SUPREME COURT COMMITTEE
ON RULES OF CIVIL PROCEDURE
MINUTES OF MEETING

October 25, 2013

The Supreme Court Civil Rules Committee was called to order by Chairman Richard W. Laugesen at 1:40 p.m. in the Court of Appeals En Banc Room, Third Floor, Ralph L. Carr Colorado Judicial Center, 2 East 14th Avenue, Denver, Colorado.

Justice Liaison:
Chief Justice-Designate Nancy E. Rice [Present]

The following members were present:

David R. DeMuro
Peter A. Goldstein
Lisa Hamilton-Fieldman
Judge Jerry N. Jones
Judge Thomas K. Kane
Richard W. Laugesen
Chief Judge Alan Loeb
Christopher B. Mueller
Frederick B. Skillern
Magistrate Chris Voisinet
Judge John R. Webb
Judge Christopher Zenisek
Debra R. Knapp

The following members were excused:

Judge Ann Frick
Richard P. Holme
Charles Kall
Cheryl Layne
David C. Little
Judge Ann Rotolo
Lee N. Sternal
Ben Vinci
J. Gregory Whitehair

Staff:
Carol Haller, Deputy State Court Administrator [Present]
Jenny Moore, Deputy Supreme Court Librarian [Present]
Cecily Nicewicz, Law Librarian [Present]

Approval of Minutes:

Following correction of a date on page 1 in the "Approval of Minutes" section ["September 27" was changed to "August 29"] the minutes of the September 27, 2013 meeting were then approved as submitted.

Information Items:

Chairman Laugesen informed the committee that the U.S. District Court of Colorado is seeking comments on proposed Local Rules changes [page 1 of Agenda Packet].

Chief Justice-Designate Rice announced that this would be her last Civil Rules Committee meeting as the liaison justice. Justice Eid will become the new liaison to the committee. Chairman Laugesen thanked Chief Justice-Designate Rice for her work with the Committee over the years.

C.R.C.P. 54(d)—Subcommittee Report and Recommendation for Amendments to C.R.C.P. 54(d) and 121, §1-22 ¶1:

Chairman Laugesen called the Committee's attention to Item 4 of the Agenda Packet [pp 2–17] and asked Judge Webb to give the C.R.C.P. 54(d) Subcommittee's report and recommendations.

Judge Webb provided a brief overview of what had gone on concerning the subject at the last three Civil Rules Committee meetings. Noting that the Subcommittee's report was at pages 2 through 6 of the Agenda Packet, he then reported that the most current version of the Subcommittee's proposal was on pages 4A and 4B [which had been handed out at the meeting]. He then continued, noting that the Subcommittee had taken up three proposals, two of which were on pages 4A and 4B. The third proposal was to add language to C.R.C.P. 54(d) with criteria for measuring the reasonableness of costs, such as the relative financial conditions of the parties. He reported that proposal was considered, debated, and rejected.

Judge Webb reported that the Subcommittee was unanimous in its recommendation of the two proposals on pages 4A and 4B. The first recommendation is adding language to C.R.C.P. 121, §1-22 requiring an evidentiary hearing on costs if a party requests it. He stated that the case law on requiring evidentiary hearings if requested could be clearer. One case holds that a hearing on attorney fees is mandatory if requested, but whether the case extends to costs is less clear. He added that if it does extend to costs, the amendment is duplicative and does not change anything.

Judge Webb continued, stating that the second recommendation was to amend C.R.C.P. 54(d) to incorporate elements of the statute on costs [C.R.S. § 13-16-122]. The proposed recommendations were the work of Member Richard Holme. He noted that the only change to the language currently in C.R.C.P. 54(d) was adding the number (1) and the word "reasonable." The proposal places the content currently in C.R.C.P. 54(d) in what will be numbered subsection (1) and adds a new subsection (2), whose content is an overlay of C.R.S. § 13-16-122 [the civil cost statute] to make it fold into Rule 54(d). Judge Webb reported the broad concept of the Subcommittee's recommendations was to reduce the amount of costs that are recoverable. Decisions of the Colorado Supreme Court and Court of Appeals have broadened C.R.S. § 13-16-122, and the proposed changes would do away with those broadened decisions.

Next, Judge Webb addressed the specific language changes in the proposal for C.R.C.P. 54(d)(2). He noted that subsections (A), (B), and (C) just contain cosmetic changes to the language from § 13-16-122. The addition of "prior trial" to (D) was to address significant and potentially abusive cost-shifting arising from litigants using daily copy transcripts to run up costs. Member Lisa Hamilton-Fieldman asked if deposition transcripts were mentioned in the proposed language. Judge Webb replied that they are addressed in (H). Ms. Hamilton-Fieldman then replied that (H) should have clearer language indicating that it covers transcripts, not just reporter fees. (E) contains a new reference to "reasonable." Judge Webb reported that the proposed language in (F)'s objective was to limit expert witness fees. It does this by allowing costs only for expert testimony at trial (not consulting experts) with the fees based on actual time spent testifying. The intent of the changes to (H) was to take away cost-shifting for discovery depositions, which goes to the idea that fees should only be shifted when the deposition is really in lieu of live testimony. Proposed (I) would contain the word "reasonable," as well as another suggestion that he would recommend once the Committee began discussing that part of the proposal. He reported that (J) does not contain an added "reasonable" because service of process and publications fees are fixed by statute and therefore will not be in controversy. (K) was different from the version of the proposal in the Agenda Packet [pp 4 and 5], in that it contains new language about reasonableness. Judge Webb concluded his report by stating that the Subcommittee's proposal constituted a philosophical change to the rules by significantly reducing shiftable costs, which was the major concern motivating the Committee to discuss amendments to the costs rules. Also, the proposal minimizes the separation of powers concerns raised at previous Committee meetings.

Member Judge Jones stated that he agreed with the Subcommittee's approach of trying to limit costs. However, he stated he is concerned with the proposal because of *Cherry Creek School No. 5 v. Voelker,* 859 P.2d 805 (Colo. 1993). *Voelker* interprets C.R.S. § 13-16-122, and the court there held that the list of awardable expenses in the statute was not exclusive and permitted the award of other reasonable costs. All litigation on awarding costs has been on C.R.S. § 13-16-122, not C.R.C.P. 54(d). Judge Jones continued, observing that the proposal changes the rule, and asked if the Supreme Court could, by a rule, amend a statute. He asked how the proposed rule change would effectively do anything because in court a litigant would cite to § 13-16-122, not to amended C.R.C.P. 54(d). Member Christopher Mueller responded, stating that the statutes say a rule can supersede statute on a matter of procedure, and that he believes this is a matter of procedure. Judge Jones stated he disagreed. Member David DeMuro agreed with Judge Jones, and raised concerns about incorporating the language of a statute into a rule and then modifying it, especially (F) on expert witnesses. The language for the proposed (F) is from C.R.S. § 13-33-102, which is yet another statute from which the proposal pulls language and then changes it. Mr. DeMuro stated that there is a lot of case law interpreting the statutes as allowing reasonable expert witness fees. Changing the language of the statute and putting it in a rule solves the problem of escalating costs, but in a way

that affects the statute. Judge Jones clarified that he supports the idea of limiting costs; it is just that he is concerned whether the proposed language will work like that.

Member Debra Knapp stated that a rule can explain or further define a statute. §13-16-122 can be read to intend that costs be reasonable, and the proposed amendments to C.R.C.P. 54(d) can further define what a reasonable cost is. Ms. Knapp stated that proposed C.R.C.P. 54(d) harmonizes with § 13-16-122 rather than thwarts it. Professor Mueller agreed with Ms. Knapp. He then asked Judge Webb if proposed C.R.C.P. 54(d)(2)(F) only allows costs for experts for the actual time they spend testifying or if it also includes the time experts spend preparing for court. Judge Webb stated that the "spent testifying at trial" language of the proposal is intended to limit expert costs to just the time the experts spend on the stand. Judge Webb continued, stating that in determining what is reasonable, a judge can consider if the witness is a general practitioner or an eminent expert, so that one hour of testifying doesn't always translate to one hour of payment without any judicial discretion. But time on the stand is intended to dominate the consideration.

Guest Stuart Jorgensen [House Counsel for State Farm] raised the point that in litigation, there are often claims and defenses that are not well supported, and do not make it to trial. However, the opposing side has to spend a lot of time and money and often hire experts to look into them. Judge Webb replied that the Subcommittee's objective was to reduce shiftable costs and focus on the trial process. He replied that the Subcommittee discussed whether C.R.C.P. 54(d)(2)(F) should read "to testify at trial or hearing," but settled on just "to testify at trial" because it would allow for a more workable bright-line test than "trial or hearing." Including "testifying at hearing" could complicate how to distinguish an expert who testifies at a hearing but not at trial from an expert who does not testify at trial or a hearing but puts a report into a summary judgment proceeding that is successful in taking out a claim before trial. Member Chief Judge Loeb pointed out that there could be evidentiary hearing proceedings where a party needs expert testimony on an issue such as jurisdiction, governmental immunity, or class certification. A judge will want that expert testimony and it will be definitive, so why is that situation being separated out from expert testimony at trial? Chief Judge Loeb stated that he would prefer C.R.C.P. 54(d)(2)(F) read "testify at trial or evidentiary hearing." Member Judge Christopher Zenisek stated that he would support that amendment. He then asked whether proposed C.R.C.P. 54(d)(2)(F) would require cost-shifting for all experts who testify. What if an expert is redundant of another expert? What if a court allows all of the experts because there is enough distinction in their testimony? Would the costs of each expert testifying have to be shifted? Judge Webb replied that adding language that micromanages the rule at that level would limit the discretion of the trial court.

Mr. Jorgensen stated that in in-house counsel work they have a strong interest in controlling costs. It is therefore frustrating when on the eve of trial, and even during trial, the other side withdraws a claim for which the attorney had to build up a

defense and spend lots of money to look into. If costs for experts' prehearing and pretrial work are never allowed to the prevailing party, the proposal could incentivize abuse of process by encouraging defendants to incur costs on claims that aren't well supported to encourage settlement on grounds that did not warrant it. Member Frederick Skillern added that bad faith failure to defend cases and alleged breach of insurance contracts is a common example of Mr. Jorgensen's point. Ms. Knapp stated that she is concerned that if costs before trial are allowed, they would not be solving the problem before the Committee: i.e., excessive costs. She stated that there is enough protection in the statutes and rules against parties acting frivolously—that if the proposal to C.R.C.P. 54(d)(2)(F) is opened up to include pretrial expert work, that will perpetuate the problem the proposal is trying to solve. Mr. DeMuro shared an example of an insurance bad faith case from his practice regarding an expert he brought in to address the opposing party's weak claims before trial. He stated that not awarding expert witness fees for pretrial work, as with the expert in his case, would be a dramatic change. Judge Jones inquired what would happen in such a situation in a federal court. Professor Mueller responded that in federal court statutory expert fees are fixed. Judge Jones replied that in federal court there are no big expert awards and that lawyers have adjusted to that. Ms. Knapp joined, stating that Mr. DeMuro's example from practice is not the usual situation, and that the Committee should address the usual situation: i.e., a case where there is an honest dispute and there is a question of denial of access to justice because of the potential financial devastation of losing.

Judge Zenisek noted that the proposed language is restrictive. He expressed concern that if a trial judge feels something isn't right, should we have a rule that limits a judge's ability to award reasonable costs. Ms. Hamilton-Fieldman agreed, and stated she was especially concerned about the specificity of the proposed C.R.C.P. 54(d)(2)(F) and taking "as of course" out of C.R.C.P. 54(d)(1). She stated that there were good reasons to justify the *Voelker* decision in its context, and having a restrictive list of items for which costs can be awarded goes too far in the other direction. She expressed concern about not letting judges consider the individual circumstance of a case, and asked what the evidentiary hearings in the proposed C.R.C.P. 121, §1-22 would even be about if the list of awardable fees costs is so specific.

Member Judge Thomas Kane expressed concern about the proposed change to C.R.C.P. 121, §1-22 requiring a hearing when requested. That would mean trial courts would have to have such a hearing in every civil case that goes to verdict. He questioned whether there would be space in judges' dockets for all of those new hearings. He stated that encouraging courts to have hearings is good, but for small, straightforward cases, such hearings could actually increase costs. He stated he feared that every time a bill of costs is submitted there would be a notice for a hearing. Judge Webb asked Judge Kane what his experience was with hearings on attorney fees, which are mandatory if a party requests such a hearing. Judge Kane said he gets them frequently. Judge Jones replied that a party has to challenge the reasonableness of the fees in requesting a hearing, and cannot just make a bare

request for a hearing, even on attorney fees. Judge Webb asked what a losing party's motivation would be to accumulate more attorney fees (which are not recoverable) to dispute costs that under the circumstances will likely be nominal rather than substantial. Further, the party requesting the hearing has to state what the hearing is for. Hearings are not routine.

Professor Mueller stated that he has been persuaded that limiting expert fees to the time the expert spends testifying is a good idea. He suggested that to clarify this limitation, "shall receive be" in line 4 of the proposed C.R.C.P 54(d)(2)(F) on page 4A be deleted and replaced with a comma, and that "based on the value of" in line 5 be replaced with "for." Ms. Hamilton-Fieldman added that "special study or experience" in line 2 should be replaced with "scientific, technical, or other specialized knowledge" as it is in C.R.E. 702.

Chief Judge Loeb stated that under the proposed rule, a party would not be able to recover costs for experts testifying on unreasonableness at an evidentiary hearing. Ms. Hamilton-Fieldman added that the bulk of expert costs for the preparation of their reports, not testifying at trial. Judge Zenisek stated that he liked the concreteness and clear line of only having an expert's testimony at trial count as a cost, but he was concerned about including the word "evidentiary" in the proposed C.R.C.P. 121, §1-22 change. Without the word "evidentiary" in the proposed rule, the hearings could be more informally conducted, but "evidentiary" implies that parties have to have a courier and copying company come testify, as well as a reasonableness expert.

Ms. Knapp raised concerns about deleting the word "value" from the fifth line of the proposed C.R.C.P. 54(d)(2)(F) on page 4A. She stated that a judge should have the discretion to decide whether a testifying expert spent more time than necessary or was duplicative of another witness, or that other testimony was especially valuable. She said that deleting "value" eliminates that discretion. Mr. Mueller stated that the current proposed language's "based on value of time" could be interpreted to mean that a judge could decide that an expert's testimony at trial was augmented by the weeks of work before trial and that the expert fees should include that preparation. He said that the present language is not clear enough to mean limiting expert fees to just the time spent on the stand. Ms. Knapp stated that this language may come from C.R.S. §13-33-102(4), which the proposed C.R.C.P. 54(d)(2)(F) on page 4A lists as the source of its language.

Mr. DeMuro reiterated Judge Kane's point regarding the flood of cost hearings under proposed C.R.C.P. 121, §1-22 ¶1. He thinks the proposed language says that a trial judge is forced to grant a cost hearing to any party who merely requests it, even if the objecting party does not have a specific argument about costs. Mr. DeMuro continued, stating that an easy way to fix this would be to add language in C.R.C.P. 121, §1-22 ¶2 (which addresses attorney fees) about how parties can request hearings on attorney fees, but they have to specify the subject matter of the attorney fee objection. He stated that there is Colorado Court of Appeals case law that a mere

request does not get you a hearing. Judge Kane asked if a party makes a general objection to the hourly fee of a lawyer and simply says that the lawyer charged too much, would that be sufficient to have to have a hearing? Judge Webb suggested adding language "identifying the issues to be addressed at the hearing" to the proposed language of C.R.C.P. 121, §1-22 ¶1 after "upon the timely request of any party potentially liable for costs," on line 3 of the proposed rule on page 4A. He also suggested eliminating "evidentiary" before "hearing" in the third line of the proposed language. The Committee agreed that these were improvements. A Committee member commented that the problem with mandatory hearings is that attorneys will bring experts to them, exacerbating the escalating costs problem.

Member Mueller asked what the addition of "prior trial" to the proposed C.R.C.P. 54(d)(2)(D) was meant to address? Judge Webb replied that the appellate rules state that parties can get costs as part of the appeals process, but the addition of this language is meant to restrain the costs for things at the current trial. He continued, stating that large, powerful parties often get daily copy for every case, which becomes very expensive. They will contrive a way to use the daily copy from a previous day of the same trial, and then if they prevail, seek their daily copy as a recoverable cost.

Judge Jones stated that that provision is taken from statute, and the statute does not have the limitation being proposed by the Subcommittee. He reiterated that he does not believe the Supreme Court can overrule the legislature. C.R.S. §13-2-108 states that rules cannot modify the substantive rights of a litigant, and case law interpreting the statute states that when a statute and a rule conflict, the statute controls. Professor Mueller stated that he believes *Voelker* can be changed by rule.

Judge Zenisek asked if C.R.S. §13-16-122 mandates the costs that the proposal would make discretionary. Ms. Knapp replied no, that the statute says "may." Judge Jones stated that this is the point of his objection to the proposal: that *Voelker* and C.R.S. §13-16-122 say "may."

Professor Mueller asked whether the proposed C.R.C.P. 54(d)(2)(H) was intended to include deposition transcripts, because "reporters' fees" does not seem to include them. Judge Webb stated that it was the Subcommittee's intent to have transcript costs included in C.R.C.P. 54(d)(2)(H). Professor Mueller suggested adding "transcript costs," to proposed C.R.C.P. 54(d)(2)(H) after "limited to" on the second line of the proposed language as it appears on page 4A. The Committee agreed.

Mr. Jorgensen stated that there are also often videographers and live links that are helpful, but expensive, and those would not be compensable under the proposed rule. He also asked how the proposed rule would award costs in the following scenario: neurological psychology experts are very expensive and are often used in trial preparation. If the allegation of a head injury is dropped before trial, are the expert's costs not recoverable? Also, if the expert does extensive preparation but only testifies for a few minutes, how much of the expert's fees are awardable to the

prevailing party? Judge Webb replied that preparation fees are not awardable, even more so with Professor Mueller's suggested changes to proposed C.R.C.P. 54(d)(2)(F). Mr. Jorgensen stated that sometimes experts block out much more time for trial than they actually use to talk, and asked how the new rule would award expert fees in that situation. Judge Webb replied that costs are only available for the time the expert spends on the stand. Under the proposal, the trial court has discretion to determine a reasonable fee for the expert's testimony, which is not necessarily what was billed.

Mr. Skillern stated that he shares the implied concern for middle- to low-income parties who need experts for their cases and their only opportunity to recover is from expert costs. The proposed rule would disrupt this. Professor Mueller responded that the lawyer would absorb the expert witness fees. That is what happens in federal court. Mr. Jorgensen stated that in state courts, the number of civil matters going to court has increased, as have the number of trials. To him, this belies the idea of inadequate access to courts. Mr. Jorgensen stated that he is concerned that the proposed language will negatively impact access to justice because there will be cases where a low-income family with a legitimate claim will decide not to go to court because they will not have the ability to recover costs and their lawyer will not shoulder them. Professor Mueller responded, stating that the main problem we are addressing is if the low-income family goes to court and loses, and then the defendant demands costs. The power of a defendant to collect its expert fees is a bigger concern.

Ms. Knapp stated that it is improper to generalize that there are more cases at court because the larger number may be from more collections cases. Mr. Jorgensen replied that even when looking at the different categories of cases, the numbers still show an increase. He said there are legitimate cases where a plaintiff gets nothing in-hand after prevailing at trial. Judge Kane stated that he agrees that it feels like there are more trials, and that access to justice is a worry. He stated that there is animosity between the insurance industry and some plaintiff firms. Limitations on costs could cause strategic maneuvering by well-funded defendants. These defendants will know they will not get costs back, but they will still have lots of experts. Plaintiffs in these cases will have no chance of getting costs back and will not be able to match all of the independent medical examination experts from the defense. Judge Kane then stated that despite his objections to the proposal, he still thinks the Committee should do something about escalating costs. Judge Jones questioned whether the discussed incentives would be altered by the proposal, and stated that insurance companies will still behave this way. He stated that there may also be a need for a change to C.R.C.P. 16. For example, not allowing parties to each retain six experts and instead limiting it to a two-expert case might help alleviate some of the concerns the Committee has discussed. Judge Kane agreed, adding that trial judges want and ought to be able to figure out discovery early.

Mr. Mueller moved to adopt the proposal as amended. Judge Webb suggested adding "or contract" to the end of proposed C.R.C.P. 54(d)(2)(I) because the American and

English rule conflict would be resolved by this addition. He stated that when the Subcommittee met, Mr. Holme stated that a contract's fee-shifting provision may make fees recoverable but it could not impact what a court treats as costs. Judge Webb stated that the law is not clear and that he is concerned that without a reference to contracts, (I) would be ambiguous.

Judge Webb asked Chairman Laugesen (1) if he should read back all of the amendments to the proposal to make sure they were all accurate and (2) if the Committee would vote on the rules all or nothing, or if they would prefer to vote on the individual amendments. Chairman Laugesen replied that Judge Webb should read back the amendments, and that the Committee would then vote on the entire rule, not the individual amendments. Judge Kane reiterated Judge Jones' point that the Committee is trying to change statutory language with a rule, and that he does not believe they can do so. Judge Jones stated that he does not believe the Committee can do this and also thinks they cannot make the decision on whether or not they can do this. Mr. DeMuro stated that he also believes the Committee cannot do this, and that the Committee should not put the Supreme Court in a position where by a rule they are changing a statute; however, he does like some of the proposed rule modifications. Judge Kane agreed. Judge Zenisek asked if the Committee's proposal was really superseding a statute or if it was just putting different rules into effect. Judge Jones replied that he thinks the proposal supersedes a statute because the proposed C.R.C.P. 54(d)(2) says that costs "*shall* be limited to the following" (emphasis added) and that C.R.S. §13-16-122 says "may." Ms. Knapp replied that the proposed C.R.C.P. 54(d)(1) says "unless the court otherwise directs" which turns the "shall" into a "may." Judge Jones replied that "unless the court otherwise directs" appears in subsection (1) and he is concerned with the "shall" in subsection (2).

Mr. DeMuro stated that there is still an offer of settlement statute with a totally different definition of costs. Under the proposed rule change, an attorney would have to figure out two different cost entitlements. Judge Jones stated that that has never been a problem. Mr. Laugesen noted there has always been a difference in offer of settlement costs. *Voelker* is clear, and the Committee's proposal is trying to say that the statute does not control and can be superseded.

Mr. Jorgensen stated that he could not find Committee minutes or other information about the Civil Rules Committee meeting by looking on the Internet. He was present at this meeting because he heard about it by word of mouth. He stated that this proposal has a potentially huge impact and he is concerned about the adequacy of notice and opportunity for public comment on it. Judge Webb replied that the Supreme Court, upon receiving the Committee's recommendations, can choose to hold a hearing or ask for more public comment. That is the way it is usually done.

Judge Webb read through the Committee's amendments to the proposed C.R.C.P. 54(d) and 121, §1-22, ¶1.

It was then moved and seconded to amend C.R.C.P. 121, §1-22, ¶1 as follows:

PROPOSED AMENDMENT

Rule 121. Local Rules — Statewide Practice Standards.

Section 1-22

COSTS AND ATTORNEY FEES

1. **COSTS.** A party claiming costs shall file a Bill of Costs within 21 days of the entry of order or judgment, or within such greater time as the court may allow. The Bill of Costs shall itemize and total costs being claimed. Taxing and determination of costs shall be in accordance with C.R.C.P. 54(d) and Practice Standard § 1-15, **EXCEPT THAT, UPON THE TIMELY REQUEST OF ANY PARTY POTENTIALLY LIABLE FOR COSTS, IDENTIFYING THE ISSUES TO BE ADDRESSED AT THE HEARING, THE COURT SHALL CONDUCT A HEARING BEFORE TAXING COSTS.**

On a call for the vote, the motion carried 9:0.

It was then moved and seconded to amend C.R.C.P. 54(d) as follows:

PROPOSED AMENDMENT

Rule 54. Judgments; Costs.

(a) through **(c) * * * * [NO CHANGE]**

(d)(1) Costs. Except when express provision therefor is made either in a statute of this state or in these rules, **REASONABLE** costs shall be allowed ~~as of course~~ to the prevailing party unless the court otherwise directs; but costs against the state of Colorado, its officers or agencies, shall be imposed only to the extent permitted by law.

(2) COSTS ALLOWED. "COSTS" SHALL BE LIMITED TO THE FOLLOWING:
(A) ANY DOCKET FEE OR ANY OTHER FEE OR TAX REQUIRED BY STATUTE TO BE PAID TO THE CLERK OF THE COURT;
(B) THE JURY FEES AND EXPENSES PROVIDED FOR BY STATUTE;
(C) ANY FEES REQUIRED TO BE PAID TO SHERIFFS PURSUANT TO STATUTE;
(D) ANY FEE OF THE COURT REPORTER FOR ALL OR ANY PART OF A PRIOR TRIAL TRANSCRIPT NECESSARILY OBTAINED FOR USE IN THIS CASE;
(E) THE WITNESS FEES, INCLUDING REASONABLE SUBSISTENCE PAYMENTS AND MILEAGE AT THE RATE AUTHORIZED BY STATUTE;

(F) FEES FOR WITNESSES ALLOWED TO TESTIFY AT TRIAL ONLY TO AN OPINION FOUNDED ON SCIENTIFIC, TECHNICAL, OR OTHER SPECIALIZED KNOWLEDGE IN ANY BRANCH OF SCIENCE OR TO MAKE SCIENTIFIC OR PROFESSIONAL EXAMINATIONS AND STATE THE RESULT THEREOF, LIMITED TO REASONABLE COMPENSATION, TO BE FIXED BY THE COURT, FOR THE TIME SPENT TESTIFYING AT TRIAL AND THE DEGREE OF LEARNING OR SKILL REQUIRED;
(G) ANY REASONABLE FEES FOR EXEMPLIFICATION AND COPIES OF PAPERS NECESSARILY OBTAINED FOR USE IN THE CASE;
(H) ANY REASONABLE COSTS OF TAKING DEPOSITIONS FOR THE PERPETUATION OF TESTIMONY, LIMITED TO TRANSCRIPT COSTS, REPORTERS' FEES, WITNESS FEES, EXPERT WITNESS FEES, MILEAGE FOR WITNESSES, AND SHERIFFS' FEES FOR SERVICE OF SUBPOENAS WHEN THE DEPOSITIONS ARE ADMITTED IN EVIDENCE IN LIEU OF THE DEPONENTS' LIVE TESTIMONY;
(I) ANY REASONABLE ATTORNEY FEES, WHEN AUTHORIZED BY STATUTE, COURT RULE OR CONTRACT;
(J) ANY FEES FOR SERVICE OF PROCESS OR FEES FOR ANY REQUIRED PUBLICATIONS;
(K) ANY OTHER ITEM SPECIFICALLY AUTHORIZED BY STATUTE TO BE INCLUDED AS PART OF THE COSTS TO THE EXTENT REASONABLE.

(e) through **(h)** * * * * **[NO CHANGE]**

On a call for the vote, the motion carried 8:2.

C.R.M 6(c)(1)(E)/7(a)(8)—Subcommittee Report and Recommendation for Amendment to C.R.C.P 7(a)(8):

Chairman Laugesen called the Committee's attention to Item 5 of the Agenda Packet [pp 18–22] and asked Judge Webb to describe the Subcommittee's work and recommendation.

Judge Webb stated that in district courts with magistrates, an anomaly can happen where a magistrate (who is not empowered to end litigation) makes a ruling that has the practical effect of ending litigation. Judge Webb said that the appointed Subcommittee was in agreement on their concern for the issue, and were unanimous in their recommendation to amend C.R.C.P 7(a)(8) on page 18 of the Agenda Packet.

It was moved and seconded to amend C.R.C.P 7(a)(8) as follows:

PROPOSED AMENDMENT

Rule 7. Review of District Court Magistrate Orders or Judgments

(a)(1) through (7) * * * * [NO CHANGE]

(8) The reviewing judge shall consider the petition for review on the basis of the petition and briefs filed, together with such review of the record as is necessary. The reviewing judge also may conduct further proceedings, take additional evidence, or order a trial de novo in the district court. **AN ORDER ENTERED UNDER 6(C)(1) WHICH EFFECTIVELY ENDS A CASE SHALL BE SUBJECT TO DE NOVO REVIEW.**

(9) through (12) * * * * [NO CHANGE]

(b) [NO CHANGE]

On a call for the vote, the motion carried 10:0.

C.R.C.P. 6(d) or 121, §1-15 ¶2—Notation of a Problem Concerning Affidavits and a Proposed Solution:

Chairman Laugesen called the Committee's attention to Item 6 of the Agenda Packet [pp 23–30], and asked Member David DeMuro to describe the issue and his proposed solution.

Member DeMuro stated that a colleague brought the issue to his attention when he was looking for the rule that if a party is going to use an affidavit to support or oppose a motion, the party must submit the affidavit with the motion or brief. Mr. DeMuro stated that this rule was deleted when the Committee amended C.R.C.P. 6 (on time computation). He believes that the concept should be returned to the rules, and that there are two possible locations for it: the Committee could readopt 6(d) with only the last sentence of the former 6(d), or they could add language to 121, §1-15 ¶2. Mr. DeMuro believes the second option is better because the concept more logically fits into Rule 121 than Rule 6. Professor Mueller agreed that the language from former Rule 6(d) should be put back in the rules and that the new language shouldn't go in current Rule 6. Professor Mueller noted that F.R.C.P. 6(c) still contains language requiring affidavits to be filed with the motions they support, and it also requires serving the motion 14 days before the hearing, which Colorado eliminated with its Rule 6 amendments.

It was moved and seconded to amend C.R.C.P 121, §1-15 as follows:

PROPOSED AMENDMENT

C.R.C.P. 121, §1-15. DETERMINATION OF MOTIONS

(1) * * * * [NO CHANGE]

(2) Affidavits. If facts not appearing of record may be considered in disposition of the motion, the parties may file affidavits WITH THE MOTION OR within the time specified FOR FILING THE PARTY'S BRIEF IN THIS SECTION 1-15, ~~in~~ Rules 6~~(d)~~, 56 or 59, C.R.C.P., OR AS OTHERWISE ORDERED BY THE COURT. Copies of such affidavits and any documentary evidence used in connection with the motion shall be served on all other parties.

On a call for the vote, the motion carried 10:0.

New Colorado Supreme Court Justice:

Carol Haller announced that Governor Hickenlooper had announced the appointment of Judge William Hood III to the Colorado Supreme Court.

Adjournment:

There being no further business, Chairman Laugesen thanked the Subcommittees for their work on the issues discussed and declared the meeting adjourned at 3:16 p.m.

The next regular meeting is scheduled for **Friday, January 31, 2014 at 1:26 p.m. in Room 4244, Fourth Floor, Ralph L. Carr Colorado Judicial Center, 2 East 14th Avenue, Denver, Colorado**.

Respectfully submitted,

Cecily S.H. Nicewicz