

PRACTICAL CONSIDERATIONS FOR RULE 21 PROCEEDINGS IN THE COLORADO SUPREME COURT

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ABSTRACT

From 2010 through 2017, the Colorado Supreme Court received on average 250 petitions each year under Colorado Rule of Appellate Procedure 21 (Rule 21)—about one for every working day. In these “Rule 21 petitions,” litigants ask the court to exercise its original jurisdiction and grant relief from a lower court or tribunal’s ruling, action, or inaction where no other adequate appellate remedy is available. Significantly, the court has agreed to grant this entirely discretionary relief in only a small fraction of those cases. The great disparity between the number of petitions the court receives and the number of cases the court ultimately agrees to review suggests, perhaps, that Colorado litigants might benefit from a Rule 21 primer. That is what we set out to provide in this Article.

We begin by briefly explaining what Rule 21 is and how it operates. Next, we share statistics that highlight the court’s recent Rule 21 proceedings. Most notably, the statistics reveal the small percentage of petitions that the court agrees to grant. After supplying that background information, we offer practical considerations about filing Rule 21 petitions that we hope will inform litigants whether seeking relief through Rule 21 is appropriate and, if so, how best to present a petition. To aid in this discussion, we apply some of these practical considerations to cases in which the court agreed to exercise its original jurisdiction and issued an opinion. We hope that sharing these considerations will teach practitioners about Rule 21 and help litigants decide whether their case merits relief through the exercise of what the supreme court has called an “extraordinary remedy.”

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INTRODUCTION

The Colorado Supreme Court has direct appellate jurisdiction over a few select case types, meaning that, in some cases, a petitioner may appeal a lower court’s decision directly to the supreme court instead of first appealing to the court of appeals. These cases include, among others, those involving writs of habeas corpus, water-rights priorities or adjudications, and death-penalty appeals.¹

But most parties bring their cases to the supreme court by filing a petition for a writ of certiorari,² meaning they ask the supreme court to review a case that the court of appeals has already considered.³ Certiorari review is discretionary, and the party seeking review must persuade the

1. See COLO. REV. STAT. § 13-4-102(1) (2018).

2. See NANCY E. RICE, COLORADO JUDICIAL BRANCH ANNUAL STATISTICAL REPORT FISCAL YEAR 2017, at 5 tbl.3 (2017), https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Annual_Statistical_Reports/2017/FY2017ANNUALREPORT.pdf (showing the distribution by type of case filed in the supreme court in fiscal years 2010 through 2017).

3. See COLO. R. APP. P. 49. Of course, a party may also file a petition for a writ of certiorari asking the court to consider a matter decided on appeal from the county court. See *id.*

court that there is a good reason to consider its case.⁴ In other words, the party must show why, after the court of appeals has already issued its opinion, the supreme court should also weigh in.

For some parties, however, the normal appellate processes are inadequate. Say, for example, that a trial court ruled that an attorney's communications with a client fell within the crime–fraud exception to the attorney–client privilege, and the People could therefore subpoena the attorney to appear before a grand jury with electronic copies of those communications.⁵ There, the appellate process would not adequately protect the attorney's interests “because the damage that could result from disclosure would occur regardless of the ultimate outcome of an appeal from a final judgment.”⁶ Or perhaps a trial court denied an out-of-state defendant's motion to dismiss for lack of personal jurisdiction, thereby allowing the litigation to proceed.⁷ There, the appellate process would be inadequate because the out-of-state defendant would be forced to defend to final judgment an action in a court that might lack jurisdiction, raising fairness concerns.⁸

In situations like these, instead of first appealing to the court of appeals and then (if that proves unsuccessful) petitioning for a writ of certiorari to the supreme court, parties may file an original proceeding in the supreme court under Colorado Rule of Appellate Procedure 21 (Rule 21). Unlike an appeal, whose purpose is to correct error, an original proceeding under Rule 21 “is appropriate to test whether the lower court [or other tribunal] is proceeding without, or in excess of, its jurisdiction and to review a serious abuse of discretion where an appellate remedy would not be adequate.”⁹ To initiate a Rule 21 proceeding, a party must file a petition with the court that shows cause (i.e., gives compelling reasons) why the court should grant the requested relief.¹⁰ As with certiorari review, the supreme court's decision whether to exercise its original jurisdiction under Rule 21 petition is discretionary.¹¹

In fact, relief under Rule 21 is “extraordinary in nature.”¹² A striking disparity exists between the number of Rule 21 petitions filed by

4. *Id.*

5. *See In re 2015–2016 Jefferson Cty. Grand Jury*, 410 P.3d 53, 56–58 (Colo. 2018).

6. *Ortega v. Colo. Permanente Grp., P.C.*, 265 P.3d 444, 447 (Colo. 2011); *see also* COLO. REV. STAT. § 13-4-102(1) (2018) (“Any provision of law to the contrary notwithstanding, the court of appeals shall have initial jurisdiction over appeals from final judgments of . . . the district courts . . .”); COLO. R. APP. P. 1(a)(1) (authorizing appeals to the court of appeals from “[a] final judgment of any district, probate, or juvenile court”).

7. *Goettman v. N. Fork Valley Rest.*, 176 P.3d 60, 65 (Colo. 2007).

8. *Keefe v. Kirschenbaum & Kirschenbaum, P.C.*, 40 P.3d 1267, 1270 (Colo. 2002).

9. CLE IN COLO., INC., COLORADO APPELLATE HANDBOOK § 18 (Alan M. Loeb ed., 2017).

10. COLO. R. APP. P. 21(b).

11. *Id.* 21(a)(1).

12. *Id.*; *see also Magill v. Ford Motor Co.*, 379 P.3d 1033, 1036 (Colo. 2016) (“Original relief pursuant to C.A.R. 21 is an extraordinary remedy that is limited both in purpose and availability.” (quoting *Dwyer v. State*, 357 P.3d 185, 187 (Colo. 2015))).

litigants in the past eight years—approximately 250 per year—and the number of petitions the court agrees to review—approximately 12 per year. This disparity suggests that Colorado litigants would benefit from a Rule 21 primer, which is precisely what this Article sets out to provide.

Because others who have written about Rule 21 have focused on its procedures (and because the rule itself is informative in this respect),¹³ we provide only a high-level overview of the rule's procedural requirements. We focus instead on the practical considerations that litigants ought to consider when filing a petition. These considerations largely relate to the petition's content, but they also include insights on timing, documentation, and what a litigant should expect from the Rule 21 process. By reviewing these matters, we aim to create awareness about which types of cases might be appropriate for Rule 21 review, and what it takes to present a persuasive petition to the court. As we discuss these practical considerations, we also apply them to cases in which the supreme court agreed to exercise its original jurisdiction and issued an opinion. In doing so, we demonstrate why relief under Rule 21 truly is an "extraordinary remedy," and why filing a Rule 21 petition is therefore appropriate only in certain circumstances. We hope that our discussion of these considerations and how they apply in practice will help Colorado litigants make a better-informed decision when electing either to file a Rule 21 petition or proceed through the regular appellate process.

I. A BRIEF OVERVIEW OF RULE 21 PROCEEDINGS

As noted above, others have already written thorough explanations of Rule 21's specific requirements and processes.¹⁴ We briefly summarize those requirements and processes here only to provide an overview for those who might be unfamiliar with this area of Colorado appellate practice, and because a basic understanding of the rule is necessary to appreciate the practical considerations that we share.

Article VI, section 3 of the Constitution of the State of Colorado grants to the Colorado Supreme Court original jurisdiction to issue "original and remedial writs."¹⁵ Today, these various common law writs are subject to Rule 21, which governs original proceedings in the supreme court.¹⁶ In particular, Rule 21 provides an avenue to challenge a lower court or tribunal's ruling, action, or inaction where no other adequate

13. See, e.g., CLE IN COLO., INC., *supra* note 9, §§ 18.1–9; 18 ANNE WHALEN GILL, COLORADO PRACTICE SERIES: APPELLATE LAW AND PRACTICE §§ 15.1–15 (3d ed. 2018); Jessica E. Yates, *Knowing When to Change Trains: The Ins and Outs of Interlocutory Appeals*, 41 COLO. LAW., June 2012, at 31, 31–32.

14. See *supra* note 13 and accompanying text.

15. COLO. CONST. art. VI, § 3.

16. COLO. R. APP. P. 21(a)(1)–(2).

remedy is available.¹⁷ This relief “is extraordinary in nature,” and whether to grant relief is wholly within the supreme court’s discretion.¹⁸

To seek relief under Rule 21, a party must file a “petition for a rule to show cause.”¹⁹ The petition must both specify the relief that the party seeks and request that the court “issue to one or more proposed respondents a rule to show cause why the relief requested should not be granted.”²⁰ In other words, it must (1) say what relief the petitioner wants and (2) identify the respondent(s) who would receive an order to justify why that relief should not be granted (i.e., the rule to show cause).²¹

The petition’s content is most important for our purposes. Because the petitioner bears the burden to convince the supreme court that it should issue a rule to show cause,²² the petition must include sufficient information to satisfy that burden. Rule 21 requires that the petition disclose specific information, including the identity of the parties and court or tribunal below, the ruling or action complained of and the relief sought, the “reasons why no other adequate remedy is available,” the issues presented, the facts necessary to understand those issues, the petitioner’s supporting legal argument, and any relevant documents.²³

Filing a petition with this information will not stay any proceeding or toll any applicable time limit.²⁴ Rather, the petitioner must request a temporary stay from the court or tribunal from whose ruling, action, or inaction it seeks relief.²⁵ The petitioner may request a stay from the supreme court only if the lower court denies or fails to promptly rule on the petitioner’s request, or if making that request is somehow impracticable.²⁶ Should the supreme court issue a rule to show cause, however, all proceedings below shall automatically stay pending the supreme court’s resolution of the original proceeding.²⁷

Once a petition is filed, the justices of the supreme court will consider it expeditiously.²⁸ One justice, selected at random, will review the petition and share with the other justices his or her recommendation

17. CLE IN COLO., INC., *supra* note 9.

18. COLO. R. APP. P. 21(a)(1).

19. *Id.* 21(b).

20. *Id.*

21. For information about filing fees and technical requirements, see *id.* 21(b), (d)(2); CLE IN COLO., INC., *supra* note 9, §§ 18.3–4.

22. COLO. R. APP. P. 21(d)(2).

23. *Id.* 21(d)(2)(A)–(I), (e).

24. *Id.* 21(f)(1).

25. *Id.*

26. *Id.*

27. *Id.* 21(f)(2).

28. See CLE IN COLO., INC., *supra* note 9, § 18.6 (explaining that each petition “is assigned to one of the justices for analysis and comment” and that the “assigned justice reports on the matter, with his or her recommendation” at the court’s weekly conference or by internal email communication).

whether to issue a rule to show cause.²⁹ Should four justices assent, the court will issue a rule to show cause.³⁰ If the court does so, it may invite or order any person in the proceeding below to respond to the rule to show cause, and the petitioner may submit a reply brief.³¹ Typically, the court will base its ruling on the briefs alone, without holding oral argument.³² But the court will hold argument when it determines that doing so would be helpful.

After the briefing is complete, the supreme court may discharge the rule (i.e., effectively affirm the lower court) or make it absolute (i.e., reverse the lower court and resolve the rule to show cause in the petitioner's favor).³³ The court has discretion whether to issue an opinion,³⁴ and it will usually do so when it has granted a Rule 21 petition to "explain its reasoning and to provide guidance to the lower court."³⁵ A party may petition for rehearing after the court issues an opinion discharging or making absolute a rule to show cause, but a party may not petition for rehearing after the court denies a petition without explanation.³⁶

Having briefly reviewed the Rule 21 process, we now turn to an overview of how Rule 21 petitions have fared in recent years.

II. RULE 21 PETITIONS BY THE NUMBERS

Say a party receives an adverse district court ruling during litigation and wonders whether to file a Rule 21 petition. How might the petition fare? The numbers from recent years suggest that it will not fare well. From 2010 through 2017, the supreme court received about 250 Rule 21 petitions per year—approximately 1 for every working day.³⁷ Of those roughly 250 petitions, the court issued a rule to show cause and either discharged the rule or made it absolute in only 14 cases per year.³⁸ And of those 14 cases, the court made its rule absolute in whole or in part—

29. The court's internal decision-making process is described briefly at *Protocols of the Colorado Supreme Court*, COLO. JUD. BRANCH, https://www.courts.state.co.us/Courts/Supreme_Court/Protocols.cfm (last updated Oct. 25, 2018).

30. CLE IN COLO., INC., *supra* note 9, § 18.6. If four justices do not agree to issue a rule to show cause, the court will deny the petition. *See id.* Any justice who would have voted to grant may elect to have his or her vote shown in the order denying the petition.

31. COLO. R. APP. P. 21(i)(1), (j).

32. *Id.* 21(k).

33. *Id.* 21(l).

34. *Id.*

35. CLE IN COLO., INC., *supra* note 9, § 18.8.

36. COLO. R. APP. P. 40(e)(2).

37. *See* RICE, *supra* note 2, at 5 tbl.3. We calculated this average using the per-fiscal-year numbers in the original proceedings row.

38. *Original Proceedings Pursuant to C.A.R. 21 in the Colorado Supreme Court*, COLO. JUD. BRANCH, https://www.courts.state.co.us/Courts/Supreme_Court/Proceedings/Index.cfm (last visited Dec. 13, 2018) [hereinafter *Original Proceedings*]. We calculated these averages by fiscal year (i.e., July 1, Year X through June 30, Year X+1) to align with the presentation of data in RICE, *supra* note 2, at 5 tbl.3. And we omit from this calculation all petitions for which the court initially issued a rule to show cause and later dismissed the rule as improvidently granted.

thereby granting the petitioner its requested relief—in only 9 cases per year.³⁹ The following table breaks down the fate of litigants’ Rule 21 petitions over the past several fiscal years⁴⁰:

Fiscal Year	2010	2011	2012	2013	2014	2015	2016	2017
Petitions filed	318	270	240	259	250	242	227	176
Rules to show cause issued	20	21	19	6	11	13	5	17
Percent of petitions resulting in a rule to show cause	6.2%	7.8%	7.9%	2.3%	4.4%	5.4%	2.2%	9.7%
Number of rules made absolute (i.e., trial court reversed)	8	13	10	4	8	11	3	14
Percent of rules made absolute	40%	61.9%	52.6%	66.7%	72.7%	84.6%	60%	82.4%

Although these numbers do not represent the statistical probability that the supreme court will issue a rule to show cause or ultimately make the rule absolute, they do tell us two important things. First, the court grants only a few petitions, so litigants should consider carefully whether to file one. And second, of those petitions that the court does grant, a large share tends to result in a ruling in the petitioner’s favor.

What the numbers do not tell us, however, is what types of issues the court agrees to review or what a party might do to best present its petition to the court. So we now turn to our discussion of certain practical

39. *Original Proceedings*, *supra* note 38. We calculated this number by reviewing the court website’s description of each opinion, verifying its accuracy against the opinion itself.

40. The numbers in the “petitions filed” row are from RICE, *supra* note 2, at 5 tbl.3. Those in the “rules to show cause issued” and “# rules made absolute” rows are from *Original Proceedings*, *supra* note 38. We include in the “# rules made absolute” row for any case in which the rule was made absolute at least in part.

considerations, which we hope will offer some valuable answers to those questions.

III. PRACTICAL CONSIDERATIONS

A litigant facing an adverse ruling, action, or inaction must ultimately decide whether Rule 21 is the appropriate avenue for relief and, if so, how best to make a case to the supreme court. So in this Part we discuss practical considerations that should guide litigants who seek answers to these questions. The many considerations that we identify may be grouped into three categories: timing, content, and reasoning. We address each category in turn, providing examples where doing so would give a litigant insight as to how exactly a consideration might apply in practice. These examples also highlight the types of cases the court has found appropriate for review under Rule 21.

A. *Timing*

The first category of practical considerations addresses two questions every party should consider when filing a petition: When should I file? And how will my filing affect the timeline of the proceedings below?

1. File Early When Possible

The saying “the sooner the better” best answers the first question. The question whether to file a Rule 21 petition sometimes arises when the potential petitioner is faced with an adverse ruling and, absent the supreme court’s intervention, some harm will follow shortly thereafter.⁴¹ But even when the harm is not imminent, there are several reasons to file the petition earlier, rather than filing at the eleventh hour. Filing early affords the court more time to review the petition and the attached documents. Because the justice to whom the petition is assigned must spend a significant amount of time familiarizing him or herself with the factual and procedural history and must review the relevant law, the petitioner ought to give the justice enough time to get up to speed.

To be sure, the court understands that it takes time for a litigant to draft a Rule 21 petition, obtain the record, and assemble any attachments. But waiting to do these things lessens the time that the court has to decide whether to issue a rule to show cause. And waiting to file a petition can also create the specter of a bad-faith attempt to delay the proceedings below. By waiting to file, a petitioner might create the impression that the matter is not urgent or, perhaps, that the petition is a strategic maneu-

41. *E.g.*, *Simpson v. Cedar Springs Hosp., Inc.*, 336 P.3d 180, 183 (Colo. 2014) (noting, after the trial court had ordered the production of documents relating to a hospital’s review of adverse drug reactions, that “[q]uestions of privilege are particularly appropriate for review under C.A.R. 21 because an erroneous disclosure of privileged information may cause harm that cannot be remedied on appeal”).

ver to prolong the proceedings below. In short, delay lessens the petitioner's ability to persuade. Thus, it is best to file as soon as possible.

2. Rule 21 Does Not Create Any Time Advantage

Turning to the second question—how filing a petition will affect the timeline of the proceedings below—a party that files a Rule 21 petition should not expect its doing so to create any sort of time advantage. In other words, a Rule 21 petition rarely, if ever, speeds up the proceedings in the trial court. As we have stated, filing a Rule 21 petition does not automatically stay the proceeding below or toll any applicable time limit.⁴² The petitioner must seek a stay from the court presiding over that proceeding, and only when doing so is not practicable, or when that court has not promptly ruled on or has denied a stay, may the petitioner move for a stay in the supreme court.⁴³ The supreme court will consider prudently whether to grant a stay, however, because doing so can cause matters in the court below to be reset, thereby imposing additional delay and expense on the parties.

Should the supreme court issue a rule to show cause, the proceedings below will automatically be stayed.⁴⁴ But the successful petitioner should not expect a quick resolution of the issue(s), primarily for three reasons. First, the court may invite responses to its rule to show cause, and the petitioner may reply to these.⁴⁵ As with regular appeals, the Rule 21 briefing process is not speedy. Second, the court may invite amici to submit briefs as well.⁴⁶ And third, the court rarely issues an order making absolute its rule to show cause without an opinion. A summary reversal would deprive the court below (and other courts) of the supreme court's reasoning, leaving unanswered the questions of how and why the court below erred. Further, the supreme court will want lower courts to avoid committing similar errors in the future—an outcome made more likely when the supreme court issues an opinion that explains its reasoning. For these reasons, Rule 21 is not a useful vehicle to accelerate a case's timeline. Potential petitioners should consider this reality before filing, as the issuance of a rule to show cause can create unfortunate consequences, such as prolonging the time somebody spends in custody or is under an order that limits the time a parent spends with his or her children.

Because the Rule 21 process generally stays the proceedings below only when the supreme court issues a rule to show cause, and because the court likely will not quickly resolve the petition if it does issue a rule to show cause, potential petitioners should understand that filing a petition will not enable them to work the timing in their favor. Now that we have

42. COLO. R. APP. P. 21(f)(1).

43. *Id.*

44. *Id.* 21(f)(2).

45. *Id.* 21(i)–(j).

46. *Id.* 21(i)(1).

provided information that tells a potential petitioner when to file and what timeline to expect after filing, we turn to considerations about what to include in the filings.

B. Content

What must accompany a Rule 21 petition? The rule provides clearly enough that each petition “must be accompanied by” any available supporting documents, such as the order from which relief is sought and related exhibits or transcripts.⁴⁷ But because Rule 21 proceedings, at their outset, require the court to make a decision based on a one-sided brief and in a short period of time, petitioners should be aware of two considerations that are not made clear by the rule. The first relates to how many supporting documents are sufficient, and the second sheds light on what facts and legal arguments the petitioner should include to avoid an embarrassing order dismissing the rule to show cause.

1. Include Enough Documentation to Support Every Assertion in the Petition, and Do Not Include Irrelevant Documents

As we have stressed, the court often must decide quickly whether to issue a rule to show cause. It makes that determination based only on the petition, any accompanying documents, and a legal assessment of the challenged ruling. To facilitate this process, a petitioner should include only enough information for the court to make its decision—and no more. If, for example, the petitioner challenges the trial court’s order compelling discovery, the attached documents should include the order and any transcripts, underlying motions, and pleadings or exhibits necessary for the court’s evaluation. The petitioner should also make clear (and near the beginning of the petition) whether some event is approaching—a deposition, for example—after which irreparable harm will result should the supreme court not intervene. The information provided in these documents will support both the petition’s recitation of the factual history and its reasoning in support of review. And a petitioner who fails to include this information runs the risk of having the court deny the petition.⁴⁸

A petitioner who includes more documents than necessary likewise risks denial. If the court must sort through a voluminous record to locate precisely what it needs to make its decision, it might find less persuasive the petitioner’s argument that some serious error, which cannot be addressed through the normal appellate process, warrants the court’s exercise of its original jurisdiction. Brevity is more persuasive. Because the

47. *Id.* 21(e).

48. Indeed, an inadequate or lacking record forces the court to speculate as to what might have happened. *Cf. Jones v. Dist. Court*, 780 P.2d 526, 533 (Colo. 1989) (Vollack, J., dissenting) (“The lack of a trial record reflecting trial court rulings in this case requires the reviewing court to speculate as to whether the trial court would or would not abuse its discretion.”).

relief requested is “extraordinary” in nature, it follows that the reasons to grant relief must be fairly clear, if not obvious. So a petitioner should include only what is necessary and nothing more, making it possible for the court to verify assertions in the petition and determine whether relief is warranted. This is not to say, however, that the petitioner should omit facts or legal authorities that do not support its argument.

2. Address Any Facts or Law that Cut Against Your Argument

Every first-year law student is instructed to concede the “bad” facts or legal authorities and distinguish them or argue that they are not dispositive. This principle applies equally in Rule 21 petitions. A petitioner should identify facts and legal authorities that cut against his or her argument, explaining why the court should nonetheless issue a rule to show cause and ultimately rule in the petitioner’s favor.

If the petitioner fails to bring these matters to the court’s attention, rest assured the respondent will. Imagine a petition that argues a district court’s ruling is erroneous without addressing the likely counterargument that, due to some fact or legal authority, the ruling is ultimately inconsequential—even if erroneous. The proposed respondent will not initially have an opportunity to respond to the petition, unless the supreme court requests one.⁴⁹ But if the supreme court issues a rule to show cause, the respondent will surely make the counterargument and point out the previously omitted fact or authority. In response, the court may dismiss the rule to show cause as having been improvidently issued.⁵⁰ Therefore, to avoid giving the court a false impression of the nature of the case, thereby wasting a client’s time and resources, the petition should preemptively address any bad facts or harmful legal arguments by demonstrating that they are not fatal to the petitioner’s position.

Having addressed both the timing and content of convincing Rule 21 petitions, we arrive now at the most important practical considerations: those relating to the reasons why the court should exercise its original jurisdiction.

C. Reasons Why Relief Under Rule 21 Is Proper

The single most important aspect of a Rule 21 petition is its justification for requesting that the supreme court exercise its original jurisdiction, rather than challenging the trial court’s action or inaction through a regular appeal. There is a reason the court calls its exercise of original jurisdiction an “extraordinary remedy”: If the court’s exercise of original

49. COLO. R. APP. P. 21(g).

50. The court has on a handful of occasions issued orders dismissing a rule to show cause as having been improvidently granted, as shown in *Original Proceedings*, *supra* note 38. We reference these orders not to suggest that they were dismissed due to some omission by the petitioner, but instead to highlight that the court has ordered that a rule to show cause be discharged as having been improvidently granted.

jurisdiction were the norm and not the exception, Rule 21 would swallow the normal appellate process. And because relief under Rule 21 is discretionary, the court tends to review only those cases whose legal issues are cleanly presented and whose facts and procedural posture are appropriate for the court's review. Therefore, a petition must show why, if over 2,000 cases are appealed to the court of appeals each year,⁵¹ this case ought to go directly to the supreme court. To do that, the petition should (1) follow the rule's text, (2) explain why only Rule 21 would allow meaningful review, (3) stress the impact that would result from the lower court's ruling, and (4) state the broader consequences of that ruling, if any. The following discussion of these considerations should both assist litigants in determining whether filing a Rule 21 petition is a worthy endeavor and, if they decide that it is, inform them how to communicate to the court that a case is deserving of such an "extraordinary remedy."

1. Follow the Rule's Text

Rule 21's text is specific and helpful. Not only does it detail all aspects of filing, procedure, and timing,⁵² it also provides some instruction on how to convince the court that the requested relief is appropriate. In particular, it states that the "[p]etitioner has the burden of showing that the court should issue a rule to show cause."⁵³ It also instructs the petitioner to identify "[t]he reasons why no other adequate remedy is available."⁵⁴ At bottom, these are the rule's most important mandates. But following the rule's straightforward provisions is only the first step to filing a persuasive Rule 21 petition. The rule itself does not clarify how exactly to best articulate why a rule to show cause should be issued and why no other adequate remedy is available. Thus, we explore what the rule does not make explicit in more detail below.

2. Show that Only Rule 21 Would Allow Meaningful Review

Rule 21 makes clear that "relief will be granted only when no other adequate remedy, including relief available by appeal or under C.R.C.P. 106, is available."⁵⁵ Nowhere does the rule require a petition to include any discussion of how the trial court's ruling, action, or inaction is erroneous. Rather, it requires the petition to include "argument and points of authority explaining why the court should issue a rule to show cause and grant the relief requested."⁵⁶ Consistent with the rule's text, when the court evaluates a Rule 21 petition, it will begin by asking whether, if an error did occur, the court's exercise of original jurisdiction would be

51. See RICE, *supra* note 2, at 11 tbl.8.

52. See COLO. R. APP. P. 21(b)-(m).

53. *Id.* 21(d)(2).

54. *Id.* 21(d)(2)(E).

55. *Id.* 21(a)(1); see also *id.* 21(d)(2)(E). COLO. R. CIV. P. 106 enables a party to obtain relief in the district court from various types of unlawful actions.

56. COLO. R. APP. P. 21(d)(2)(H).

appropriate in the first place. Accordingly, the petition should focus on why the requested extraordinary relief is proper.

A discussion of some examples helps to clarify when only Rule 21—as opposed to some other mechanism for relief—will adequately address the challenged ruling, action, or inaction. Our first example—*In re 2015–2016 Jefferson County Grand Jury*⁵⁷—concerns an action that cannot be undone. There, the People believed that the target’s communications with his attorney would reveal evidence of a crime.⁵⁸ The People therefore issued a grand jury subpoena duces tecum to the attorney, ordering her to produce any files related to her representation of the target.⁵⁹ The attorney and target, in turn, moved to quash the subpoena on statutory grounds, but the district court rejected their arguments and denied the motions to quash.⁶⁰ As a result, the attorney and target would have to disclose their communications to the grand jury.⁶¹ The supreme court found that exercise of its original jurisdiction under Rule 21 was proper under these circumstances because the normal appellate process would be inadequate: “Once provided to the People and the grand jury, the confidential materials sought by the subpoena cannot be retracted.”⁶² In other words, if the attorney and target were forced to disclose their communications, they could not then “unring the bell” through the regular appellate process.

An issue that will become moot upon the arrival or passing of some future event is similarly appropriate for immediate review under Rule 21. For instance, several pretrial rulings in criminal cases become moot after trial. In one case, the supreme court held that a trial court’s pretrial ruling that denied the defendant immunity under the make-my-day statute may be reviewed under Rule 21, but not after trial.⁶³ Because the jury’s verdict necessarily rejected the defendant’s make-my-day defense,⁶⁴ the defendant’s appeal—after his conviction—that challenged the pretrial ruling was moot.⁶⁵ By contrast, the court has reasoned that a pretrial Rule 21 petition challenging a trial court’s refusal to hold a preliminary hearing was timely because “a refusal to review . . . would result in a situation where such action could never be reviewed as the trial would render the issue moot.”⁶⁶ Thus, that a challenged ruling, action, or inaction will

57. 410 P.3d 53, 56 (Colo. 2018).

58. *See id.* (“The People asserted that the crime–fraud exception to the attorney–client privilege applies.”).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 58.

63. *Wood v. People*, 255 P.3d 1136, 1141 (Colo. 2011).

64. Under Colorado law, when a defendant asserts an affirmative defense at trial, the prosecution must prove beyond a reasonable doubt that the conditions that would satisfy the affirmative defense are not met. *See id.* at 1140.

65. *Id.* at 1141–42.

66. *Kuypers v. Dist. Court*, 534 P.2d 1204, 1206 (Colo. 1975).

become moot is another reason supporting the supreme court's exercise of original jurisdiction.

In assessing whether a Rule 21 petition is appropriate, keep in mind that there are some circumstances in which a rule of procedure or statute authorizes immediate appellate relief, cutting against review under Rule 21. For example, Colorado Rule of Civil Procedure 106 authorizes review by the district court of an agency or county court's action that exceeds its jurisdiction or abuses its discretion where "there is no plain, speedy and adequate remedy otherwise provided by law."⁶⁷ Were this type of review available for the out-of-state defendant whose motion to dismiss for lack of personal jurisdiction had been denied, it would be "very unlikely that the supreme court [would] consider issuing a rule to show cause."⁶⁸ So too where a statute authorizes immediate appellate review of certain trial court orders, as is the case for orders terminating or refusing to terminate parental rights,⁶⁹ or rulings on whether sovereign immunity bars a suit.⁷⁰

A good petition will therefore demonstrate that there is no other mechanism by which a lower court or tribunal's ruling, action, or inaction may be addressed. And it will do so with specific reference to the facts of the case, rather than by parroting the language of the rule. Beyond that, it will also show that significant harm will result absent the supreme court's intervention, further warranting discretionary relief under Rule 21.

3. Describe the Impact of Any Harm that Shall Result from the Trial Court's Ruling, Action, or Inaction

Because review under Rule 21 is discretionary, a showing that irreparable or significant harm would result if the supreme court did not intervene might make the court more inclined to exercise its original jurisdiction. Indeed, an extraordinary harm more likely warrants an extraordinary remedy.

Disclosures mandated by a trial court's ruling on a discovery motion, for example, can cause irreparable harm.⁷¹ Consider a trial court's ruling that a party produce his mental-health records to the opposing party. By their nature, the records might include highly personal details that the party would not wish to share with anybody other than a physi-

67. COLO. R. CIV. P. 106(a)(4).

68. CLE IN COLO., INC., *supra* note 9, § 18.2.

69. COLO. REV. STAT. § 19-1-109(2)(b) (2018).

70. *Id.* § 24-10-108.

71. "Even though a trial court's ruling on a discovery motion is interlocutory in character and is generally not reviewable in a C.A.R. 21 original proceeding, a discovery ruling is not exempt from extraordinary relief if it appears that the order 'may cause unwarranted damage to a litigant that cannot be cured on appeal.'" *In re Marriage of Wiggins*, 279 P.3d 1, 5 (Colo. 2012) (quoting *Cardenas v. Jerath*, 180 P.3d 415, 420 (Colo. 2008)).

cian. The damage that would result from the disclosure of these personal documents would therefore be significant, and once disclosed any subsequent damage cannot be undone.⁷² But what if the records at issue were not mental-health records, but rather x-rays of a broken ankle? Any damage that might result from their disclosure would still be irreversible, but not likely as significant as that which would result from the disclosure of mental-health records.

A showing of extreme inconvenience and significant cost, coupled with constitutional concerns, can also suffice. For example, when an out-of-state defendant received an adverse ruling on a motion to dismiss for lack of personal jurisdiction, the court explained its decision to exercise its original jurisdiction by noting that such a case “raises the question whether it is unfair to force such a party to defend here at all.”⁷³ Of primary importance, the question of jurisdiction over an out-of-state defendant implicates a core constitutional protection: due process.⁷⁴ Additionally, the party would surely incur significant costs in defending the litigation to final judgment; costly litigation alone, however, is an insufficient reason for the court to review a case. Thus, the two-fold harm involved in such a situation more readily justifies the court’s decision to exercise its original jurisdiction under Rule 21.

Accordingly, a petition should make clear that harm will result absent the supreme court’s intervention, and state precisely the nature of that harm. And, where possible, the petitioner should alert the court of any impact beyond that in the proceedings below.

4. If the Trial Court’s Ruling, Action, or Inaction Will Have Consequences Beyond Those in the Proceedings Below, Say So

The supreme court has used Rule 21 as a vehicle to review rulings that have consequences beyond the case in which they are issued. A savvy petitioner will therefore point out whether a case is one whose result will apply broadly or will settle a rule of law.

One group of cases which the court has been keen to review under Rule 21 is those “cases that raise issues of first impression and that are of significant public importance.”⁷⁵ For instance, the court exercised its

72. As the supreme court recognized when dealing with such a case, “the damage that could result from disclosure would occur regardless of the ultimate outcome on appeal from a final judgment.” *Gadeco, LLC v. Grynberg*, 415 P.3d 323, 327 (Colo. 2018) (quoting *Bailey v. Hermacinski*, 413 P.3d 157, 160 (Colo. 2018)). For another example of a case where significant, irreversible damage would result from a similar ruling, see *People v. Chavez*, 368 P.3d 943, 944 (Colo. 2016) (reviewing a trial court’s order granting the defendant in a sex-assault case access to the victim’s home, where the assault had occurred).

73. *Keefe v. Kirschenbaum & Kirschenbaum, P.C.*, 40 P.3d 1267, 1270 (Colo. 2002).

74. See *Magill v. Ford Motor Co.*, 379 P.3d 1033, 1037 (Colo. 2016) (“To exercise jurisdiction over a nonresident defendant, a Colorado court must comply with Colorado’s long-arm statute and constitutional due process.”).

75. *Stamp v. Vail Corp.*, 172 P.3d 437, 440 (Colo. 2007).

original jurisdiction to review a trial court's ruling that the Ski Safety Act's damages-cap provision, and not the Wrongful Death Act's damages-cap provision, limited recovery of compensatory damages in an action stemming from a ski accident.⁷⁶ Explaining its decision to review the ruling, the court stressed that it had never considered the interaction between the two statutes, that one statute was of particular significance to the state, and that "ski tourism is important to Colorado's economy."⁷⁷ In another case, the court reviewed an order denying a motion to dismiss a complaint that claimed a statute "reducing each [school] district's school funding by a fixed percentage" offended a constitutional amendment requiring "annual increases to 'statewide base per pupil funding' for public education."⁷⁸ The court gave a sound reason for its exercise of original jurisdiction: the question presented "implicates the apportionment of nearly one billion dollars of state funding."⁷⁹ Thus, a petitioner should certainly emphasize that an issue is one of statewide importance.

Yet there is still hope for those who do not have a billion-dollar case of great public importance or one whose result will affect a crucial state industry. The court has also found Rule 21 to be a good vehicle to settle inconsistent application of the law. When three judges in one district applied the change-of-venue rule⁸⁰ inconsistently, the supreme court exercised its original jurisdiction to resolve the venue dispute and settle the rule's application.⁸¹ To be sure, issues of venue can merit review under Rule 21 in their own right, and for the same reasons that jurisdictional issues do.⁸² Yet the court recognized "the need to promote a uniform application of the venue rules," and so issued rules to show cause.⁸³ A petitioner should be sure, then, to point out any inconsistent application of the law that might warrant the court's exercise of its original jurisdiction under Rule 21.

Thus, although many trial court rulings affect only the case in which they are issued, those rulings with broader consequences—either due to the importance of the issue they address or because they create an inconsistent application of the law—are more likely to attract the court's attention.

76. *Id.* at 439–40.

77. *Id.* at 440.

78. *Dwyer v. State*, 357 P.3d 185, 187 (Colo. 2015) (quoting COLO. CONST. art. IX, § 17(1)).

79. *Id.* at 188.

80. COLO. R. CIV. P. 98(f).

81. *Hagan v. Farmers Ins. Exch.*, 342 P.3d 427, 430 (Colo. 2015).

82. *Compare Hagan*, 342 P.3d at 432 (noting that venue issues affect the court's jurisdiction and authority to entertain the case, and review of venue issues can avoid unnecessary delay and expenses), with *Keefe v. Kirschenbaum & Kirschenbaum, P.C.*, 40 P.3d 1267, 1270 (Colo. 2002) (stating that review of a challenge to the court's personal jurisdiction allows review "where a district court is proceeding without or in excess of its jurisdiction," and also addresses the same questions of fairness).

83. *Hagan*, 342 P.3d at 430.

CONCLUSION

The decision whether to file a Rule 21 petition is a significant one. To write a petition is time-consuming and expensive for the client. And as the data we provided shows, the supreme court seldom finds that Rule 21 petitions merit exercise of its original jurisdiction. For these reasons, a potential petitioner should give due consideration to whether Rule 21 is the appropriate avenue for relief and, if so, whether the ruling it seeks to challenge is one that the supreme court might like to review.

We hope that this Article's discussion of certain considerations for litigants to keep in mind when filing a Rule 21 petition will make the answers to those questions clearer. By looking closely at Rule 21's text and taking into account our considerations of timing, content, and reasons why relief under Rule 21 is proper, litigants will have a better perspective as to what types of rulings are properly challenged under Rule 21 and what a petition ought to contain. Litigants who take seriously these considerations will also know to focus their arguments on why the supreme court should exercise its original jurisdiction, rather than focusing on the alleged error.

Even for litigants who take these considerations seriously, there is no guarantee that the supreme court will exercise its discretion to grant this "extraordinary remedy." But the considerations should give litigants a better sense of when a ruling is worth an attempted challenge under Rule 21.