A PRACTITIONER'S GUIDE TO THE PROMISSORY NOTE REQUIREMENT IN C.R.C.P. 121, SECTION 1-14(F)

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INTRODUCTION

Colorado district courts receive a nearly constant stream of motions for default judgment. Under the Colorado Rules of Civil Procedure, Rule 55 provides the authority for entering a default judgment, while Rule 121, section 1-14 provides the requirements for filing it. Practitioners typically comply with all the requirements[1] under Rule 121, section 1-14, except one: submission of the original promissory note.

Although most of Rule 121, section 1-14 is straightforward, there is confusion regarding the original promissory note requirement. Often, the attorney does not consider the document at issue a "promissory note," even though the definition is broad. Equally often, the attorney is not familiar with the filing procedures. Sometimes, the attorney does not have the original note and files the motion with the hope that the court will not notice the omission.

This short article is intended as a guide to the original promissory note requirement in the context of default judgments. It does not attempt to address every conceivable situation regarding promissory notes, but rather outlines the basic legal framework surrounding promissory notes and provides citations to resources for further research, if necessary.

The article proceeds by addressing the definition of promissory note, discussing the general filing procedures in Colorado courts, and exploring the options to consider when the original promissory note is missing.

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† The author served as a Colorado district court law clerk from 2009 to 2011 and, during that time, reviewed literally thousands of motions for default judgment. The impetus for this article was practitioners' frequent noncompliance with the promissory note requirement and the fact that there is little Colorado authority addressing the issue. The author is currently an Associate Attorney with Thomas Pollart & Miller LLC in Greenwood Village, Colorado, where he practices in the areas of civil liability and workers' compensation defense.

1. At least two articles have appeared in *The Colorado Lawyer* discussing the requirements of Colorado Rules of Civil Procedure 121, section 1-14. Sonja S. Rawls's excellent 1995 article, *Motions for Default Judgments*, provides a thorough overview of the Rule's requirements and some advice for fulfilling those requirements. *See generally* Sonja S. Rawls, *Motions for Default Judgment*, 24 COLO. LAW. 1295 (1995). Richard P. Holme's 2006 update on changes to the Colorado Rules of Civil Procedure also touches on some of the Rule's requirements. Richard P. Holme, *2006 Amendments to the Civil Rules: Modernization, New Math, and Polishing*, COLO. LAW. May 2006, at 21, 31.

I. WHAT IS A PROMISSORY NOTE?

Fundamentally, a promissory note is nothing more than a written promise to pay a specified amount of money to a person named in the note.[2] A promissory note may be either negotiable or non-negotiable.[3] The distinction is based on whether the promissory note meets the requirements set forth in Article 3 of the Uniform Commercial Code.[4] Should the promissory note not meet Article 3's requirements, it is still enforceable under common law principles.[5] The distinction is important for a number of reasons, including the negotiability of the promissory note and the method for enforcement should the original promissory note be unavailable.

A. Negotiable Promissory Notes

Negotiable promissory notes are, by far, the most common type of notes in the context of default judgments. Colorado has long subscribed to Article 3,[6] and section 4-3-104[7] provides the framework for determining whether a promissory note is negotiable.

Section 104 provides that a promissory note is negotiable if it meets four requirements[8]: (1) it is "an unconditional[9] promise[10] or order[11] to pay a fixed amount[12] of money"; (2) it "[i]s payable to bearer or to order at the time it is issued";[13] (3) it "[i]s payable on demand or at a definite time";[14] and (4) it does not require a party "to do any act in addition to the payment of money."[15]

Although section 104 provides several exceptions to these four requirements, they are met by a broad range of promissory notes. Promissory notes for home loans, automobile loans, and personal loans, for example, can all meet these requirements. It is not the caption on the prom-

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2. *See* 11 AM. JUR. 2D *Bills & Notes* § 29 (2010); *accord* BLACK'S LAW DICTIONARY 492 (3d Pocket ed. 2001) (defining "promissory note" as "[a]n unconditional written promise, signed by the maker, to pay absolutely and in any event a certain sum of money either to, or to the order of, the bearer or a designated person.").

3. *See* 11 AM. JUR. 2D *Bills & Notes* § 29 (2010).

4. *See id.*

5. *See id.*

6. For a thorough overview of Colorado's version of Article 3, see Steven D. Miller, *The Uniform Commercial Code—Article 3—Negotiable Instruments*, *in* 2A COLORADO METHODS OF PRACTICE §§ 83.1 to 83.27 (Cathy Stricklin Krendl, ed. 4th ed. 2003).

7. COLO. REV. STAT. § 4-3-104 (2013)

8. *Id.* at § 4-3-104(a).

9. *Id. at*. § 4-3-106.

10. A "promise" is "a written undertaking to pay money signed by the person undertaking to pay." *Id.* at § 4-3-103(9).

11. An "order" is "a written instruction to pay money signed by the person giving the instruction." *Id.* at § 4-3-103(6).

12. *See id.* § 4-3-112(b).

13. *See id.* § 4-3-109.

14. *Id.* at § 4-3-104(a)(2).

15. *Id.* at § 4-3-104(a)(3). *See also* Roa v. Miller, 784 P.2d 826, 829 (Colo. App. 1989) (holding that express condition within the note rendered it non-negotiable).

issory note that matters but whether its contents meet the elements set out in section 104.

B. Non-Negotiable Promissory Notes

A promissory note that does not meet the four requirements for negotiability is, necessarily, a non-negotiable promissory note. A promissory note's non-negotiability does not affect the borrower's obligation to repay the lender—it simply changes the legal framework.[16]

Non-negotiable promissory notes are relatively rare in the context of default judgments, but they do appear from time to time. For example, a promissory note drafted and entered into by unrepresented parties, specifically stating to whom the money must be paid (and thus not payable to bearer) would be non-negotiable.[17] Another example would be a promissory note that includes a condition (and thus requiring an act in addition to the payment of money).[18] Whether the original promissory note is negotiable or non-negotiable, Rule 121, section 1-14(f) requires that it be filed in order to obtain a default judgment.

II. HOW IS AN ORIGINAL PROMISSORY NOTE FILED—AND HOW IS IT RETURNED?

With the requirement of e-filing in Colorado courts,[19] submitting an actual piece of paper to the court is comparatively rare. Nevertheless, Rule 121, section 1-14(f) requires that the original promissory note be submitted to the court as a condition of obtaining default judgment. There are a number of considerations to keep in mind when filing an original note, and when attempting to get an original note back.

A. Purpose of the Requirement

The purpose behind Rule 121, section 1-14(f)'s requirement of the original promissory note is simple: presentation of the original promissory note helps the court prevent an unjust double recovery.

First, the court can examine the original note for any notation stating that a judgment has previously been entered on it. For example, a notation could easily be blocked out by creative photocopying and could subject a debtor to multiple liability. The court must have some way to ensure that such malfeasance does not occur.

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16. *See* 11 AM. JUR. 2d *Bills & Notes* § 29 (2010).

17. *See* Gooch v. Rodewald, 432 P.2d 755, 756 (Colo. 1967). The non-negotiability of the promissory note in this case is suggested by the fact that it does not meet the requirements set forth in § 4-3-104(a), specifically that the note was payable exclusively to the plaintiff and not to bearer or to order.

18. *See* Reid v. Pyle, 51 P.3d 1064, 1067 (Colo. App. 2002) (finding that a condition in the note precluded negotiability).

19. *See generally* COLO. R. CIV. P. 121, § 1-26.

Second, and more doctrinally important, is the merger doctrine. Under the merger doctrine, once a noteholder obtains a judgment on a promissory note, "the note loses its identity and merges into the judgment."[20] The form of the debt changes from an obligation under a promissory note to an obligation under a judgment.[21]

In order for notations to be checked or promissory notes to be merged, however, one must first properly file one's original promissory note with the court.

B. Overview of the filing process

Although each Colorado district court's filing procedures have minor differences, filing the original promissory note for the purposes of default judgment is similar across most districts.[22]

Perhaps most importantly, the original promissory note should be filed as soon as possible after filing the motion for default judgment. Should the judge review the motion before the note gets to his or her desk, the motion is facially defective and will likely be denied. Attorneys are often unaware that it takes up to a few days for the clerk's office to sort through the day's voluminous filings, stamp the note as "filed," enter its receipt into ICCES,[23] and finally deliver it to chambers where it must again be sorted and filed by the judge's staff. It is, therefore, unlikely that the judge will receive the note the day it is filed.

Filing can be done in person, by courier, or by mail. Most districts prefer that a copy of the note also be e-filed so that the clerk's office does not need to perform the additional step of scanning it in to ICCES.

It is not necessary to file a motion along with the note; a letter indicating the purpose of the filing, the case name, and the case number is sufficient and, in fact, preferred. It is a good idea, however, to include on the original promissory note a small sticky note stating the case name and case number should the original promissory note somehow become separated from the letter.

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20. Mortg. Invs. Corp. v. Battle Mountain Corp., 70 P.3d 1176, 1185 (Colo. 2003).

21. *Id.*; *accord* Ott v. Edwards, 420 P.2d 837, 838 (Colo. 1966) ("Originally the debt 'was evidenced by a promissory note; now it is evidenced by this judgment.'" (quoting Hiller v. Matheny, 256 P. 10, 11 (Colo. 1927))).

22. In preparing this article, the author interviewed court clerks from several Colorado district and county courts. The author would like to thank Debra Crosser of the Twentieth Judicial District, Marla Bohling of the Nineteenth Judicial District, Tammy Herivel of the Eighteenth Judicial District (Arapahoe), Cheryl Layne of the Eighteenth Judicial District (Douglas), Sherlyn Sampson of the Eighth Judicial District, and Natalie Schlidt of the Seventeenth Judicial District for their time and assistance in explaining their court's procedures for filing original promissory notes. Interview notes are on file with the author.

23. "ICCES" (pronounced *eye-sis*) is the acronym for Colorado's new e-filing system, the Integrated Colorado Courts E-Filing System.

Once the clerk's office receives the original promissory note, a clerk will enter its receipt into ICCES and send the original promissory note to the judge's chambers. The note will be placed in the file by the judge's judicial assistant, and then either the judicial assistant or law clerk will review the file to determine whether it contains all the documentation required under Rule 121, section1-14. After this process is completed, the file goes to the judge for a final review and, if appropriate, entry of default judgment.

Assuming the motion for default judgment is granted, the judge will sign the proposed form of order entering judgment and then send the file back to the clerk's office. A clerk (or, in some districts, the judge's judicial assistant) will then stamp the original promissory note as "Reduced to Judgment" and either return it to the case file or file it with other cancelled original promissory notes. After the completion of these steps, the original promissory note will have been merged into the judgment and the case will be closed.

C. May a party have the original promissory note back?

Attorneys and their clients often expect the original promissory note to be automatically returned to them after judgment. The reality is that this practice varies widely by district, with some districts returning the note as a matter of course and others requiring a motion to the court.

In those districts that return the note as a matter of course, attorneys are encouraged to include a self-addressed stamped envelope if they care to have the cancelled note returned. Although some districts will mail the note to the attorney of record even if no self-addressed stamped envelope is included, some will not.

In those districts that require a motion to the court, Rule 121, section 1-14(1)(f) provides a basis to have the note returned. The Rule states that "[i]f the note is to be withdrawn, a photocopy shall be substituted."[24] Although neither the official comments nor any appellate court have clarified this language, the sentence suggests that if, *after* judgment has entered and the original promissory note has been stamped as cancelled, a party may withdraw the note and substitute a photocopy in the court file. A simple motion to withdraw the original promissory note and substitute a photocopy in its place should be sufficient to get the original promissory note back in those districts where such a motion is required. As with all motions, practitioners should be sure to prepare a proposed form of order.[25]

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24. COLO. R. CIV. P. 121, § 1-14(1)(f).

25. A proposed form of order is more than a courtesy to the court; it is a requirement and some court clerks will automatically reject the motion if it is not accompanied by a proposed form or order. *See id.* at § 1-15(10).

III. WHAT IF THE ORIGINAL PROMISSORY NOTE IS MISSING?

The original promissory note is always required for a default judgment—except when it is missing. Both negotiable and non-negotiable promissory notes may be supplanted by copies in the right circumstances. The requirements are different for each.

A. Negotiable Promissory Notes

Article 3 provides a detailed framework for dealing with lost negotiable promissory notes. Section 4-3-309 requires that the noteholder fulfill five elements in order to enforce his "lost, destroyed, or stolen instrument."[26] The noteholder must show that: (1) he had "possession of the [note] and [was] entitled to enforce it when loss of possession occurred"; (2) "the loss of possession was not the result of a transfer by the person or a lawful seizure"; and (3) he "cannot reasonably obtain possession" of the note because it was "destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person[,] a person that cannot be found[,] or [a person who] is not amenable to service of process."[27] The noteholder must further (4) "prove the terms of the instrument and the person's right to enforce the instrument"; and (5) make a showing that "the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument."[28]

These elements may be proven in the context of default judgments through the use of affidavits and other exhibits. In the case of a bank or credit union moving for default judgment on a car note, for example, facts fulfilling the first three elements may be shown through the affidavit of a bank employee who has knowledge of the circumstances. The last two elements may be fulfilled in a similar manner: the affiant bank employee could direct the court's attention to an attached photocopy of the note, and the affiant bank employee could further state that the debtor is adequately protected from another claim because of the bank's immense capital reserves. The factual circumstances spelled out in an affidavit, coupled with a photocopy of the note, are likely sufficient to fulfill section 309's requirements.

B. Non-Negotiable Promissory Notes

Because non-negotiable promissory notes are less common than negotiable promissory notes, there is a paucity of modern case law instructing courts on specific procedures to follow. One statute and one case,

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26. COLO. REV. STAT. § 4-3-309 (2013).
27. *Id.* at § 4-3-309(a).
28. *Id.* at § 4-3-309(b). The comments to section 309 point out that "adequate protection" is a flexible concept whose reasonableness under the circumstances is left to the discretion of the trial court.

however, suggest that the process is similar to that of negotiable promissory notes.

Colorado's lost document statute provides a basic framework for proving the contents of a non-negotiable promissory note. Section 13-25-113 provides that any party who relies on a note that he claims is lost or destroyed may not present evidence of the note's contents until he, his agent, or his attorney, "makes an oath" regarding the loss or destruction of the note and its contents.[29] This affidavit must be made by someone with personal knowledge of the note's contents and personal knowledge of the note's loss or destruction.[30]

The Colorado Supreme Court has discussed what kind of evidence is sufficient for proving the contents of a lost note. In *Gooch v. Rodewald*, the Colorado Supreme Court held that, in order to recover on a lost note, the note's proponent must prove the "former existence, execution, delivery, loss, and contents of" the note.[31] The Colorado Supreme Court found that testimony about the note's contents and a carbon copy of the note was sufficient to make this showing, and affirmed the trial court's judgment in favor of the noteholder.[32]

Thus, although no single Colorado statute or case is dispositive, it seems likely that an affidavit (1) by a person with personal knowledge of the note's contents and its loss or destruction, that (2) states facts regarding the "former existence, execution, delivery, loss, and contents of" the note, would be sufficient to take the place of the original promissory note in the context of a motion for default judgment. Similar to the negotiable promissory note requirements discussed above, a photocopy of the note attached as an exhibit to the affidavit would be helpful. Although the trial court may require more, this much proof would be an excellent start.

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29. *Id.* at § 13-25-113; *see also* Fotios M. Burtzos, *The Other Rules of Evidence*, 24 COLO. LAW. 2169, 2170 (1995) (discussing section 1325-113).

30. People v. Heckers, 543 P.2d 1311, 1313 (Colo. App. 1975), *abrogated on other grounds by* Decker v. Browning-Ferris Indus., 903 P.2d 1150, 1155 (Colo. App. 1995), *rev'd on other grounds*, 931 P.2d 436, 448 (Colo. 1997).

31. 432 P.2d 755, 757 (Colo. 1967).

32. *Id.* The Colorado Supreme Court also held that the proof must be by "clear and convincing" evidence. *Id.* at 756. This holding seems to conflict with Colorado Revised Statutes section 13-25-127(1), which mandates that the burden of proof in a civil case is by a preponderance of the evidence. COLO. REV. STAT. § 13-25-127(1) (2013); *see also Decker*, 903 P.2d at 1154–55 (noting that "[t]he vitality of *Walkers* and *Heckers* for the proposition that 'clear and convincing' evidence of the contents of a writing is necessary has been significantly undercut by the adoption of § 13-25-127 . . . ."). No subsequent case has specifically resolved this issue, but the Colorado Supreme Court has indicated that, absent constitutional requirements necessitating a heightened standard, section 13-25-127(1)'s burden of proof should abrogate inconsistent case law. *See* Gerner v. Sullivan, 768 P.2d 701, 706 (Colo. 1989). Consequently, it is arguable that a preponderance of the evidence is sufficient.

CONCLUSION

Faced with a growing number of motions for default judgment, Colorado courts must strike a balance of due process and efficiency. It is Rule 121, section 1-14's purpose to enable practitioners to assist the courts in their role of protecting the rights of both debtor and creditor. The author's hope is that, with a better understanding of the purposes behind, and mechanics of, the original promissory note requirement, Colorado attorneys will be inclined to view the requirement not as meaningless rote, but as a necessary step toward obtaining a fair result for everyone involved.