SECTION 2. 18-1-403, Colorado Revised Statutes 1973, 1978  
11 Repl. Vol., is amended to read:

12 18-1-403. Legal assistance and supporting services. EXCEPT  
13 AS PROVIDED IN SECTION 16-5-501, C.R.S. 1973, all indigent  
14 persons who are charged with or held for the commission of a  
15 crime are entitled to legal representation and supporting  
16 services at state expense, to the extent and in the manner  
17 provided for in sections 21-1-103 to 21-1-105, C.R.S. 1973.

18 SECTION 3. The introductory portion to 21-1-103 (2),  
19 Colorado Revised Statutes 1973, 1978 Repl. Vol., is amended to  
20 read:

21 21-1-103. Representation of indigent persons. (2) EXCEPT  
22 AS PROVIDED IN SECTION 16-5-501, C.R.S. 1973, the state public  
23 defender shall represent indigent persons charged in any court  
24 with crimes which constitute misdemeanors; juveniles upon whom a  
25 delinquency petition is filed or who are in any way restrained by  
26 court order, process, or otherwise; persons held in any

1 institution against their will by process or otherwise for the  
2 treatment of any disease or disorder or confined for the  
3 protection of the public; and such persons charged with municipal  
4 code violations as the public defender in his discretion may  
5 determine, subject to review by the court if:

6 SECTION 4. Effective date. This act shall take effect  
7 September 1, 1981.

8 SECTION 5. Safety clause. The general assembly hereby  
9 finds, determines, and declares that this act is necessary for  
10 the immediate preservation of the public peace, health, and  
11 safety.



Bill 3

A BILL FOR AN ACT

1 CONCERNING THE RECOUPMENT OF ATTORNEY FEES AND COSTS IN CASES OF  
2 STATE-SUPPLIED OR COURT-APPOINTED COUNSEL.

---

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Provides that a court may assess attorney fees and costs against a defendant and shall notify the controller, who shall institute proceedings to recover such fees and costs.

---

3 Be it enacted by the General Assembly of the State of Colorado:

4 SECTION 1. Article 1 of title 21, Colorado Revised Statutes  
5 1973, 1978 Repl. Vol., as amended, is amended BY THE ADDITION OF  
6 A NEW SECTION to read:

7 21-1-106. Recoupment of fees and costs. In any case when a  
8 court determines that a defendant is able to repay all or part of  
9 the expense of state-supplied or court-appointed counsel or any  
10 ancillary expenses incurred in representing such defendant, the  
11 court shall assess such fees or costs against such defendant and  
12 shall notify the controller, who shall institute proceedings

1 pursuant to section 24-30-202.4, C.R.S. 1973, necessary to  
2 recover such fees or costs.

3 SECTION 2. Effective date. This act shall take effect  
4 September 1, 1981.

5 SECTION 3. Safety clause. The general assembly hereby  
6 finds, determines, and declares that this act is necessary for  
7 the immediate preservation of the public peace, health, and  
8 safety.

Bill 4

A BILL FOR AN ACT

1 CONCERNING REIMBURSEMENT FOR EXPENSES OTHER THAN ATTORNEY FEES IN  
2 CASES OF COURT-APPOINTED COUNSEL.

---

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Provides that an attorney shall be awarded reimbursement for expenses reasonably or necessarily incurred in those cases where the court appoints counsel to represent an indigent person in lieu of the state public defender.

---

3 Be it enacted by the General Assembly of the State of Colorado:

4 SECTION 1. 21-1-105, Colorado Revised Statutes 1973, 1978  
5 Repl. Vol., is amended to read:

6 21-1-105. Appointment of or contract with other attorney in  
7 place of public defender. For cause, the court may, on its own  
8 motion or upon the application of the state public defender or  
9 the indigent person, appoint an attorney other than the state  
10 public defender to represent the indigent person at any stage of  
11 the proceedings or on appeal. The attorney shall be awarded  
12 reasonable compensation and reimbursement for expenses REASONABLY

1 OR necessarily incurred, to be fixed and paid by the court from  
2 state funds appropriated therefor.

3 SECTION 2. Effective date. This act shall take effect  
4 September 1, 1981.

5 SECTION 3. Safety clause. The general assembly hereby  
6 finds, determines, and declares that this act is necessary for  
7 the immediate preservation of the public peace, health, and  
8 safety.

**Bill 5**

A BILL FOR AN ACT

1 CONCERNING PROCEDURES FOR THE CARE AND TREATMENT OF THE MENTALLY  
2 ILL, AND MAKING AN APPROPRIATION THEREFOR.

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Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Makes procedural changes in statutes concerning care and treatment of the mentally ill. Requires the attorney general or his designee to conduct proceedings for certification from a state institution. Allows records to be admitted into evidence in mental health hearings.

---

3 Be it enacted by the General Assembly of the State of Colorado:

4 SECTION 1. 27-10-107 (2) and (6), Colorado Revised Statutes  
5 1973, as amended, are amended to read:

6 27-10-107. Certification for short-term treatment.

7 (2) The notice of certification must be signed by a professional  
8 person on the staff of the evaluation facility who participated  
9 in the evaluation. The certification shall be filed with the  
10 court within ~~forty-eight-hours--excluding-Saturdays;-Sundays;-and~~  
11 ~~court--holidays;~~ FIVE DAYS of the date of certification. The

1 certification shall be filed with the court in the county in  
2 which the respondent resided or was physically present  
3 immediately prior to his being taken into custody.

4 (6) (a) The respondent for short-term treatment or his  
5 attorney may, at any time, file a written request that the  
6 certification for short-term treatment or the treatment be  
7 reviewed by the court or that the treatment be on an outpatient  
8 basis. If review is requested, the court shall hear the matter  
9 within ten FIFTEEN days, INCLUDING SATURDAYS, SUNDAYS, AND COURT  
10 HOLIDAYS, after the request, and the court shall give notice to  
11 the respondent and his attorney and the certifying and treating  
12 professional person of the time and place thereof. The hearing  
13 shall be held in accordance with section 27-10-111. At the  
14 conclusion of the hearing, the court may enter or confirm the  
15 certification for short-term treatment, discharge the respondent,  
16 or enter any other appropriate order.

17 (b) ANY CERTIFICATION FILED WITH THE COURT UNDER THIS  
18 SECTION MAY CONTAIN A REQUEST THAT A SPECIFIC LEGAL DISABILITY BE  
19 IMPOSED OR THAT A SPECIFIC LEGAL RIGHT BE DEPRIVED. THE COURT  
20 MAY ORDER THE LEGAL DISABILITY IMPOSED OR THE LEGAL RIGHT  
21 DEPRIVED IF IT OR A JURY HAS DETERMINED THAT THE RESPONDENT IS  
22 MENTALLY ILL OR GRAVELY DISABLED AND THAT, BY REASON THEREOF, THE  
23 PERSON IS UNABLE TO COMPETENTLY EXERCISE SAID LEGAL RIGHT OR  
24 PERFORM THE FUNCTION AS TO WHICH THE LEGAL DISABILITY IS SOUGHT  
25 TO BE IMPOSED. ANY INTERESTED PERSON MAY ASK LEAVE OF COURT TO  
26 INTERVENE AS A COPETITIONER FOR THE PURPOSE OF SEEKING THE

1 IMPOSITION OF A LEGAL DISABILITY OR THE DEPRIVATION OF A LEGAL  
2 RIGHT. A PROCEEDING INITIATED UNDER THIS PARAGRAPH (b) SHALL BE  
3 HELD IN ACCORDANCE WITH PARAGRAPH (a) OF THIS SUBSECTION (6).

4 SECTION 2. 27-10-111 (5), Colorado Revised Statutes 1973,  
5 is amended, and the said 27-10-111, as amended, is further  
6 amended BY THE ADDITION OF A NEW SUBSECTION, to read:

7 27-10-111. Hearing procedures - jurisdiction. (4.5) If a  
8 respondent refuses to accept medical treatment, the court having  
9 jurisdiction of the action under subsection (4) of this section  
10 or the court of the jurisdiction in which the designated facility  
11 treating the respondent is located has jurisdiction and venue,  
12 upon the filing of a petition by a professional person treating  
13 such respondent, to enter an order requiring that the respondent  
14 accept such treatment or, in the alternative, that such treatment  
15 be forcibly administered to him. Upon the filing of such a  
16 petition, the court shall hear the matter forthwith.

17 (5) All proceedings shall be conducted by the district  
18 attorney of the county where the proceeding is held or by a  
19 qualified attorney acting for the district attorney appointed by  
20 the district court for that purpose; except that, in any county  
21 or in any city and county having a population exceeding one  
22 hundred thousand persons, the proceedings shall be conducted by  
23 the county attorney or by a qualified attorney acting for the  
24 county attorney appointed by the district court. ALL PROCEEDINGS  
25 FOR CERTIFICATION FROM A STATE INSTITUTION SHALL BE CONDUCTED BY  
26 THE ATTORNEY GENERAL OR BY A QUALIFIED ATTORNEY ACTING ON BEHALF

1 OF THE ATTORNEY GENERAL.

2 SECTION 3. 27-10-120 (1) (e), Colorado Revised Statutes  
3 1973, as amended, is amended to read:

4 27-10-120. Records - evidence. (1) (e) To the courts, as  
5 necessary to the administration of the provisions of this  
6 article. SUBJECT TO THE RULES OF EVIDENCE, COMMUNICATIONS BETWEEN  
7 A PATIENT AND THE TREATING STAFF OF A FACILITY IN THE PROVISION  
8 OF SERVICES OR APPROPRIATE REFERRALS SHALL BE ADMITTED INTO  
9 EVIDENCE AND SHALL NOT BE SUBJECT TO THE PROVISIONS OF SECTION  
10 13-90-107 (1) (d), C.R.S. 1973, FOR PROCEEDINGS BROUGHT UNDER  
11 THIS ARTICLE.

12 SECTION 4. Appropriation. There is hereby appropriated,  
13 out of any moneys in the state treasury not otherwise  
14 appropriated, for the fiscal year beginning July 1, 1981, to  
15 \_\_\_\_\_, the sum of \_\_\_\_\_ dollars (\$ \_\_\_\_\_), or so much thereof  
16 as may be necessary, for the implementation of this act.

17 SECTION 5. Effective date. This act shall take effect  
18 September 1, 1981.

19 SECTION 6. Safety clause. The general assembly hereby  
20 finds, determines, and declares that this act is necessary for  
21 the immediate preservation of the public peace, health, and  
22 safety.



Bill 6

A BILL FOR AN ACT

1 CONCERNING SHORT-TERM CARE AND TREATMENT OF THE MENTALLY ILL.

---

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Provides for a hearing before the court in all cases where a mentally ill person is certified for short-term care and treatment. Further provides for one extension of such care and treatment and for a hearing when such extension is requested.

---

2 Be it enacted by the General Assembly of the State of Colorado:

3 SECTION 1. The introductory portion to 27-10-107 (1) and  
4 27-10-107 (2), (3), (5), and (6), Colorado Revised Statutes 1973,  
5 as amended, are amended to read:

6 27-10-107. Certification for short-term treatment. (1) If  
7 a person detained for seventy-two hours under the provisions of  
8 section 27-10-105 or a respondent under court order for  
9 evaluation pursuant to section 27-10-106 has received an  
10 evaluation, he may be certified for ~~not-more-than-three-months-of~~  
11 short-term treatment PRIOR TO A HEARING HELD PURSUANT TO THIS  
12 SECTION under the following conditions:

1           (2) The notice of certification must be signed by a  
2 professional person on the staff of the evaluation facility who  
3 participated in the evaluation. The certification AND A PETITION  
4 FOR SHORT-TERM CARE AND TREATMENT OF THE RESPONDENT shall be  
5 filed with the court within ~~forty-eight--hours;--excluding~~  
6 ~~Saturdays;--Sundays;--and-court-holidays;~~ FIVE DAYS of the date of  
7 certification. The certification AND PETITION shall be filed  
8 with the court in the county in which the respondent resided or  
9 was physically present immediately prior to his being taken into  
10 custody.

11           (3) Within twenty-four hours of certification, copies of  
12 the certification AND PETITION shall be personally delivered to  
13 the respondent and mailed to the department, and a copy shall be  
14 kept by the evaluation facility as part of the person's record.  
15 The respondent shall also be asked to designate one other person  
16 whom he wishes informed regarding certification. If he is  
17 incapable of making such a designation at the time the  
18 certification is delivered, he shall be asked to designate such  
19 person as soon as he is capable. ~~In-addition-to-the-copy-of--the~~  
20 ~~certification;--the--respondent--shall--be-given-a-written-notice~~  
21 ~~that-a-hearing-upon-his-certification--for--short-term--treatment~~  
22 ~~may--be--had--before--the--court--or--a-jury-upon-written-request~~  
23 ~~directed-to-the-court-pursuant-to-subsection-(6)-of-this--section~~  
24 WITHIN TEN DAYS AFTER RECEIPT OF THE PETITION, THE RESPONDENT OR  
25 HIS ATTORNEY MAY REQUEST A JURY TRIAL BY FILING A REQUEST  
26 THEREFOR WITH THE COURT.

1 (5) Whenever a certification AND PETITION is filed with the  
2 court, the court, if it has not already done so under section  
3 27-10-106 (10), shall forthwith appoint an attorney to represent  
4 the respondent. ~~The court shall determine whether the respondent~~  
5 ~~is able to afford an attorney:---If the respondent cannot afford~~  
6 ~~counsel; the court shall appoint either counsel from the legal~~  
7 ~~services program operating in that jurisdiction or private~~  
8 ~~counsel to represent the respondent:~~ The attorney representing  
9 the respondent shall be provided with a copy of the certification  
10 AND PETITION immediately upon his appointment. ~~Waiver of~~  
11 ~~counsel must be knowingly and intelligently made in writing and~~  
12 ~~filed with the court by the respondent:---In the event that a~~ THE  
13 RESPONDENT MAY WAIVE COUNSEL IF THE COURT IS SATISFIED THAT THE  
14 RESPONDENT UNDERSTANDS HIS ACT AND ITS POSSIBLE CONSEQUENCES. IF  
15 A respondent who is able to afford an attorney PAY COUNSEL fails  
16 to pay the appointed counsel DO SO, such counsel, upon  
17 application to the court and after appropriate notice and  
18 hearing, may obtain a judgment for reasonable attorney fees  
19 against the respondent or AND ANY OTHER person making request for  
20 such counsel or both the respondent and such person LIABLE FOR  
21 ATTORNEY FEES.

22 (6) ~~The respondent for short term treatment or his attorney~~  
23 ~~may at any time file a written request that the certification for~~  
24 ~~short term treatment or the treatment be reviewed by the court or~~  
25 ~~that the treatment be on an outpatient basis:---If review is~~  
26 requested; The court shall hear the matter within ten FIFTEEN

1 days after the request FILING OF THE PETITION, and the court  
2 shall give notice to the respondent and his attorney and the  
3 certifying and treating professional person of the time and place  
4 thereof. ~~The hearing shall be held in accordance with section~~  
5 ~~27-10-111. At the conclusion of the hearing, the court may enter~~  
6 ~~or confirm the certification for short-term treatment; discharge~~  
7 ~~the respondent; or enter any other appropriate order~~ THE COURT OR  
8 JURY SHALL DETERMINE WHETHER THE CONDITIONS OF SUBSECTION (1) OF  
9 THIS SECTION ARE MET AND WHETHER THE RESPONDENT IS MENTALLY ILL  
10 AND, AS A RESULT, A DANGER TO OTHERS OR TO HIMSELF OR GRAVELY  
11 DISABLED. THE COURT SHALL THEREUPON ISSUE AN ORDER OF SHORT-TERM  
12 CARE AND TREATMENT FOR A TERM NOT TO EXCEED THREE MONTHS, OR IT  
13 SHALL DISCHARGE THE RESPONDENT FOR WHOM SHORT-TERM CARE AND  
14 TREATMENT WAS SOUGHT, OR IT SHALL ENTER ANY OTHER APPROPRIATE  
15 ORDER. AN ORDER FOR SHORT-TERM CARE AND TREATMENT SHALL GRANT  
16 CUSTODY OF SUCH RESPONDENT TO THE DEPARTMENT FOR PLACEMENT WITH  
17 AN AGENCY OR FACILITY DESIGNATED BY THE EXECUTIVE DIRECTOR TO  
18 PROVIDE SHORT-TERM CARE AND TREATMENT. WHEN A PETITION CONTAINS  
19 A REQUEST THAT A SPECIFIC LEGAL DISABILITY BE IMPOSED OR THAT A  
20 SPECIFIC LEGAL RIGHT BE DEPRIVED, THE COURT MAY ORDER THE  
21 DISABILITY IMPOSED OR THE RIGHT DEPRIVED IF IT OR A JURY HAS  
22 DETERMINED THAT THE RESPONDENT IS MENTALLY ILL OR GRAVELY  
23 DISABLED AND THAT, BY REASON THEREOF, THE PERSON IS UNABLE TO  
24 COMPETENTLY EXERCISE SAID RIGHT OR PERFORM THE FUNCTION AS TO  
25 WHICH THE DISABILITY IS SOUGHT TO BE IMPOSED. ANY INTERESTED  
26 PERSON MAY ASK LEAVE OF COURT TO INTERVENE AS TO A COPETITIONER

1 FOR THE PURPOSE OF SEEKING THE IMPOSITION OF A LEGAL DISABILITY  
2 OR THE DEPRIVATION OF A LEGAL RIGHT.

3 SECTION 2. Effective date. This act shall take effect  
4 September 1, 1981.

5 SECTION 3. Safety clause. The general assembly hereby  
6 finds, determines, and declares that this act is necessary for  
7 the immediate preservation of the public peace, health, and  
8 safety.

Bill 7

A BILL FOR AN ACT

1 CONCERNING THE CONDITIONAL RELEASE OF MENTALLY ILL PERSONS  
2 COMMITTED UNDER CIVIL PROCEEDINGS, AND MAKING AN  
3 APPROPRIATION THEREFOR.

---

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Establishes procedures under which a mentally ill person under civil commitment may be conditionally released. Provides for the revocation of such release for violation of any condition thereof.

---

4 Be it enacted by the General Assembly of the State of Colorado:

5 SECTION 1. Article 10 of title 27, Colorado Revised  
6 Statutes 1973, as amended, is amended BY THE ADDITION OF A NEW  
7 SECTION to read:

8 27-10-110.5. Conditional release. (1) The chief officer  
9 of the institution who is in charge of treatment of any  
10 respondent under certification for short-term treatment pursuant  
11 to section 27-10-107, under an extended certification pursuant to  
12 section 27-10-108, or under an order for long-term care and

1 treatment or any extension thereof pursuant to section 27-10-109  
2 may, at any time, release the patient, subject to such terms and  
3 conditions as the chief officer may deem appropriate.

4 (2) (a) Unless revoked as provided in subsection (3) of  
5 this section, the duration of any order of the chief officer of  
6 the institution providing for the conditional release of the  
7 respondent shall coincide with the period of the original  
8 certification for short-term treatment, extended certification,  
9 or order for long-term care and treatment or any extension  
10 thereof, and such order of conditional release may be extended in  
11 any proceeding to extend said original certification, extended  
12 certification, or order, as provided in this article.

13 (b) If such order of conditional release is revoked as  
14 provided in subsection (3) of this section, the respondent shall  
15 remain subject to the original certification, extended  
16 certification, or order.

17 (3) (a) Upon an affidavit filed with the court which  
18 relates sufficient facts to establish that a respondent under  
19 conditional release as provided in this section appears to be in  
20 violation of one or more conditions of such release, the court  
21 may order the person described in the affidavit to be taken into  
22 custody and placed in a seventy-two-hour treatment facility  
23 designated or approved by the executive director pursuant to this  
24 article.

25 (b) The executive director shall forthwith cause to be  
26 filed with the court a petition for the revocation of the

1 respondent's conditional release, which shall set forth the name  
2 of the respondent, the condition of release alleged to have been  
3 violated, and the substance of the evidence sustaining the  
4 allegation of violation. At any time after the filing of a  
5 petition, the executive director may cause the revocation  
6 proceedings to be dismissed by giving written notification of his  
7 decision for such dismissal to the court. At any evidentiary  
8 hearing concerning the petition, the executive director or his  
9 representative shall be in attendance and present the evidence  
10 against the defendant. Prior to any appearance of the respondent  
11 before the court, he shall be given a copy of the petition for  
12 revocation of release.

13 (c) Within seventy-two hours after the respondent is taken  
14 into custody, excluding Saturdays, Sundays, and court holidays,  
15 he shall be brought before the court for a preliminary hearing to  
16 determine if probable cause exists to believe that a condition of  
17 release has been violated by the respondent as alleged in the  
18 petition. The hearing may be continued by the court upon good  
19 cause. If the court finds that probable cause does not exist, it  
20 shall dismiss the petition and reinstate its original order of  
21 conditional release. If the court finds that probable cause does  
22 exist, it shall temporarily revoke the respondent's conditional  
23 release and advise the respondent of his right to request a final  
24 hearing as provided in paragraph (d) of this subsection (3). The  
25 court also may order the respondent transferred to any  
26 appropriate facility.



1 (d) Within five days after the court enters any order  
2 temporarily revoking the respondent's conditional release, the  
3 respondent may request a final hearing on the allegations of the  
4 petition. If the respondent does not request a final hearing  
5 within said five days, the temporary revocation of the  
6 respondent's conditional release shall become final. If the  
7 respondent timely files a request for a final hearing, such  
8 hearing shall be held as soon as the court sees fit. Any  
9 evidence having probative value shall be admissible, but the  
10 respondent shall be permitted to offer testimony and to call,  
11 confront, and cross-examine witnesses. If the court finds by a  
12 preponderance of the evidence that the respondent has violated  
13 one or more conditions of his release, it shall enter a final  
14 order revoking the respondent's conditional release. If the  
15 court does not find such violation by a preponderance of the  
16 evidence, it shall dismiss the petition and reinstate its  
17 original order of conditional release.

18 (4) The department shall promulgate rules and regulations  
19 assuring the periodic monitoring and treatment of respondents on  
20 conditional release and assuring the efficient enforcement of the  
21 terms and conditions of such release.

22 SECTION 2. Appropriation. There is hereby appropriated,  
23 out of any moneys in the state treasury not otherwise  
24 appropriated, to \_\_\_\_\_, for the fiscal year beginning July 1,  
25 1981, the sum of \_\_\_\_\_ dollars (\$ \_\_\_\_\_), or so much there of  
26 as may be necessary, for the implementation of this act.

1           SECTION 3. Effective date. This act shall take effect  
2     September 1, 1981.

3           SECTION 4. Safety clause. The general assembly hereby  
4     finds, determines, and declares that this act is necessary for  
5     the immediate preservation of the public peace, health, and  
6     safety.

Bill 8

A BILL FOR AN ACT

1 CONCERNING PROCEDURES IN THE CRIMINAL INSANITY STATUTES.

---

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Provides that, unless the court for good cause shown permits, a defendant is not entitled to a release hearing for at least one year subsequent to the initial release hearing.

---

2 Be it enacted by the General Assembly of the State of Colorado:

3 SECTION 1. 16-8-115 (1), Colorado Revised Statutes 1973,  
4 1978 Repl. Vol., is amended to read:

5 16-8-115. Release from commitment after verdict of not  
6 guilty by reason of insanity. (1) The court may order a release  
7 hearing at any time on its own motion, on motion of the  
8 prosecuting attorney, or on motion of the defendant. The court  
9 shall order a release hearing upon the contested report of the  
10 chief officer of the institution in which the defendant is  
11 committed, as provided in section 16-8-116, or upon motion of the  
12 defendant made after one hundred eighty days following the date

1 of the commitment order. THEREAFTER, UNLESS THE COURT FOR GOOD  
2 CAUSE SHOWN PERMITS, THE DEFENDANT IS NOT ENTITLED TO REQUEST A  
3 HEARING WITHIN ONE YEAR SUBSEQUENT TO A PREVIOUS HEARING.

4 SECTION 2. Effective date - applicability. This act shall  
5 take effect September 1, 1981, and shall apply to any motion for  
6 a release hearing made on or after said date.

7 SECTION 3. Safety clause. The general assembly hereby  
8 finds, determines, and declares that this act is necessary for  
9 the immediate preservation of the public peace, health, and  
10 safety.

Bill 9

A BILL FOR AN ACT

1 CONCERNING CONDITIONAL RELEASE FROM CONFINEMENT AFTER A VERDICT  
2 OF NOT GUILTY BY REASON OF INSANITY.

---

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Where a criminal defendant has been found not guilty by reason of insanity, committed to the custody of the department of institutions, and granted conditional release as provided by law, the bill establishes procedures to revoke such release when the defendant has violated one or more conditions thereof.

---

3 Be it enacted by the General Assembly of the State of Colorado:

4 SECTION 1. Article 8 of title 16, Colorado Revised Statutes  
5 1973, 1978 Repl. Vol., as amended, is amended BY THE ADDITION OF  
6 A NEW SECTION to read:

7 16-8-115.5. Revocation of conditional release from  
8 commitment. (1) Whenever the executive director of the  
9 department of institutions has reason to believe that any  
10 defendant granted conditional release as provided in section  
11 16-8-115 (3) has violated one or more conditions of such release,

1 the executive director shall apply forthwith to the committing  
2 court for an order directed to the sheriff of any county where  
3 the defendant may be found, commanding him to take all necessary  
4 legal action to take custody of the defendant and deliver him  
5 immediately to any seventy-two-hour treatment facility designated  
6 or approved by the executive director pursuant to article 10 of  
7 title 27, C.R.S. 1973.

8 (2) The executive director of the department of  
9 institutions shall forthwith cause to be filed in the committing  
10 court a petition for the revocation of the defendant's  
11 conditional release, which shall set forth the name of the  
12 defendant, the condition of release alleged to have been  
13 violated, and the substance of the evidence sustaining the  
14 allegation of violation. At any time after the filing of a  
15 petition, the executive director may cause the revocation  
16 proceedings to be dismissed by giving written notification of his  
17 decision for such dismissal to the court. At any evidentiary  
18 hearing concerning the petition, the executive director or his  
19 representative shall be in attendance and present the evidence  
20 against the defendant. Prior to any appearance of the defendant  
21 before the court, he shall be given a copy of the petition for  
22 revocation of release.

23 (3) Within seventy-two hours after the defendant is taken  
24 into custody as provided in subsection (1) of this section,  
25 excluding Saturdays, Sundays, and court holidays, he shall be  
26 brought before the court for a preliminary hearing to determine

1 if probable cause exists to believe that a condition of release  
2 has been violated by the defendant as alleged in the petition.  
3 The hearing may be continued by the court upon good cause. If  
4 the court finds that probable cause does not exist, it shall  
5 dismiss the petition and reinstate its original order of  
6 conditional release. If the court finds that probable cause  
7 exists, it shall temporarily revoke the defendant's conditional  
8 release and recommit the defendant to the department of  
9 institutions.

10 (4) Within thirty days after a preliminary hearing  
11 resulting in the temporary revocation of the defendant's  
12 conditional release, the court shall hold a final hearing on the  
13 petition for revocation of conditional release. At such hearing,  
14 any evidence having probative value shall be admissible, but the  
15 defendant shall be permitted to offer testimony and to call,  
16 confront, and cross-examine witnesses. If the court finds by a  
17 preponderance of the evidence that the defendant has violated one  
18 or more conditions of his release, it shall enter a final order  
19 revoking the defendant's conditional release and recommitting the  
20 defendant to the department of institutions. At any time  
21 thereafter, the defendant may be afforded a release hearing as  
22 provided in section 16-8-115. If the court does not find by a  
23 preponderance of the evidence that the defendant has violated one  
24 or more conditions of his release, it shall dismiss the petition  
25 and reinstate its original order of conditional release.

26 SECTION 2. 16-8-115 (3), Colorado Revised Statutes 1973,

1 1978 Repl. Vol., is amended to read:

2 16-8-115. Release from commitment after verdict of not  
3 guilty by reason of insanity. (3) If the court or jury finds  
4 the defendant eligible for release, the court may impose such  
5 terms and conditions as the court determines are in the best  
6 interests of the defendant and the community, and the jury shall  
7 be so instructed. If the court or jury finds the defendant  
8 ineligible for release, the court shall recommit the defendant.  
9 ANY TERMS AND CONDITIONS IMPOSED BY THE COURT ON THE DEFENDANT'S  
10 RELEASE SHALL EXPIRE FIVE YEARS FROM IMPOSITION UNLESS THE COURT  
11 SOONER HOLDS A RELEASE HEARING AS PROVIDED IN THIS SECTION.

12 SECTION 3. Effective date - applicability. This act shall  
13 take effect September 1, 1981, and shall apply to revocation  
14 proceedings commenced on or after said date.

15 SECTION 4. Safety clause. The general assembly hereby  
16 finds, determines, and declares that this act is necessary for  
17 the immediate preservation of the public peace, health, and  
18 safety.



Bill 10

A BILL FOR AN ACT

1 CONCERNING PUBLICATIONS RELATING TO RULES AND REGULATIONS OF  
2 AGENCIES OF THE EXECUTIVE BRANCH.

---

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Provides that the general assembly shall provide a code of Colorado regulations and a Colorado register for principal departments, the offices of governor and lieutenant governor, legislative agencies, and each county in the state and requires funding to be provided for maintenance of these publications. Further provides that such code and register shall be the sole official publications for rules and regulations of agencies of the executive branch. Repeals inconsistent provisions.

---

3 Be it enacted by the General Assembly of the State of Colorado:

4 SECTION 1. 24-4-103 (9) and (11) (a), Colorado Revised  
5 Statutes 1973, as amended, are amended, and the said 24-4-103  
6 (11) is further amended BY THE ADDITION OF A NEW PARAGRAPH, to  
7 read:

8 24-4-103. Rule-making - procedure. (9) Each agency shall  
9 make available to the public and shall deliver to anyone  
10 requesting it a copy of any rule of the agency then in effect or

1 of any notice of proposed rule-making proceeding in which action  
2 has not been completed. Upon request, such copy shall be  
3 certified. The agency may make a reasonable charge for supplying  
4 any such copy. SUCH COPY SHALL BE IN THE SAME FORMAT AS THE RULE  
5 APPEARS IN THE CODE OF COLORADO REGULATIONS OR THE COLORADO  
6 REGISTER ESTABLISHED PURSUANT TO SUBSECTION (11) OF THIS SECTION.

7 (11) (a) There is hereby established the code of Colorado  
8 regulations for the publication of rules and regulations of  
9 agencies of the executive branch and the Colorado register for  
10 the publication of notices of rule-making, proposed rules,  
11 attorney general's opinions RELATING TO SUCH RULES AND  
12 REGULATIONS, and adopted rules. THE CODE OF COLORADO REGULATIONS  
13 AND THE COLORADO REGISTER SHALL BE THE SOLE OFFICIAL PUBLICATIONS  
14 FOR SUCH RULES AND REGULATIONS, NOTICES OF RULE-MAKING, AND  
15 ATTORNEY GENERAL'S OPINIONS, SHALL CONTAIN, WHERE APPLICABLE,  
16 REFERENCES TO COURT OPINIONS AND RECOMMENDATIONS OF THE LEGAL  
17 SERVICES COMMITTEE OF THE GENERAL ASSEMBLY WHICH RELATE TO OR  
18 AFFECT SUCH RULES AND REGULATIONS, AND MAY CONTAIN OTHER ITEMS  
19 WHICH, IN THE OPINION OF THE EDITOR, ARE RELEVANT TO SUCH RULES  
20 AND REGULATIONS.

21 (k) The general assembly shall provide for at least one  
22 code of Colorado regulations and one Colorado register for each  
23 of the principal departments, the offices of the governor and  
24 lieutenant governor, appropriate legislative agencies, and the  
25 board of county commissioners of each county of the state and  
26 shall make annual appropriations necessary to accomplish the

1 purposes of this paragraph (k).

2 SECTION 2. Repeal. 24-4-103 (11) (j), Colorado Revised  
3 Statutes 1973, as amended, is repealed.

4 SECTION 3. Safety clause. The general assembly hereby  
5 finds, determines, and declares that this act is necessary for  
6 the immediate preservation of the public peace, health, and  
7 safety.

Bill 11

A BILL FOR AN ACT

1 MAKING A SUPPLEMENTAL APPROPRIATION TO THE DEPARTMENT OF  
2 ADMINISTRATION FOR ALLOCATION TO THE DIVISION OF PURCHASING.

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Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Makes a supplemental appropriation to the division of purchasing for county acquisition of the Code of Colorado Regulations.

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3 Be it enacted by the General Assembly of the State of Colorado:

4 SECTION 1. Part I (8) and the affected totals of part I of  
5 section 2 of chapter 1, Session Laws of Colorado 1980, are  
6 amended to read:

7 Section 2. Appropriation.

	ITEM & SUBTOTAL	TOTAL	APPROPRIATION FROM	
			GENERAL FUND	CASH FUNDS
\$	\$	\$	\$	\$

FEDERAL FUNDS

PART I

DEPARTMENT OF ADMINISTRATION

(8) PURCHASING DIVISION

Personal Services 302,784

(14.0 FTE)

Operating Expenses 17,716

Travel and Subsistence 1,284

Energy Program 20,945

Colorado Code of

Regulations Subscription 12,185

27,935

354,914

370,664

\$-60,867,049

\$ 60,882,799

TOTALS PART I (ADMINISTRATION)

\$-42,164,859

\$ 42,180,609

\$ 65,170

\$ 18,637,020

20,945

1           SECTION 2. Safety clause. The general assembly hereby  
2 finds, determines, and declares that this act is necessary for  
3 the immediate preservation of the public peace, health, and  
4 safety.

## COMMISSION ON JUDICIAL QUALIFICATIONS

### Background

#### Creation of Commission on Judicial Qualifications

In 1966, a proposal to replace the partisan election of justices and judges with a judicial merit selection system was initiated by petition and an amendment to the state Constitution was submitted to the voters as Amendment No. 3 at the general election. This proposed amendment was approved by the voters and became effective January 17, 1967. The judicial merit selection system that was thus established is set forth in Article VI, Sections 20-25 of the Colorado Constitution and contains three primary elements: (1) establishment of nominating commissions to supply a list of names of the best qualified candidates for a judicial office to the governor for his appointment of one of the candidates; (2) a provision that justices and judges declare whether they desire to run for another term at the general election with the electorate deciding, by indicating either "Yes" or "No", whether the justice or judge should be retained in office; and (3) creation of a commission on judicial qualifications for the purpose of investigating judicial misconduct and recommending appropriate discipline to the Colorado Supreme Court. The study conducted by the interim Committee on Judiciary focuses on the last element of the judicial merit selection system: the Judicial Qualifications Commission.

#### Commission Composition and Procedures

Composition. The Judicial Qualification Commission consists of three district court judges and two county court judges who are selected by the Colorado Supreme Court for terms of four years, two lawyers who are selected by majority action of the governor, the chief justice, and the attorney general (they must have practiced law in Colorado for ten years and are also appointed for four-year terms) and two members, appointed by the Governor for a four-year term, who are citizens of the State of Colorado and who are neither justices, judges, nor attorneys.

Commission members serving as of the date of this report are: John A. Love, Chairman, Denver; Blanche T. Cowperthwaite, Vice-Chairperson, Denver; James Golden, Secretary, Grand Junction; Thelma Carter, Sterling; Judge J. Robert Miller, Fort Collins; Judge Vasco G. Seavy, Jr., Breckenridge; Judge Marcus O. Shivers, Jr., Littleton; Judge Philip Icke, Ouray; and Judge John R. Tracey, Pueblo. All members of the commission serve without salary but receive reimbursement for actual and necessary expenses.

Responsibilities. The commission is charged with the responsibility to investigate complaints against judges for:

- willful misconduct in office;
- willful or persistent failure to perform duties;
- intemperance;
- disability interfering with performance of duties which is, or is likely to become, permanent; and
- conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

The commission has jurisdiction to consider complaints concerning the 217 justices and judges who serve in the Colorado state court system. The commission does not have jurisdiction over the judges who sit in the county court of the City and County of Denver since they are not a part of the unified judicial system. (The Denver City Charter provides for a qualifications commission for Denver County judges.) In addition, municipal judges are not under the jurisdiction of the commission.

Procedures. Rules of Procedure for the Commission on Judicial Qualifications have been promulgated by the Colorado Supreme Court and are contained in Chapter 24, Volume 7A, C.R.S. 1973. Generally, any citizen of the state may file a complaint with the commission or the commission may act on its own motion. The commission meets on a quarterly basis, however, if the number of complaints is sufficient to warrant more meetings, then they are scheduled at the convenience of the commission members. Due to the fact that commission members reside throughout the state, copies of each complaint are sent to the members for review before the meetings. As filed, each complaint is assigned to one of the commission members for detailed review and analysis. That commission member then is responsible to present that particular complaint in detail at the next commission meeting. In this manner each complaint is afforded individual attention so that the best possible resolution of the complaint may be found. This initial evaluation in many instances determines whether or not the case is determined to be unfounded, to perhaps merit further review, or to be appellate in nature.

"Appellate in nature" means that the action which is reported in the complaint is determined to be of such a nature that it should be subject to review by either the Colorado Court of Appeals or the Colorado Supreme Court. That is, appellate in nature means that it is a matter which concerns the interpretation of the law or the application of the law, and is not an action that reflects on judicial conduct. Such legal questions are subject to review by the appellate court. The commission is not an appellate body for the purpose of reviewing individual trial judges' interpretation of the law or the application thereof, therefore, such cases are dismissed as being "appellate in nature." The commission has no authority to reverse or change any court orders, these are subject to a right of appeal to



either the Colorado Court of Appeals or the Colorado Supreme Court. The appellate court to which the individual case is appealed is determined by the constitution and statute.

After the initial presentation by the individual commission member, the commission has several alternatives which it may follow in order to pursue a complaint. It may decide that the complaint is without merit or of an appellate nature and order it dismissed, or the commission may decide it needs additional information in order to make a judgment. In this case, the judge who is the subject of the complaint is asked to respond and may be asked to furnish a transcript of the court proceedings to clarify the complaint.

If the commission decides that the judge acted improperly it may issue a letter of reprimand and close the case. Should the commission decide that the act is serious enough to warrant an investigation, it may proceed with an informal hearing. Prior to the hearing, an investigator, usually an attorney, is employed who conducts an investigation. The conduct of the preliminary hearing may include receiving and reviewing transcripts of court proceedings, receiving and reviewing a response from the judge who is under investigation, interviewing lawyers, judges, clerks, litigants, or other persons who may have some knowledge of the incident complained of, and in some instances doing legal research into the problem area. The report of the investigator is considered by the commission which then decides whether to have an informal hearing or proceed with a formal hearing.

In the event the commission elects to proceed with an informal hearing, the judge who is the subject of the complaint is invited to appear before the commission to discuss the charges which are contained in the complaint. After that proceeding has been held, the commission then determines whether to proceed to a formal hearing or to take some other action. The other actions that the commission may take in such circumstances include censure, continuation of the case for further review, or dismissal of the case with a reprimand.

Should the commission proceed to a formal hearing, the commission, through its counsel, proceeds to draw formal charges against the judge and serves the judge with copies thereof and also copies of the initial complaint. A date is set for the formal hearing at which the judge appears with counsel. The person employed by the commission as the investigator is usually retained and in these circumstances acts as a prosecutor of the case against the judge.

At the conclusion of a formal hearing the commission may recommend to the Colorado Supreme Court that the judge be either retired or removed. It may also decide that such recommendations are not in order and instead it may censure or reprimand the judge who is the subject of the complaint. The commission weighs very seriously any recommendation for removal or retirement inasmuch as such a recommendation means the conclusion of the professional career of the judge or justice under consideration.

If a complaint is filed against a judge who is a member of the commission, the judge disqualifies himself from participating in such deliberations. If a judge is a member of the commission and serves within the same judicial district as a judge who is subject to a complaint, then he also disqualifies himself and does not participate in any of the deliberations.

Confidentiality of proceedings. The constitution and the rules of procedure provide that all papers filed with, proceedings before, and action taken by the commission are to be confidential. However, upon the filing of a record of formal proceedings by the commission for review by the court, the contents of the record lose their confidential character.

### History of Commission Activity

From 1967 through 1979, the commission has conducted 84 meetings and considered 777 cases (new cases plus additional discussions held on previously considered cases). Thus the commission considered an average of seven cases at each meeting. During 1979 the average increased to twenty-one and one-half cases per meeting. From 1967 through 1979, the commission conducted thirty-five informal hearings and seven formal hearings.

Complaints. A total of 402 complaints against justices and judges of the appellate, district and county courts have been filed from 1967 through 1979. Table I sets forth the number of complaints (402) filed against the appellate, district and county court judges. In the thirteen year history of the commission, the majority of complaints have been filed against district judges (77.6 percent or 312 of the total 402 complaints), with 20.7 percent (83 of the 402) filed against county judges, and 1.7 percent (seven of 402) against appellate justices or judges. The 402 complaints filed with the commission were against 185 different judges.

In 1979, fifty-nine complaints were filed: fifty-one complaints were received from citizens who were litigants in cases; seven were received from lawyers who were appearing before various judges; and one was initiated by the judge himself because of physical disability. Of the fifty-nine complaints filed in 1979, twenty-eight were from domestic relations cases; seventeen were from civil cases; thirteen were from criminal cases; and one was a medical disability case.

Table I

COLORADO COMMISSION ON JUDICIAL QUALIFICATIONSCOMPLAINTS FILED BY TYPE OF COURT  
CALENDAR YEARS 1967 THROUGH 1979

Years	Number of Complaints Filed Against Judges							
	Appellate		District		County		Total	
	No.	%	No.	%	No.	%	No.	%
1967	0	0	5	50	5	50	10	100
1968	0	0	6	60	4	40	10	100
1969	0	0	4	57	3	43	7	100
1970	0	0	14	78	4	22	18	100
1971	0	0	10	63	6	37	16	100
1972	0	0	23	92	2	8	25	100
1973	0	0	13	87	2	13	15	100
1974	2	5	26	69	10	26	38	100
1975	2	4	34	69	13	27	49	100
1976	0	0	35	81	8	19	43	100
1977	2	5	28	78	6	17	36	100
1978	1	1	65	86	10	13	76	100
1979	<u>0</u>	0	<u>49</u>	83	<u>10</u>	17	<u>59</u>	100
Total	7	1.7	312	77.6	83	20.7	402	100

Of the total 402 complaints filed from 1967 through 1979, twenty complaints were initiated by the commission on its own motion and concerned eighteen different judges. Ten of these judges ultimately resigned or retired, but not necessarily as a result of the case initiated by the commission. The status of the judges involved in those complaints is as follows:

<u>Status</u>	<u>No. Judges</u>
Retired	5
Resigned	4
Not Retained	1
Recommended Retirement or Removal to the Supreme Court	2
Deceased	2
Active	<u>4</u>
Total Judges	18

Disposition of complaints. From 1967 through 1979, the following dispositions have been made:

	<u>1979</u>	<u>Cumulative Total (1967 through 1979)</u>
Ordered retired by the Supreme Court for disability	0	6
Resigned or retired following commission investigation	1	19
Censured (including admonitions and reprimands)	2	27

Of the nineteen judges who resigned or retired following commission investigation, the original charges and whether they resigned or retired were as follows:

<u>Original Charges</u>	<u>Resigned</u>	<u>Retired</u>	<u>Total</u>
Bringing the judicial office into disrepute	1	0	1
Intemperate behavior	4	3	7
Alcoholism	1	0	1
Falsifying documents	1	0	1
Medical disability	0	2	2
Pending criminal charges	1	0	1
General acts of misconduct	<u>5</u>	<u>1</u>	<u>6</u>
Total	13	6	19

Only two of the nineteen were filed concerning medical disability and they both retired under the state's Public Employees Retirement Association program. Of the nineteen judges, nine were district court judges and ten were county court judges.

Of the six judges who were ordered retired by the Supreme Court, the reasons for the ordered retirement were: heart disease, cancer and stroke.

The twenty-seven censures, admonishments and reprimands were issued by the commission on twenty-one different judges. The current status of these judges are as follows:

<u>Current Status</u>	<u>Number of Judges</u>
Resigned	6
Retired	3
Not Retained by Electorate	2
Deceased	2
Active Judge	<u>8</u>
Total Judges	21

Four of the twenty-one judges have had additional censures, reprimands, or admonishments after the initial action by the commission. Thirteen of the twenty-one judges had a total of thirty-one additional complaints filed against them after the commission issued a censure, reprimand, or admonishment.

Table II shows the final disposition of complaints which were considered at commission meetings from 1976 through 1979. Over that four year period:

- 78 percent (177 of the 227 complaints) were dismissed.
- 2.2 percent (five of the 227 complaints) were concluded by an informal letter to the judge which recommended changes in his conduct.
- 11 percent (twenty-five of the 227 complaints) involved formal corrective actions by the commission.
- 8.8 percent (twenty of the 227 complaints) were still pending at the end of 1979.

Table II

## COLORADO COMMISSION ON JUDICIAL QUALIFICATIONS

DISPOSITION OF COMPLAINTS,  
CALENDAR YEARS 1976 THROUGH 1979

Final Dispositions	1976		1977		1978		1979		1976 thru 1979 Total	
	No.	%	No.	%	No.	%	No.	%	No.	%
Dismissals										
Appellate	24	50	15	38.5	22	27.2	21	35.6	82	36.1
Not Within Commission Jurisdiction	3	6.3	4	10.3	10	12.4	11	18.6	28	12.3
No Misconduct	3	6.3	5	12.8	1	1.2	12	20.3	21	9.3
Additional Information Not Submitted; Complaint Withdrawn	0	0	2	5.1	1	1.2	4	6.8	7	3.1
Purpose for Investigation Ended (Death, Not Retained, Resignation)	<u>3</u>	<u>6.3</u>	<u>0</u>	<u>0</u>	<u>34</u>	<u>42</u>	<u>2</u>	<u>3.4</u>	<u>39</u>	<u>17.2</u>
Subtotal	33	68.9	26	66.7	68	84	50	84.7	177	78.0
Proper Action Taken Private Letter to Judges Recommending Changes	0	0	4	10.3	0	0	1	1.7	5	2.2
Commission Corrective Actions:										
Admonish	5	10.4	1	2.5	1	1.2	2	3.4	9	3.9
Reprimand	2	4.1	2	5.1	1	1.2	0	0	5	2.2
Censure	4	8.3	0	0	2	2.5	1	1.7	7	3.1
Recommend Retirement Resignations	<u>1</u>	<u>2.0</u>	<u>2</u>	<u>5.1</u>	<u>0</u>	<u>0</u>	<u>1</u>	<u>1.7</u>	<u>4</u>	<u>1.8</u>
Subtotal	12	25	5	12.7	4	4.9	4	6.8	25	11
Pending at end of Year	3	6.3	4	10.3	9	11.1	4	6.8	20	8.8
Grand Total of Complaints	48	100	39	100	81	100	59	100	227	100

## Committee Procedures

Initially, members of the 1980 interim Committee on Judiciary received memoranda from the Legislative Council staff on the American Bar Association standards pertaining to the discipline and removal of judges, the structure and power of judicial qualifications commissions in other states, previous recommendations for changing the provisions on the commission, and copies of the 1979 annual report of the Commission on Judicial Qualifications and their rules of procedure. These memoranda are available at the Legislative Council office.

During the interim, the Judiciary Committee received testimony from two members of the Commission on Judicial Qualifications, Judges John Tracey and Thelma Carter; Frank Jamison, the commission's investigator and legal advisor; Jim Thomas, the State Court Administrator and Secretary to the Commission; former chief justice of the Colorado Supreme Court, Edward Pringle; and the current Chief Justice of the Colorado Supreme Court, Paul Hodges. Many of the previous suggestions for legislative change that were studied by the 1976 and 1977 interim Judiciary Committees were again highlighted in the testimony received by the 1980 interim Judiciary Committee.

Previous legislative studies. The 1976 interim Committee on Judiciary I was established to consider various aspects of Colorado's judicial merit selection system and the administrative and rulemaking procedures of the judicial branch. One of the specific areas that the committee was directed to examine included "study of current procedures for the retirement and removal of justices and judges and the authority of the Judicial Qualifications Commission ..." A nine-member advisory committee consisting of three persons appointed by the chief justice, three persons appointed by the Colorado Bar Association, and three persons appointed by the governor was established to assist the committee in its deliberations. During the course of the 1976 interim, some fifty-six proposals were articulated regarding issues under consideration. The advisory committee, in a preliminary report of its recommendations, phrased each of the proposals in the form of a "yes" or "no" question, responded to each question, and inserted brief comments for the purpose of clarifying the rationale for its response. The advisory committee's preliminary report is contained in Colorado Legislative Council Research Publication No. 218 (December, 1976) beginning on page 51.

The 1977 interim Committee on Judiciary continued the study of the judicial merit selection system and was again assisted by the advisory committee. The committee utilized the major portion of the 1977 interim to conduct an item-by-item review of advisory committee recommendations contained in the 1976 preliminary report and to hold public hearings. The advisory committee issued its final report to the committee on October 24, 1977, and it is contained in Legislative Council Research Publication No. 223 (December, 1977) beginning on page 43. The advisory committee strongly recommended that no constitutional amendment (to the judicial article) be proposed at that time.

However, the advisory committee did respond specifically to various suggestions which had been made. Included in these responses were answers to several questions regarding possible changes in the Commission on Judicial Qualifications. These answers and the report of the advisory committee were reviewed by the committee.

Previous legislation. During the 1977 legislative session, a constitutional amendment -- House Concurrent Resolution No. 1011 -- was introduced and considered by the General Assembly. The resolution would have provided that the facts upon which the supreme court retires, removes, or censures a justice or judge were to be made available to the public. The resolution was amended to expand the criteria for which a judge could be removed, retired, or censured, to include: (1) conduct which is prejudicial to the administration of justice; (2) conduct which brings the judicial office into disrepute; and (3) violation of the "Colorado Code of Judicial Conduct." House Concurrent Resolution No. 1011 was eventually defeated on third reading in the Senate. This resolution was again reviewed by the committee.

#### ~~Committee~~ ~~Committee Recommendations~~ ~~Committee~~

From a review of past legislative studies, previous efforts to amend the constitutional provision governing the commission, and based upon testimony received by the committee, the committee recommends an amendment to the state constitution. The adoption of the committee's proposal -- Bill 1, a Concurrent Resolution -- will make various changes in the commission's composition, powers, and procedures. The following paragraphs summarize these changes.

Name change. The committee recommends that the name of the **Commission on Judicial Qualifications be changed to the Commission on Judicial Discipline.** The current name of the commission is misleading and confusing. Often times the work of the nominating commission is confused with that of the qualifications commission. Changing the name of the commission to the Commission on Judicial Discipline will more accurately reflect the nature and function of the commission, and may help inform the public that there is a commission whose duty it is to investigate complaints of judicial misconduct.

Commission membership. Currently, only two of the nine persons on the commission are non-judge, or non-lawyer members. The committee expressed concern that the preponderance of judges and lawyers on the commission might overwhelm the members who are not judges or lawyers with their legal knowledge and expertise, or that the judges and lawyers on the commission would be more likely to protect justices and judges who are undergoing investigation.

Although testimony revealed that there is very effective participation by the non-judge, non-lawyer members and that there is no proclivity on the part of the judges or lawyers on the commission to protect those judges who are being investigated, the committee recom-



mends increasing the number of members who are neither judges nor lawyers from two to four, and decreasing the number of district court judges from three to two. It is hoped that this recommendation will increase the degree of public input and participation and yet still maintain a commission size that is workable.

Appointing authority. In order to provide legislative input into the appointment of commission members, Bill 1 provides that the two attorneys and the four non-judge, non-lawyer members be appointed by the Governor with the consent of the senate. Under the present system, the Governor appoints the non-judge, non-lawyer members, and the governor, the chief justice, and the attorney general appoint the attorney members. The committee believes that it is important to involve all three branches of government in the appointing process, and that recommending senate confirmation of gubernatorial appointees will give the representatives of the people some input into the selection of commission members.

The appointment of the district and county court judges on the commission by the supreme court would remain unchanged.

If any member ceases to be a member for whatever reason, his successor is appointed for the unexpired term in the same manner as for the person vacating the office.

Removal of inactive or disinterested members. There is no constitutional provision nor do the commission's rules reflect any type of mechanism which is available for removing inactive or disinterested members, when such inactivity or disinterest interferes with the performance of the commission. Bill 1 contains a constitutional mechanism which permits the removal of members who are substantially inactive or disinterested. A vacancy occurring in this manner is filled in the same manner as for the person vacating the office, and is for the unexpired term. It is the intent of committee to clarify any type of procedural problems which may arise in this area.

Appointment of a special member. In addition to the removal of inactive or disinterested members, the committee is suggesting that the commission be allowed to appoint a special member for a commission member who is disqualified to act in any matter pending before the commission. Members could be disqualified for the same reasons that would cause a justice or judge to disqualify himself from hearing a specific case. In this type of case, the commission or the appointing or selecting authority may appoint or select a special member to sit on the commission solely for the purpose of deciding that specific case. The purpose of this recommendation is to prevent possible conflicts of interest from arising.

Criteria for removal of justices or judges. Under current law, a justice or judge may be removed for willful misconduct in office, willful or persistent failure to perform his duties, or intemperance. Bill 1 expands the criteria for which a justice or judge may be removed to include the following:

- corruption in office;
- gross partiality in office;
- oppression in office;
- violation of any canon of the "Colorado Code of Judicial Ethics";
- conviction of a felony; and
- other grounds as may be specified by the general assembly.

Testimony before the committee indicated that there was a need to provide for greater flexibility in handling disciplinary charges against justices and judges. This expanded list of items for which a justice or judge may be removed allows the commission to become involved with a greater number of cases of judicial misconduct and to recommend disciplinary action in a wider range of circumstances. If experience indicates that other grounds for removal are desirable, additional standards may be adopted by the legislature.

Commission powers: Accompanying the committee's recommendation to expand the criteria for removal of a justice or judge, is the suggestion that the powers of the Commission on Judicial Qualifications include the power to suspend with or without pay, to censure, to reprimand and to discipline a justice or judge. The Colorado Constitution provides that the commission only has the power to recommend the removal or retirement of a justice or judge. However, this does not take into account those situations which are not serious enough to recommend removal or retirement, but for which some type of disciplinary action may be necessary. This committee recommendation will allow of a judge to be disciplined without the necessity of removing him. This type of intermediate remedy can also serve as a preliminary warning to a justice or judge of a need for him to change his behavior and it may have a deterrent effect on the potential judicial misconduct of other judges. All of the remedies proposed which are short of actual removal or retirement will hopefully improve the effectiveness of the commission.

As an additional power, the committee proposes that the commission have the power to recommend that a justice or judge under investigation bear the cost of such investigation and any subsequent hearing.

Confidentiality. The Colorado Constitution requires that the papers filed with and any proceedings before the commission shall be confidential until the record of the case is filed by the commission in the supreme court. In Bill 1, the committee recommends that confidentiality be dropped when grounds for disciplinary action have been found following a formal hearing. This is earlier than is now constitutionally mandated. The committee recognizes that many of the cases involve very sensitive matters and that many of the mistakes and

errors that are committed by judges can be corrected through private conferences or letters. The committee nevertheless believes that the right of the public to be informed on charges of judicial misconduct makes greater openness imperative. The committee is of the opinion that if a complaint of judicial misconduct is serious enough to merit a recommendation for disciplinary action, the public has a right to know of the action. If citizens are to make knowledgeable, well-informed decisions concerning a justice's or judge's retention, they must be made aware of judicial misconduct, particularly misconduct serious enough to require a hearing.

### Other Issues

Public information. Concern was expressed by members of the committee that there is not enough public awareness of the existence of the commission, its role, and the outcomes of its investigations. Although the committee hopes that changing the name of the commission and making the commission's proceedings public at the time of a formal hearing will help the public's awareness, increased dissemination of information on the commission by the judicial department is a necessary adjunct to the committee's recommendations.

## RULE-MAKING AUTHORITY OF THE COLORADO SUPREME COURT

### Background

The task of exploring the issue of the rule-making power of the Colorado Supreme Court reflects the committee's desire to avoid potential conflict between the legislative and judicial branches of state government. Currently, the supreme court has the power to promulgate rules on court procedures and the general assembly has the power to enact rules of substance. The possibility of confrontation arises because of the uncertainty of what rules are procedural in nature and within the judicial purview and what rules are substantive in nature and, hence, within the scope of the state legislature.

### Historical Overview 1/

The early political organization of Colorado, first as a territory and in 1876 as a state, came during a period when the legislative branch of government was dominant. The territorial legislature enacted several comprehensive statutes on practice and procedure (See, for example, An Act Concerning Practice in Civil Cases, Gen. Laws Colo. Terr. 275 (1861)).

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1/ Much of the material included in this background report was adopted from two sources: "Rule-Making in Colorado: An Unheralded Crisis in Procedural Reform", 38 U.Colo. L. Rev. 137 (1966), and "Judicial Rulemaking in the State Courts", American Judicature Society (1978).

The Colorado Supreme Court and district courts were authorized by one of the earliest acts of the territorial legislature to "institute such rules of practice, ... for the regulation of said courts as shall by them be deemed advisable, not inconsistent with any law of this Territory." (Gen. Laws Colo. Terr. Sec. 11 (1861)). This statute was repealed in 1868 and replaced by an enabling act conferring such powers only upon the supreme court, and only for practice, process and record-keeping in the supreme court itself (Rev. Stat. Colo. Terr. ch. LXXXI, Sec. 4 (1868)). The 1868 statute was re-enacted with only minor changes in terminology after statehood, and remains in effect at the present time (now Section 13-2-110, C.R.S. 1973).

One of the first major projects of the General Assembly after statehood was the enactment of a complete Code of Civil Procedure (An Act Providing a System of Procedure in Civil Actions in Courts of Justice of the State of Colorado, approved March 17, 1877). That code, as amended, remained in effect until supplanted by the Colorado Rules of Civil Procedure in 1941 (the code appeared essentially unchanged in the following compilation of Colorado Statutes: Gen. Stat. Colo. (1883); Rev. Stat. Colo. 75-176 (1908); Comp. Laws Colo. 103-212 (1921); 1 Colo. Stat. Ann. (1935)).

For almost a decade after the 1868 act, there appears to have been no general rulemaking power conferred on the district courts by statute; such a provision was included in the Code of Civil Procedure in 1877 and was retained until the provision was repealed in 1967. In addition, several other statutes conferred special rulemaking powers on the district courts.

During these early years, both the supreme court and the district courts did make rules, whether under the statutory authorizations or in the exercise of inherent powers. The courts seem to have issued rules only to govern their own internal administration or to regulate practice before the issuing court. The supreme court apparently made no effort to make uniform rules for practice in the district courts until this kind of rulemaking was specifically authorized by statute in 1913 (Colo. Laws 1913, p. 447). The Enabling Act of 1913, in its original form, read as follows:

The Supreme Court shall prescribe rules of practice and procedure in all courts of record and may change or rescind the same. Such rules shall supersede any statute in conflict therewith. Inferior courts of record may adopt rules not in conflict with such rules or with statute.

In 1914, under the authority of this statute, the supreme court adopted a fairly comprehensive set of rules governing practice in inferior courts and the supreme court and these were amended from time to time. These rules were supplementary to the existing Code of Civil Procedure and they were not used to supplant the code.

Three cases concerning the rulemaking authority of the supreme court were decided during the period these rules were in force. The first, Ernst v. Lamb, 73 Colo. 132, 213 Pac. 994 (1923), involved a question of practice before the supreme court. Plaintiff in error, relying upon a 1911 statute which specified a three year time limit for writ of error, sought review more than two years but less than three years after rendition of the judgment in question. Defendant in error moved to dismiss the writ on the ground that rule 17 of the Supreme Court Rules provided only a two year limit. Plaintiff in error argued in response that the time limit was not a matter of practice and procedure within the 1913 act authorizing the court to set procedural rules and that, even if it were, the act so applied would be an unconstitutional delegation of legislative power.

The court dismissed the writ, holding that its own rule governed, that the time limit was a matter of practice and procedure within the meaning of the 1913 act, and that the act permitted such rules to override prior conflicting statutes. The court stated:

This court has always been of the opinion, we believe unanimously so, that the act of 1913 was not a delegation of legislative authority. The regulation of its own practice and procedure has always been a matter for the court except so far as the Legislature has interfered .... The act of 1913 restored that power which other legislatures had partially taken away and gave the added power to make rules for lower courts, just as other states have done ....

Six years later, in 1929, the court found itself directly confronted with the problem of legislative usurpation. In Walton v. Walton, 86 Colo. 1, 278 P. 780 (1929), the court stated:

We seriously question the power of the legislature to make any rules or to enact any laws relative to procedure in courts. It is doubtful if the legislature in Colorado could have enacted any law with reference to procedure in courts of record unless that power had been expressly or tacitly surrendered to it by the judiciary. Assuming, but not admitting, that the judiciary had so lost its right, or had so surrendered it, or a part of it, to the legislative branch of government, so that the two exercised it concurrently, that can not now be the law in Colorado, for in 1913, the legislature expressly enacted a law recognizing the right of the courts to make rules with reference to procedure. The statute being as follows (S.L. 1913, p. 447, chapter 121.): 'The Supreme Court shall prescribe rules of practice and procedure in all courts of record and may change or rescind the same. Such rules shall supercede any statute in conflict therewith. Inferior courts of record may adopt rules not in conflict with such rules or with statute.'

In 1929, the Colorado Supreme Court adopted a rule which in substance permitted trial judges to comment upon the evidence in jury trials, to the same extent that such comment was permitted in the federal district courts. Two years later, in 1931, the application of this rule in a criminal case was challenged. The case, Kolkman v. People, 89 Colo. 8, 300 P. 575 (1931), upheld the validity of the rule. The court reiterated its belief that the rulemaking power is an inherent and constitutional right of the judicial department, quite apart from any common law or statutory grant. The court stated:

Aside from any common law right or statutory grant, the power to make rules of procedure is our constitutional right. Section 1, article VI, of the Constitution of the state of Colorado, provides that the judicial power of the state shall be vested in the courts, section 2 charges this court with "a general superintending control over all inferior courts," and article III of the same Constitution provides that the government shall be divided into three departments, of which the judicial is one, and also provides that neither department shall exercise any powers properly belonging to the other, except as in the Constitution expressly directed or permitted. A search of the Constitution warrants the statement that there is no provision therein expressly directing or permitting the legislature or executive departments to make rules with reference to trial procedure in the judicial department of government. We are not called upon to determine what right and power the legislative department possesses, with reference to procedure in acquiring jurisdiction of the person or subject matter, but the question with which we are concerned is the right, irrespective of the statutes and the common law, but in conformity with constitutional provisions, to make rules with reference to procedural matters for the conduct of trials. This is inherent in the judicial department.

The judicial power of the state is vested in the courts; the legislative and executive departments are expressly forbidden the right to exercise it, and the courts, charged with the duty of exercising the judicial power, must necessarily possess the means with which to effectuate and expeditiously discharge that duty; this duty can be performed and discharged in no other manner than through rules of procedure, and consequently this court is charged with the power and duty of formulating, promulgating, and enforcing such rules of procedure for the trial of actions as it deems necessary and proper for performing its constitutional functions.

If we assume that for many years the courts have surrendered, to a certain extent, the rule-making power to the legislative department, and if we assume that

such a practice, over a long period of time, gave validity to the exercise of that function by the legislative department, or that the legislative statutes upon the questions of procedure, and the enforcement of those statutes by the courts, amounted to an adoption thereof by the courts of such statutes as rules of courts, all has now been set at rest by the solemn act of the Legislature in passing a statute recognizing the constitutional power of the courts to make its own rules for its own procedure.

Even when the case was being decided, it was clear that the members of the General Assembly took a different view. In the Spring of 1931, before official release of the Kolkman opinion, the legislature amended the 1913 act by adding the following words to the statutory authorization: "Provided, that no rule shall be made by the Supreme Court permitting or allowing Trial Judges ... to comment on the evidence given on the trial." (Colo. Laws 1931, Ch. 132). This amendment had no direct effect on the Kolkman case itself, since it did not purport to have any retroactive effect. However, it was a direct assault on the court's assertion of inherent or constitutional powers; if the court's surrender of such powers to the legislature was at an end, as the opinion of Kolkman suggested, it would be expected that the court would resist this assault. Such, however, was not the case. The restriction was carried over in the Enabling Act of 1939 (now Section 13-2-108, C.R.S. 1973). And when the court promulgated the Colorado Rules of Civil Procedure under this later act, it included a prohibition against comment on the evidence by trial judges. Rule 51, Colorado Rules of Civil Procedure, reads in part: "Before argument, the court shall read its instructions to the jury but shall not comment upon the evidence." An almost identical provision appears in Rule 30, Colorado Rules of Criminal Procedure.

The court promulgated the Rules of Civil Procedure in 1941 under the 1939 Enabling Act (now Section 13-2-108, C.R.S. 1973) and also promulgated the Rules of Criminal Procedure under the 1960 Enabling Act (now Section 13-2-109, C.R.S. 1973). In these instances, rulemaking power has been specifically delegated to the supreme court by the General Assembly. Specifically, Section 13-2-108, C.R.S. 1973, grants the court the power to prescribe rules of practice and procedure in civil actions in courts of record. The statute provides that "... no rules shall be made by the supreme court permitting or allowing trial judges to comment on the evidence given on the trial. Such rules shall neither abridge, enlarge, nor modify the substantive rights of any litigants. The rules shall take effect three months after their promulgation." Another statute, Section 13-2-109, C.R.S. 1973, grants the supreme court the authority to prescribe rules "... of pleading, practice, and procedure with respect to all proceedings in all criminal cases in all courts of the state of Colorado." The statute provides that the court shall fix the dates when such rules take effect. A third statutory provision, Section 13-2-110, C.R.S. 1973, grants the supreme court the authority to institute rules of

practice and prescribe forms of process not inconsistent with the laws or constitution of the state.

### Adoption of Section 21, Article VI, in 1962

In the early 1960's Colorado attempted to clarify the court's rulemaking authority. That is, pursuant to the judicial article (Colo. Const. Art. VI, Sec. 21), adopted in November, 1962, (effective on January 12, 1965) the supreme court was constitutionally vested with authority to make rules of civil and criminal practice and procedure. The judicial article (Colo. Const. Art. VI, Sec. 1 and 2) also vests the supreme court with general superintending control over all inferior courts. Under Section 21 of Article VI, the General Assembly may provide simplified procedures for claims of less than \$500 and for misdemeanors. The section reads as follows:

SECTION 21. Rule-making power. The supreme court shall make and promulgate rules governing the administration of all courts and shall make and promulgate rules governing practice and procedure in civil and criminal cases, except that the general assembly shall have the power to provide simplified procedure in county courts for claims not exceeding five hundred dollars and for the trial of misdemeanors.

This provision did not attract much attention during the conferences and discussions on revision of the judicial article. Although the background material prepared in 1960 for submission to the General Assembly contains several references to Section 21, these do no more than summarize the provisions of the section (Colorado Legislative Council Research Publication No. 49, Judicial Administration in Colorado, xxi, 184 (1960). Constitutional rulemaking powers adopted or proposed in other states are mentioned, but are not critically analyzed.

### Recent Statutory Enactments

Several recent changes have been made in the supreme court's rulemaking authority wherein the General Assembly has expressly directed the court to promulgate rules of procedure. Senate Bill 278 (1977 Session) enacted a new statutory section, 13-6-309.5, C.R.S. 1973, and directed the court to promulgate rules of procedure for the operations of county court traffic violations bureaus. Senate Bill 52 (1976 Session) enacted a new statutory part (Part 4 of Article 6 of Title 13, C.R.S. 1973) to create a small claims division in the county court. Section 13-6-413, C.R.S. 1973, directs the court to implement the statute by appropriate rules of procedure for the small claims court. Senate Bill 532 (1979 Session) added a new statutory section (13-25-128, C.R.S. 1973) which specifically authorized the supreme



court to prescribe general rules of evidence. Such rules of evidence are to be construed to be rules of procedure and practice and are not to be construed in such manner that such rules would fix, abridge, enlarge, modify, or diminish any substantive right. The General Assembly specifically reserved to itself the power to enact laws relating to substantive rights including, but not limited to, laws modifying or eliminating said rules of evidence.

### Procedural vs. Substantive Rules

This amendment to the judicial article at least appears to have altered the context in which interpretation of the rulemaking power must occur. The problem may no longer be approached as one of statutory construction, or through speculation about the inherent powers of the court; it has instead become a question of basic constitutional law. One major aspect of the problem involves the range of subject matter affected by the rulemaking power. Have the court and the legislature both power to make rules upon the same subject matter, or is there a sphere within which the court's power is exclusive? The constitution apparently withdraws the power of the legislature to regulate practice and procedure except in the county courts. Yet the General Assembly has continued to pass such statutes (Articles 1 to 13 of Title 16, Code of Criminal Proceedings, C.R.S. 1973, enacted in 1972).

It is generally recognized that no absolute line of demarcation can be drawn between matters of substance and those of procedure, since a rule characterized as substantive for one purpose may appropriately be regarded as procedural for another. The absence of firm definitions concerning matters of substance and procedure makes generalizations about judicial rulemaking power difficult. Several tests have been proposed to be of assistance in determining the appropriate scope of the judicial rulemaking power. See "Rules of Practice and Procedure: A Study of Judicial Rule-Making", 55 Mich. L. Rev. 623 (1957); and "Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision", 107 U. Pa. L. Rev. 1 (1958).

### Scope of Rules

Pursuant to either inherent, constitutional, or statutory authority, or a combination thereof, the court has promulgated rules in the following areas:

Rules of Civil Procedure - Chapters 1 to 17, Vol. 7A  
Rules Governing Admission to the Bar - Chapter 18, Vol. 7A  
Unauthorized Practice of Law - Chapter 19, Vol. 7A  
Discipline of Attorneys - Chapter 20, Vol. 7A  
Code of Professional Responsibility - Appendix to Chapter 20,  
Vol. 7A

Professional Service Corporations - Chapter 22, Vol. 7A  
Group Legal Service - Chapter 23, Vol. 7A  
Commission on Judicial Qualification Rules of Procedure -  
Chapter 24, Vol. 7A  
Code of Judicial Conduct - Appendix to Chapter 24, Vol. 7A  
Rules of County Court Civil Procedure - Chapter 25, Vol. 7B

Rules of Procedure for Small Claims Courts - Chapter 26,  
Vol. 7B  
Rules of Probate Procedure - Chapter 27, Vol. 7B  
Rules of Juvenile Procedure - Chapter 28, Vol. 7B  
Rules of Criminal Procedure - Chapter 29, Vol. 7B  
Rules Governing the Creation, Appointment, Terms and Procedure  
for the Public Defender Commission - Chapter 29.3, Vol. 7B

Colorado Rules for County Court Traffic Violations Bureaus -  
Chapter 29.5, Vol. 7B  
Municipal Court Rules of Procedure - Chapter 30, Vol. 7B  
Rules of Jury Selection and Service - Chapter 31, Vol. 7B  
Appellate Rules - Chapter 32, Vol. 7B  
Colorado Rules of Evidence - Chapter 33, Vol. 7B

Colorado Jury Instructions - Separate book published by  
Bancroft-Whitney

### Rulemaking Process

Other than the provision in 13-2-108, C.R.S. 1973, which provides that the rules of civil procedure shall take effect three months after being promulgated, there is no express constitutional, statutory, or court rule which specifies the rulemaking process. Generally, the supreme court requests the participation of various groups in the development, drafting and adopting of court rules. The supreme court appoints the individual representatives from the judicial council, legislature, bar association committees and the judges' association who participate in the rulemaking process. Bar association committees and committees appointed by the court are established on an ad hoc basis. Open hearings and prior publication of proposed rules are not specifically required.

The proposed rules are officially adopted by action of the supreme court. No review is required by any other agency or governmental body.

Rulemaking procedures in other states. As a means of gaining a perspective on possible approaches for formalizing the rulemaking process the procedures used in several other states were reviewed. For example, in Arizona, the legislature has specified that the supreme court must print and distribute all rules to members of the state bar and that rules may not be effective until sixty days after they have been so distributed (Ariz. Rev. Stat. Sec. 12-109 (1956)). In Connecticut, the legislature has provided for the appointment of six mem-

bers of the legislature's joint standing committee on judiciary who, on the call of the chief justice, shall meet at least once a year to confer with the rules committee of the superior court regarding the rules of practice, pleadings, forms and procedures for all courts of record (Conn. Gen. Stat. Ann. Sec. 51-15a). The process utilized in Florida for developing, drafting, and adopting rules of court is more formalized than in most states. The supreme court has set out a "Procedure for Changes to all Rules of Procedure in Florida Courts", which includes the following steps:

1. Recommendations (made to the court every four years);
2. Submission to Rules Committee of the Florida Bar;
3. Assignment by the committee to subcommittees (reports from subcommittees due on or before October 15 of the year preceeding adoption of rules);
4. Submission to the Board of Governors of the Florida Bar at its January meeting;
5. Board recommendations to Supreme Court before April 1 of each quadrennium;
6. Hearing held in May or June after publication in the Florida Bar Journal;
7. If adopted, the rule(s) become effective on January 1 after the hearing.

In Iowa, all civil, criminal, and appellate rules and forms prescribed by the supreme court under Iowa Code Ann., Sec. 684.18, must be reported to the General Assembly within twenty days after the commencement of either regular legislative session. The legislature may amend these rules during the session in which they are reported. The rules take effect July 1 following the adjournment of the session in which they were reported.

In Maryland, legislation has been enacted which provides statutory authorization for the appointment of a standing committee on rules of practice and procedure. The statute sets out the composition; provisions for reimbursement of members; travel and other expenses; the employment of reporters and other committee assistants; etc. Md. Courts Code Ann. Sec. 13-301 et seq., (1977 Cum. Supp.). The statute has been implemented by Maryland Rule 4 ("Promulgation of Rules"), which regulates the rulemaking process and procedure; provides for publication of notice of proposed rule changes; and establishes effective dates for such rule changes.

In South Carolina, all supreme court rules and amendments to rules governing practice and procedure in state courts must be submitted by the court to the judiciary committees of each house of the legislature. Such rules or amendments become effective ninety calendar days after submission, unless disapproved by a concurrent resolution of both houses of the General Assembly (Rules of Supreme Court, Rule 36 (adopted 1977)).

In Vermont, the General Assembly may modify rules or repeal supreme court rules before they take effect (Vt. Const. Ch. II, Sec.

28d (1974) and Vt. Stat. Ann. Tit. 12, Sec. 1 (Supp. 1977)).

In Virginia, the supreme court has rulemaking authority, but the legislature may supercede all court rules (Va. Const. Art. VI, Sec. 5).

### Rulemaking Authority in Other States -- Courts or Legislative

The majority of states appear to vest rulemaking power in the courts, as does Section 21 of Article VI of the Colorado Constitution. However, some states have different provisions. The judicial article of the Kansas constitution vests judicial power in one court of justice and grants the supreme court general administrative authority over all state courts. The Kansas constitution, however, does not explicitly recognize the court's rulemaking authority. An express grant of rulemaking power was deliberately deleted by the legislature before the article was passed (Kan. Const. Art. 3, Sec. 1). Responsibility for procedural rulemaking rests in both the legislature and the supreme court. The legislature has adopted codes of criminal and civil procedure. However, it has recognized the inherent power of the court to supplement or amend the codes insofar as they pertain to pleading, practice or procedure, and do not abridge, enlarge, or modify any substantive right (Kan. Stat. Ann. 60-2607 (1976)).

Rulemaking authority in Alaska rests within the supreme court, subject to change by a two-thirds vote of each house of the legislature (Alaska Const. Art. IV, Sec. 15). In New York, the legislature has the primary power to regulate practice and procedure, but it may delegate rulemaking power in these areas in whole or in part, to the courts (N.Y. Const. Art. 6, Sec. 30). Rulemaking power in North Carolina is shared by the supreme court and the General Assembly. The supreme court has ultimate authority for the appellate division; the General Assembly has ultimate responsibility for the superior court and district court divisions. The General Assembly may, however, delegate this authority to the supreme court. Nevertheless, the General Assembly may still alter, amend, or repeal any rule of practice or procedure adopted by the supreme court for the superior court or district court divisions (N.C. Const. Art. IV, Sec. 1).

The rulemaking power in Oregon is vested primarily in the legislature. In 1977, the Oregon General Assembly enacted a statute which established a Council on Court Procedures. This council consists of one justice of the supreme court, one judge of the court of appeals, six judges of the circuit court, two judges of the district court, twelve members of the state bar, and one public member. This council has authority to adopt "rules governing pleading, practice and procedure in all civil proceedings in all courts of the state which shall not abridge, enlarge, or modify the substantive rights of any litigant." The rules authorized by the statute do not include rules of evidence or rules of appellate procedure. The rules adopted by the council, along with a list of statutory sections to be superceded by such rules, are to be submitted to the legislature at the beginning of

each regular session and are to go into effect ninety days after the close of that session unless the legislature provides an earlier effective date. But the legislature may, by statute, amend, repeal, or supplement any of the rules.

### Committee Action

Two chief justices of the Colorado Supreme Court, former Chief Justice Edward Pringle and current Chief Justice Paul Hodges, testified before the 1980 interim Committee on Judiciary on the rule-making power of the supreme court. Although legislators expressed concern over the potential conflict that could arise over the issue of rule-making, both chief justices asserted that the present system was working well, and that no constitutional or statutory changes were needed. Both chief justices were further of the opinion that confrontation between the legislature and the judicial branch has been avoided because the representatives in the legislature and the justices of the supreme court realize the parameters of their respective authority in relation to the rule-making process. Members of the committee, while acknowledging that major conflicts have thus far been avoided, nonetheless warned that confrontation may inevitably occur. Although there was some interest expressed by both legislators and the chief justices in attempting to further delineate the respective powers of the legislature and the supreme court by differentiating substantive rules from procedural rules, the committee concludes that this is an area that needs further study.

No legislative recommendations are made by the committee in the area of the rule-making power of the supreme court.

## THE COST OF COURT-APPOINTED COUNSEL AND THE PUBLIC DEFENDER SYSTEM

### Background

The right of a defendant to have the assistance of counsel is well defined in both the United States Constitution and the Colorado Constitution and has been upheld in numerous court decisions. <sup>2/</sup> This constitutional guarantee has been expanded by the courts to entitle an indigent defendant in a criminal proceeding to have counsel appointed

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<sup>2/</sup> United States Constitution, amends. VI, XIV; Colorado Constitution, art. II, Sec. 16.; Escobedo v. State of Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 2d 977 (1964).

at the expense of the state in order to assist such indigent in his defense. 3/ Consequently, absent an intelligent waiver, no person may be imprisoned for any offense unless he was represented by counsel at his trial. 4/

The constitutional right to counsel has been further expanded by the courts in their rulings regarding enhancement of punishment for certain crimes. The courts have held that an uncounseled prior conviction cannot be used later to support or enhance a deprivation of liberty for another offense, even if there was no possibility of imprisonment for the initial offense. 5/ This concept and the impact of such decisions will be discussed in greater detail later in this report.

The state of Colorado established a public defender's office in 1970 for the express purpose of representing indigent clients. However, even with the establishment of the public defender's office, there are still many instances in which indigent defendants must be supplied with private counsel appointed by the court. These include conflict of interest cases within the public defender's office, the lack of a public defender in a certain geographical area; when the public defender staff is not adequate to provide a competent defense; or, in civil matters such as guardian ad litem cases and dependency and neglect cases, which the public defender does not litigate. While the public defender overload situation is essentially the result of workload and lack of staff problems, conflict of interest situations are the result of rules of law and ethics. Such appointments will continue as long as there are multiple defendants. In addition, the appointments of counsel in guardian ad litem and dependency and neglect cases is required by law.

3/ Martinez v. People, 173 Colo. 515, 480 P.2d 843 (1971).

4/ Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed. 2d 383 (1979); Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed. 530 (1972).

5/ Baldasar v. Illinois, \_\_\_ U.S. \_\_\_, 100 S.Ct. 1585, \_\_\_ L.Ed. 2d \_\_\_ (1980); People v. Hampton, \_\_\_ Colo. \_\_\_, \_\_\_ P.2d \_\_\_ (1980) (Supreme Court No. 79SA361, announced October 6, 1980); People v. Roybal, \_\_\_ Colo. \_\_\_, \_\_\_ P.2d \_\_\_ (1980) (Supreme Court No. 79SA466, announced September 22, 1980); People v. Roybal, \_\_\_ Colo. \_\_\_, \_\_\_ P.2d \_\_\_ (1980) (Supreme Court No. 79SA389, announced September 15, 1980) (Roybal I); People v. McKnight, \_\_\_ Colo. \_\_\_, \_\_\_ P.2d \_\_\_ (1980) (Supreme Court No. 79SA371, announced September 2, 1980).

The rising cost to the state of providing court-appointed counsel over the last three fiscal years is reflected in Table III which was prepared by the Joint Budget Committee staff. The Joint Budget Committee explained the information presented in Table III, as follows:

The data presented on Table I (shown here as Table III) is for court-appointed counsel actual expenditures in FY's 1977-78 and 1978-79 and appropriations in FY's 1979-80 and 1980-81 by reason of appointment. The magnitude of growth alone points out the problem. Not counting the prior year appointments appropriation, made for the first time in FY 1980-81, the average annual compounded growth rate for the most recent three fiscal years is 35.4%. The prior year's appointment appropriation was made for the first time in FY 1980-81 in an attempt to relate expenditures to date of appointment. The (judicial) department had been accumulating a large backlog of accounts payable for appointments made in one fiscal year but not payable until the following. This was the (joint budget) committee's attempt to clarify the accounting system for appointments. (Language in parenthesis added for clarity.)

This increasing cost for defending indigent persons and of representing children as guardian ad litem or in dependency and neglect cases necessitated an examination of the problem by the 1980 interim Committee on Judiciary in the hope that solutions could be proposed to control these rising state expenditures.

TABLE III

Court-Appointed Counsel Payments  
By Reason of Appointment

<u>Reason</u>	<u>Actual FY 1977-78</u>	<u>Actual FY 1978-79</u>	<u>Appropriation FY 1979-80</u>	<u>Appropriation FY 1980-81</u>
Conflict of Interest	\$ 713,399 (1,796)	\$ 864,092 (1,946)	\$1,086,325	\$1,261,500
Public Defender Overload	\$ 156,818 (1,207)	\$ 158,017 (1,152)	\$ 281,649	\$ 177,005
Public Defender Unavail- able	\$ 20,513 (176)	\$ 13,607 (73)	\$ 18,349	\$ 33,715
Guardian ad Litem	\$ 147,679 (1,110)	\$ 261,457 (1,951)	\$ 374,404	\$ 573,169
Dependency and Neglect	\$ 130,602 (510)	\$ 192,521 (766)	\$ 334,394	\$ 388,252
Other	\$ 23,240 (99)	\$ 19,558 (107)	\$ 21,462	\$ 24,732
Prior Year Appoint- ments	--	--	--	\$ 750,000
TOTAL	\$1,192,251 (4,898)	\$1,509,252 (5,992)	\$2,116,583	\$3,208,373*

\* A more accurate total for comparison purposes would be to omit the prior year's appointments appropriation from the total. The more comparable figure would be \$2,458,373.



## Committee Findings and Recommendations

In order to combat the rising costs of court-appointed counsel for indigents, various recommendations were made to the committee. However, before these suggestions are examined, it should first be pointed out that there are already attempts being made to reduce expenditures in this area. Pilot programs have been established in Denver, El Paso, and Adams counties to improve the screening process to more accurately determine the eligibility of a person for a state-funded attorney. Additionally, the Chief Justice of the Supreme Court may now transfer appropriations from the judicial department to the public defender's office. Footnote 91 of the 1980 Long Bill authorized the chief justice to transfer public defender overload and unavailable appropriations to the public defender. Recently, \$188,000 was transferred to the public defender's office in this manner. This transfer may possibly reduce this area of expenditure in the next fiscal year because the public defender provides less expensive assistance to indigents compared to private attorneys appointed by the court. 6/

Elimination of possibility of imprisonment. Because an indigent defendant must be offered counsel if there is a possibility that his conviction could result in imprisonment, eliminating the potential incarceration would relieve the state of its obligation to provide an attorney for an indigent defendant. One method of accomplishing this is to require the prosecuting attorney to indicate in his initial charge whether he will seek incarceration as a penalty if the defendant is convicted. This is one of the committee's recommendations and is contained in Bill 2. In addition, the bill mandates that the judge cannot sentence a defendant to jail if the prosecuting attorney has stipulated that he will not ask for a jail term upon conviction.

A second method for eliminating the possibility of imprisonment would be to reduce the number of crimes which carry a potential jail sentence. Because of the enormous task of examining all the crimes, the committee concluded that it did not have sufficient time to accomplish this task. Therefore, the committee did not make any specific recommendation regarding crime reclassification. However, a special commission composed of representatives from all three branches of government is currently undertaking an examination of Colorado's crime classification system for discrepancies. 7/ It may be appropriate for this commission to address the question of which crimes should be reclassified so as not to have a jail sentence.

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6/ For fiscal year 1977-78, the joint budget committee staff computed that the average cost for defending indigents was \$152 per case for the public defender's office as compared to \$280 per case for court-appointed private attorneys.

7/ The Commission on Crime Classification and Sentencing was established by executive order on December 31, 1979.

The efficacy of reducing costs by reducing the number of crimes which carry potential jail sentences was questioned by the public defender's office. The crimes that would be effected by this approach are those in which jail sentences are rarely given, that is, misdemeanors and traffic offenses. Only a small portion of the total cost for both the public defender system and court-appointed private counsel is used for defending persons charged with these types of minor crimes. Virtually none of the crimes which currently require the appointment of counsel would be eliminated by decriminalization, and the appointments that would be eliminated would have an insignificant impact because of the small fees charged for these minor crimes. One alternative in this area would be to reduce the number of filings through the use of deferred prosecution programs; this may have an impact by reducing the number of smaller cases.

Directly related to the issue of removal of possible jail sentences by reclassifying crimes or by legal and administrative procedures is the problem concerning the enhancement of punishment. The question is this: can a conviction obtained without benefit of counsel or waiver of counsel be used to increase a sentence for a subsequent violation? There have been two contradictory holdings by the United States Supreme Court in this matter. In Baldasar v. Illinois, \_\_\_ U.S. \_\_\_, 100 S.Ct. 1585, \_\_\_ L.Ed. 2d \_\_\_ (1980), the court ruled that an uncounseled prior conviction may not be used to increase a sentence for a later conviction, even if no imprisonment was imposed for the prior conviction. Conversely, in Lewis v. United States, \_\_\_ U.S. \_\_\_, 100 S.Ct. 915, 63 L.Ed. 2d 198 (1980), the court held that a prior felony conviction which resulted in imprisonment was permitted to support a federal criminal charge of possession of a firearm by a convicted felon. This same problem concerning enhancement of punishment has recently been addressed by the Colorado Supreme Court in cases involving persons found to be habitual traffic offenders. 8/ In the Roybal I case, the court held that the statute on driving after judgment must be construed to prohibit the use of a conviction obtained without benefit or waiver of counsel as a foundation for the increased punishment which is authorized for violation of that statute. In Roybal I the initial conviction was punishable by a jail sentence. In the Hampton case there was no possibility of incarceration for the initial offense, and yet, expanding the scope of Roybal I, the supreme court held that although incarceration was not a possible consequence of conviction, the right to counsel, absent a waiver, is still necessary since its later use may be used to support a jail sentence.

8/ People v. Hampton, \_\_\_ Colo. \_\_\_, \_\_\_ P.2d \_\_\_ (1980) (Supreme Court No. 79SA361, announced October 6, 1980); People v. Roybal, \_\_\_ Colo. \_\_\_, \_\_\_ P.2d \_\_\_ (1980) (Supreme Court No. 79SA466, announced September 22, 1980); People v. Roybal, \_\_\_ Colo. \_\_\_, \_\_\_ P.2d \_\_\_ (1980) (Supreme Court No. 79SA389, announced September 15, 1980) (Roybal I); People v. McKnight, \_\_\_ Colo. \_\_\_, \_\_\_ P.2d \_\_\_ (1980) (Supreme Court No. 79SA371, announced September 2, 1980).

Reduction of the number of defendants eligible for state-funded counsel. Another method for cutting costs is to reduce the number of persons who are eligible to receive counsel at state expense by increasing the income level for determining indigency. As previously mentioned, pilot programs are underway which may improve the screening process by eliminating those persons who are ineligible for assistance. The current eligibility income guidelines are established by supreme court directive Number 79-14 which is set forth below:

#### ELIGIBILITY INCOME GUIDELINES

As approved by the Board of Directors of the Legal Aid Society of Metropolitan Denver, effective May 29, 1979.

<u>FAMILY SIZE</u>	<u>MONTHLY INCOME</u>	<u>YEARLY INCOME</u>
1	\$354	\$ 4,250
2	\$460	\$ 5,525
3	\$583	\$ 7,000
4	\$698	\$ 8,375
5	\$812	\$ 9,750
6	\$927	\$11,125

More than six (6) add \$115 per additional person.

The above income levels, which are based on the latest semi-annual revision of the poverty guidelines by the Federal Office of Management and Budget, should be used to determine client eligibility. The guidelines are based on GROSS INCOME.

TOTAL FAMILY INCOME CONSIDERED IN APPLYING STANDARDS, IF MORE THAN ONE MEMBER OF THE FAMILY DOMICILED AT THE SAME RESIDENCE IS WORKING. INDIVIDUAL INCOME ONLY TO BE CONSIDERED, IF DEFENDANT IS ESTRANGED AND DOMICILED SEPARATELY FROM OTHER FAMILY WAGE EARNER(S).

- 1) \$50.00 per month flexibility factor in determining whether applicant is eligible, i.e., if applicant is \$50.00 per month or less over income guidelines.
- 2) Discretion can be exercised to determine eligibility.
- 3) Unusual, necessary, recurring expenses can make an otherwise ineligible client, eligible.
- 4) Examples of factors that may make client eligible: child care expenses, recurring medical expenses, spousal maintenance, child support.
- 5) In a questionable case of eligibility, the following additional factors should be considered:

written applications for probation, etc.); and (4) examine Rule 11 of the Rules of Criminal Procedure to find less time consuming methods of informing defendants of the consequences of their plea. The committee urges representatives of the state court administrator's office to transmit these ideas to the supreme court. The committee does not recommend any legislative changes because of the administrative nature of these suggestions.

Establishment of a conflict defender's office. During the 1979 legislative session, a bill which would have established a separate conflict defender's office was introduced and considered by the General Assembly. The purpose of the proposed bill (Senate Bill 244) was to create a state conflict defender to represent those who would currently be represented by special court-appointed counsel due to a conflict of interest of the State Public Defender's Office. For example, if there are two or more co-defendants in a case, the public defender may represent only one of the defendants, and the remaining defendant(s) must be represented by special court-appointed counsel. The bill also would have established the Office of State Conflict Defender, and provided for the appointment of a State Conflict Defender by a Conflict Defender Commission appointed pursuant to rule of the supreme court. The State Conflict Defender would have represented other persons and served as guardian ad litem when appointed by the court where a statute authorizes such an appointment. The bill was eventually postponed indefinitely.

The fiscal note to Senate Bill 244 indicated that the establishment of such a program would have resulted in a general fund savings after the second year of operation. It was estimated that if the conflict defender could absorb 1,585 conflict appointments during FY 1979-80, approximately fifty percent of the payments to court-appointed counsel for conflicts could be avoided. All of the cost of court-appointed counsel would not be eliminated due to: a) cases where more than two co-defendants exist and court-appointed counsel are still necessary; and b) court-appointed counsel appointed prior to the effective date of the bill would not be affected by the establishment of the conflict defender's office. The estimated cost of the program was \$713,341 for FY 1979-80 and \$752,644 for FY 1980-81. These costs were estimated for the establishment of three state conflict defender branch offices located in the eight front range counties. The anticipated defense conflicts occurring elsewhere in the state would not warrant field offices to be located anywhere else in the state. It is assumed that any defense conflicts in other outlying judicial districts would continue to be represented by court-appointed counsel.

The committee again considered recommending a bill for the establishment of a state conflict defender's office. The proposed bill was rejected by the committee at the last meeting on November 18.

Establishment of a state guardian ad litem office. The cost of civil representation of children in dependency and neglect cases and the appointments of guardian ad litem for children is the fastest

rising expenditure for the state for court-appointed counsel payments (see Table III). Increasing awareness of children's rights, recent statutory changes to the "Children's Code", and the adoption of the "Uniform Parentage Act" are some of the reasons given for this increasing cost. Testimony presented to the committee during the interim pointed to different alternatives that could possibly be examined for their application in Colorado. One of the alternatives discussed was the comprehensive guardian ad litem programs currently in operation in Seattle, Washington and in Ontario, Canada. The committee was urged to develop a state guardian ad litem program, either as an adjunct to a separate conflict defender's office or as a separate operation; however, no action was taken on this recommendation.

Contracting and bidding on indigency cases. The concept of contracting with private attorneys and individual law firms to represent indigent defendants was one of the suggestions that the committee considered. One method includes having an attorney or law firm enter into a contract to handle a certain number of cases or type of case for a specified amount. This system could be implemented through the establishment of an independent office for appointed counsel, which would contract with private attorneys for a number of cases at a set rate. The system could also be implemented by empowering the chief judge of a judicial district to enter into contracts with private attorneys. It is believed that this system could control the cost of court-appointed counsel in a more effective manner than the present system and allow for a continuing involvement of the private bar in the criminal process.

The committee makes no legislative recommendation in this area, since the present statutes appear to provide the judicial system with this authority at the present time (see section 21-1-105, C.R.S. 1973).

Adequacy of current fees paid to court-appointed attorneys and inclusion of professional costs. Private attorneys who testified before the committee pointed out that present fees paid to court-appointed counsel are not adequate. Presently, the supreme court allows counsel for indigents in both criminal and juvenile cases to receive a maximum of \$25 per hour for out-of-court time and \$35 per hour for pre-trial, trial, and post-trial appearances. The supreme court has also established maximum amounts to be paid for any given type of case. These maximum amounts are set forth in a supreme court directive (CJD No. 6, 1977) as follows:

A) Pertaining to Criminal Cases:

1) The maximum amount to be paid in the event a case goes to actual trial, based upon the single most serious crime charged against the defendant, and regardless of the actual number of hours spent, shall be:

a) Class 1 felonies, and unclassified felonies

where the maximum possible penalty is death, life, or more than 51 years -- \$3,000;

- b) Class 2 felonies, and unclassified felonies where the maximum possible penalty is 41 through 50 years -- \$1,500;
  - c) Class 3, 4, and 5 felonies, and unclassified felonies where the maximum possible penalty is from 1 to 40 years -- \$1,000;
  - d) Class 1, 2, and 3 misdemeanors, unclassified misdemeanors, and petty offenses -- \$200.
- 2) The maximum fee to be paid court appointed counsel where the case is disposed of without proceeding to trial shall be one-half of the applicable maximum fee listed above.
  - 3) If a judge orders a fee exceeding the maximum permitted by the schedule above, a justification signed by the judge setting forth the specific unusual facts and circumstances of the particular case justifying the excess fee shall accompany the fee order. Form orders of justification, conclusory statements, and mere recapitulation of time shown on the order for attorney fees form are not acceptable as justification for a fee in excess of the maximum and shall be returned for amplification or correction in accordance with this directive.

B) Pertaining to Juvenile Cases:

- 1) The maximum amount to be paid, regardless of the number of hours shall be \$1,000, if the case proceeds to actual trial, and \$500, if the case is disposed of prior to trial.
- 2) Any person appointed as guardian ad litem, whether or not a licensed attorney, shall be paid at the rates listed above applicable to juvenile cases, but subject to a maximum fee, regardless of the number of hours spent, of \$200 if the matter proceeds to actual trial, and \$100 if the matter is disposed of without trial.
- 3) If a judge orders a fee exceeding the maximum permitted by the schedule above, a justification signed by the judge setting forth the specific unusual facts and circumstances of the particular case justifying the excess fee shall accompany the fee order. Form orders of justification, conclusory statements, and mere recapitulation of time shown on

the order for attorney fees form are not acceptable as justification for a fee in excess of the maximum and shall be returned for amplification or correction in accordance with this directive.

It was suggested to the committee that the fees paid to court-appointed counsel be increased. The committee makes no recommendations concerning the fee schedule or the amount of fees since the schedule and the fees can be changed by action of the Supreme Court.

Directly related to this area of concern is the fact that there is no specific provision for payment of costs incurred by attorneys defending indigents for ancillary items such as computer time, use of paralegals, investigators, and other professional costs.

Reimbursement of attorney expenses -- Bill 4. To meet this concern the committee recommends Bill 4 for approval by the General Assembly. The bill provides that an attorney may be reimbursed for all expenses reasonably and necessarily incurred.

Overburdening because of indigency cases. Some attorneys pointed out that in certain areas and in certain situations, they or their law firms were overburdened with court-appointed counsel cases. For many, it is not cost effective to handle these types of cases. The committee makes no specific recommendations in this area.

Lack of juvenile representation. One concern expressed by the public defender was that counsel for juveniles is not being provided in some critical instances. Many times juveniles are stampeded by their parents or by other participants within the criminal justice system into admitting doing something which, in fact, they did not do. It is essential that these individuals be represented by counsel.

Appointment of counsel. One suggestion offered by the public defender's office was to have counsel chosen by a commission rather than the trial judge. The rationale for this approach is that a commission will have less bias than the trial judge, who in most cases will be very familiar with the attorney whom he appoints. Committee members questioned the wisdom of whether or not a judicial administrator in Denver can make a better selection of counsel than a trial judge.

Judicial Planning Council recommendations. Because of their interest in the subject of the cost of court-appointed counsel, the Judicial Planning Council formed a Committee on Counsel for Indigent Persons. Representatives from this group presented testimony to the committee on the nature and scope of their study. The preliminary recommendations of the Committee on Counsel for Indigent Persons and the areas identified for possible action are discussed below.

The recommendations of the Subcommittee on Criminal Representation of the Committee on Counsel for Indigent Persons include:

- Creation of suggested administrative guidelines by a committee of chief judges of the various judicial districts to maximize the use of time and minimize paperwork by Public Defender and court-appointed counsel.
- Development of a questionnaire to be completed by every attorney in each judicial district to determine eligibility and availability for court appointments. It is recommended that this questionnaire be mailed annually with the attorney registration forms. From this information each judicial district would make and forward a master list of lawyers available for appointment to each judge in the district. In the Denver metropolitan area, it is recommended that combined lists of attorneys in the various metro districts be made available to all judges.
- The setting of minimum standards for appointments should be explored. Who should set the standards and how they should be developed will require long-term study.
- The advantages and disadvantages of creating a conflict public defender's office should be further explored.
- The advantages and disadvantages of various methods of contracting for representation of indigent persons by one lawyer or firm should be further explored.
- Improved methods of establishing eligibility and of recovering fees from partially indigent clients should be established. Possible expansion of the state court administrator's pilot screening programs is also being examined.
- Recommendations should be made for removal of possible jail sentences from particular offenses, including problems relating to enhancement statutes in light of recent Colorado Supreme Court decisions (People v. Roybal, Colo. Sup. Ct. No. 79SA389, September 15, 1980; and People v. Hampton, Colo. Sup. Ct. No. 79SA361, October 6, 1980).
- The adequacy of the current fee schedule for court-appointed attorneys, including the advisability of allowing compensation for support services and investigations by other than the attorney should be addressed.

The recommendations of the Subcommittee on Juvenile Representation of the Committee on Counsel for Indigent Persons include:

- An amendment to the children's code should be adopted to define the duties and distinguish the functions of appointed counsel for the child and of the guardian ad litem. The subcommittee recommended the duties be defined generally as follows:

Counsel -- An attorney who is appointed for a party in juve-



nile matters to act as the party's legal advisor and to represent that person in court.

Guardian Ad Litem (GAL) -- A person, not necessarily an attorney, who is appointed in a juvenile matter to act independently of and in the best interest of the child.

- Recommendations are expected to be submitted to the legislature by January 1, 1981 for statutory changes or clarification with respect to the appointment of attorney or non-attorney guardian ad litem in certain situations. Recommendations for statutory changes may be submitted to make appointment of a guardian ad litem permissive rather than mandatory in some instances. Consideration will be directed toward determining whether it is necessary or advisable to appoint attorneys rather than non-attorney guardians in certain cases.
- The possible establishment of a state office of juvenile representation or creation of a state juvenile coordinator, within the state court administrator's office, to assist judicial districts with implementation of their own plans for providing counsel or guardian ad litem services through contracting or other means will be explored.
- Recommendations for the pilot proposal by the guardian ad litem task force which will test several models for use of professionals and volunteers to assist attorneys representing juveniles will be examined. The guardian ad litem task force is an ad hoc committee consisting of members of the following organizations: Colorado Advocates for Children Today, Metropolitan Child Protection Council, National Association of Council for Children, Colorado Commission on Children and Their Families, Junior League, League of Women Voters, Legal Aid, Bar Association, and others.

The Committee on Counsel for Indigent Persons is considering and will make written recommendations outlining the parameters of the public's responsibility to furnish counsel for indigent persons in terms of current constitutional and statutory requirements. The Committee on Counsel for Indigent Persons also is considering the philosophical question of whether the Bar has a pro bono obligation to represent indigent persons, and, if so, to what degree the Bar should share with the state the public responsibility of providing counsel.

Suggestions from the Colorado Bar Association. Representatives from the Colorado Bar Association made several suggestions to the committee that were previously discussed. These suggestions include: (1) establishment of a state guardian ad litem program; (2) establishment of a separate public defender's office to handle conflict of interest cases; (3) contracting with private law firms to handle indigency cases; (4) improving the methods of screening indigency applicants; and (5) eliminating jail sentences for certain crimes.

CARE AND TREATMENT OF THE MENTALLY ILL --  
COMMITMENT PROCEDURES AND CONDITIONS TO RELEASE

Background

On September 15, 1979, RTD bus driver Jon Bauer was fatally stabbed by David Dela Cruz, who was later found innocent of the crime by reason of insanity. It was disclosed that Dela Cruz had been in and out of mental hospitals several times but was not held long-term despite a record of violence. In February, 1980, Andrew McCoy Jr., another mental patient who had been in and out of mental hospitals for several years, fatally stabbed Steven Herrin at Stapleton International Airport. Also in February, 1980, Louis Nestor seriously injured two mental health workers with a knife. In March, 1980, Larry Evans shot and wounded a Denver policeman, and was shot and killed when police returned the fire. Larry Evans had also been in and out of mental hospitals over a period of years. In April, 1980, Seth Buckmaster, another mental patient who had been in and out of mental hospitals, shot and killed a Colorado Springs policeman while attempting to rob a convenience store.

This series of violent crimes, which caused death or injury to innocent persons and which were committed, or allegedly committed, by former mental patients, caused great concern in the state. It was recognized that there could be former mental patients, with documented illnesses and histories of violence, circulating in the community. It was also recognized that the current emphasis on community care rather than custodial care of the mentally ill has resulted in the release of potentially dangerous patients. In order to explore ways in which the effective care of the mentally ill could be preserved with a view towards protecting the public from dangerous mentally ill persons while preserving the rights of mentally ill persons, Senator Ruth Stockton, on March 26, 1980, introduced Senate Joint Resolution 14.

Senate Joint Resolution 14. Senate Joint Resolution 14 called upon the Legislative Council to appoint a committee to undertake "... a study of the Colorado laws concerning the care and treatment of the mentally ill and the related criminal laws, including the criminal definition of insanity and the criminal defense of insanity, and to further study the administration of said laws, including commitment procedures and conditions to release, and to identify the needs of the state mental institutions, community mental health centers, and the problems of the chronically mentally ill living in alternative housing". This study directive was eventually incorporated into Senate Joint Resolution 26 and the study was assigned by the Legislative Council to the interim Committee on Judiciary.

Executive order regarding violence committed by former mental patients. On April 14, 1980, Governor Richard D. Lamm, through an Executive Order, directed the Department of Institutions, through its Division of Mental Health, to:

1. Review all cases of serious violent acts committed by mentally ill persons who have either been discharged from state mental hospitals or from non-hospital treatment facilities.
2. Review the initial assessment process of the violent mentally ill.
3. Review the treatment of the violent mentally ill.
4. Review the training of staff who treat the violent mentally ill.
5. Review the discharge process of the violent mentally ill.
6. Review the follow-up process of the violent mentally ill.
7. Review the case and distribution of criminal court commitments, including those under a commitment of not guilty by reason of insanity.
8. Review changes in the trend in mental hospital populations toward the more dangerous client.

On June 12, 1980, the study conducted by the Division of Mental Health was presented to the Governor and was made available to the committee members. The objectives of the study were to: assess the scope of the situation Colorado confronts; identify the specific problem areas involved; recommend immediate steps to be taken; recommend areas for more extended evaluation; and recommend a constructive process for developing future solutions. Copies of the study are available from the Division of Mental Health and the Legislative Council. Findings and recommendations from the study are discussed below.

#### Committee Procedure

Areas of concern. In 1973, the Colorado statutes governing civil certification were revised (S.B. 349, 1973 Session) to encourage the use of voluntary rather than involuntary commitments, and, if that failed, to treat the patient in the least restrictive environment. Furthermore, mental patients were given the explicit right to contest their certification if they chose, and were provided an attorney to help them do so -- something that wasn't guaranteed previously. In October, 1979, the Colorado Supreme Court, in Goedecke vs. the Department of Institutions, ruled that patients have the right to refuse treatment, including medication. Only when there is a clear emergency (the patient is an immediate threat to himself or others) can a doctor use medication without patient consent. Otherwise, there has to be a court order before medication can be forcibly administered to a patient.

In the 1960's, Colorado, along with other states, began a move toward deinstitutionalization of the mentally ill. Community mental

health centers and clinics were established to serve the patient needs in the community rather than at large state operated institutions. The impetus for the new approach came from the growing public awareness of deplorable conditions at overcrowded state mental hospitals which merely "warehoused" the patients rather than treating them. Taking these people out of the hospitals and treating them in their own communities was deemed more effective therapy and more humane. Also, it was thought that this type of community treatment would be cheaper in the long run. Deinstitutionalization has moved forward over the years. In 1959-60, Colorado State Hospital housed 5,851 patients. By 1978-79, the number was 703.

In addition, the availability of new chemotherapy (and particularly psychotropic medications, which are administered infrequently, and have substantial psychic impact) makes practical the provision of out-patient treatment. In many instances these patients would previously have required more extensive medical supervision. At the same time, such medication raises new legal problems, as in the above-noted Goedecke case.

The development of community mental health centers and clinics and the treatment with new medications have assisted in the movement toward deinstitutionalization. Despite these successes, the mental health system has been criticized because the development of alternatives to institutional treatment in the community have not grown in sufficient numbers to satisfy the need in the community and the alternatives which are currently available frequently do not assure the appropriate continuum of care and treatment which is necessary. This may be the result of community opposition and inadequate funding. Thus, it is recognized that alternatives do not exist in Colorado in sufficient numbers to satisfy all the needs of the mentally ill and that "gaps" may exist in the mental health service system.

The committee sought to assess the impact of these four factors (deinstitutionalization, patient rights, therapeutic technology, and insufficient community alternatives) on the care and treatment of the violent mentally ill. Of specific concern to the committee were such questions as the following: Has deinstitutionalization resulted in the release to the community of violent mental patients who should be confined in a long-term treatment facility? Are the tests for release from commitment and the conditions of release sufficient to provide for the needs of the patient and to protect the public? Do the statutes concerning the rights of patients contain an imbalance of rights which inadvertently have endangered the public safety? Are there sufficient alternatives available in the community to adequately treat those who may have a potential for violence and are there adequate follow-up mechanisms available to assure that those who are released from institutionalization meet the conditions of their release? Has the civil commitment law, with its mandatory review of certification orders, been a burden on the mental health system and the judiciary? Do "professional persons" refuse to go through the judicial process for certification because of the time involved and have the statutes become a convenient excuse for the mental health system to deny ser-

vices to patients they either can't or don't want to treat? Is it possible to predict if a person in an institution will commit a violent act when released? Are potentially dangerous mental health patients released prematurely because of overcrowded conditions at the state hospitals? Has the right to refuse medication had any positive or negative results on treatment or in controlling potentially violent mentally ill patients? Has the right to refuse medication impaired the effective treatment of the violent mentally ill? Are the practices and procedures of the mental health delivery system adequate to identify the violent client and are practices with regard to treatment, release and follow-up sufficient to protect the public? What kinds and amounts of security are both legal and necessary for the control of the violent mentally ill? Finally, what should be done with a violent mentally ill patient who appears to be untreatable?

Committee procedure. In an attempt to answer some of the questions posed above, the committee devoted four full-day meetings to the violently mentally ill issue and received testimony from representatives of the Department of Institutions, Division of Mental Health, public and private psychologists and psychiatrists, mental health center and clinic representatives, judges, district attorneys, public defenders, private attorneys representing the mentally ill, representatives of the bar association committees and other experts in the mental health area. In all, twenty-two individuals testified before the committee.

The committee primarily focused on commitment and release procedures under the law and on the subject of patient rights. The committee directed its interest in attempting to determine whether the present civil commitment law is effective in safeguarding the individual rights of patients and in protecting the public. Specific inquiry was directed toward determining whether the present law is in need of revision or modification to improve the system. The committee also received testimony concerning the need for more adequate funding of the mental health delivery system and the need for construction of long-term treatment facilities and intermediate care facilities. The committee determined that any recommendations in the area of staffing, services, and construction of facilities would be more appropriate for the interim Committee on Health, Environment, Welfare, and Institutions, which was also studying various mental health issues.

Scope of the problem. The study conducted by the Division of Mental Health on Violence and the Mentally Ill indicates that there is no existing data which can provide an answer to the question of whether more mentally ill persons in the community today are committing more violent acts than in the past. Part of the problem of assessing the impact of mental illness on crime related statistics is the changing relationship between the criminal justice system and the mental health system. A number of former crimes are now considered illness: alcoholism, drug abuse, and sexual psychopathy, for example. Some of them have mandatory treatment requirements. Psychiatrization of criminal behavior -- defining previous crimes as psychiatric illnesses -- results in more criminals in mental health settings and

higher probable crime rates by so-called ex-mental patients. Other studies suggest that deinstitutionalization opened up psychiatric beds when prisons were becoming overcrowded. Thus criminal deviants were shifted from one system to the other.

In discerning the scope of the problem, the study conducted by the Division of Mental Health on Violence and the Mentally Ill summarized the major points and problems as follows:

- Nationally an increase in violent crimes committed by the mentally ill is becoming evident, but it appears due to the fact that more persons with previous arrest records are entering the mental health system.
- This shift from the correctional system to the mental health system may be due, in part, to the facts that: (a) while deinstitutionalization opened up beds in mental health hospitals, the prisons have become overcrowded and (b) former crimes are now considered illnesses.
- The absolute number of mentally ill persons committing violent crimes remains very small.
- No data system exists in Colorado which permits a direct assessment of the size of the problem
- The indirect evidence in Colorado does not provide a firm conclusion as to whether there has been an increase in violent acts committed by mental patients.
  - a. For an increase: more staff injuries from patients; more security calls; more incompetence evaluations and commitments; more emergency calls; and an increase in variables associated with more violent patients in mental health centers in energy impact areas and in downtown Denver.
  - b. Against an increase: no general change in the age of the institutionalized population and other variables associated with the violent patient; no increase in deferred sentences and conditions of parole related to mentally ill persons; and mental health centers are split on their perceptions of treating more violent persons.
- Violent crimes in Colorado have increased from 154 per 100,000 in 1962 to 525 per 100,000 in 1979.
- No relationship between mental illness and violent crime has been found.

Prediction of dangerousness. The committee focused its attention on the question of whether it is possible to predict dangerousness either at the time of release or when making a decision to hold someone. Also of concern was the impact

deinstitutionalization has had in the mental health system. For example, are patients released without adequate community resources and are violent mentally ill patients being released prematurely. The study conducted by the Division of Mental Health on Violence and the Mentally Ill summarized the major problems in predicting dangerousness as follows:

- Predicting if a person in an institution will commit a violent act when released has been found so inaccurate that for every one person held who would be violent, nine others would be held who would not.
- Most methods of predicting future violence are open to significant bias.
- No study has been made to determine if accurate predictions can be made as to whether a person in the community will act violently in that setting.

Specifically, the study points out that:

"(v)iolence among the mentally ill occurs infrequently, and it has been proven statistically that predictions of infrequent events inevitably produce significant numbers of false positives. It is highly likely that overpredicting will occur. Not only will the overpredicting occur because of statistical factors, but also because of human factors. If the psychiatrist underpredicts danger and clears a patient who later commits a violent act, he will be subjected to severe criticism. If on the other hand, he over-predicts danger, he will suffer no consequence from such prediction, for his prediction might have come true had there been no intervention (such as institutionalization). Inevitably, this will result in all concerned doing the 'safe thing': predicting dangerousness, if there are even the most minimal reasons to justify it.

In human terms this means for every person society confines who will commit a violent act, somewhere between three and three hundred persons will be held who will not commit a violent act. There is no way of knowing how many would have acted violently had they not been held".

The study emphasizes that the most basic question facing the state is one of preventive detention. How much unjust deprivation of liberty will society tolerate to protect itself? What set of conditions are necessary for a dangerous person to be committed and for how long? What kind and amount of security are necessary and legal to control the dangerous patient? At what point in a criminal commitment to the mental health system, or a civil commitment for "dangerousness

to others", should a patient be released? What should be done with a dangerous and mentally ill person who appears to be untreatable?

Deinstitutionalization. Deinstitutionalization is often cited as a cause for the increase in violence by mental patients. It has been alleged that too many patients were released without adequate community facilities and services and in an unplanned way; that community mental health centers were short on funds and short on trained personnel; that the originally perceived benefits of living in the community have not occurred; and that the severely mentally ill in the community have fewer jobs, lower functioning levels, worse housing, more readmissions, and fewer people to care for them.

Through contracts with community mental health centers, the Division of Mental Health has specified that approximately seventy-six percent of the total number of clients admitted to mental health centers be moderately or severely disabled patients. Some of the community mental health centers in Colorado provide national models for social-rehabilitation programs. The centers have also become Medicaid clinic providers which has increased the accessibility of services for the severely mentally ill.

The study conducted by the Division of Mental Health defined the problem as follows:

In the 1960's patients were released before there were adequate community facilities and programs. At the same time the hospitals were reduced without appropriate regard to the staff needed to cope with the patients hospitalized. Today both problems continue to plague the mental health system. Each mental health planning area does not have the full array of programs essential for psycho-social rehabilitation of the severely mentally ill, and the two state hospitals do not have the staff needed to care for their patients.

Needs in the area of housing for the mentally ill have intensified in the greater Denver area as available resources have declined. Boarding homes and similar residences have shut their doors due to inadequate revenues. Nursing homes also are taking fewer and fewer mentally ill patients because the managers perceive the costs involved as higher than the payment they receive.

At the most intense end of the continuum are the hospitals. Over the last several years their admissions have begun to rise. During the same time periods there have been declines in staff with clinical staff being cut less to avoid significant problems in providing quality patient care.

A final resource issue that faces the mental health system is the lack of intensive treatment resources --



between the hospital and the halfway houses in the community. Currently there is a waiting list of 60 patients at Fort Logan, and there have been as many as forty patients more than Colorado State Hospital could handle hospitalized there for brief times. Because patients who are stabilized but not fully recovered may be moved to less intensive programs to make room for more severely troubled patients who are waiting, the numbers stated above could be considered underestimates. In other words if patients were kept hospitalized for longer periods of time, the waiting list might soar to two hundred. In effect Colorado does not have the right level of in-between program -- structured, secure non-hospital, intense. This lack is a national one and is often focused around the use of nursing homes as a poor substitute for the appropriate programs for the non-elderly, severely disabled client.

It is estimated that there are some 230,000 Colorado citizens who are moderately and severely disabled. The mental health system funded with public dollars serves about 80,000 of those people. Some of them are going to commit violent acts, and not all can be prevented. Without sufficient resources to care for them appropriately prevention of violent acts is significantly more difficult.

Premature release of patients. One of the criticisms of the mental health system that has been voiced recently is that patients are being released too soon. The study conducted by the Division of Mental Health concluded that there is no data available that would substantiate the claim one way or the other. Part of the problem in discussing the issue is to define what is meant by "ready for release". From the point of view of hospital personnel their waiting list of sixty people or more forces them to consider if someone waiting to be admitted is so seriously ill that someone already there who can survive in the community should be discharged. At times a patient whose symptoms have decreased in severity and who has community and family support, including a willingness to attend the local mental health center, is discharged without having his long term problems fully alleviated. In this case the judgment is made that the person will get better through services offered in the community and that his condition will not deteriorate.

Length of stay data confirm that patients at Colorado State Hospital stay longer than at the Fort Logan Mental Health Center. This difference in length of stay may be due to such factors as distances between hospital and community resources, the fact that ninety-five percent of the patients admitted to Fort Logan and sixty percent of those admitted to the Colorado State Hospital are screened by local mental health centers before being accepted, and that there are significantly more resources in the Denver area. The variance cannot be assumed to be solely an issue of premature release without treatment.

Rights issues. The right of a patient to refuse treatment or a part of treatment, such as medication, has received much attention recently. The Colorado Supreme Court, in Goedecke vs. the Department of Institutions (October, 1979), considered this right implicit in the Colorado civil commitment statute. It has been claimed by some that these rights interfere with the mental health professional's capacity to treat patients and thus protect society. The study conducted by the Division of Mental Health indicates that, subsequent to the court decision, the number of persons refusing treatment in the two state hospitals has not created significant problems for the professional staff. Medication can be forced in emergency situations. Currently the area of greatest concern to mental health professionals is the right of a patient to refuse treatment under non-emergency circumstances. A recent study of patient refusals showed that in seven percent of the cases staff perceived the refusal to impair effective inpatient treatment. One percent of the cases became threatening. Apparently there is no data to show that the long term effects of right to refuse medication have produced more violent released patients.

Security. The area of the availability of secure facilities in which to treat the violent mentally ill and to protect the public is also of concern. In Colorado's mental health system the only completely secure unit is the maximum security unit of the Institute of Forensic Psychiatry at Colorado State Hospital. All other units, even if they are called lockable or have a fence around them, are not secure and not designed for the high security risk person. The study conducted by the Division of Mental Health indicates that unauthorized releases from both state hospitals (leaving against medical advice or leaving without permission) by those having either voluntary or involuntary status have increased over the last five years.

### Civil Commitment Law

The Colorado civil commitment law, entitled "Care and Treatment of Mentally Ill", is contained in Article 10 of Title 27, C.R.S. 1973. The act is also known as the Mental Health Law, the Civil Commitment Act, and "27-10". The law was enacted by Senate Bill 349 in 1973 and became effective July 1, 1975. This portion of the report briefly summarizes the provisions of the law as they relate to civil commitment.

### Application of Civil Commitment Law

The mental health "civil commitment" law applies to persons who are found to be mentally ill and who, as a result of mental illness, represent a danger to others or to himself. The law also applies to those who are determined to be gravely disabled. "Mentally ill person" means a person who is of such mental condition that he is in need of medical supervision, treatment, care, or restraint. "Gravely

disabled" means a condition in which a person, as a result of mental illness, is unable to take care of his basic personal needs or is making irrational or grossly irresponsible decisions concerning his person and lacks the capacity to understand this is so. A person of any age may be "gravely disabled" under this definition, but the term does not include mentally retarded persons by reason of such retardation alone.

### Voluntary Commitment

Nothing in the law is to be construed in any way as limiting the right of any person to make voluntary application at any time to any public or private agency or professional person for mental health services. The medical and legal status of all voluntary patients receiving treatment for mental illness in inpatient or custodial facilities shall be reviewed at least once every six months. One of the stated purposes of the law is "...to encourage the use of voluntary rather than coercive measures to secure treatment and care for mental illness".

### Involuntary Commitment

The other purpose of the law is "...to deprive a person of his liberty for purposes of treatment or care only when less restrictive alternatives are unavailable and only when his safety or the safety of others is endangered". To accomplish this deprivation of liberty, the law establishes several procedures by which a person may be detained involuntarily for evaluation and treatment.

Emergency procedure. When a person appears to be mentally ill and appears to be an imminent danger to others or to himself or appears to be gravely disabled, he may be taken into custody by a peace officer or professional person, upon probable cause, and placed in a seventy-two-hour facility for treatment or evaluation. The court may order the person taken into custody and placed in a seventy-two-hour facility upon an affidavit sworn to or affirmed before a judge.

The facility may detain the person for evaluation and treatment for a period not to exceed seventy-two hours. The person may be provided services on a voluntary basis if he can be properly cared for without being detained. The person shall be released before seventy-two hours have elapsed if, in the opinion of the professional person in charge of the evaluation, the person no longer requires evaluation or treatment. The person may also be referred for further care and treatment on a voluntary basis, or certified for treatment.

Court-ordered evaluation. Any person alleged to be mentally ill or to be gravely disabled may be given an evaluation of his condition under court order when a person petitions the court requesting that an evaluation of the person's condition be made. The court is to

designate a facility or professional person to screen the person to determine whether there is probable cause to believe the allegations. Following screening, the facility or professional person shall file a report with the court. Whenever it appears, by petition and screening, to the satisfaction of the court that probable cause exists to believe that a respondent is mentally ill or gravely disabled, the court shall issue an order for evaluation authorizing a peace officer to take the respondent into custody and place him in a seventy-two-hour facility. Within the seventy-two hour period, the respondent shall be released, referred for further care on a voluntary basis, or certified for short-term treatment.

The person shall be advised of his right to retain and consult with an attorney at any time and that if he cannot afford to pay an attorney, upon proof of indigency, one will be appointed by the court without cost. If at any time during the seventy-two-hour evaluation the facility staff requests the person to sign in voluntarily and he elects to do so, an advisement must be given orally and in writing.

Certification for short-term treatment. When the evaluation of a person detained for seventy-two hours under the emergency procedure is completed or when the evaluation made under a court order is completed the patient may be certified for not more than three months of short-term treatment under the following conditions:

- (1) The professional staff of the seventy-two-hour facility has found the person is mentally ill or gravely disabled.
- (2) The person has not accepted voluntary treatment. If the person has accepted voluntary treatment and if reasonable grounds exist to believe that the person will not remain in a voluntary treatment program, his acceptance of voluntary treatment shall not preclude certification.
- (3) The facility has been designated or approved to provide such service.

The notice of certification must be signed by a professional person who participated in the evaluation and shall be filed with the court within forty-eight hours of the date of certification. Within twenty-four hours of certification, copies shall be personally delivered to the respondent and mailed to the department, and a copy shall be kept by the evaluation facility. The respondent shall also be given a written notice that a hearing upon his certification for short-term treatment may be held before the court or before a jury upon written request directed to the court.

The respondent may be represented by private counsel or the court shall appoint an attorney to represent the respondent, if he cannot afford private counsel. The attorney shall be provided a copy of the certification upon his appointment. Waiver of counsel must be knowingly and intelligently made in writing and filed with the court

by the respondent.

The respondent, or his attorney, may at any time file a written request that the certification for short-term treatment (or the specified treatment itself) be reviewed by the court. He may also ask that the treatment be transferred to and be made on an outpatient basis. If review is requested, the court shall hear the matter within ten days after the request. At the conclusion of the hearing, the court may enter or confirm the certification for short-term treatment, discharge the respondent, or enter any other appropriate order.

Extension of short-term treatment. If the professional person in charge of the evaluation and treatment believes that a period longer than three months is necessary for treatment, he shall file with the court an extended certification. No extended certification for treatment shall be for a period of more than an additional three months. The respondent shall be entitled to a hearing on the extended certification under the same conditions as in an original certification. The attorney initially representing the respondent shall continue to represent that person, unless the court appoints another attorney.

Certification for long-term treatment. Whenever a respondent has received short-term treatment for five consecutive months, the professional person in charge of the evaluation may file with the court a petition for long-term care and treatment under the following conditions:

- (1) The professional staff of the facility providing short-term treatment has found that the respondent is mentally ill or gravely disabled.
- (2) The person has not accepted voluntary treatment. If the person has accepted voluntary treatment and reasonable grounds exist to believe that the person will not remain in a voluntary treatment program, his acceptance of voluntary treatment shall not preclude certification.
- (3) The facility has been designated or approved to provide such service.

The petition shall include a prayer for a hearing before the court prior to the expiration of six months from the date of the original certification. A copy must be delivered personally to the respondent and mailed to his attorney and the department.

Within ten days after receipt of the petition; the respondent or his attorney may request a jury trial by filing a written request with the court. The court or jury shall determine whether the person is mentally ill or gravely disabled. The court shall thereupon issue an order of care and treatment for a term not to exceed six months, or it shall discharge the person, or it shall issue any other appropriate order.

When a petition contains a request that a specific legal disability be imposed or that a specific legal right be deprived, the court may make such an order if it or a jury has determined that the respondent is mentally ill or gravely disabled and that, by reason thereof, the person is unable to competently exercise said right or perform the functions as to which the disability is sought to be imposed.

Unless further extended, an original order of long-term care and treatment or an extension of such order shall expire upon the date specified therein. If an extension is being sought, the professional person shall certify to the court at least thirty days prior to the expiration date that an extension of such order is necessary, and a copy of such certification shall be delivered to the respondent and mailed to the attorney and the department. At least twenty days before the expiration of the order, the court shall give written notice that a hearing upon the extension may be had before the court (or a jury upon written request to the court) within ten days after receipt of the notice. If no hearing is requested the court may proceed ex parte. If a hearing is timely requested, it shall be held before the expiration date of the order in force. If the court or jury finds that the respondent is mentally ill or gravely disabled, the court shall issue an extension of the order. Any extension shall be for a period of not more than six months, but there may be as many extensions as the court orders.

Termination of short-term and long-term treatment. An original certification for short-term treatment, or an extended certification, or an order for long-term treatment or an extension thereof, shall terminate as soon as, in the opinion of the professional person in charge of the treatment, the respondent has received sufficient benefit from such treatment for him to leave. The professional person shall notify the court in writing within five days of such termination.

### Hearing Procedure

Hearings before the court shall be conducted in the same manner as other civil proceedings. The burden of proof is on the person or facility seeking to detain the respondent. The court of jury must find the person mentally ill or gravely disabled by clear and convincing evidence.

The court may appoint a professional person to examine the respondent and to testify at the hearing. Such court-appointed professional person shall act solely in an advisory capacity, and no presumption shall attach to his findings.

Every respondent shall be advised of his right to appeal the order by the court at the conclusion of any hearing as a result of which such an order may be entered. Appellate review of any order may be had as provided in the Colorado appellate rules. Such appeal shall

be advanced upon the calendar of the appellate court and, pending disposition, the appellate court may make such order relating to the care of the respondent as it may consider proper.

All proceedings shall be conducted by the district attorney or by a qualified attorney acting for the district attorney appointed by the court. In counties, or in any city and county over 100,000 persons, the proceedings are to be conducted by the county attorney or by a qualified attorney acting for the county attorney.

Proceedings shall not be initiated or carried out involving a person charged with a criminal offense unless or until the criminal offense has been tried or dismissed; except that the judge of the court wherein the criminal action is pending may request the district or probate court to authorize and permit such proceedings.

Any person detained pursuant to this law shall be entitled to an order in the nature of habeas corpus upon proper petition to any court generally empowered to issue orders in the nature of habeas corpus. Any person receiving evaluation or treatment under any of the provisions of this law is entitled to petition the court pursuant to the provisions of the habeas corpus statute for release to a less restrictive setting within or without a treating facility or release from a treating facility when adequate medical and psychiatric care and treatment is not administered.

#### Impact of Law

Entry into the mental health system is made at a variety of points: emergency rooms, mental health centers, hospitals, police stations, jails, and courts. Also a variety of people are either participants or actually decision makers in the process. These can include: family, friends, and the person himself at the time of referral; police at the time of arrest; district attorneys at the time of charging; judges at the time of sentencing; mental health professionals when evaluating; and correctional staff when transferring.

Commitments have increased over the last five years with most of the increase coming in the involuntary category. The total number of civil commitments has increased by ten percent. The study conducted by the Division of Mental Health indicates that over the last eighteen months there appears to be a very slight downward trend in referrals for seventy-two hour evaluations -- from 2,269 for the third quarter of 1978 to 1,962 for the fourth quarter of 1979.

Out of a total of 12,163 evaluations statewide, eighteen percent were immediately screened and discharged, thirty percent were admitted into treatment voluntarily, and fifty-two percent were detained involuntarily. Most of these evaluations were initiated by a professional person (fifty-three percent) rather than a peace officer (thirty-five percent). Only twelve percent of the evaluations were referred by the courts.

Of the fifty-two percent who were detained involuntarily, twenty-four percent of them were discharged within seventy-two hours, thirty-three percent were admitted voluntarily, and forty-three percent were certified for short-term treatment. Thus out of 12,163 evaluations, 2,116, or seventeen percent were voluntarily admitted, and 2,694, or twenty-two percent, were certified for short-term treatment.

Suggested Changes to the Civil Commitment Law  
and Committee Recommendations

Several changes to the civil commitment law were proposed by witnesses appearing before the committee and by various studies on the subject. This portion of the report briefly outlines these suggested changes and indicates whether or not the committee acted favorably on the recommendations.

Definitions

Dangerousness. Present law provides that an individual may be committed under the emergency procedure provision or for short-term or long-term treatment when it is determined that the individual is "an imminent danger to others or to himself or appears to be gravely disabled". The study by the Division of Mental Health sampled short-term certification forms ("Hold Forms") in order to determine which of the three categories (danger to self, danger to others, and gravely disabled) were being used most to involuntarily detain persons. The results of that sample are as follows:

Number of Responses  
to 27-10 Conditions for Holding

<u>Gravely Disabled (GD)</u>	<u>GD &amp; Danger to Self</u>	<u>Danger to Self</u>	<u>All 3 Categories</u>	<u>GD &amp; Danger to Others</u>	<u>Danger to Others</u>	<u>Danger to Self &amp; Others</u>
113	11	6	89	4	3	74

If all the "hold forms" which include all of the three categories are considered one group, all those with danger to self in them a second group, and all those with danger to others in them a third group, the respective percentages are as follows: all -- 29.7; self -- 43.3; others -- 27. The study by the Division of Mental Health suggests that there may be confusion over the use of the three categories by the various participants in the process and that perhaps precise definitions or guidelines would help to clear up any confusion on what the three categories mean. Other witnesses before the committee proposed that these terms be specifically defined in the law since the law does



not now define the terms "danger to others" or "danger to self". It was also pointed out that the term "imminent" is vague.

It was suggested that the committee examine laws similar to the law in Arizona (Ariz. Rev. Stat., Sec. 36-501 et seq.) which specifically define "danger to others" and "danger to self". These definitions are set forth below:

3. "Danger to others" means behavior which, as a result of a mental disorder, constitutes a danger of inflicting substantial bodily harm upon another person within thirty days based upon a history of either:
  - (a) Having seriously threatened, within thirty days previous to the filing of the petition for court-ordered evaluation, to engage in behavior which will likely result in substantial bodily harm to another person, if the threat be such that, when considered in light of its context and in light of the individual's previous acts, it is substantially supportive of an expectation that the threat will be carried out.
  - (b) Having inflicted or having attempted to inflict substantial bodily harm upon another person within one hundred eighty days preceding the filing of the petition for court-ordered treatment, except that:
    - (i) If the proposed patient has existed under conditions of being restrained by physical or pharmacological means, or of being confined, or of being supervised, which have deterred or tended to deter him from carrying out acts of inflicting or attempting to inflict bodily harm upon another person, the time limit of within one hundred eighty days preceding the filing of the petition may be extended to a time longer than one hundred eighty days as consideration of the evidence indicates; or
    - (ii) If the bodily harm inflicted upon or attempted to be inflicted upon another person was grievous or horrendous, the time limit of within one hundred eighty days preceding the filing of the petition may be extended to a time longer than one hundred eighty days as consideration of the evidence indicates.
4. "Danger to self" means:
  - (a) Behavior which, as a result of a mental disorder, constitutes a danger of inflicting substantial bodily harm upon oneself within thirty days, including

attempted suicide or the serious threat thereof, if the threat, made within thirty days previous to the filing of the petition for court-ordered evaluation, be such that, when considered in the light of its context and in light of the individual's previous acts, it is substantially supportive of an expectation that the threat will be carried out; or

- (b) Behavior which, as a result of a mental disorder, will, without hospitalization, result in grave physical harm or serious illness to the person within thirty days, except that this definition shall not include behavior which establishes only the condition of gravely disabled.

Substantial bodily harm is further defined in the Arizona law to mean physical injury which creates a reasonable risk of death or serious and permanent disfigurement, or serious impairment of health or loss or protracted impairment of function of any bodily organ or limb.

The committee considered and rejected the recommendation that these definitions be included in the current law.

Gravely disabled. It was suggested to the committee that the definition of "gravely disabled" may be constitutionally vague and the committee was informed that this issue is currently being tested in court. The issue is whether the term "gravely disabled" must be defined in terms of danger to self or whether it should be distinguished from the "dangerousness to self" standard. Arizona has defined "gravely disabled" to distinguish it from the "danger to self" standard. The Arizona definition at Ariz. Rev. Stat., Sec. 36-501 (11), is set forth below:

- 11. "Gravely disabled" means a condition evidenced by recent behavior in which a person is within thirty days likely to come to grave physical harm or serious illness because he is unable to provide for his basic physical needs such as food, clothing or shelter as a result of a mental disorder of a type which has:
  - (a) Developed over a long period of time and has been of long duration; or
  - (b) Developed as a manifestation of degenerative brain disease during old age; or
  - (c) Developed as a manifestation of some other degenerative physical illness of long duration.

The committee considered and rejected the recommendation that this definition be amended into the current law.

Professional person. Present law (27-10-102 (11), C.R.S. 1973) defines "professional person" as a person licensed to practice medicine in the state or a psychologist certified to practice in this state. It was pointed out that several full-time staff at the Colorado State Hospital are not licensed to practice in the state but are licensed in other states. Another statutory section, 27-1-102 (2)(b), C.R.S. 1973, exempts medical personnel employed by the Department of Institutions from being licensed in the state if rendering services to patients in the department. The question arises as to whether these doctors can make mental health certifications and this question is now on appeal in the courts. It was suggested to the committee that the definition of "professional person" be amended to provide that it include those persons exempted under 27-1-102 (2)(b), C.R.S. 1973. This suggestion was approved by the committee and is included in Bill 5 which is recommended for approval by the General Assembly.

It was also suggested that the definition of "professional person" be amended to allow social workers at the highest level or psychiatric nurses to make certifications. This may be particularly necessary in the rural areas.

#### Emergency Procedure

Elimination of gravely disabled. One provision of the emergency procedure statute (Section 27-10-105, C.R.S. 1973) which is under constitutional attack in the courts is the provision which allows the emergency procedure to be utilized when the respondent appears to be gravely disabled but not dangerous. It was suggested to the committee that the gravely disabled portion of the emergency procedure statute be eliminated.

Use of emergency procedure. It was suggested to the committee that the emergency procedure statute is often used in non-emergency cases and that the statute should clarify that the procedure is to be used only in true emergency cases.

Probable cause hearing. It was suggested to the committee that the emergency procedure statute should be amended to require a probable cause hearing before a respondent can be detained in a seventy-two hour facility. A related issue brought before the committee was whether there is a need for a preliminary or probable cause hearing in all mental health cases as opposed to present court hearings only in those cases where the respondent requests such a hearing. The committee adopted the latter suggestion and this provision is included in Bill 6.

#### Short-Term and Long-Term Treatment

Filing of certification in court. Present law (Section 27-10-107 (2), C.R.S. 1973), provides that the certification shall be filed with the court "within forty-eight hours, excluding Saturdays,

Sundays, or court holidays, from the date of certification." The statute further provides that the certification shall be filed within the county where the respondent resided or was physically present immediately prior to his being taken into custody. It was pointed out to the committee that the form for certification does not show the hour in which the person was certified, and that the court filing stamps do not show the hour in which the certification was filed. In this situation it is impossible for the court to calculate forty-eight hours. Another problem is the delay caused by mailing. If a person is certified at the Colorado State Hospital and the place where he was taken into custody was in Steamboat Springs, it is virtually impossible to certify the patient and have the notice filed in the district court in Steamboat Springs within forty-eight hours. It was recommended that the time period be increased to five days, or that the statute be amended to provide that the certification shall be mailed by certified mail or filed with the court no later than two days from the date of certification. The committee approved the suggestion that the time period be increased to five days and this suggestion is incorporated in Bill 5.

Hearing in ten days from request. Present law (Section 27-10-107 (6), C.R.S. 1973) provides that the respondent may at any time file a request that the certification for short-term treatment or the treatment itself be reviewed by the court or that the court order that the treatment be on an outpatient basis. "If review is requested, the court shall hear the matter within 10 days after the request, and the court shall give notice to the respondent and his attorney and the certifying and treating professional person of the time and place thereof". It was pointed out to the committee that this ten-day period is often not long enough and that cases have been dismissed because they cannot be heard within the ten-day period. It was suggested that the time should be increased to fifteen days, excluding Saturdays, Sundays, or court holidays. This suggestion was approved by the committee and is included in Bill 5. It was also suggested that the statute could be amended to provide that if a request for hearing is filed in the court of original jurisdiction prior to transfer of jurisdiction to another county, and if the transferee court receives the order of transfer within ten days of the filing of request for hearing, the transferee court may have an additional ten days from receipt of the transfer order to hear the matter. No action was taken on this suggestion.

Attorneys conducting proceedings. Present law (Section 27-10-111 (5), C.R.S. 1973), directs that the district attorney in counties under one hundred thousand persons, and the county attorney in counties over one hundred thousand persons shall conduct the proceedings. It was explained to the committee that Pueblo County now supports one full-time attorney to hear and try mental health cases for patients from the Colorado State Hospital. Seventy out of the 402 cases from last year were cases transferred from other counties to Pueblo County. In some cases patients certified from Colorado State Hospital directly to Pueblo County were not initially residents of Pueblo County, but were transferred previously by the Department of

Corrections, Department of Institutions, or other agencies to Colorado State Hospital for treatment prior to certification. It was further pointed out that the county attorney is not the legal counsel for Colorado State Hospital and therefore should not be giving legal advice to the hospital with respect to interpretation of the statutes. This position should be held by the Attorney General. Thus, it was recommended that Section 27-10-111 (5), C.R.S. 1973, be amended to add the following: "Certifications from a state institution shall be conducted by the Attorney General or by a qualified attorney acting on behalf of the Attorney General." This recommendation was approved by the committee and is included in Bill 5.

Criminal proceedings vs. civil proceedings. Under Section 27-10-123, C.R.S. 1973, a civil proceeding cannot be filed or carried out once a person is charged with a criminal offense "unless or until the criminal offense has been tried or dismissed." The statute does, however, provide the following exception: "...except that the judge of the court wherein the criminal action is pending may request the district or probate court to authorize and permit such proceedings." It would appear that the judge of the criminal court must request from some district or probate court authority to issue an order authorizing such a filing of a civil proceeding or the carrying out of a civil proceeding. It was suggested that the statute is poorly worded and confusing. What was apparently intended was that the criminal court could authorize the filing of a civil mental health proceeding. It was suggested that the statute be amended to read as follows: "Proceedings under sections 27-10-105, 27-10-106, or 27-10-107 involving a person charged with a criminal offense in a court of law, should not be initiated unless or until the criminal offense has been tried or dismissed; except that the judge of the criminal court where the action is pending may authorize the filing of proceedings under this article." This suggestion was rejected by the committee.

Another question arises as to whether or not a proceeding for long term commitment (Section 27-10-109, C.R.S. 1973) can be initiated or carried out when a criminal action is pending. That is, since it is not included in the above-mentioned exclusion, it has been ruled that long-term proceedings may be initiated and carried out even though criminal proceedings are filed against the patient after he has been certified for short-term treatment.

Use of records as evidence. Present law (Section 27-10-120 (1) (e), C.R.S. 1973) provides that the communication between qualified professional personnel in the provision of services or appropriate referrals may be provided to the court as "necessary to the administration provisions of this article." The Colorado Rules of Evidence, Rule 803 (6), provides that business records may now be admitted into evidence. Under that rule medical records now appear to be specifically admissible.

It was pointed out to the committee that the treatment of some patients constitutes volumes of paperwork. An example given was a hearing held this year involving a patient who had been at the state

hospital since 1966. The number of persons who have evaluated and observed the patient is in the hundreds. It is totally impractical to subpoena those witnesses to trial. A second problem explained to the committee is that the staff at Colorado State Hospital consists primarily of interns. These interns are employed the fourth week of June of each year and leave the hospital the following June. As a result, hearings held in July and August of each year involve doctors who in some cases have never seen the patients except for a brief period of time just before they appear in court. Without the new doctor's ability to rely on the previous doctors' evaluations and the reports of staff members, most of the cases would be dismissed and the persons released from the hospital. Since hospital records are maintained under very strict procedures, their authenticity can not easily be questioned. It was suggested that the statute should properly reflect the use, in whole or in part, of those records.

It was recommended to the committee that Section 27-10-120 (1) (e), C.R.S. 1973, be amended as follows: "Communications between the patient and the treating staff in the provision of services or appropriate referrals shall be admitted into evidence and not subject to a patient-doctor confidentiality." This suggestion was approved by the committee and is included in Bill 5. It was also recommended that a new paragraph be added to the section as follows: "Original records or copies thereof, properly authenticated, concerning the medical, psychological, or psychiatric treatment of the respondent shall be admitted into evidence. With the exception of a jury trial, the respondent may request the continuance of the hearing in order to subpoena witnesses, if available, concerning the records introduced and admitted into evidence." No action was taken on this recommendation.

Treatment in the least restrictive environment. Present law (Sections 27-10-101 and 27-10-116, C.R.S. 1973), provides that a respondent is entitled "to medical and physical care and treatment suited in the least restrictive environment possible." When a respondent requests a hearing under Section 27-10-107 (short-term treatment), "at the conclusion of the hearing, the court may enter or confirm the certification for short-term treatment, discharge the respondent, or enter any other appropriate order." It was explained to the committee that problems arise under these statutory sections where the state concedes that it has not provided an individual treatment program or is not providing treatment in the least restrictive environment. The issue is whether the court under its power to "enter any other appropriate order" can order the Department of Institutions to comply with the statute rather than simply order a discharge of the respondent. It was explained that this is a real problem in cases where the department takes the position that to do anything other than discharge the patient is beyond its financial ability or outside of its financial priorities. It was suggested that the committee may wish to amend the statute to clarify what the term "any other appropriate order" means and to state directly whether or not the court can order treatment in a less restrictive environment. No action was taken on this recommendation.

Treatment in federal facilities. Present law (Section 27-10-121, C.R.S. 1973), provides a procedure for treatment in federal facilities (the Veterans Administration system) when an individual is eligible for such treatment. The statutory section was taken without change from a prior mental health statute. It was pointed out to the committee that the section does not fit very well into the present statute in that it suggests that a Colorado veteran who is certified for treatment in a Veterans Administration hospital is subject to federal rules and not state law. There may be no problem if the veteran is a voluntary patient. However, if he is an involuntary patient, the question arises as to whether or not a Colorado citizen should be entitled to the protections of the Colorado civil commitment statute; the same protection which other citizens have. It was explained that the problem may be intensified by the fact that the Veterans Administration Fort Lyons facility does not meet the Department of Institutions standards for designation as an approved facility and that there have also been problems with such designation of the Veterans Hospital in Denver. No specific recommendations for change to the statute were received by the committee but it was suggested that some changes may be necessary. No action was taken on this recommendation.

#### Imposition of Legal Disability

Short-term treatment. Present law (Section 27-10-109, C.R.S. 1973 -- long-term certification) provides that when a petition contains a request that a specific legal disability be imposed or that a specific legal right be deprived, "the court may order the disability or the right deprived if it or a jury has determined that the respondent is ill or gravely disabled and that by reason thereof, the person is unable to competently exercise said right or perform the function as to which disability should be imposed. Any interested person may ask leave of the court to intervene as a co-petitioner for the purpose of seeking the imposition of a legal disability or the deprivation of a legal right."

The short-term certification portion of the statute (Section 27-10-107, C.R.S. 1973) does not provide for the imposition of a legal disability. The question has been raised as to whether a court can order involuntary drug treatment or impose any other legal disability for an individual detained under the short-term treatment statute. This question is currently on appeal in the courts. It was recommended that the following language be added to Section 27-10-107: "The petition may contain a request that a specific legal disability be imposed or a legal right deprived. The court may order the disability or the right deprived if it or a jury has determined that the respondent is mentally ill or gravely disabled and that by reason thereof, the person is unable to to competently exercise said right or perform the function as to which disability should be imposed. Any interested person may ask leave of the court to intervene as a co-petitioner for the purpose of seeking the imposition of a legal disability or the deprivation of a legal right." This recommendation was approved by

the committee and is included in Bill 5.

Mandatory appointment of professional person. Present law provides that in any proceeding concerning the deprivation of a legal right or the imposition of a legal disability the court shall appoint a professional person for the respondent who is to serve in the role of an advocate for the respondent (Section 27-10-125 (4) (b), C.R.S. 1973). On the other hand, Section 27-10-111 (2), C.R.S. 1973, which deals with hearings on involuntary certification proceedings, provides that appointment of an independent medical witness is discretionary with the court and that the role of the doctor appointed is advisory to the court. These two sections appear to be inconsistent and it was suggested that an amendment may be necessary to make the two sections consistent. The committee took no action on this suggestion.

Incompetent to stand trial. Present law (Section 27-10-125, C.R.S. 1973) provides for a method of requiring involuntary treatment where a short-term or long-term certification has not been filed. The statute also provides for a method of requiring involuntary treatment of persons found to be criminally insane under section 16-8-101, C.R.S. 1973. It was pointed out to the committee that the statute fails to take care of the situation where a criminal defendant has been declared incompetent. The question arises as to whether Section 27-10-125, C.R.S. 1973, can be used to provide involuntary treatment for those individuals found incompetent. A district court has ruled that it cannot be used for such purposes. For this reason, it was suggested that the statute be amended to provide that those who are incompetent be included in the statute's coverage.

#### Petitions for Involuntary Treatment

The Colorado Supreme Court in Goedecke v. Colorado (October 10, 1979) ruled that mental patients may not be given medication against their will. The court reasoned that normal medical decisions on a treatment require the concurrence of doctor and patient and that the mental patient should not be an exception unless a court determines that a patient is incapable of participating in the treatment decision or that the refusal to take medication is irrational. The committee was informed that the court's decision is of substantial consequence since it is the availability and use of psychotropic medications which has allowed a large percentage of the chronically mentally ill to be treated in the community rather than in institutions. Under present levels of staff and current resource allocations, the institutions cannot absorb a substantially greater number of chronic patients who may require long-term institutionalization if medication is not used.

Although other courts have reached the same result (regarding the right to refuse medication) on constitutional grounds, the Colorado Supreme Court based its conclusion on statutory construction. The court relied heavily on the legislative declaration in section 27-10-101, C.R.S. 1973, which focuses exclusively on the rights of a



respondent. The court stated in part:

The entire tenor of the Article ... is to recognize and protect the dignity and legal rights of patients treated pursuant to its provisions. Among the purposes of Article 27-10 declared by the General Assembly are:

- (c) To provide the fullest possible measure of privacy, dignity, and other rights to persons undergoing care and treatment for mental illness;
- (b) To encourage the use of voluntary rather than coercive measures to secure treatment and care for mental illness.

Section 27-10-101 (1), C.R.S. 1973.

Section 27-10-104 declares that: "Unless specifically stated in an order by the court, a respondent shall not forfeit any legal right or suffer legal disability by reason of the provisions of this article." There is no provision, in any court order in the record before us, declaring the appellant legally disabled from exercising whatever legal right a medical patient normally has to decline treatment with a dangerous or obnoxious drug.

It would be inconsistent with the statutes' spirit and purpose to insist that a patient's common law right to decline medical treatment is abrogated by short-term certification alone. Instead, we conclude that this right is to be numbered among those protected by C.R.S. 1973, 27-10-104 and is therefore preserved intact in the absence of some finding, reached by a competent tribunal, that the patient's illness has so impaired his judgment that he is incapable of participating in decisions affecting his health.

It was suggested to the committee that perhaps some clarification of the factors to be weighed in determining whether to order medication over the objections of the respondent may be necessary. No action was taken by the committee on this suggestion.

Several other suggestions were received by the committee concerning the hearing that is required in order to obtain a court order for involuntary treatment.

Immediate hearings. Because of the urgent need to obtain a court order for involuntary treatment when a patient refuses medication, it was suggested that the statute be amended to provide that a request for a medication order be heard by the court forthwith. It was also suggested that a later hearing could be held, upon presenta-

tion of substantial grounds therefore, in order to compensate for any injustice caused by the initial "forthwith" hearing. This suggestion was approved by the committee and is included in Bill 5.

Venue and jurisdiction. It was pointed out to the committee that some uncertainty exists as to whether or not a petition for a medication order has to be filed in the original court which certified the patient. To clarify this situation, it was recommended that the statutes be amended to make it clear that venue for medication orders would be proper both in the jurisdiction where a previous certification order had been issued and in the jurisdiction in which the individual, who was the subject of such order, was being treated. The following language was suggested: "In the event that a respondent refuses to accept medical treatment, the court having jurisdiction of the action pursuant to section 27-10-111 (4) and the court of the jurisdiction in which the designated facility treating the respondent is located shall have jurisdiction and venue to accept a petition by a treating professional person and enter an order requiring that the respondent accept such treatment, or, in the alternative, that the treatment be forcibly administered to him." This suggestion was approved by the committee and is included in Bill 5.

Mandatory appointment of professional person. Pursuant to Section 27-10-111 (2), C.R.S. 1973, the court may appoint a professional person to examine the respondent (for whom short-term or long-term treatment is sought) and to testify at the hearing as to the results of his examination. Such professional person shall act solely in an advisory capacity. It was suggested that in the case of a hearing on a petition for medication orders the appointment of a professional person to render an independent opinion be made mandatory rather than discretionary. No action was taken on this suggestion.

#### Relationship Between Children's Code and Civil Commitment Statute

The committee was informed that there are at least eight ways in which a child can be placed into a mental institution in Colorado. The relationship between the general civil commitment statutes and the provisions of the children's code is not clear. It was suggested that careful study of this area be undertaken to clarify the relationship of the two laws.

Several areas of concern were expressed to the committee. For example, should a juvenile be able to be processed under either law? If a mentally ill juvenile is processed under the general civil commitment law, should the rules be changed so that juveniles may be certified on the basis of mental illness and need for treatment rather than the existing bases of mental illness and proof of dangerousness or grave disability.

At the present time, children may be placed involuntarily in a treatment facility by the child's parents or legal guardian. The legal guardian is very often the Department of Social Services. There

is no provision for a review of that placement except under Senate Bill 26, which applies only when the child is placed in a state institution and there is an expenditure of public funds. The committee was informed that there are some children who have been at Colorado State Hospital for a period greater than ninety days and that no petitions under Senate Bill 26 have been filed with the court. Thus, there appears to be no way to monitor Senate Bill 26, and, since the child is not represented by counsel, the child has no way to enforce Senate Bill 26. The committee was also informed that children placed in private institutions should have some procedure available to review their placement.

It was suggested to the committee that some provision should be written into the mental health statute which requires the filing of a petition to review the placement of a child for mental health treatment either in a private or a public institution. Counsel should be appointed, and if the parents have the capability of paying for the cost of that attorney, then it should be so ordered by the court.

#### Release Decisions

Immunity for professional persons. It was suggested to the committee that some type of immunity statute may be necessary to protect professional persons who make the decision to release a patient or to hospitalize a patient. It was suggested that some type of standard similar to that contained in the medical malpractice law be formulated to protect professional persons against liability for the release of patients. No specific recommendations were received by the committee, and no action was taken on this suggestion.

Conditional release. Presently there is no established procedure by which a mental patient can be conditionally released. In order to provide such a procedure to the Department of Institutions, the committee recommends the adoption of Bill 7. The bill establishes procedures under which a mentally ill person under civil commitment may be conditionally released. The duration of any conditional release shall coincide with the period of the original certification or extended certification. The bill provides for the revocation of such conditional release for violation of any condition thereof. The department is directed to promulgate rules and regulations assuring the periodic monitoring and treatment of respondents on conditional release and assuring the efficient enforcement of the terms and conditions of such release.

#### Deferred Prosecution and Treatment -- Probation

Section 16-7-402, C.R.S. 1973, provides a method by which criminal offenders can be ordered to undergo treatment for a mental condition. The statute provides:

In any case in which treatment for a mental condition

is authorized in connection with a deferred prosecution or probation, the court may require the defendant to obtain treatment for any mental condition. The defendant may be permitted to obtain such treatment from any psychiatrist and at any suitable public or private mental health facility of his choosing. Upon request of the defendant, the court may order the department of institutions to admit him for rehabilitative treatment to one of the mental institutions under its control, for a period not to exceed one year. The defendant may be required to remain under treatment for that time, not to exceed one year, and under such conditions as the psychiatrist responsible for his care deems necessary to improve, to the extent possible, his mental condition related to the offense charged.

The committee was informed that judges appear to interpret the statute to mean that they can place someone in a mental health facility for a year. Mental health facilities interpret the same statute to say that the person can stay no longer than a year. From these interpretations and their uses flow widely different expectations.

Judges often perceive their actions as sentencing the person for a definite period of time. They expect the mental health facility to incarcerate the person for a year, make sure no escapes occur, cure the illness, and release them only with their permission. Mental health facilities behave as if the person becomes a patient once in their program. To them this means the person will be treated like any other patient, subject to the same rules and risks. Release decisions will be made by them strictly on the basis of whether the person is ready to function outside the institution in a reasonable manner according to mental health standards.

Testimony before the committee indicated that there needs to be a prior evaluation concerning the necessity for mental health treatment before the court orders an individual to submit to such treatment and that the statutes should be amended to require such prior evaluation. Testimony also indicated that the statute is unclear as to who has authority to make release decisions -- the professional person in charge of the individual or the court. It was suggested that the statute should be amended to clarify who has the authority to release an individual who has been referred as a condition of deferred prosecution or probation. No action was taken by the committee on this suggestion.

## CRIMINAL INSANITY LAWS

### Background and Committee Procedure

Closely related to and associated with the commitment procedures and conditions for the release of the violent mentally ill are

the criminal insanity laws. Of particular concern are those persons acquitted of crime because of a finding of not guilty by reason of insanity. Professional and public criticism of the insanity defense has increased over the years. This criticism has an impact on both the criminal justice system and the mental health system. The use of the defense in sensational cases has stirred the public mind by raising the prospect of acquittal of the offender. This has resulted in the public perception of mental illness and dangerousness (criminality) as being synonymous. This perception is often manifested in opposition to the care of the mentally ill in the community. The impact of such opposition may affect the mental health system's efforts to implement the objective of caring for the mentally ill in the least restrictive environment.

Some of the reasons given for dissatisfaction with the "innocent by reason of insanity" defense include: a lack of understanding of the statute on the part of juries and the public; poor statutory definitions and vagueness of the law which leads to uneven application of the statute; medical testimony which pits one expert against another in a "battle of the experts"; preconceived ideas about the acquittal of those judged innocent by reason of insanity thus letting such defendants out of jail too soon; and the confusion about the medical and legal issues that are allowed under the statute.

Some criticize the use of such a defense because they believe it is misused; that guilty people are improperly escaping the consequences of their behavior; that it is a cause of an erosion in society's respect for the law and other institutions; and that the terms and concepts used in the defense are not psychiatric in nature, but are legal, moral and social issues upon which psychiatrists are called upon to form an opinion (such things as "responsibility", "right", and "wrong" are examples). It is also claimed that psychiatry is not a scientifically precise profession, that there is difficulty in presenting vague psychiatric concepts in terms understandable to the laymen, and that there is an expectation that the psychiatrist can give a competent informed opinion on what the mental state of an individual was months and perhaps years prior to the time their examination was made.

Another criticism of the law stems from the statutory requirement that such individuals may be released from commitment by the court when the individual is no longer a danger to self or others. As was pointed out earlier in this report, there is no empirical data on which to base a valid prediction of future dangerous behavior. Even when specified procedures, observations, and and tests are carefully followed to arrive at the conclusion that an individual can be released without danger to the public, such a conclusion, once reached, is still just an opinion.

These various criticisms have caused a widespread concern that the legal defense of insanity in criminal proceedings does not sufficiently protect the public. This concern has led to various studies on the subject throughout the United States. As a result, several

states have adopted optional or alternative approaches to the legal defense of insanity. In Colorado, the subject of criminal insanity has not been thoroughly reviewed since 1965. In order to provide an opportunity for a thorough review of current law and to review the concerns expressed by the public, the General Assembly, through the enactment of Senate Joint Resolution No. 26, directed the Legislative Council to appoint a committee to study the criminal definition of insanity and the criminal defense of insanity. The interim Committee on Judiciary was assigned this study.

Committee procedure. The committee received testimony from representatives of the Department of Institutions, Division of Mental Health, public and private psychologists and psychiatrists, mental health center representatives, judges, district attorneys, public defenders, representatives of Bar Association committees, and other interested persons. The Report of Governor Love's Committee to Study the Criminal Insanity Laws (1965) and other literature on the subject was reviewed by the committee. In May, 1978, Governor Lamm, by executive order, established a Criminal Insanity Law Review Task Force for the purpose of evaluating and analyzing the criminal insanity statutes. Although no formal report has been prepared by the task force and their final recommendations have not been formulated, the committee received testimony on its work and some of the issues with which it has been concerned.

The committee focused primarily on: the subject of acquittal and commitment under a not guilty by reason of insanity plea; the procedures and process for releasing an individual committed under a not guilty by reason of insanity plea; and, the various legal procedures and issues raised by a criminal insanity defense. The committee sought to determine whether the present law is in need of revision or modification.

### Colorado's Criminal Insanity Law

Colorado's criminal insanity law is contained in Title 16, Article 8, C.R.S. 1973. Section 16-8-101, C.R.S. 1973, defines insanity in the following manner:

A person who is so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong with respect to that act, or being able so to distinguish, has suffered such an impairment of mind by disease or defect as to destroy the willpower and render him incapable of choosing the right and refraining from doing the wrong is not accountable; and this is so howsoever such insanity may be manifested, by irresistible impulse or otherwise. But care should be taken not to confuse such mental disease or defect with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or

other motives, and kindred evil conditions, for when the act is induced by any of these causes the person is accountable to the law.

This section, which was enacted in 1951, and which codified numerous Colorado court decisions, adopted the "M'Naghten right and wrong test" and the "irresistible impulse test" as the methods to be used in the determination of insanity. The M'Naghten test holds that a person is insane when his mind is so diseased or defective that he cannot distinguish right from wrong. The M'Naghten test is supplemented by the irresistible impulse test -- a test in which an individual is not criminally responsible if he had a mental disease that kept him from controlling his conduct, regardless of his knowledge of the nature and the quality of his act and the awareness that it was wrong. Thus, a person is held to be insane, as far as the criminal laws are concerned, when he is so diseased in mind as to be incapable of distinguishing right from wrong or where he suffers such an impairment of mind as to render him incapable of choosing the right and refraining from doing the wrong.

In terms of the actual criminal proceedings regarding an insanity plea, two separate trials must be held: a sanity trial to determine the issue of mental capacity to commit the crime and another trial to determine the issue of guilt or innocence.

When using insanity as a defense against a criminal charge, a defendant must enter a specific plea of not guilty by reason of insanity at the time of his arraignment. After the plea of not guilty by reason of insanity is accepted by the court, the court commits the defendant to one of the state's institutions for observation and a sanity examination.

Once the defendant has been committed, he is examined by one or more physicians who are specialists in nervous and mental disorders. The court may order additional examinations if it deems it advisable under the circumstances. After the examination is completed, a written report is submitted to the court describing the examination and the results, including a diagnosis and prognosis of the defendant's physical and mental condition, an opinion as to whether the defendant suffers from a mental disease or defect, and separate opinions by each examining physician as to whether the defendant was insane at the time of the commission of the act, is incompetent to proceed, or is ineligible for release. A defendant has the right to be examined by an expert of his own choice in connection with any of the insanity proceedings.

Once the examination report is received by the court, a date for a jury trial is established for the purpose of deciding the question of the defendant's sanity. A defendant may waive a jury trial in all cases except for Class 1, Class 2, or Class 3 felonies. During the outset of the trial, a presumption of sanity exists, and it is the

defendant who must generate a reasonable doubt as to its existence. However, once evidence has been introduced that puts the defendant's sanity in doubt, the people have the burden of proving beyond a reasonable doubt that the defendant is sane. If the trier of fact determines that the defendant was sane at the time of the criminal act, the court then sets a trial date on the issue of guilt. If the trier of fact finds that the defendant is not guilty by reason of insanity, the court must then commit the defendant to the custody of the Department of Institutions, until he is found eligible for release.

If the chief officer of the institution at which the defendant has been committed determines that the defendant no longer suffers from a mental disease or defect which is likely to cause him to be dangerous to himself or others, the chief officer must report this to the court who committed the defendant. Thirty days after receiving this report, the court must order the discharge of the defendant unless the district attorney contests the report, at which time a release hearing must be held.

The court may order a release hearing upon its own motion or upon the motion of the prosecuting attorney or the defendant. The court must order a release hearing if the report of the chief officer of the institution in which the defendant is committed is contested or, upon the motion for release filed by the defendant after 180 days following his commitment order have past. If the defendant's eligibility for release is contested, the court may order a release examination and the provision of any other information determined to be related to the question of his eligibility for release. After all the information is obtained by the court, if the defendant so requests, a hearing is held before the court or to a jury. If the court or jury finds the defendant eligible for release, the court may impose conditions on such release, which it determines are in the best interests of the defendant and the community. If the court or jury finds the defendant ineligible for release, the court must recommit the defendant.

The test for determination of a defendant's sanity for release from commitment, or his eligibility for conditional release, is: "That the defendant has no abnormal mental condition which would be likely to cause him to be dangerous either to himself or to others or to the community in the reasonably foreseeable future".

Except for the issue of insanity, no person can be tried or sentenced if he is not competent stand trial. Therefore, even though the trier of fact determines that the defendant was sane at the time of his criminal action, the court must still make a preliminary determination as to whether or not the defendant is competent to proceed. This determination is based on whether the defendant is capable of conducting his defense in a rational and reasonable manner. To this end, a competency hearing and examination may be held if adequate psychiatric information is lacking. If the defendant is judged competent to proceed, the trial process continues. If a determination is



made by the court that the defendant is not competent to proceed, the court must commit the defendant to the Department of Institutions until he is able to continue with the criminal proceedings. If the defendant remains mentally incompetent, the court may continue or modify any orders entered at the time of the original determination, or enter a new order.

An arrest warrant may be issued for any defendant who escapes from an institution for the care and treatment of the mentally ill or handicapped. Such escape becomes part of the defendant's record.

### The Tests of Insanity

The purpose of this part of the report is to briefly discuss the various insanity tests utilized by state courts and by the federal courts, and to compare them to the present M'Naghten or Right/Wrong Test used in Colorado. Comments from the Report of Governor Love's Committee to Study the Criminal Insanity Laws (1965) are included as being illustrative of criticisms of the tests used in other jurisdictions.

#### M'Naghten or Right/Wrong Test

In the 1843 case of Daniel M'Naghten, the House of Lords announced the following test of criminal responsibility:

To establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. M'Naghten's Case, 10 Clark & Fin. 200, 8 Eng. Rep. 718 (1843).

Under this test, insanity is defined solely in terms of impairment of cognitive capacity; that is, intellectual capacity to distinguish right from wrong. This test has been criticized since it was first announced because it deals only with the cognitive function -- the capacity for understanding. It does nothing for the person who knows the conduct to be wrong but as a result of mental defect or disease is powerless to control that conduct. In 1953, the British Royal Commission on Capital Punishment summarized this criticism:

The M'Naghten Test is based on an entirely obsolete and misleading conception of the nature of insanity, since insanity does not only, or primarily, affect the cognitive or intellectual faculties, but affects the whole personality of the patient, including both the will and the emotions. An insane person may, therefore, often know the nature and quality of his act and that it is

wrong and forbidden by law, but yet commit it as a result of the mental disease.

As of 1975, twenty-one states applied the M'Naghten test of criminal responsibility; three states by statute and 18 states by case law.

### The Irresistible Impulse Test

A significant number of later cases appended a volitional test to M'Naghten.

Did he know right from wrong, as applied to the particular act in question? If he did have such knowledge, he may nevertheless not be legally responsible if the two following conditions concur: (1) If, by reason of the duress of such mental disease, he had so far lost the power to choose between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed; (2) and if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it solely. Parsons v. State, 2 So. 854 (1887).

This irresistible impulse test was thus added to the right and wrong test. The irresistible impulse test as the sole standard of criminal responsibility is not used in any jurisdiction; rather in those jurisdictions where it has been accepted (Colorado is an example) it is used in conjunction with and supplementary to the M'Naghten test. As of 1975, the irresistible impulse test supplemented the M'Naghten formulation in eleven states; by statute in four states, including Colorado, and by case law in seven states. While M'Naghten by itself considers only the actor's cognition, the irresistible impulse addition permits examination of his volition (self-control). There is a recognition that mental illness may affect the actor's will and emotions as well as his cognitive or intellectual capacity. An individual is not criminally responsible under the irresistible impulse test if he had a mental disease that kept him from controlling his conduct, despite his knowledge of the nature and quality of his act and his awareness that it was wrong.

The irresistible impulse test has been criticized primarily because the word "impulse" implies that the defense is applicable only to those criminal acts which have been suddenly and impulsively committed after a sharp internal conflict, that the test gives no recognition to mental illness characterized by brooding and reflection and so relegates acts caused by such illness to the application of the right/wrong test. The American Law Institute views "impulse" as "...impliedly restricted to sudden spontaneous acts as distinguished from insane propulsions that are accompanied by brooding or reflection." Model Penal Code, Section 4.01, Comments, at 157 (Tent. Draft

No. 4, 1955). This criticism has been answered by pointing out that the phrase irresistible impulse is merely a caption and is really not an appropriate title to describe the test in practice. "Most of the cases do not even use the phrase. It is much more accurate to describe the rules as concerned with lack of control and to use the shorthand designation 'control' test...." A. Goldstein, The Insanity Defense 50 (New Haven; Yale Univ. Press, 1967). Because the jury is not told that proof of sudden, unplanned action is required for them to find loss of control, a planned act may be sufficient to absolve a defendant of criminal liability.

### The Durham or Product Test

In Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), the Court of Appeals of the District of Columbia made an historic break from the M'Naghten - Irresistible Impulse formulations. The court announced a new test of criminal responsibility:

An accused is not criminally responsible if his unlawful act was the product of mental disease or defect.

The court premised its decision on the medically accepted view that because the mind functions as an integrated whole, the functions of cognition and control cannot be separated. Recognizing that an integrated personality cannot be only partially diseased, the court declared futile any attempt to identify types of malfunctioning symptoms:

The question will be simply whether the accused acted because of a mental disorder, and not whether he displayed particular symptoms which medical science has long recognized do not necessarily, or even typically, accompany even the most serious mental disorder.

In the court's view, the test would permit broadened expert testimony. Psychiatrists would be allowed to inform the jury of the character of the defendant's mental disease.

The Durham decision has been criticized mainly on two grounds: (1) failure to adequately define mental disease, and (2) opening the door to the idea that all crime was to some extent the product of a mental illness. As of 1975, the Durham test of criminal responsibility was applied in two states, one by statute and one by case law.

### The American Law Institute's Model Penal Code Test

One year following the Durham decision, the American Law Institute (hereinafter ALI) in its Model Penal Code presented another formulation of the test of criminal responsibility which recognizes impairment of both cognition and volition as a result of mental defect or disease. The ALI test now reads:

Section 4.01. Mental Disease or Defect Excluding Responsibility.

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law.

(2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

In a general way, the American Law Institute test is the M'Naghten rule with irresistible impulse added. Supporters of this test cite improvements in wording, such as the substitution of "appreciate" for "know", thus indicating emotional as well as intellectual awareness of the criminality of the conduct. They also argue that "substantial" incapacity comports better with modern psychiatric knowledge than the total incapacity often said to be required by M'Naghten. And it uses the word "conform" instead of "control", while avoiding any reference to the misleading words "irresistible impulse".

Critics of the test contend that important words -- for example, "substantial" and "appreciate" -- are vague and undefined and are too nebulous for juries to grasp. The strongest criticism of the test has been addressed to paragraph (2), which attempts to exclude psychopathic personality disorders from the definition of "mental disease or defect." Thus, psychopaths would be held criminally responsible. Critics oppose such a rigid rule excluding psychopaths because of existing doubts about whether the psychopathic personality is a valid psychiatric classification. Other critics contend that psychopathy is never manifested solely by repeated criminal conduct and that therefore any effort to exclude psychopaths from the insanity defense based on paragraph (2) must fail.

As of 1975, seventeen states had adopted the American Law Institute test; twelve states by statute and five states by case law.

Currens Test

In United States v. Currens, 290 F.2d 751 (3d Cir. 1961), the U.S. Court of Appeals for the Third Circuit adopted the American Law Institute test but eliminated the language "either to appreciate the criminality (wrongfulness) of his conduct...." The court stated: "We are unable to accept the phrase "to appreciate the criminality of this conduct." This phrase would overemphasize the cognitive element in criminal responsibility and thus distract the jury from the crucial issues while being little more than surplusage." Defenders of the Currens formulation contend that the appropriate legal issue to be determined is whether the individual was substantially able to conform

his conduct to the law's requirements. This issue cannot be resolved by focusing on the defendant's cognitive capacity, which is just one particular facet of his integrated personality. Cognitive impairment is important only when it substantially incapacitates volitional function.

Most courts appear to have refused to treat the cognitive feature as merely one aspect of the ultimate control element and thus have rejected the Currens formulation. See United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972). They assert that a pragmatic justification exists for retaining the language of cognition.

#### Report of Governor Love's Committee to Study the Criminal Insanity Laws

On April 15, 1964, by Executive Order, Governor John A. Love established an Insanity Laws Study Committee to study and evaluate the existing insanity laws and to make recommendations thereon. The Committee transmitted their report to the Governor in January, 1965. The first recommendation of the committee was stated as follows:

1. That the present Colorado test for insanity upon a plea of not guilty by reason of insanity be retained precisely as it is presently prescribed by statute. The Colorado test is superior to any test used in any other jurisdiction, or any that has been proposed. It establishes a legal and moral standard and is not subject to vagueness and indefiniteness as are other tests.

The committee reviewed other tests employed by various jurisdictions and commented, in part, as follows:

Unlike the Colorado rule which relates the diseased condition of the mind to the standard of right and wrong, the above quoted rules make the diseased or defective mental condition the touchstone for the evaluation of accountability. Under these tests, mental disease or defect become the all-inclusive incubator for the exculpation of conduct that results in violation of the law.

These tests, moreover, instead of articulating standards for the determination of responsibility in law, help to stimulate confusion and speculation as to the precise determination which, under our jury system, laymen are necessarily called upon to make...

Imprecision, indefiniteness and vagueness are the porous foundation upon which all the proposed tests for insanity are based. What constitutes mental disease or defect is so ambiguous as to create a morass into which any conduct which deviates from the prevailing norm may

be cast. The honest judgments of honest experts as to whether the same manifestations constitute a "mental disease or defect" will differ widely. Classifications such as these are subject to change by the experts themselves, and history has demonstrated such change. Moreover, such proposed tests contain other salient weaknesses of indefinability. What is meant by such words as "product, result, substantial, capacity, conform conduct to the requirements of the law," and especially when such terms are related to "disease or defect" have created an academic holiday for psychiatric debate. But it is respectfully submitted that we are here concerned with the conduct of an orderly society and not histrionic pedantics.

Under our system of the administration of justice, juries are called upon to decide whether a person charged with a crime is accountable or responsible in law, or, as the term is used, "not insane," and they must make this determination after they are instructed that a crime is a "union or joint operation of act and intent." They may listen to countless folios of medical semantics as to what constitutes conduct that does or does not fall into certain medical categories and, indeed, as to what those categories themselves constitute, but aside from the aspects of behavior of the defendant the jury must also decide the legal issue, namely, whether there existed criminal intent. The proposed rules seem to abandon the element of criminal intent, or if it is contemplated by such rules, it is so submerged under the disease or defect ambiguities that it is meaningless.

This brings into focus one of the principal reasons for the rejection of all the other tests considered, and the retention of the present Colorado statute. The tests laid down by Durham, Currens, A.L.I., and the California rule seem to place the emphasis in the wrong place, on the medical significance of behavior, not the legal significance. The matter of criminal responsibility is a matter of legal significance, not medical significance. Responsibility under the criminal law is in the last analysis an appraisal of the blameworthiness of the defendant's conduct. Mental condition in the medical sense is, on the other hand, a problem of diagnosis. Medical and psychological evidence is relevant to the determination of the legal issue, but such evidence is not in itself the determination of that issue.

In attempting to effectuate changes for the betterment in the evaluation of law and accountability there has developed an irresponsible if not dangerous trend in the realm of criminal responsibility. That is the aban-

donment of the factor of legal responsibility. The determination of intent is a legal responsibility and not a medical one. Too much reliance has been placed on the medical significance of behavior and too little on the legal import of conduct. The ultimate decision in a criminal proceeding should properly be made by the judicial system and not the medical profession. This fact should be kept in mind by zealous psychiatrists, some of whom are inclined to stray out of their province and into the field of legal evaluation. It should also be remembered by judges and juries, some of whom may be inclined to shirk their duty of judgment in misplaced deference to ordered opinion. Hence, psychiatric evidence ought to be fully received in the determination of criminal responsibility, but the ultimate decision is a legal question to be decided by judge or jury.

The committee did not, however, determine that the Colorado rule should be retained for the reason that the other tests or proposals should be rejected because it is the least undesirable. It recognizes that the Colorado rule contains certain deficiencies that do not make for the best solution to the problem, but it also recognizes that perfection or even near perfection in this turbulent field will never be reached.

One of the requirements of the law in criminal cases is that juries must be instructed with particularity as to what the law is, and are charged that they must apply such law to the facts in arriving at their verdict. In being so instructed, jurors should be told with as much precision as the law is capable of defining it what the law is and how it should be applied to a particular set of facts. Thus, jurors are entitled to be properly guided as to legal tests and standards in the application of the laws, and these should be established in a framework so that the jurors will not have to resort to surmise and conjecture.

The Colorado rule, unlike the other proposed rules, furnishes the only standard of accountability in law, namely, a person's mental ability to distinguish between right and wrong. It is recognized by the committee that it is this very aspect of the progenitor of the Colorado rule, McNaughton, that has brought so much censure upon McNaughton and variations of it, such as our present statute.

The principal criticisms of some eminent psychiatrists and some renowned jurists is that the right/wrong concept is a moral evaluation and not a medical determination. This phase of the problem will be considered later, after closer scrutiny is given the necessity of

applying an applicable standard in criminal proceedings requiring the use of the jury system.

The right/wrong test is sufficiently definite and certain that a jury can apply it to a course of conduct in reaching the ultimate question that is an absolute prerequisite in a criminal proceeding: Is the accused accountable in law? It furnishes guideposts by which behavior can be measured, and does not relegate the jury to speculation and conjecture as to what is or is not accountability.

Moreover, the definiteness of the Colorado rule has been tightened by judicial interpretation through the years, thereby furnishing additional delineations for instructing the jury. The other tests are so vague and indefinite as to conduct and category that they are constantly subject to appellate determination. The result is that instead of a standard being established by the legislature that can serve as a guidepost for judges and juries, there could be a constantly changing standard by judicial interpretation.

Thus, when compared with the other competitors, the Colorado rule finds much to support its retention. Moreover, the Colorado rule is not solely the McNaughton right/wrong test. It has the element of cognition, the ability to distinguish between right and wrong, and it also incorporates the element of volition, the ability to refrain from doing the wrong once choice is recognized. Therefore, the rule is not subject to the criticism that it is not sufficiently broad to encompass the element of recognition of right and wrong, but also the further element of not being able to refrain from unlawful conduct once such recognition is made.

The Colorado rule, however, goes even further by permitting exculpation of unlawful conduct that arises from irresistible impulse. The use of the term "irresistible impulse" in its context in the Colorado statute makes the conduct which constitutes irresistible impulse related to the right/wrong test in the statute. Thus, the term is taken out of the Durham concept or the popularly prevailing view that irresistible impulse is conduct of an irrepressible, instantaneous theretofore unpredictable nature. The term in the Colorado statute envisions conduct that is qualified by application of the right/wrong test in the first instance.

The Colorado rule excludes certain conduct which has long been recognized in the law as blameworthy or culpable, namely, moral obliquity, mental depravity, or passion growing out of anger, revenge, or hatred. The



presence of any of these factors does not eliminate the insanity test in the statute; it merely further delineates the right/wrong test as one of insanity, and the presence of one or more of such factors does not render the test inapplicable.

One of the principal reasons for the retention of the Colorado statute is its recognition of a moral standard as a test for legal accountability. As has been previously noted, this feature of McNaughton has been subject to severe criticism by many writers, and especially psychiatrists. These latter individuals have been most vociferous in attacking the right/wrong test on the ground that they are called upon to render a moral opinion concerning the mental competency of an accused, and not a medical opinion. It is submitted that the Colorado test is a test of legal accountability and not one of medical or moral significance only, but one wherein medical knowledge and expertise should be used interconjunctively with moral considerations to evaluate accountability in law. As long as intent is an element in law, moral climate will be a factor in such law, and this is especially so as long as there exists the lack of knowledge in mental science that exists at the present time. It is recognized that psychiatrists have been somewhat curtailed by legal restrictions in their capacity to communicate with juries concerning the capacity of an accused, and a relaxation of some of the rules of evidence is proposed by the committee in its revised draft of the rules in criminal insanity proceedings. This does not supplant the medical responsibility for the legal responsibility. It is and must remain legal. The law is interested in capacity as it is defined by the law-making agency, and not the medical classification of an illness, but whether such illness deprived the accused of such capacity.

As has been stated previously, one of the salient reasons for the retention of the Colorado rule is its recognition of the moral aspect of conduct. The committee recognizes that despite the advances in mental sciences, that in man's relationship with his fellow man there are certain fundamental basic concepts which are both moral and legal and which delineate conduct for the facility of an orderly society. Some of these are rights and wrongs, good and evil, and other moral considerations. Any attempt to eradicate legal sanctions for human conduct that transgresses against the historical recognition of another human being's rights under the euphemistic canopy that man is not the motivator of his own actions is a concession to a nihilistic society. This is not to say that a person cannot be both bad and ill, for he can. But merely because he is ill does not

excuse him legally unless because of such illness he could not help being bad.

The trend away from the recognition of moral responsibility is misplaced and can lead only to an abetting of an already too rapidly advancing crime rate. It is conceded that there is not complete reconciliation between the medical tests of insanity and the moral tests of criminal responsibility. The purposes and assumptions behind the two are different.

The Colorado rule is the most adaptable to practical approach to accountability and most easily to instruct to the man-on-the-street juror whose responsibility it is to make the decision of sanity or insanity as it applies to legal accountability in criminal law.

### Committee Recommendation

Testimony before the committee generally supported the above-quoted 1965 study findings and again indicated that the current test of insanity should not be changed. Furthermore, no proposals to change the test were submitted. Therefore, the committee makes no recommendations to alter or amend the current insanity test.

### Optional Approaches to the Defense of Criminal Insanity

In considering changes to the present defense of legal insanity, five specific approaches have been suggested by various sources or implemented by various jurisdictions. There are: first, procedurally inhibiting the use of the defense by shifting to an accused the burden of persuasion on the issue of lack of criminal responsibility due to mental disease or defect; secondly, modifying the defense by requiring a bifurcated trial at which issues of guilt and criminal responsibility would be separately adjudicated; thirdly, modifying the defense by adding a "guilty but mentally ill" verdict; fourthly, abolishing the defense by precluding evidence of abnormal mental condition from the trial; and fifthly, substituting a rule of diminished capacity which would allow evidence of abnormal mental condition to affect the degree of crime for which an accused could be convicted.

### Affirmative defense

Since lack of criminal responsibility is classified as a "defense", the burden of persuasion rests upon the people to prove criminal responsibility beyond a reasonable doubt. During the trial, a presumption of sanity exists, and it is the defendant who must

generate a reasonable doubt as to its existence. However, once evidence has been introduced that puts the defendant's sanity in doubt, the People have the burden of proving beyond a reasonable doubt that the defendant is sane (Section 16-8-105 (2), C.R.S. 1973).

Constitutionally, a state may decide where to place the burden of persuasion in the defense of lack of criminal responsibility (Leland v. Oregon, 343 U.S. 798 (1952)). In approximately one-half of the states and the District of Columbia, lack of criminal responsibility due to mental disease or defect is an affirmative defense requiring an accused to shoulder the burden of establishing such a defense by a preponderance of the evidence (The Insanity Defense: A Blueprint for Legislative Reform, Grant Morris, 1975, p. 89-92). The 1965 Report of Governor Love's Committee to Study the Criminal Insanity Laws, page 7, recommended "that the burden of proving insanity, after a defendant has pleaded guilty by reason of insanity, be on the defendant by a preponderance of the evidence.... This change makes for fairness, both for the defendant and the prosecution, and brings into balance the position of the parties before the court". The rationale of the 1965 committee for this recommendation is set forth below:

The reason for the placement of the burden on the defendant is that that is primarily where it belongs. This does in no way lighten the burden on the state to prove each and every material element of the offense beyond a reasonable doubt, and this includes the element of intent, or mens rea. But the sanity of the accused is not an element of the offense. The question of guilt and the question of sanity are two distinct issues. Sanity is not an ingredient of crime. It is a condition precedent to all intelligent action, both beneficent and nefarious. It is a quality of the actor, not an element of the act. It is incumbent upon the state to prove the commission of a crime and in doing so it must prove intent, and this may be shown by circumstances to sustain inferences of malice and such emotions as the particular crime may include. But sanity is not one of these inferences. It is a preexisting fact of which there is a presumption. It may be contended that criminal intent, malice, and premeditation are facts to be proven by the state, that these cannot exist in an insane mind, therefore sanity must be proved by the state. But these are facts of mental condition and action, and they can only be proven by inference from material facts, circumstances and acts. It is incumbent, therefore, upon the prosecution to prove such material facts, circumstances and acts as would compel the inference of guilty in a sane person; and this is the limit of the state's burden. As to these and others, the burden is on the state and it never shifts. But as to the issue of insanity the burden never attaches to the state. The plea of not guilty by itself

does not put the issue of insanity of the accused in issue; it must be raised by special plea, and as such the defendant is the moving party and, hence, should sustain the burden.

Another argument against the placement of the burden of proof on the defendant is that the state has funds to provide for psychiatric examinations, whereas the defendant, if he be indigent, would not have such funds, and therefore the defendant is placed at a disadvantage. This attack is immediately dissipated, for another section of the statute provides that mental examinations shall be made available to the accused. The present statute also provides the method and places of examination, as well as providing that a physician of the defendant's own choosing may be furnished the accused at the expense of the state, upon a showing of indigency.

There are special and compelling circumstances in Colorado that gave rise to the committee's considered judgment in placing the burden of proving insanity on the defendant. Colorado appears to be singular among states in that under the present statute and existing law the defendant, once having entered the plea, can thereafter refuse to subject himself to observation and examination.

Reference is made to the case of Daniel Lee French v. District Court, et al, 384 P.2d. 268, August 6, 1963. In that case French, charged with rape, entered a plea of not guilty by reason of insanity, and was thereafter committed to the Colorado Psychopathic Hospital for observation as required by the statute. The examining psychiatrists reported to the trial court that French refused to cooperate with them and that cooperation would be necessary to determine his mental condition. Later a hearing was had at which the court ordered that French withdraw his plea of insanity or cooperate with the examining psychiatrists, and he was ordered then returned to the hospital for a 30-day period of psychiatric evaluation. The doctors again notified the trial court that French would not cooperate, and after a further continuance for purposes of examination the psychiatrists reported that French refused to cooperate, and with reference to the refusal the report stated: "...of his own volition and he was in my opinion, at the time of my examination, capable of such discussion." Thereupon, the trial court, upon oral motion of the district attorney, ordered the plea of not guilty by reason of insanity stricken and the cause was set for trial on the merits of the plea of not guilty. French sought a writ of prohibition against the trial court requiring him to go to trial without the benefit the plea of

insanity. The Supreme Court of Colorado granted the writ, holding that a person who is accused of crime and who enters a plea of insanity cannot be compelled to be examined, and need not cooperate with persons appointed to examine him, for the reason that to require him to do so would be an infringement of his constitutional right against self incrimination.

In light of that case the posture of the plea of insanity in Colorado is that a defendant may enter a plea, refuse to cooperate or be examined by physicians appointed by the Court, and then after the introduction of any slight evidence of insanity require the state to prove beyond a reasonable doubt that the defendant is sane. Add to this imbalance the right of such defendant to adduce expert psychiatric testimony from physicians of his own choice, the inequities are patent. The state is put at a distinct disadvantage if it is required to prove the defendant's sanity beyond a reasonable doubt. If honest experts cannot agree, does it not follow that lay jurors will certainly have a doubt as to a defendant's sanity? All that the defendant must do is create a doubt in the minds of jurors, and if the prosecution's experts are to be cut off from conducting a complete examination of the defendant, how can the prosecution reasonably be expected to be able to sustain its burden?

It is noted that the section makes reference to the measure or weight of proof necessary, and recommends that the defendant prove his insanity only by a preponderance of the evidence and not beyond a reasonable doubt. The reason is sounded in fairness and equity. The same inequities that exist with reference to making the prosecution prove the defendant's sanity beyond a reasonable doubt would apply if the defendant were required to prove his insanity by the same measure of proof.

Requiring the defendant to prove his insanity as proposed by the committee is not a startling innovation in the United States. The practice of requiring a defendant to establish or prove his insanity in a criminal proceeding by a preponderance of evidence has been recognized by numerous states, namely, Arkansas, California, Georgia, Iowa, Kentucky, Louisiana, Maine, Minnesota, Missouri, Montana, Nevada, New Jersey, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Washington, and West Virginia. Delaware, North Carolina, and Virginia require the defendant to prove his insanity "to the satisfaction of the jury." See generally Weihofen, *Mental Disorder as a Criminal Defense*, 241-72 (1954), and see *Journal of the Missouri Bar*, December, 1963, p. 709.

## Bifurcated Trial

Present Colorado law provides that the issues raised by the plea of not guilty by reason of insanity shall be tried separately to different juries, and the sanity of the defendant shall be tried first (Section 16-8-104, C.R.S. 1973). The states of California, Pennsylvania, and Wisconsin are among the states which use the bifurcated trial approach and which require two separate trials -- one to determine guilt, the second to determine mental capacity. During the first stage of the trial, it is determined whether an accused committed the crime charged and also whether he possessed the requisite mental capacity for the commission of specific intent offenses. Accordingly, psychiatric evidence relevant to the issue of capacity to commit specific intent offenses is admissible at this trial stage. During the second stage of the trial, a formal defense of legal insanity may be raised. If acquitted by reason of insanity, psychiatric hospitalization or outpatient psychiatric treatment follows. It was suggested by several witnesses that Colorado adopt the approach of California.

The California approach has been criticized from several sources. Professors Louisell and Haxard concluded:

The separate trial procedure, as it stands today, results in duplication. The proof admissible to show defendant's mental state at the time of the crime is substantially the same as that admissible to show insanity. No workable rule has been formulated, and probably none can be formulated, that would effectively differentiate between the two types of evidence.

The separate trial procedure was based on an inadequate premise of law. It assumed that the issue of guilt and the issue of mental condition are separable. We submit that reason shows they are not separable, and that experience confirms this conclusion. We, therefore, believe that the separate trial procedure should be abolished. Insanity as a Defense: The Bifurcated Trial, 49 Cal. L. Rev. 805, p. 829-830 (1961).

Professor Morris also observed, "(t)wo governor's commissions have recommended that the California bifurcation statute be repealed as no longer serving a useful purpose". The Insanity Defense: A Blueprint for Legislative Reform, 46 (1975).

## Guilty but Mentally Ill Verdict

Several sources have suggested that the committee recommend the adoption of a "guilty but mentally ill" statute similar to the one in Michigan. Michigan has adopted a statute that provides not only for a defense of legal insanity but also for a defense of "guilty but mentally ill". The latter defense would prevail should the trier of fact find that while the accused was guilty of the offense charged, he was

not legally insane, but was nevertheless mentally ill at the time of the commission of the offense. Such a finding would permit the imposition of any applicable sentence were the accused to have been found guilty. Commitment would be to the Department of Corrections with such evaluation and treatment as psychiatrically indicated to be rendered by either the Department of Corrections or the Department of Mental Health. Authority to release prior to expiration of a sentence is vested in a Board of Parole based upon a report on the condition of the defendant which contains the clinical facts, the diagnosis, the course of treatment, and the prognosis for the remission of symptoms, potential for recidivism and recommendations for future treatment. Treatment may be required as a condition of parole. Should probation in lieu of imprisonment be utilized, a five-year probationary period is required and may not be shortened without receipt and consideration of a forensic psychiatric report by the sentencing court (Michigan Comp. Laws, Section 768-36 (Supp. 1977)).

The decision in People v. McQuillan, 221 N.W.2d. 569 (1974), provided the direct impetus for the enactment of the guilty but mentally ill statute. The McQuillan court construed Michigan's automatic commitment statute as requiring a hearing before commitment to determine if one found not guilty by reason of insanity was presently insane. The court also required that hearings be held to determine the present sanity of all those automatically committed prior to the McQuillan decision. Responding to the concern that these hearings were resulting in the release of dangerous people, the Michigan legislature promptly adopted the guilty but mentally ill statute.

This statute has been criticized because:

A GBMI (guilty but mentally ill) verdict is nearly identical in its consequences to a verdict of "guilty". The confusion stemming from the overlap between the statutory definitions of "mental illness" and "legal insanity" and the tendency of jurors to compromise are certain to cause some legally insane defendants to be found GBMI. Consequently, the GBMI statute will deprive these legally insane defendants not only of their statutory rights but also of their colorable Constitutional right to acquittal. For this reason, the GBMI statute violates the due process clause of the United States Constitution". See Note, The Constitutionality of Michigan's Guilty But Mentally Ill Verdict, 12 Univ. of Mich. Journal of L. Reform, 189 (1978). (explanation in parenthesis added.)

### Abolishing The Defense

Increasingly, there is debate concerning the idea of completely eliminating the insanity defense. See "The End of Insanity", 19 Washburn Law Journal 24; "Abolish the Insanity Defense -- Why Not?", 72 Yale Law Journal 853 (1963); and "Abolishing the Insanity Defense:

The Most Significant Feature of the Administration's Proposed Criminal Code -- An Essay, 9 Crim. Law Bull. 434 (1973). In general, the proponents of abolition of the insanity defense base their arguments on sociological, penological, humanitarian, and moral grounds. While many of these theories appear to be sound in their own fields, they do little to solve the practical legal problems involved in attempting to draft a law that would withstand constitutional scrutiny.

The United States Supreme Court has apparently never clearly decided whether an insanity defense is constitutionally mandated. Several state supreme courts which have considered the issue, however, have held that it would be unconstitutional to abolish the insanity defense (State v. Strasburg, 60 Wash. 106, 110 P. 1021 (1910) and Sinclair v. State, 161 Miss. 142, 132 So. 581 (1931)). It has been argued that the insanity defense is so basic to the American legal system and has become so fundamental to the American criminal law, that it falls under the protection of rights guaranteed by the Fourteenth Amendment.

A further argument supporting the view that the insanity defense is of constitutional magnitude is that legally insane persons are incapable of possessing the criminal intent (referred to by the court as "mens rea") constitutionally essential to a finding of guilt. However, courts disagree as to whether insanity and mens rea can co-exist. In Davis v. United States, 160 U.S. 469 (1895), the court concluded that insanity and mens rea cannot co-exist, while Leland v. Oregon, 343 U.S. 790 (1952), concluded that mens rea and insanity can co-exist. It is further argued that if mens rea is a constitutionally required element of criminal offenses, then a legally insane defendant has a constitutional right to be acquitted.

### Diminished Capacity

Under a rule of diminished capacity, evidence of abnormal mental condition would be admissible to affect the degree of crime for which an accused could be convicted. Specifically, those offenses requiring intent or knowledge could be reduced to lesser included offenses requiring only reckless or criminal negligence. This approach is generally conceived as a means of reducing the level of criminality, rather than as a complete defense.

Under the diminished capacity proposal the insanity defense and its traditional tests would no longer be appropriate. Any relevant evidence of mental defect or disease on the issue of criminal intent would be permitted. Since "insanity" would no longer be recognized in the law, there could be no such verdict as "not guilty by reason of insanity", and thus no triggering of the mechanisms the law has developed for dealing with such persons.

The diminished capacity rule is judicially recognized in various forms in twenty-one states, including Colorado, and in the District of Columbia (Schwickrath v. People, 159 Colo. 390, 411 P.2d 961



(1966) and Becksted v. People, 133 Colo. 72,292 P.2d 189 (1956).

A February 17, 1978 Report to Governor Hugh L. Carey on the Insanity Defense in New York, prepared by the Department of Mental Hygiene, recommended the adoption of a rule of diminished capacity in New York. The recommended rule is set forth below:

SECTION A. Effect of Mental Disease or Defect Upon Liability. Mental disease or defect is not, as such, a defense to a criminal charge; but in any prosecution for an offense, evidence of mental disease or defect of the defendant may be offered by the defendant whenever such evidence is relevant to negative an element of the crime charged requiring the defendant to have acted intentionally or knowingly.

SECTION B. Notice of Intent to Rely Upon Evidence of Mental Disease or Defect. 1. If a defendant intends to offer evidence of mental disease or defect pursuant to section 15.30 of the penal law, he shall serve upon the people and file with the court a written notice of such intention. Such notice must be served and filed before trial and not more than thirty days after entry of the plea of not guilty to the indictment. In the interest of justice and for good cause shown, however, the court may permit such service and filing to be made at any later time prior to the close of the evidence.

2. After receiving such notice, the court, upon motion of the people, shall order the defendant to submit to a psychiatric examination by a psychiatrist designated for this purpose in the order of the court. No statement made by the defendant in the course of any examination provided for by this section, whether the examination shall be with or without the consent of the defendant, shall be admitted in evidence against the defendant on the issue of guilt in any criminal proceeding.

3. If there is a failure to give notice when required by subdivision one of this section or to submit to an examination when ordered under subdivision two of this section, the court may exclude the testimony of any expert witness offered by the defendant on the issue of his mental disease or defect.

SECTION C. Rules of Evidence; Psychiatric Testimony Concerning Effect of Mental Disease or Defect Upon Liability. 1. When, in connection with evidence of mental disease or defect pursuant to section 15.30 of the penal law, a psychiatrist who has examined the defendant testifies at a trial concerning the defendant's mental condition at the time of the conduct

charged to be a crime, he must be permitted to testify as to the nature of the psychiatric examination, to describe the defendant's mental condition and symptoms, his pathological beliefs and motivations, if he was thus afflicted, and to explain how these influenced or could have influenced his behavior, particularly his mental capacity intentionally or knowingly to commit the crime charged. A psychiatrist must be permitted to make any explanation reasonably serving to clarify his diagnosis and opinion and he may be cross examined as to any matter bearing on his competency or credibility or the reliability or the validity of his diagnosis or opinion.

2. For a period of two years following the effective date of this section, the commissioner of mental health shall systematically assess the reliability and validity of psychiatric diagnoses and opinions received into evidence pursuant to subdivision one of this section and periodically report to the legislature his findings and recommendations. For this purpose, within thirty days following a verdict in a criminal action in which psychiatric testimony as permitted in subdivision one is presented, regardless of the verdict, the court clerk shall direct the court stenographer, and the court stenographer shall make and certify a typewritten transcript of all psychiatric testimony presented and shall deliver the transcript to the commissioner of mental health. The expense of such transcripts shall be a state charge.

#### Suggested Changes to the Criminal Insanity Law and Committee Recommendations

Several changes to the criminal insanity law were proposed by witnesses appearing before the committee and by various studies on the subject. This portion of the report briefly outlines these suggested changes and indicates whether the committee acted favorably on the recommendations.

#### Procedures Following Finding of Not Guilty by Reason of Insanity.

If the trier of fact finds that the defendant is not guilty by reason of insanity, the court shall commit the defendant to the custody of the Department of Institutions until such time as he is found eligible for release (section 16-8-105 (4), C.R.S. 1973). The statutes do not require that a minimum hospitalization term or accountability period be imposed by the court. Several recommendations were received by the committee to amend the statutes to require some type of accountability period.

Accountability period. It was suggested that some type of

accountability period or minimum term of treatment be imposed by the court when the person is committed to the state hospital. It was suggested that perhaps this minimum term could be tied to the type of crime for which the person was charged or the degree of harm resulting from the criminal act. The committee took no action on this suggestion.

Hearing to determine present dangerousness. It was suggested that the statute should be amended to require another hearing before commitment to determine if one found not guilty by reason of insanity is presently insane, or whether he then meets the criteria for release (present dangerousness). If the individual is determined to be dangerous, then he would be committed to the state hospital. If the individual is found not to be presently dangerous, then he would be released.

This suggestion was considered and rejected by the committee.

### Release Procedures

Several changes to the present statute concerning applicable procedures on the release of persons who have been committed following a not guilty by reason of insanity plea were suggested by witnesses appearing before the committee, by various study groups, and by written correspondence. These recommended changes are briefly summarized below:

180-day rule. Present law provides that "(t)he court shall order a release hearing upon the contested report of the chief officer of the institution in which the defendant is committed, . . . or upon motion of the defendant made after one hundred eighty days following the date of the commitment order." This language was adopted through the enactment of Senate Bill 44 in 1972. The 180-day rule was recommended in the "Report of Governor Love's Committee to study the Criminal Insanity Laws" in 1965. Senate Bill 44, as introduced, contained the following language: "Unless the court for good cause shown permits, the defendant is not entitled on his own motion to a subsequent hearing for at least one year." This language was amended out of the bill by the House on second reading.

It was pointed out to the committee that theoretically a committed person could get two hearings per year and that this may be a very costly process. It was suggested that the committee may wish to examine the necessity for the 180-day rule and to adopt language similar to that amended out of Senate Bill 44 in 1972. This suggestion was approved by the committee and the amended language is contained in Bill 8.

Release hearings. In correspondence to the committee it was pointed out that since the statute does not give the court any authority to summarily deny the defendant's request for release hearing, in many cases, despite the fact that all psychiatrists have determined

that the defendant is dangerous to himself, to others, or to the community in the reasonably foreseeable future, the court is compelled to conduct a jury trial. This is required even though the defendant has no evidence he will be able to produce justifying his being released from the hospital. This means a jury of twelve must be selected (an act requiring at least thirty to forty jurors to appear for the trial) and a trial conducted. Such a trial normally takes two to three days and involves not only the judge, but also members of the district attorney's staff and a member of the public defender's office. It was recommended that the statute be amended to give the court some discretion to summarily deny the defendant's request for the hearing. Specifically, it was recommended that Section 16-8-115 (2), C.R.S. 1973, be amended by adding the following language: "If any of said reports or studies indicate the defendant is eligible for release, the court shall set the matter for release hearing. If, however, none of said reports so indicate, the defendant's request for hearing may be summarily denied." No action was taken by the committee on this recommendation.

It was also suggested that the following language in Section 16-8-115 (2), C.R.S. 1973, be deleted: "or on demand by the defendant to a jury of not to exceed twelve persons." This would do away with a jury trial in release hearings. The "Report of Governor Love's Committee to Study the Criminal Insanity Laws" in 1965 also recommended that the issue of eligibility for release be tried by the court without a jury. The Report states that:

the issue of eligibility for release is properly one for the court and not the jury. The judge can best evaluate the evidence to determine whether the best interests of both society and the defendant are being served. Also, the issue will not be submerged in the emotion and passion of jurors who might be subjected to a climate of current reign of crime in the community. Jurors may be so overcautious about the public's interests that only a relatively few defendants may be given an opportunity to reclaim themselves in society.

No action was taken by the committee on this subject.

Test for release. It was suggested to the committee that the test for release may be too stringent. The test for determination of a defendant's sanity for release from commitment, or his eligibility for conditional release, is contained in Section 16-8-120, C.R.S. 1973, and reads as follows: "That the defendant has no abnormal mental condition which would be likely to cause him to be dangerous either to himself or to others or to the community in the reasonably foreseeable future." This test for release was proposed by the "Report of Governor Love's Committee to Study the Criminal Insanity Laws" in 1965. The report states: "This test is primarily designed for the protection of the public so that a person who may be legally sane under the right-wrong test but nevertheless is dangerous shall not be released and thereby be a potential danger to members of the commu-

nity."

The report also states that:

in the consideration of release from a mental institution emphasis must be placed on the objectives sought to be accomplished. They are twofold; the best interests of both the individual and of society must be served. It is not conducive to the best interests of the defendant that he be released if he is dangerous or potentially dangerous. Such an individual wants and needs help. Giving him freedom from custodial care and treatment, even though the same be confining, serves neither his purpose or desires. On the other hand, the best interests of the community certainly are not served by placing within it a potential danger. Common sense dictates the conclusion.

The committee did not approve any changes to the present statutory test for release from commitment.

Section 16-8-120, C.R.S. 1973, provides two different tests for release. As to any person charged with any crime committed on or after June 2, 1965, the test for determination of a defendant's sanity for release from commitment, or his eligibility for conditional release, is the test set forth above (danger to himself or to others, or to the community in the reasonably foreseeable future). As to any person charged with any crime allegedly committed prior to June 2, 1965, the test for determination of a defendant's sanity for release from commitment, or his eligibility for conditional release, shall be the test provided by law at the time of the alleged crime to determine the sanity or insanity of such defendant (the M'Naghten test). It was suggested that perhaps the pre-1965 commitments should be judged by the post-1965 standard and that the current release standard should apply to those committed prior to 1965. The committee makes no recommendations on this suggestion.

Burden of proof. There is a difference in the burden of proof required for commitment and release. When a plea of not guilty by reason of insanity is entered, the state has the burden of proving sanity "beyond a reasonable doubt". If the question of defendant's eligibility for release is contested, the burden of submitting evidence and the burden of proof "by a preponderance of evidence" shall be upon the party contesting the report of the chief officer of the institution having custody of the defendant. It was suggested that the burden of proof in the release procedure should be "beyond a reasonable doubt" rather than by a "preponderance of the evidence." The committee makes no recommendations on this suggestion.

Criminal or civil rules of discovery. Section 16-8-115, C.R.S. 1973, does not state that the release hearing shall be considered a civil proceeding. The Supreme Court has held that where a proceeding is an inquiry into the mental condition of a defendant, who has been

committed under a plea of not guilty by reason of insanity, the proceeding is not an adversary proceeding (which is controlled by the rules of civil procedure) in the usual sense of a case (People v. District Court, 557 P.2d 414 (1976)). In view of the detailed procedures prescribed by the statute, the release proceedings are special statutory proceedings governed by Rule 81 (a), C.R.C.P. Based on sections 16-8-115, 16-8-116, and 16-8-117, C.R.S. 1973, the participants in release proceedings do not have the broad right of discovery as provided in the rules of civil procedure. It was suggested that perhaps the statute needs to clarify whether the criminal rules of discovery or the civil rules of discovery apply in release hearings. The committee makes no recommendations on this suggestion, but suggests that the Supreme Court examine this procedural problem.

Standard on peremptory challenges. When a demand for a jury trial in a release proceeding is made, the court must empanel a jury. Apparently, there is some confusion in the courts as to how many peremptory challenges each side is entitled. Rule 47, C.R.C.P., provides that each side shall be entitled to four peremptory challenges. Rule 24, Crim. P., provides that the state and the defendant shall each be entitled to ten peremptory challenges. It was suggested that some clarification in the statute may be necessary as to what standards should be used concerning peremptory challenges. Others suggested this confusion could be corrected by clarification of the rules of procedure. The committee recommends that the Supreme Court examine this subject and determine if a change in the rules is appropriate.

### Conditional release

Section 16-8-115 (3), C.R.S. 1973, provides that "(i)f the court or jury finds the defendant eligible for release, the court may impose such terms and conditions as the court determines are in the best interests of the defendant and the community, and the jury shall be so instructed." Thus, the jury's function ends with its determination whether or not the defendant is eligible for release. The decision whether to impose conditions on release is the courts (People v. Giles, 557 P. 2d 408 (1976).) The statute is not specific as to what conditions can be imposed, what follow-up mechanisms the court may use, and what recourse the court may have if the conditions imposed are not met. It was suggested that perhaps additional language is necessary to clarify these concerns. In regards to follow-up procedures for those who have been conditionally released, it was suggested that something like a probation or parole system could be established to require periodic reports by those conditionally released to the clinics and centers.

On July 14, 1980, the Department of Institutions, Division of Mental Health, issued new procedures for meeting its statutory responsibilities for persons who had been committed pursuant to a verdict of not guilty by reason of insanity and who had subsequently been conditionally released from Colorado State Hospital (CSH) following treatment. The procedures delineate the responsibilities of CSH, Fort

Logan Mental Health Center (FLMHC), and the state's twenty community mental health centers relative to a patient who is conditionally released by the court. Basically, the new procedures establish a mechanism whereby the superintendent of CSH will continue to be responsible to the court for the conditionally released patient. Fort Logan Mental Health Center will serve a liaison role between the hospital and the Denver area community mental health centers. Colorado's twenty community mental health centers will appoint a coordinator to work with the hospital and Fort Logan in providing mental health services to the conditionally released patient (as stipulated by the courts) and will now provide monthly reports on these patients.

Under these new procedures, if the person refuses to meet or is unable to meet the conditions of release, or again comes in violation of law, or again becomes mentally ill, the following procedures will be followed:

-- If the person refuses to meet the conditions of release which were judicially determined, steps shall be taken to notify the committing court of possible violation of the release conditions. The community mental health center coordinator shall notify the Forensic Aftercare Service Director of the patient's failure to comply with release conditions within five working days. The CSH Forensic Aftercare Services Director will then notify the CSH Superintendent, who will then notify the committing court.

-- If the client is charged with a violation of the law, the CMHC should work with local law enforcement officials, treating the situation as a new, independent case. If the person has been conditionally released or discharged, it may not always be possible to return the person to CSH under the original order of hospitalization. If the new violation is outside the jurisdiction of the original committing court, the original committing court will be notified.

-- If the person again becomes mentally ill, the same resources and services available to any other citizen will be utilized, as outlined in the current mental health law, Section 27-10-101 et seq, C.R.S. 1973.

A copy of these procedures are available in the Legislative Council office or from the Division of Mental Health.

The committee considered and adopted Bill 9 which relates to conditional release from confinement after a verdict of not guilty by reason of insanity. The bill provides for conditional release and establishes procedures to revoke such release when the person has violated one or more conditions thereof. The procedure is basically as follows:

-- Upon an affidavit filed with the court which relates sufficient facts to establish that the conditions to release have been violated, the court may order the person to be taken into custody and placed in a seventy-two hour treatment facility.

-- Within seventy-two hours after the defendant is taken into custody, he shall be brought before the court for a preliminary hearing to determine if probable cause exists to believe that a condition of release has been violated. If the court finds that probable cause does not exist, it shall dismiss the petition and reinstate the original order of conditional release. If the court finds that probable cause exists, it shall temporarily revoke the conditional release and recommit the defendant.

-- After a preliminary hearing resulting in the temporary revocation, the court shall hold a final hearing on the petition. If the court finds by a preponderance of the evidence that the defendant has violated one or more conditions of his release, it shall enter a final order revoking the conditional release and recommit the defendant. At any time thereafter, the defendant may be afforded a release hearing as provided in section 16-8-115, C.R.S. 1973. If the court does not find by a preponderance of the evidence that the defendant has violated one or more conditions of his release, it shall dismiss the petition.

-- The bill provides that any terms or conditions of release shall automatically expire within five years unless the court sooner holds a release hearing as provided by law.

#### Patient privilege.

It was reported to the committee that when a release report is contested by the district attorney, it is difficult for the district attorney to secure the records of the institution upon which the release decision was made because of the physician-patient privilege. The privilege prevents the physician from testifying, without the consent of the patient, as to any information acquired in attending the patient. It was suggested that the statute be amended to provide that the privilege will not apply in a release hearing situation. The committee makes no recommendation on this suggestion.

#### Proposed Revisions to the Incompetent to Proceed Statute

In the June 12, 1980, report by the Department of Institutions entitled "Violence and the Mentally Ill: A Response to an Executive Order by Governor Lamm of Colorado", at page 36, it is observed that, in the area of incompetence to stand trial, Colorado has not made the adjustments in its statutes which the Jackson v. Indiana decision has stimulated in other states. The Jackson v. Indiana decision is found at 406 U.S. 715, 32 L.Ed. 2d 435, 92 S. Ct. 1845 (June 1972).

The report notes that Colorado State Hospital has tried to implement practices consistent with the principles outlined in that decision. These principles include:

- definite time limits on the period in which



evaluation must take place;

- a time limit on the period of treatment;
- the feasibility of provisional trials in which innocent only trials would be held for incompetent defendants;
- guidelines for the dismissal of criminal charges;
- special features for the trial to minimize the effects of incompetency;
- evaluations during the trial; and
- community based evaluations.

The report states that with such changes there might be less fear of an indefinite and unreviewed stay in a mental hospital. The report also describes the results of research studies which support the need for changes for patients found to be in the "incompetent to stand trial" category. The committee makes no recommendations concerning changes to the incompetent to proceed statute.

## REGULATION OF CONDOMINIUMS AND TIME-SHARING SYSTEMS

### Background

In recent years, several problems involving the sale, ownership, management, and disposition of condominiums and time-sharing arrangements have surfaced in a number of states, including Colorado. Pursuant to Senate Joint Resolution No. 26, the General Assembly directed the Legislative Council to appoint a committee to study these various problems. The Legislative Council assigned this study item to the interim Committee on Judiciary.

### Previous Legislation

Because condominium and time-share ownership is so different in many respects from the normal real estate ownership, Colorado adopted the "Condominium Ownership Act" in 1963 (Article 33 of title 38, C.R.S. 1973). This act officially recognized condominium ownership, established provisions for the assessment of condominiums, and stipulated rules to be followed in the recording of the condominium declaration. In 1975, the act was amended by adding provisions concerning condominium bylaws, records, and liability of owners. The act was again amended in 1977, this time adding provisions on time-share ownership. Provisions on tenant notification of condominium conversion were added in 1979. Also in the 1979 legislative session, House Bill

1310 was introduced which would have enacted the "Colorado Condominium Act"; an act patterned after the "Uniform Condominium Act." The purpose of the act was to establish a comprehensive set of guidelines for condominium regulation and to prevent abuses from occurring. Specifically, the act contained provisions governing the sale, use, management, and termination of condominiums in Colorado, including declarations, bylaws, and plats and plans; provisions for management of the condominiums, including details relating to the owners' organization and responsibilities for upkeep, liabilities, insurance, and assessments; and provisions for the protection of purchasers with respect to public offering statements, time-sharing, conversions, and warranties. House Bill 1310 was defeated in the Senate Judiciary Committee.

### Committee Procedure

The committee devoted a full-day meeting to receiving testimony from representatives of the condominium and time-sharing industry, consumers who have encountered problems with their condominiums and time-sharing units, representatives of the attorney general's office, and representatives of the building and construction industry. In discussions concerning the regulation of condominiums the committee used the engrossed version of House Bill 1310 (1979 Session) as a focal point.

### Issues, Proposals, and Committee Recommendation

#### Condominiums

Many of the problems revealed by testimony involved the failure of the developer or the manager of a condominium complex to perform specified duties. In one situation, the owners' association of a condominium complex was forced to pay for items such as sewer backups, leaking pipes, and street problems. The association argued that the developer should have been required to fix these items. Because the owners must collectively pay for these types of repairs, additional fees must be charged and collected. Additional problems are created when there is no machinery to enforce the levying and collecting of extra assessments.

In addition to the problems that owners' associations have had with developers, it was alleged that companies managing condominium complexes are often remiss in their duty to enforce the provisions of the condominium's declaration and bylaws. This problem is even more significant when the fact that the developer often maintains control of a condominium complex through a management company, for a period of time after the units are sold, is taken into consideration.

Another problem that owners of condominiums are encountering is the lack of a developer disclosure statement containing information on

the development's overall debt along with other important financial data.

In discussing the adequacy of the current condominium law, some committee members pointed out that the current law is silent on many important items, examples being a lack of the timely availability of relevant documents prior to the sale of a condominium and a lack of adequate recourse for buyers should problems later arise. Other committee members voiced the opinion that there was no need for additional legislation in this area, and that the problems brought to the committee's attention could be addressed through the condominium declaration or through existing statutes. Some members of the committee expressed concern that many of the problems arising in other states were occurring in Colorado and that legislation should be enacted to prevent further abuses. Still other members agreed that it was unfair to assume that problems in other states would occur in Colorado and that it had not been sufficiently demonstrated that existing laws and methods would not solve any current problems.

### Time Sharing

Because the concept of time sharing is a relatively new and unique idea, it is important to review what time sharing is and how it works. The following description of time sharing is taken from Changing Times, August 1980, page 27.

There are two basic forms of time sharing: ownership time sharing and nonownership (or right-to-use) time sharing. The major types of ownership time shares are tenancy in common ownership (which is also known as time-span ownership) and interval ownership.

Tenancy in common ownership gives you an undivided interest in the property prorated according to the length of the period you decide to purchase. A separate agreement, which binds all owners, fixes your right to occupy the unit for a specific period each year.

With interval ownership you actually own the unit you select for a specified period each year for a certain number of years (usually the useful life of the building, say 20 to 40 years); after which you and the other time-share owners of your unit become tenants in common.

With ownership arrangements you get a warranty deed and title insurance, and you can sell, lease, lend or bequeath your interest in the unit as long as your agreements allow it. You get some say in how the development is operated and may qualify for a small tax deduction. Prices average about \$4,000 but run to \$13,000 per week and higher. In addition, there are

annual assessments that currently range from \$100 to \$150 per week of ownership. They usually cover management of the property, taxes, upkeep, replacement of furnishings and maid service.

A nonownership time-sharing deal may be structured as a "vacation license," "vacation lease," or "club membership time share." The most prevalent type of nonownership time share is the vacation license, which allows you to use a certain unit for a specific period each year for a stated number of years or for the useful life of the building, after which the property reverts to the developer. To prevent potential problems with securities laws, most developers stipulate in the terms of the license that your rights may not be sold at a profit. Rentals are usually forbidden, too.

Generally, nonownership arrangements cost less and have lower annual assessments than ownership deals.

Both ownership and nonownership forms of time sharing have many variations. Indeed, no two plans are exactly alike.

Time-sharing problems at the Stanley Hotel in Estes Park, Colorado, and units being offered by West Vail Development Corporation in Vail, Colorado, were the developments that were specifically mentioned in testimony before the committee.

In the Stanley Hotel case, an owner of one of the time-sharing units told of high pressure sales techniques, misrepresentations, non-performance of duties by the seller, loss of capital and funds, and loss of exchange privileges. The Stanley Hotel, Inc. has filed for reorganization in bankruptcy court.

In the situation of West Vail Development Corporation, the same type of high pressure sales and misrepresentations were alleged. Other problems included lack of a disclosure statement, the lack of an escrow account, and the failure to complete the unit and complex when promised.

Another spokesperson for a legal firm specializing in time-sharing provided the committee with some of the practical problems involved therein. In terms of managing the time-sharing project, it is impractical to have all owners involved. Representatives will have to be selected, and from among them a board of directors should be appointed, -- a practical way to provide owner input. However, even the owner directors will only be able to devote a minimal amount of time to the complex, thus requiring the employment of a managing agent. An alternative to employing an agent would be to require a certain percentage of the representatives to concur with any action taken by the board. Another problem is the time-share owner who overstays his time in the unit, thus trespassing on the occupancy of

another time-share owner. Related to this is the problem of the time-share owner who leaves the unit damaged. raising the question as to what rights a time-share owner has with respect to another who trespasses or leaves the unit damaged?

Another problem is the valuation of the time-span owners interest in the general common elements in the entire complex in the event of condemnation, destruction, or sale of the entire property.

In a complex, there can be several hundred deeds of trust to record; of this number a significant number will probably be foreclosed. Will the county clerk and recorder be overburdened with these deeds? How much will it cost to record these deeds and foreclose some of the deeds? The same problem arises with the county assessor. He will have to value, assess, and collect real estate and personal property taxes from hundreds of persons in each time-share development. Annexation and zoning regulations are also problem areas. For example, if land owners are required to approve annexation of their property into a municipality, does each unit owner receive a vote? Are time shares "subdivisions" or are they classified as a use right and subject to zoning regulations? Other problems involving sales and marketing commissions, and escrow accounts to insure project completion, were mentioned.

Individuals who testified before the committee, specifically Mr. John Kaufman and Mr. David Tackle, suggested that the committee consider the following remedies to the problems of time-sharing:

- licensing of salesmen;
- holding the developer liable for the representations of his salesmen;
- regulation of marketing and advertising through a state agency;
- prohibiting pre-sales of time-sharing units;
- defining the legal status of purchasers;
- providing for disclosure statements by the developer, including the underlying debt;
- clarifying the type of real estate fee, if any, a purchaser is obtaining;
- establishing escrow accounts using a percentage of the initial builder loan and a percentage of the money that is received as a down payment for the time-share units;
- requiring the builder to have completion bonds;
- providing a legal recourse for consumers;

- clarifying the provisions on exchange programs;
- instituting audits of developers and sellers; and
- providing for civil actions and criminal penalties.

Uniform Real Estate Time Share Act. It was suggested that the committee consider adopting the "Uniform Real Estate Time-share Act" drafted by the National Conference of Commissioners on Uniform State Laws. This proposed act was drafted to promote uniformity in the laws with regards to time sharing, to anticipate future problems, and to deal with problems that currently exist. The following paragraphs contain a description of the act as set forth in the act's prefatory note:

Article I of the Act contains definitions and general provisions applicable throughout the Act. The article includes such matters as status and taxation of time-share estates as distinguished from time-share licenses (sometimes known as "right to use"), unconscionable agreements or terms of contract, and other general matters.

Article II provides for the creation, termination and other incidents of time shares, including information which must be contained or provided for in the governing ("time-share") instrument, allocation of common ("time-share") expenses, and any voting rights and partition. The Article also contains provisions with respect to secured lenders and transfer of licenses.

Article III deals with management of time-share units. If the time shares in a property exceed a specified number, management of the time-share project must be the responsibility of either an association which must be a profit or nonprofit corporation (or an unincorporated association), or a manager. The Article provides broad-ranging powers to the association and covers such matters as tort and contract liability, insurance, assessments for expenses and liens for assessments. Inasmuch as the time-share owners are likely to be numerous and widely dispersed geographically, Article III contains unique provision dealing with "initiative, referendum and recall."

Article IV deals with consumer protection for purchasers of time shares. The Article is very similar to Article IV of UCA (Uniform Condominium Act) and addresses a number of specific abuses that have been experienced in the condominium industry. The Article requires substantial disclosure by developers which must be made available to consumers before transfer of a time share. The Article also requires that, in the event of

a resale of a time share by a time-share owner other than a developer, the seller must provide the purchaser with a resale certificate containing important consumer information.

Article V is an optional article that establishes an administrative agency to supervise developer activities. The Article is so drafted that it may be included as part of the Act in those states where an agency is thought desirable, and deleted from the Act in states that desire to have the Act enforced by private action.

Model time-share ownership act. A spokesperson from the timesharing industry urged the committee to adopt the "Model Time-share Ownership Act" rather than the uniform act. The model act was drafted by the Resort Timesharing Council of the American Land Development Association and the National Association of Real Estate License Law Officials. The model act was purported to be a more reasonable approach to the regulation of timesharing than the uniform act, especially in avoiding or minimizing potential problems and fraudulent sales practices. Some of the key provisions of the model act are outlined below:

-- Local zoning, subdivision, or other ordinances should not be permitted to discriminate against timeshare projects in relation to similar developments offering a different type of ownership.

-- Timesharing should be allowed to be created in existing projects unless it is specifically prohibited in restrictive covenants or other controlling documentation.

-- The existence of fee type offerings and license or right-to-use type offerings should be specifically recognized and individually addressed.

-- Minimum standards should be prescribed for project documentation and contractual arrangements between the developer and purchasers.

-- Minimum standards should be prescribed for the creation and maintenance of management responsibilities.

-- No action for partition by a purchaser should be allowed to be maintained except as expressly permitted by the project documentation.

-- Each purchaser should be provided with a public offering statement which includes disclosure of those relevant facts necessary to enable a purchaser to make an informed decision on the purchase.

-- A mutual right of cancellation of the purchase contract by the developer or the purchaser for a three-day period following delivery of the public offering statement.

-- In order to avoid a duplication of effort by government agencies as well as the developer, a developer who has prepared a public offering statement pursuant to the provisions of the timesharing statute should be exempted from filings with state securities and land sales regulatory agencies; conversely, a developer who has previously registered his project with the state securities agency or state land sales agency and who is distributing a disclosure document approved by one of those agencies should be exempted from the provisions of the timesharing statute.

-- A timeshare developer should be required to make suitable arrangements to protect a purchaser from foreclosure of underlying liens which may affect the interest of a purchaser or which might entirely divest a purchaser of any rights of occupancy.

-- Civil and criminal penalties should be provided for in the event of failure to abide by the act's provisions.

-- A statute of limitations of four years relative to the commencement of a law suit regarding the accuracy of the public offering statement or validity of any contract of purchase should be created.

-- A specific state agency should be designated to bear responsibility for the enforcement and administration of the timesharing statute.

-- All timeshare developers, acquisition agents, sales agents, and managing agents should be required to register with the designated state agency and the public offering statement should be filed with such designated state agency; in addition, acquisition agents, sales agents, and managing agents should be required to post a surety bond prior to commencement of sales activities.

-- The designated state agency, after notice and hearing, should be authorized to suspend a registration in the event of a violation of the timesharing statute.

Committee Recommendation. The committee considered these timeshare problems and proposed solutions. One solution considered by the committee was to prohibit non-fee time sharing ownership (or right-to-use) in Colorado. However, some members of the committee thought that this prohibition would decrease builder and purchaser



flexibility. As in the condominium issue, committee members differed on the necessity for or type of legislation required in the area of time sharing. Thus, no legislative recommendations thereon were made by the committee.

## PUBLICATION PROCESS FOR RULES AND REGULATIONS OF DEPARTMENTS

### Background

The Code of Colorado Regulations (code) and the Colorado Register (register) were authorized by statute in 1977 (House Bill 1623 which enacted section 24-4-103, C.R.S. 1973) and began publication in January, 1978. The code is a twelve volume loose-leaf set containing all of the rules and regulations of the state departments and agencies of state government. The regulations are organized by department and agency and the regulations can be located through a table of contents and a topical index. Each specific set of regulations are prefaced by a title page showing: the administering department or agency; the regulation's title; editor's notes related to its legislative authority, history, and amendments; cross references to relevant attorney general's opinions; and, annotations to judicial opinions. The register, a companion publication to the code, is a monthly update containing new rule changes to the code as well as proposed rule making materials, notices of proposed rulemaking, and a calendar of rulemaking hearings.

The development of the code and register created, for the first time, a central uniform system for the publication and compilation of administrative rules in Colorado. As the official source of state rules, the code makes possible rapid location of up-to-date existing rules for any state agency. The code and register are published privately under a contract supervised by the Secretary of State.

Subscribers. At present, there is one full set of the code in each of the sixty-three counties in the state, twenty-five copies in executive and legislative branch offices and twenty-three copies in district courts. The remainder of the 211 full sets are sold to the public. In addition, there are 169 limited sets (an eight volume set which excludes the regulations governing the Department of Social Services) in distribution.

Pricing. The regular twelve volume set is currently sold for \$482. The limited edition eight volume set of the code is currently sold at \$444. The regular edition of the register is sold for \$257 and the limited edition is sold for \$214. A subscriber can also purchase the rules of an individual department, division, or commission. Information regarding the cost of specific regulations is available from the publisher upon request. The annual cost to the state of maintaining the sets for the executive, legislative, and judicial

branches is approximately \$13,000.

Quantity. The code currently totals approximately 12,000 pages. The total page count by department as of September, 1980, is as follows:

<u>Department</u>	<u>Number of Pages</u>
Department of Administration	188
Department of Revenue	415
Department of Education	382
Department of Natural Resources	1,144
Department of Institutions	110
Department of Highways	136
Department of Regulatory Agencies	1,606
Department of Personnel	137
Department of Law	36
Department of Health	2,071
Department of Labor and Employment	220
Department of Agriculture	570
Department of Local Affairs	77
Office of Planning and Budgeting	95
Additional Agencies	231
Department of Social Services	<u>4,273</u>
Total Code Pages	11,691

The register currently totals an average of approximately 8,500 pages a year. The page counts for 1978 and 1979 (by section of the register) as well as the page count for the nine-month period January through September of 1980 is set forth below.

THE COLORADO REGISTER  
1978-1979  
PAGE COUNTS

1978

<u>Month</u>	<u>Digests</u>	<u>Code Insertions</u>	<u>Proposed Rules</u>	<u>Atty. Gen. Opinions</u>	<u>Total</u>
January	14	1,686	137	120	1,957
February	12	386	236	62	696
March	12	608	305	92	1,017
April	7	112	186	32	337
May	14	446	150	38	648
June	15	622	216	170	1,023
July	35	358	452	66	911

August	14	452	197	140	803
September	21	304	285	76	686
October	12	362	466	68	908
November	11	206	298	58	573
December	<u>13</u>	<u>494</u>	<u>566</u>	<u>100</u>	<u>1,173</u>
TOTALS	180	6,036	3,494	1,022	10,732

1979

January	13	852	230	68	1,163
February	16	758	672	76	1,522
March	12	950	42	42	1,046
April	12	424	110	56	602
May	8	552	56	60	676
June	12	400	88	62	562
July	12	260	100	64	436
August	14	922	84	102	1,122
September	14	774	86	74	948
October	14	340	170	50	574
November	<u>16</u>	<u>552</u>	<u>102</u>	<u>40</u>	<u>710</u>
TOTALS	143	6,784	1,740	694	9,361

1980  
Nine-month Period

January	9	533	134	44	720
February	10	675	41	96	822
March	9	479	41	43	572
April	6	299	170	47	522
May	9	368	84	54	515
June	11	410	38	69	528
July	7	486	29	67	589
August	8	643	38	54	743
September	<u>7</u>	<u>547</u>	<u>212</u>	<u>49</u>	<u>813</u>
TOTALS	76	4,440	787	521	5,824

Issues and Committee Recommendations

Several issues and problems concerning the publication of rules and regulations in the code and register were brought to the committee's attention. Some of the problems require legislative action to resolve and some of the problems can be dwelt with by administrative action. This part of the report outlines the major problems discussed by the committee, the solutions to the problem which were proposed,

and recommendations approved by the committee.

### Availability of Rules

At the time the code and register were authorized by the legislature in 1977, it was anticipated that the codification and availability of the rules to the state and the public would be accompanied by a reduction in agencies' costs for maintaining internal publishing and printing requirements for regulations. Some agencies have eliminated duplicative systems and now rely entirely on the code system. Other agencies, however, have not reduced or eliminated their internal distribution systems and continue to duplicate the code for their individual agency.

Increase state purchase. One of the major reasons given for the failure of some state agencies to use the code is that it is often unknown and unavailable within state agency offices. As noted above, only twenty-five sets of the code are presently in state offices. By way of comparison, over 2,400 sets of the Colorado Revised Statutes are distributed to state government offices. Yet, in many instances, administrative rules govern the day-to-day conduct of agencies more than the statutes. In order to effectively make the code and register available to state agencies and thereby establish conditions under which agencies can fully utilize and rely on such rules, it was proposed that the state increase the purchase of individual volumes of the code, together with an annual subscription to the register for regular updating of each volume. The increase should provide sufficient copies to be more readily available to state officials in all functional units of each administrative department. These volumes would be limited to rules of the major departments concerned (not the full twelve volume set). The number of sets for each department will vary based on departmental organization and need, but it was recommended that a total of 350 sets be purchased and distributed initially. The one time cost for acquisition of the 350 sets will depend upon the final selected distribution (how many each department or agency is to receive) but should not exceed \$35,000. The first year subscription to the register for these sets would also cost approximately \$35,000. It was suggested that each agency receiving a departmental volume of the code rules be directed to include the annual update costs for these volumes (the register) in its annual budget request in future years. It was suggested that this proposal would significantly improve the efficiency and consistency of state government, and should permit reductions in some current agency publishing expenditures which may far exceed the cost of these additional volumes.

The committee concluded that the proposal should be directed to the Joint Budget Committee since that committee is better equipped to examine individual agency budgets, the amounts which are spent on agency printing of rules and regulations, and to make the determination whether the proposal would result in more efficiency and save the state money. Therefore, the committee makes no specific recommenda-

tions on the proposal.

Prohibition of duplicative printing. Testimony before the committee indicated that some state agencies are duplicating their in-house agency rules for distribution within the agency and to other persons upon request. In several instances the rules that were duplicated for distribution were not the correct up-to-date version of the rules contained in the code. Thus, agency personnel and others may be relying upon the wrong or outdated version of the rules. In order to correct this situation, it was proposed that the statute be amended to prohibit agencies from duplicating any copies of rules for distribution, unless the rules are in the form in which such rules appear in the code. This amendment would make the code the sole official published form for such material; any rule not in such form would not be the official version, should be easily identifiable, and should not be relied upon. The effect of the proposed amendment is to prohibit agencies from duplicating their unofficial rules for distribution. The committee adopted the proposed amendment and it is included in Bill 10 which the committee recommends for approval by the General Assembly.

Appropriation for supplying codes to counties. Each year since the code and register were created and published, the General Assembly has appropriated moneys to purchase forty-eight sets for the executive, legislative, and judicial branches and sixty-three sets for each of the sixty-three counties of the state. These appropriations have been added to the long bill in prior years. In 1980, the Joint Budget Committee included the amount of \$12,185 for the forty-eight sets for the executive, legislative and judicial departments; however, this did not include the amount of \$15,750 for the sixty-three counties.

Since it was not now possible to include this additional amount, it will be necessary for each county to pay for its own copy of the register in order to have each set of the code up-to-date. If any county fails to so subscribe, the entire code in that county will be obsolete and of little value. It was proposed that a bill be enacted to provide that the General Assembly will appropriate annually sufficient moneys for the annual subscription for the forty-eight state subscriptions and the sixty-three county subscriptions. This proposal was adopted by the committee and is included in Bill 10 which the committee recommends for approval by the General Assembly. The committee also recommends Bill 11 which is a supplemental appropriation of \$15,750 to pay for updating the sets in the sixty-three counties.

#### Format of Rules

When the register was first established, it was anticipated that the total page count would approximate 3,000 pages a year. The average page count is now 8,500 per year. Several unanticipated developments have caused the page count to exceed the anticipated count and these developments were reviewed by the committee. Several

other issues concerning the format of the code and register were reviewed by the committee.

Publication of full text of proposed rules. Present law permits agencies enacting, amending or rescinding administrative rules the option of publishing (1) a notice and summary of proposed rulemaking, or (2) a notice with the full text of the proposed rule. Actual practice varies by agency with some providing summaries and others providing full text. It was suggested to the committee that it is not necessary to publish the full text of the proposed rule and that the publication of the full text significantly adds to the bulk and cost of the register. It was proposed that the procedure should be standardized so that all proposed rulemaking actions be announced in the register on a standard form, providing the information required by the statute including a summary of the proposed rule or rule change. The standard form would include a clear statement of the availability of the full text, as well as a clearly identified responsible individual within the agency to contact for further information.

In order to assure ready availability of the full text of proposed rules the publisher would have available, for a stated period of time, and would promptly mail to any subscriber so requesting, the full text of the proposed rule after publication of the notice. In addition, the publisher would provide copies of the proposed rules to the agency or to persons referred by the agency at standard copying costs. If this latter procedure is adopted, the notice will include a statement indicating how to obtain copies of the full text of proposed rules. It was suggested that this proposal will standardize procedures, reduce costs, improve the readability and usefulness of the register, and reduce its bulk.

Annotations. Present law (Section 24-4-103 (11) (i), C.R.S. 1973) provides that the code shall "... contain only such notices, proposed rules, adopted rules, opinions, and other relevant information and materials as are filed pursuant to law with the secretary of state". Section 24-4-103 (11) (a), C.R.S. 1973, further provides that the code and register are established "... for the publication of notices of rulemaking, proposed rules, attorney general's opinions, and adopted rules". Questions have been raised in the past as to whether or not the findings and recommendations of the Legal Services Committee of the General Assembly should be included in the annotation page of the code. A December 6, 1979, attorney general's opinion concluded that the Secretary of State is not required to transmit for publication the findings or opinions of the Legal Services Committee, or any legislative committee, if such opinions pertain to rules, since the findings of the committee do not fall within any of the items listed in Section 24-4-103 (11) (i), C.R.S. 1973. They are neither notices, proposed rules, adopted rules nor opinions. Further, since the committee's recommendations are not required by law to be filed with the Secretary of State, the recommendations do not fall within the category of "other relevant information and materials as are filed pursuant to law with the secretary of state".

The committee concluded that the recommendations of the Legal Services Committee should be published in the annotations (or the editor's page) since this gives notice of the action of the legislative committee empowered to review rules and regulations. The committee therefor recommends an amendment to Section 24-4-103 (11) (a), C.R.S. 1973, to provide that the code shall contain, in addition to rules and regulations, notices of rule-making, and attorney general's opinions, recommendations of the Legal Services Committee which relate to or affect such rules and regulations, and any other items which, in the opinion of the editor, are relevant to such rules and regulations. This recommendation is contained in Bill 10.

## DOMESTIC ABUSE

### Background

The interim Committee on Judiciary received testimony from various groups and individuals on the growing concern about the incidence of domestic violence occurring in the state of Colorado and throughout the nation. Initially, testimony revealed that it is extremely difficult to determine the actual magnitude of the problem of domestic abuse because few such statistics are kept by the police, governmental agencies, or mental health centers. Certain studies were cited in order to give the committee some idea of the scope of the problem. According to a Federal Bureau of Investigation report completed in 1976, the most frequently occurring crime was that of assault on a woman. A 1978 report issued by the United States Civil Rights Commission indicated that there are approximately 1.8 million domestic assaults per year and that the number could well be twice as large because of the lack of reporting of domestic assault cases. According to a study conducted by the Denver Police Department in 1978, a total of 14,405 family disputes were reported in a six-month period of that year. Of these 14,405 disputes, 6,700 involved physical violence against women in their own home. Another 1978 study by the National Technical Assistance Center on Domestic Violence estimated that 102 domestic assaults against women occur each day in the state of Colorado. A study conducted in 1977 showed that in El Paso County, 367 domestic assault cases were filed, with eighty percent of these cases involving physical injury. Further statistics were cited in which the community mental health centers in Delta, Gunnison, Logan, Mesa, and Routt counties reported that fifty percent of their cases involved domestic violence. In the summer of 1978, three facilities for the care of victims of domestic abuse (shelters) reported that they had turned away more than 2,000 persons seeking assistance. A study by the Denver Research Institute in Craig, Colorado, showed that family violence complaints had increased 350 percent between 1973 and 1976.

Additional testimony analyzed the impact domestic assault cases have on the police. A recent study in Kansas City found that eighty-five percent of the calls that the police received involved some type

of domestic disturbance. In testimony presented by the Denver Police Department, it was noted that eighty percent of the "street time" spent by the Denver police involves domestic disputes. The Denver Police Department carried out a study in 1975 in order to ascertain the time and money that is spent on domestic violence cases. From July through December of 1975, 6,405 calls were received by the Denver police concerning family disturbances. It is estimated that this total has at least doubled in 1980.

Various witnesses before the committee emphasized that there is no single, identifiable type of person who is abused. Domestically abused persons can be found in all age groups, income groups, educational levels, and ethnic and cultural backgrounds. The same lack of identifiable characteristics is true of abusers. However, studies tend to indicate that the abuser usually has grown up in a family where domestic violence was prevalent. Battering becomes a generational inheritance in which children of persons who demonstrate family violence become batterers. One characteristic that is found in homes where domestic abuse occurs is the difficulty in communications between the spouses. Also, once abuse has taken place, a tremendous stigma becomes attached to both parties leading to individual isolation and even greater difficulties in communicating.

#### Committee Procedure

Various alternatives for dealing with the domestic abuse problem in Colorado were presented for the committee's consideration. Suggestions were made to require agencies who provide services to victims of domestic violence to keep statistics on battered women and their families. In addition, it was suggested that police departments should keep separate reports and statistics on domestic assaults and family disturbances. The reasons for the previous suggestions are twofold: First, statistics need to be accumulated in order to gain an accurate picture of the magnitude of the problem; secondly, statistics on battered women and their children can provide information on the level and type of services that are needed in this area, and the amount of funding involved. Another recommendation was the need to initiate and fund specific programs and shelters for meeting the needs of the victims of domestic abuse. It was also proposed that the committee consider strengthening civil and criminal statutes such as temporary restraining orders, broadening the powers of the police in domestic disturbance cases, and making domestic assault a separate crime. Regarding the last suggestion, the committee concluded that the current statutes on assault were sufficient to cover domestic abuse cases. The committee compared Florida's law on the issuance of temporary restraining orders with Colorado's law, and concluded that no changes were necessary regarding this matter.

The committee reviewed a comprehensive "Domestic Abuse Act" which was prepared by the Colorado Coalition for Domestic Violence Legislation. The central purpose of this proposed act is to provide funding for domestic abuse programs. Under the proposed act, the



executive director of the state Department of Social Services and a Council on Domestic Abuse which would be created within the Department of Social Services would be responsible for carrying out the provisions of the act. The Council on Domestic Abuse would be created to review and approve funding to various domestic abuse programs, provide an organized method of citizen participation in reviewing and planning for the prevention of domestic abuse, and assist victims of abuse. The executive director of the Department of Social Services, who would be the chief administrator under the "Domestic Abuse Act", would be charged with receiving applications for the development and establishment of domestic abuse programs and recommending appropriate courses of action to the council. With council approval the executive director could approve or reject applications for funding, and, if approved, distribute money. The funding for the act would come from two sources -- a special assessment on the marriage license fee and general fund money appropriated by the General Assembly. Also under the proposed act, a program would be established which would enable the Department of Social Services to purchase domestic abuse services. Certain criteria are outlined in the proposed act which would have to be followed by any domestic abuse program seeking to obtain funds. Any domestic abuse program receiving money under the act would be required to file a report with the council on the operation of their program. The council, in turn, would be required to file reports with the governor and the Joint Budget Committee on the status of the various domestic abuse programs funded under the act.

#### Committee Recommendation

Because of the difficulty in assessing the exact scope of the problem and in determining the exact needs of domestic abuse prevention programs, the committee makes no recommendation for legislative action at this time. The committee recognizes the severity of the problem and is aware that there may be an appropriate role for state government to assume in this area. However, the committee was unable to agree on exactly what the responsibility of the state should be and how the state should assist in dealing with the problem. Several members expressed a reluctance to establish another state agency to deal with the problem. Other members expressed their preference for an approach similar to that adopted in the community corrections programs, wherein units of local government or nongovernmental agencies may establish and operate community domestic abuse facilities and programs and enter into a contractual relationship with the state. The committee suggested that the proponents of state involvement in domestic abuse prevention programs continue their effort to more specifically define what the state responsibility should be and to determine the needs of the various programs which ought to be provided with state assistance.