AGENDA

COLORADO SUPREME COURT
COMMITTEE ON THE
RULES OF CIVIL PROCEDURE

Friday, September 30, 2016, 1:30p.m.
Ralph L. Carr Colorado Judicial Center
2 E.14th Ave., Denver, CO 80203
Fourth Floor, Supreme Court Conference Room

I. Call to order

II. Approval of June 24, 2016 minutes [Page 1 to 4]

III. Announcements from the Chair

A. Contingency Fee Rules—transferred to the Rules of Professional Conduct Committee

B. 2017 Schedule
January 27
March 31
June 23
September 29
October 27
November 17

IV. Introduction of members and guests

V. *Warne v. Hall*, 2016 CO 50—General discussion [Page 5 to 43]

VI. Business

A. CRCP 121 §1-27—(Judge Jonathan Shamis) [Page 44 to 47]

B. CRCP 52—(Lee Sternal) [Page 48 to 77]

C. CRCP 53—(Judge Zenisek) [Page 78 to 85]

D. New Form for admission of business records under hearsay exception rule—(Damon Davis and David Little) [Page 86 to 98]

E. Colorado Courts E-Filing System name change—(Judge Berger) [Page 99 to 101]

VII. New Business

VIII. Adjourn—Next meeting is October 28, 2016 at 1:30pm

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Conference Call Information:

Dial (720) 625-5050 (local) or 1-888-604-0017 (toll free) and enter the access code, 79102117, followed by # key.

Colorado Supreme Court Advisory Committee on the Rules of Civil Procedure
June 24, 2016 Minutes

A quorum being present, the Colorado Supreme Court Advisory Committee on Rules of Civil Procedure was called to order by Judge Michael Berger at 1:30 p.m., in the Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Colorado Judicial Center. Members present or excused from the meeting were:

Name	**Present**	**Excused**
Judge Michael Berger, Chair	X	
Chief Judge (Ret.) Janice Davidson	X	
Damon Davis		X
David R. DeMuro		X
Judge J. Eric Elliff	X	
Judge Adam Espinosa	X	
Judge Ann Frick		X
Judge Fred Gannett	X	
Peter Goldstein	X	
Lisa Hamilton-Fieldman	X	
Richard P. Holme	X	
Judge Jerry N. Jones		X
Judge Thomas K. Kane	X	
Debra Knapp	X	
Richard Laugesen	X	
Cheryl Layne	X	
Judge Cathy Lemon	X	
Bradley A. Levin	X	
David C. Little		X
Chief Judge Alan Loeb		X
Professor Christopher B. Mueller	X	
Gordon "Skip" Netzorg		X
Brent Owen	X	
Stephanie Scoville	X	
Lee N. Sternal	X	
Magistrate Marianne Tims	X	
Jose L. Vasquez	X	
Ben Vinci	X	
Judge John R. Webb	X	
J. Gregory Whitehair	X	
Judge Christopher Zenisek	X	
Non-voting Participants		
Justice Allison Eid, Liaison	X	
Jeannette Kornreich	X	

I. Attachments & Handouts

A. June 24, 2016 agenda packet

B. Supplemental Material

- County Court Rules Subcommittee's Proposal
- C.R.C.P. 53 – Memo & OK Statute

II. Announcements from the Chair

- The May 20, 2016 minutes were approved with two amendments: in subsection (E) "162" was changed to "182"; and in subsection (G) "pursuing an amendment" was changed to "studying the issue";
- New member Judge Elliff was introduced and welcomed;
- County Court Rules Subcommittee member Jacques Machol was in attendance to discuss the subcommittee's proposal;
- The C.R.C.P. 120 public hearing will be held on November 10 at 2:30;
- The County Court Judges Association's (CCJA) comment in response to the recommended county court jurisdictional increase was circulated. The CCJA is generally opposed to the increase, and the committee will take no further action at this time; and
- The committee is at capacity with 31 members; new members will be added when an existing member leaves. A list of persons interested in appointment will be kept for when there is a vacancy.

III. Business

A. County Court Rules Subcommittee

The County Court Rules Subcommittee was formed at the beginning of the year, and its members were from a prior county court group operating under the State Court Administrator's Office (SCAO). Membership consists of county court judges, a magistrate, clerks of court, SCAO representatives, and attorneys. Subcommittee chair Ben Vinci reported that the subcommittee had unanimously adopted the proposed changes to the rules and forms. The proposals were amended and adopted by the committee as noted:

- In Form 26, "under penalty of perjury" was added in the statement after #5 by a vote of 11:8. There was a motion to keep the Return of Service that had been struck on page 4, but with two yes votes the motion failed;

- In Form 28, the subcommittee added a column for "The Employer's Calculation," but after discussion the committee voted to remove the column 15:4. In #1, a motion to delete "I object" and replace it with "Judgment Debtor's objection" passed unanimously;

- In Forms 29, 31, 32, and 33 "under penalty of perjury" was added in the statement after #5;

- It was clarified that the changes in the draft apply to both C.R.C.P. 103 and 403. In subsection (h)(2), the amended language will be changed to "and the *Judgment Debtor's* Objection to the Calculation of the Amount of Exempt Earnings" to track Form 28, and the "6 month" references in the rule will be changed to 182 days; and

- A motion to adopt the rules and forms as amended passed unanimously.

B. C.R.C.P. 57(j) & Fed. R. Civ. P. 5.1

Stephanie Scoville addressed whether C.R.C.P. 57 should be amended to mirror the federal rule, which expressly provides for notice to the U.S. Attorney General's Office when the constitutionality of a statute is challenged. Ms. Scoville advised the committee it could do nothing or pursue a truncated version of Fed. R. Civ. P. 5.1. A simpler version of Fed. R. Civ. P. 5.1 could provide clarification as to how and how long a party has to notify the Colorado Attorney General's Office, but something as extensive as the federal rule is unnecessary. A subcommittee will be formed and decide what action to pursue.

C. County and municipal appeals to district court

Subcommittee chair Judge Espinosa began and stated that the subcommittee wanted the committee to weigh in on an issue. The subcommittee was discussing ways in which an indigent county court appellant can get a copy of the record on appeal. The subcommittee had a few ideas, but discussion centered on the service For The Record (FTR), which is used in many courts. FTR records and produces an electronic copy of the record. The committee was interested in the subcommittee studying this issue further, so the subcommittee will follow-up when it has more information about FTR.

D. C.R.C.P. 33 & Form 20

Judge Berger received an inquiry about the 2015 change to C.R.C.P. 33 that was part of the Improving Access to Justice proposal. Specifically, was the language in subsection (b)(1), inadvertently struck:

C.R.C.P. 33 Interrogatories to Parties

(a) [NO CHANGE]

(b) Answers and Objections.

(1) An objection must state with specificity the grounds for objection to the Interrogatory and must also state whether any responsive information is being withheld on the basis of that objection. A timely objection to an Interrogatory stays the obligation to answer those portions of the Interrogatory objected to until the court resolves the objection. No separate motion for protective order pursuant to C.R.C.P. 26(c) is required. ~~Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the~~

~~reasons for objection and shall answer to the extent the interrogatory is not objectionable.~~

After discussion, the committee agreed the language in subsection (b)(1) was inadvertently struck. The struck language will be reinstated, and Rule 33 will be sent to the Editing Subcommittee for review.

E. C.R.C.P. 83

Jeannette Kornreich stated that a question was raised as to whether courts need to require notarization where a Judicial Department Form (JDF) must be verified by statute. Where a statute requires a filing be verified, but doesn't specify that it must be signed by a notary, the JDF could have a sworn declaration acknowledging the signer understands he or she is subject to the penalty of perjury if the information provided is not true and correct. The text of the new rule, C.R.C.P. 83, and the verification statement were discussed. The committee asked how this would affect the domestic setting where notarization is important to acknowledge that the signer is actually the signer, and whether any uniform acts could impact this proposal. Ms. Kornreich will look into the committee's concerns and report back.

F. C.R.C.P. 52

The subcommittee had met a few times and is still discussing what to do. The subcommittee is considering deleting the last sentence of C.R.C.P. 52, but adding a comment discussing how the deletion should be construed. The subcommittee will continue to meet and follow-up at the next meeting.

G. C.R.C.P. 53

Subcommittee member Greg Whitehair's memo was circulated to the committee. The subcommittee is meeting in July, and C.R.C.P. 53 will be discussed at the next meeting.

H. New Form for Admission of Business Records Under Hearsay Exception

Passed to September 30, 2016 meeting.

I. Code of Virginia § 8.01-296. Manner of Serving Process Upon Natural Persons

Passed to September 30, 2016 meeting.

IV. Future Meetings

September 30, 2016

The Committee adjourned at 3:30p.m.

Respectfully submitted,
Jenny A. Moore

ADVANCE SHEET HEADNOTE
June 27, 2016

2016 CO 50

No. 14SC176, Warne v. Hall—Civil Procedure—Pleading.

Warne petitioned for review of the court of appeals' judgment reversing the dismissal of Hall's complaint, which asserted a claim of intentional interference with contract. Although invited to apply the standard for dismissal articulated in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009), the district court dismissed for failure to state a claim upon which relief could be granted without addressing either Twombly or Iqbal in its written order. By contrast, the court of appeals expressly declined to apply the more recent United States Supreme Court jurisprudence governing Fed. R. Civ. P. 12(b)(6), finding itself instead bound by the Colorado Supreme Court's existing precedent, which had heavily relied on the United States Supreme Court's earlier opinion in Conley v. Gibson, 355 U.S. 41 (1957), and particularly its language to the effect that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove "no set of facts" in support of his claim. Declining, therefore, to be influenced by the United States Supreme Court's more recent admonition to the federal courts that "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is

plausible on its face,'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 570), the court of appeals found the complaint sufficient to state a claim.

The Colorado Supreme Court reversed the judgment of the court of appeals finding the complaint to be sufficient. Because the Colorado Supreme Court's case law interpreting the Colorado Rules of Civil Procedure in general, and C.R.C.P. 8 and 12(b)(5) in particular, reflected first and foremost a preference to maintain uniformity in the interpretation of the federal and state rules of civil procedure and a willingness to be guided by the United States Supreme Court's interpretation of corresponding federal rules whenever possible, rather than an intent to adhere to a particular federal interpretation prevalent at some fixed point in the past, the Colorado Supreme Court found that its precedent was interpreted too narrowly by the court of appeals. Because it also found that the plaintiff's complaint, when evaluated in light of the more recent and nuanced analysis of Twombly and Iqbal, failed to state a plausible claim for relief, the Colorado Supreme Court found the complaint insufficient under the Colorado Rules of Civil Procedure.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2016 CO 50

Supreme Court Case No. 14SC176
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 12CA719

Petitioner:

Menda K. Warne,

v.

Respondent:

Bill J. Hall.

Judgment Reversed in Part and Affirmed in Part
en banc
June 27, 2016

Attorneys for Petitioner:
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JUSTICE COATS delivered the Opinion of the Court.
JUSTICE GABRIEL dissents, and **JUSTICE MÁRQUEZ** and **JUSTICE HOOD** join in the dissent.

¶1 Warne petitioned for review of the court of appeals' judgment reversing the dismissal of Hall's complaint, which asserted, as relevant here, a claim of intentional interference with contract. See Hall v. Warne, No. 12CA719 (Colo. App. Jan. 23, 2014) (not published pursuant to C.A.R. 35(f)). Although invited to apply the standard for dismissal articulated in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009), the district court dismissed for failure to state a claim upon which relief could be granted without addressing either Twombly or Iqbal in its written order. By contrast, the court of appeals expressly declined to apply the more recent United States Supreme Court jurisprudence governing Fed. R. Civ. P. 12(b)(6), finding itself instead bound by this court's existing precedent, which has heavily relied on the Supreme Court's earlier opinion in Conley v. Gibson, 355 U.S. 41 (1957), and particularly its language to the effect that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove "no set of facts" in support of his claim. Declining, therefore, to be influenced by the United States Supreme Court's more recent admonition to the federal courts that "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face,'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 570), the court of appeals found the complaint sufficient to state a claim.

¶2 Because our case law interpreting the Colorado Rules of Civil Procedure in general, and C.R.C.P. 8 and 12(b)(5) in particular, reflects first and foremost a preference to maintain uniformity in the interpretation of the federal and state rules of civil procedure and a willingness to be guided by the Supreme Court's interpretation of

corresponding federal rules whenever possible, rather than an intent to adhere to a particular federal interpretation prevalent at some fixed point in the past, the court of appeals too narrowly understood our existing precedent. Because the plaintiff's complaint, when evaluated in light of the more recent and nuanced analysis of Twombly and Iqbal, fails to state a plausible claim for relief, the judgment of the court of appeals finding the complaint to be sufficient is reversed, and the matter is remanded with instruction to permit further proceedings consistent with this opinion.

I.

¶3 Bill Hall filed a complaint in state district court against the Town of Gilcrest and its mayor, Menda Warne, as an individual. Hall's complaint alleged that Warne used her authority as mayor to interfere with his purchase agreement to sell a parcel of land in Gilcrest to Ensign United States Drilling, Inc., which intended, according to an attachment to the complaint, to build its headquarters on the property. Although the precise terms of the agreement were not included in the pleadings, the complaint, along with its attached exhibits, indicated that Ensign tried for more than a year to obtain approval to purchase the property and construct its headquarters in Gilcrest, but its efforts were thwarted by the town government. More specifically, the complaint alleged that Warne caused Ensign to terminate the agreement by imposing unauthorized and unreasonable conditions on its proposed site development plan, by mayoral order, after the plan had been conditionally approved by the town board at a public hearing. The complaint further alleged that Warne's actions were motivated by malice towards Hall and that the conditions imposed on Ensign's plans were

"disproportionate to any impact Ensign would have on the town" and "were not based on the reasonable requirements of applicable ordinances or law." On the basis of these and similar allegations, the complaint asserted several claims for relief under state and federal law, including intentional interference with contractual obligations, taking without just compensation, and violation of substantive due process under 28 U.S.C. § 1983 (2012).

¶4 Because the original complaint included both state and federal claims, the case was removed to federal district court pursuant to 28 U.S.C. § 1441 (2012). Upon removal, Warne and the town filed a motion to dismiss for failure to state a claim for relief under Fed. R. Civ. P. 12(b)(6). Before briefing was complete, the federal district court accepted a stipulation by the parties whereby the federal law claims would be voluntarily dismissed by Hall and the case would be remanded to state district court for resolution of the state law claim for intentional interference with contractual obligations against Warne.[1]

¶5 On remand to the state district court, the motion to dismiss under Fed. R. Civ. P. 12(b)(6) was converted into a motion to dismiss under the corresponding, though differently-numbered state rule, C.R.C.P. 12(b)(5). In subsequent briefing, Warne and the town urged the district court to review the motion to dismiss according to the "plausible on its face" standard recently articulated by the United States Supreme Court in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S.

[1] Two unrelated claims against the town were also included in the remand order and later dismissed by the state district court. The plaintiff did not appeal the dismissal of these claims, and thus neither is at issue before us.

662 (2009), rather than the so-called "no set of facts" standard from Conley v. Gibson, 355 U.S. 41 (1957), cited favorably by this court in the past. Without expressly distinguishing the Conley from the Twombly/Iqbal standard of review, the district court granted the defendants' motion to dismiss, finding that the complaint contained insufficient allegations that Warne in fact caused the conditions to be imposed on Ensign's proposed development plan that ultimately led Ensign to terminate its contract with Hall.

¶6 The plaintiff was granted leave to file an amended complaint, which he did, to include additional allegations that he had been informed that Warne exercised control over land development matters and would have used any means at her disposal to ensure that Ensign would never meet the requirements necessary to build, regardless of what had been approved by the town board. The defendants renewed their motion to dismiss for failure to state a claim, which the district court again granted, finding that while the amended complaint provided additional allegations supporting a conclusion that Warne possessed the authority and intent to block Ensign's development plan, it lacked allegations of Warne's specific conduct causing Ensign's breach. Subsequently, the district court also awarded attorney fees in favor of the defendants.

¶7 On Hall's appeal of the dismissal of his claim for contractual interference, the court of appeals reversed, finding itself bound by this court's precedent relying on Conley's "no set of facts" standard and, therefore, rejecting Warne's proposal to examine the complaint under the Twombly/Iqbal "plausible on its face" standard. Under the Conley standard, the court of appeals concluded that the complaint sufficed

to state a claim for relief and, more specifically, that Hall's allegations to the effect that Warne possessed the authority and intent to block Ensign's development plan and that she had exercised that authority to impose conditions despite the town board's prior approval of Ensign's plan sufficiently pled that Warne caused Ensign to terminate its contract with Hall. The court of appeals therefore also reversed the district court's award of attorney fees.

¶8 Warne petitioned this court for further review by writ of certiorari.

II.

¶9 In Bell Atlantic Corp. v. Twombly, in addressing the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct, the United States Supreme Court explicated the pleading standard of Federal Rule of Civil Procedure 8 in greater detail than it had done in at least a half-century, giving particular emphasis to the "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief.'" 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). In that context, the Court stated that the factual allegations of the complaint must be enough to raise a right to relief "above the speculative level," id., and provide "plausible grounds to infer an agreement," id. at 556. Had there been any doubt, two years later, in Ashcroft v. Iqbal, the Court made clear that Twombly's "plausibility standard" was in no way limited to the antitrust conspiracy context in which it had been articulated, but rather represented a "construction of Rule 8," Iqbal, 556 U.S. 662, 678–80 (2009), which governs the pleading standard "in all civil actions and proceedings in the United States district courts," id. at 684. Quoting liberally from its earlier opinion in Twombly, the Court in

Iqbal characterized that standard as being underlain by two working principles: First, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," id. at 678, and second, "only a complaint that states a plausible claim for relief survives a motion to dismiss," id. at 679.

¶10 The Court derived its "plausibility standard" from Rule 8 as it then existed, without feeling compelled to either amend the language of the rule or overturn any of the Court's prior interpretations, Twombly, 550 U.S. at 569 n.14, instead characterizing the Twombly plaintiffs' main argument against this interpretation as its "ostensible conflict" with an isolated statement in the Court's earlier construction in Conley v. Gibson, 355 U.S. 41 (1957), Twombly, 550 U.S. at 560–61. As the Court explained, when it spoke (some fifty years earlier in Conley) not only of the need for fair notice of the grounds for entitlement to relief, but also of "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," id. at 561 (quoting Conley, 355 U.S. at 45–46), the "accepted rule" to which it referred was a rule that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint," id. at 563. While the Court openly conceded that the "no set of facts" passage of Conley could be read in isolation as saying that any statement revealing the theory of the claim would suffice unless its factual impossibility could be shown from the face of the pleadings, and that many courts had understood it precisely that way, id. at 561, in context, Conley "described the breadth of opportunity to prove what an adequate complaint claims, not

the minimum standard of adequate pleading to govern a complaint's survival," id. at 563.

¶11 Like many federal courts and other state courts, this court took Conley's "no set of facts" language, at least ostensibly, at face value. As the court of appeals rightly noted, this court has a long, and continuous, tradition of repeating, in reliance on Conley, that motions for dismissal are looked upon with disfavor and will be granted only if it appears beyond doubt that the plaintiff can prove no set of facts in support of a claim that would entitle the plaintiff to relief. See, e.g., Qwest Corp. v. Colo. Div. of Prop. Taxation, 2013 CO 39, ¶ 12, 304 P.3d 217, 221; Sprott v. Roberts, 390 P.2d 465, 467 (Colo. 1964) (quoting Conley's "no set of facts" passage for the first time in a concurring opinion, while noting that "[t]his expresses the recognized way to test the sufficiency of a claim, and it has been applied in a legion of cases in the lower federal courts"). In fact, our reliance on the federal courts for our interpretation of the pleading standards of our own Rule 8 can be traced back even before Conley, virtually to the initial replacement of our former Code of Civil Procedure by the modern Rules of Civil Procedure. See People ex rel. Bauer v. McCloskey, 150 P.2d 861, 863 (Colo. 1944) (citing Eberle v. Sinclair Prairie Oil Co., 35 F. Supp. 296, 297 (E.D. Okla. 1940), aff'd, 120 F.2d 746 (10th Cir. 1941); Sparks v. England, 113 F.2d 579, 582 (8th Cir. 1940); Leimer v. State Mut. Life Assurance Co. of Worcester, Mass., 108 F.2d 302, 306 (8th Cir. 1940) (subsequently relied on by Conley, 355 U.S. at 45–46 n.5, for its characterization of the "accepted rule")).

¶12 The question before us today is therefore less one of whether we will abandon the Conley pleading standard in favor of the Twombly/Iqbal standard than whether

our pleading standard has always represented an attempt to mirror the accepted federal construction of the virtually identical federal pleading rules, rather than to adopt the particular interpretation of the corresponding federal rule that was prevalent at the time. For a number of reasons, in the absence of some compelling justification unique to the history or practice of this jurisdiction, we have always considered it preferable to interpret our own rules of civil procedure harmoniously with our understanding of similarly worded federal rules of practice. See Leaffer v. Zarlengo, 44 P.3d 1072, 1080 (Colo. 2002) (federal cases interpreting federal rules provide "highly persuasive guidance" when interpreting identical state rules); Faris v. Rothenberg, 648 P.2d 1089, 1091 n.1 (Colo. 1982). We see no reason to abandon that philosophy or approach today.

¶13 As a general matter, except as required by the Supremacy Clause of the Federal Constitution, we are clearly not bound to accept the United States Supreme Court's understanding of language susceptible of more than one reasonable interpretation, and for various reasons we have, on occasion, deviated in our construction of similarly worded constitutional provisions, statutes, and rules. However, quite apart from the fact that a considered interpretation by the Supreme Court, applying rules of construction equally acceptable in this jurisdiction, will virtually always be worthy of serious consideration, as we have previously observed, simply disagreeing with the Supreme Court about the meaning of the same or similar provisions appearing in both federal and state law risks undermining confidence in the judicial process and the objective interpretation of codified law. See Curious Theatre Co. v. Colo. Dep't of Pub. Health & Env't, 220 P.3d 544, 551 (Colo. 2009). This concern is only heightened when

the disagreement in question reflects our resistance to the Supreme Court's determination that our understanding of one of its prior pronouncements has in fact been mistaken. Cf. Ingold v. AIMCO/Bluffs, L.L.C. Apartments, 159 P.3d 116, 123–25 (Colo. 2007) (overturning prior decision relying on federal caselaw subsequently repudiated by the United States Supreme Court).

¶14 In light of our unequivocal statements of attribution in the past, we think it disingenuous to suggest that our understanding of the pleading requirements of our own rules was not directly borrowed from the prevailing interpretation of the corresponding federal rules, by both the lower federal courts and ultimately the Supreme Court itself. Of course, were we to conclude that our reliance on this federal interpretation had become so much a part of the fabric of state practice that the benefit of retaining it unaltered would outweigh the benefits of harmonizing the construction of identical federal and state rules of civil procedure, we could avoid the tension created by disparate interpretations of identical rules by simply amending our rule to expressly codify a "no set of facts" standard. We do not, however, find that to be the case.

¶15 The desirability and importance of procedural uniformity in our unique, federal form of government has been a critical factor not only in the development of federal rules capable of serving as a model for the states, but also for our own decision to adopt a version of the federal rules and construe them accordingly. It cannot seriously be disputed that the Colorado Rules of Civil Procedure were modeled almost entirely after the corresponding federal rules, with the principal goal of establishing uniformity between state and federal judicial proceedings in this jurisdiction. See C.R.C.P. app. D

at 427, Colo. Stat. Ann. vol. 1 (Supp. 1941) ("With the hope that procedure might be adopted in Colorado following as far as practicable the new federal rules, so that a Colorado lawyer would be equally at home in the courts of the United States and those of Colorado, the Colorado Bar Association in September, 1938, authorized the appointment of a Committee to effectuate that reform."); see also Thomas Keely, How Colorado Conformed State to Federal Civil Procedure, 16 F.R.D. 291 (1954) (authored by the Chairman of the Colorado Supreme Court Rules Committee).

¶16 Far from a novel concept, the prevailing policy in this country has been to favor procedural uniformity between state and federal court practice virtually since the founding of our Union. Beginning with its adoption of the so-called "Conformity Act" in 1789, Congress required lower federal courts to largely apply the procedural law of the state in which they were located. Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93; see also 4 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1002 (3d ed. 2002) (titled, "History of Federal Procedure Under Statute"). While the Conformity Act's localized approach to federal procedure ultimately proved problematic, it was replaced by the Federal Rules of Civil Procedure, which were intended to facilitate state-federal uniformity by serving as a singular, authoritative model for states to follow. See Report of the Committee on Judicial Administration and Remedial Procedure, reprinted in Report of the Thirty-Fifth Annual Meeting of the American Bar Association at 434–35 (1912) (resolving to adopt rules of civil procedure for use in federal courts and "as a model"); see also Edson R. Sunderland, The Grant of Rule-Making Power to the Supreme Court of the United States, 32 Mich. L. Rev. 1116,

1122 (1934) (authored by one of the eventual drafters of the Federal Rules) ("[T]he primary purpose [of the Federal Rules project] . . . was the attainment of local uniformity in trial court practice between the state and federal courts.").

¶17 Beyond the convenience and practical benefits of permitting practicing attorneys to move effortlessly from one forum to another, both this court and the Supreme Court have long emphasized the undesirability of having vastly different outcomes result from nothing more than a choice of forums. See, e.g., Erie R. Co. v. Tompkins, 304 U.S. 64, 77–78 (1938); AE, Inc. v. Goodyear Tire & Rubber Co., 168 P.3d 507, 511 (Colo. 2007) ("Colorado's policy is to discourage . . . forum shopping."). While state courts are generally free to adopt procedural rules different from those governing federal proceedings, but see Brown v. W. Ry. of Ala., 338 U.S. 294, 298 (1949) (state court not permitted to dismiss federal law claim under strict local rule of pleading), the more outcome-determinative any specific disparity between state and federal rules may be, the more undesirable that disparity becomes. In this respect, there can be little question that the difference between a rule of pleading that effectively permits reliance on the compulsory process available in civil actions to discover whether grounds for the action exist in the first place and another that effectively bars such reliance without being able to first allege plausible grounds for relief can be extremely outcome-determinative. One important benefit of uniformity in federal and state procedures has been and continues to be the reduction of forum shopping.

¶18 In addition to the clear importance we have identified in maintaining a substantial degree of procedural uniformity between state and federal practice, we also

do not view the plausibility standard described by the Supreme Court as effecting a meaningful departure from the direction our interpretations and amendments have taken in light of the existing realities of modern practice. Just as the Supreme Court observed that a good many judges and commentators have balked at taking the literal terms of the Conley passage as a pleading standard, Twombly, 550 U.S. at 562–63 (citing numerous examples of Conley's "no set of facts" language being "questioned, criticized, and explained away" by judges and scholars, alike), we have at times found it problematic to accept factual allegations that appear too conclusory, and on at least one occasion have, without openly criticizing the "no set of facts" standard, simply found a complaint insufficient to state a claim, for the reason that it merely asserted a theory without alleging facts which, if proved, would satisfy the elements of the claim, see Denver Post Corp. v. Ritter, 255 P.3d 1083, 1088 (Colo. 2011) (favorably citing Western Innovations, Inc. v. Sonitrol Corp., 187 P.3d 1155, 1158 (Colo. App. 2008) (itself relying on Twombly, 550 U.S at 555–56)); see also Pub. Serv. Co. of Colo. v. Van Wyk, 27 P.3d 377, 385 (Colo. 2001) (predating Twombly) (Mullarky, C.J., joined by Rice and Coats, JJ., concurring in part and dissenting in part) ("[T]he Van Wyks' conclusory allegations of unreasonableness fail to support a nuisance claim and thus, the motion to dismiss was properly granted.").

¶19 Similarly, just as the Supreme Court in Twombly referenced the costs of modern litigation and the inadequacy of discovery and case management alone to weed out groundless complaints as support for its decision to finally correct the widespread misinterpretation of Conley, see Twombly, 550 U.S. at 558–59; see also Iqbal, 556 U.S. at

678–79 ("Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."), we have similarly identified a growing need, and effort in our rules, to expedite the litigation process and avoid unnecessary expense, especially with respect to discovery, see DCP Midstream, LP v. Anadarko Petroleum Corp., 2013 CO 36, ¶ 27, 303 P.3d 1187, 1194; see also Richard P. Holme, New Pretrial Rules for Civil Cases—Part II: What Is Changed, 44 Colo. Law. 111 (July 2015) (discussing 2015 amendments to the Colorado Rules of Civil Procedure, which were "designed to significantly reduce the cost of and delays in litigation and to create a new culture for the handling of lawsuits"); id. at 111 (explaining that one of the primary influences of the 2015 amendments were proposed amendments to the federal rules which were later adopted). In light of our recent ruling in Antero Resources Corp. v. Strudley, 2015 CO 26, ¶¶ 19–26, 347 P.3d 149, 155–57, to the effect that the federal rules, in one particular regard, authorize a trial court to eliminate frivolous claims and defenses beyond what is currently authorized by our rules, the effectiveness of the "plausibility standard" in weeding out groundless complaints at the pleading stage may take on an even greater practical significance in this jurisdiction than in the federal courts.

¶20 Finally, in addition to his other arguments for not accepting the plausibility standard of Twombly and Iqbal as the correct interpretation of our own Rule 8, Hall asserts that, in fact, the state and federal rules are not similar at all and that material differences in the provisions of the two rules make a parallel interpretation of our rule untenable. Hall refers to language in subsection (e)(1) of the rule, which finds no analog

in the federal rule. Compare C.R.C.P. 8(e)(1), with Fed. R. Civ. P. 8(d)(1). That subsection indicates, in relevant part, that when a pleader is without direct knowledge, allegations may be made upon information and belief, and that pleadings otherwise meeting the requirements of the rules shall not be considered objectionable "for failure to state ultimate facts as distinguished from conclusions of law." C.R.C.P. 8(e)(1).

¶21 Even without express authorization in the language of Federal Rule 8, federal courts had long understood it to permit pleading based on information and belief, and they continue to do so following Twombly and Iqbal. See generally 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1224 & nn.1–1.75 (3d ed. 2002 & 2015 Supp.) (titled, "Statement of the Claim—Pleading on Information and Belief") (gathering cases and characterizing allegations on information and belief as a "practical necessity"). Far from its conflicting with the plausibility standard, federal courts have observed that pleading based on information and belief may, in fact, be useful where the facts giving rise to a plausible claim are peculiarly within the possession and control of the defendant, or where the belief is based on factual information that makes the inference of culpability plausible. See, e.g., Arista Records, LLC v. Doe 3, 604 F.3d 110, 120 (2d Cir. 2010); see also 5 Wright & Miller, supra, § 1224 & n.7 ("Pleading on information and belief is a desirable and essential expedient when matters that are necessary to complete the statement of a claim are not within the knowledge of the plaintiff but he has sufficient data to justify interposing an allegation on the subject.").

¶22 With regard to C.R.C.P. 8(e)(1)'s reference to "ultimate facts" and "conclusions of law," although this reference might on first glance appear to bear on the requirement of

Twombly/Iqbal to allege plausible grounds for relief, in reality the term "ultimate facts" appears as a term of art, with reference to distinctions between "evidentiary facts," "ultimate facts," and "conclusions of law," having significance for pleading under the former code pleading system in this jurisdiction, but not for pleading under the scheme of the rules. See McCloskey, 150 P.2d at 862 (addressing C.R.C.P. 8(e)(1) and explaining that it served to distinguish our rules from code pleading rules); see also John Denison, Code Pleading in Colorado §§ 312–13 (1936) (authored by former Chief Justice of Colorado) ("It is said that ultimate fact is a conclusion by reasoning on evidentiary facts, and that evidentiary fact is acquired by the senses, i.e., sight, hearing, taste, etc.").

¶23 As the original committee comment explained, C.R.C.P. 8(e)(1)'s unique language—with regard to both pleading based on "information and belief" and pleading "ultimate facts"—was not added to distinguish our rule from the corresponding rule, but rather to "clarify the [rule's] meaning and bring it in line with the majority of the Federal decisions." C.R.C.P. 8(e)(1) note, Colo. Stat. Ann. vol. 1 (Supp. 1941).

¶24 Because we understand our prior cases as reflecting the merit of interpreting our rules of civil pleading harmoniously with the corresponding federal rules, wherever that can be accomplished without violating our own interpretative rules or interfering with important state policy, and because we find the interpretative gloss added by the Supreme Court in Twombly and Iqbal to be very much in line with the direction our rule-making has taken and the current needs of the civil justice system in this

jurisdiction, we join those other states already embracing the plausibility standard articulated in those cases as a statement of the pleading requirements of their own analogs to Federal Rule 8.

III.

¶25 A plaintiff cannot be entitled to relief on a claim of intentional interference with contract unless he alleges and proves that the defendant intentionally and improperly induced a party to breach the contract or improperly made it impossible for a party to perform.[2] Krystkowiak v. W.O. Brisben Cos., 90 P.3d 859, 871 (Colo. 2004). Because it is so clearly dependent upon context and circumstances, we have never attempted to rigidly define "improper" for all purposes of interference with contract, but we have favorably referenced the Restatement (Second) of Torts § 767 (Am. Law Inst. 1965), in this regard and its enumeration of potentially relevant factors, which includes the nature of the actor's conduct, the actor's motive, the interests of the other with which the actor's conduct interferes, the interests sought to be advanced by the actor, the social interests in protecting the freedom of action of the actor and the contractual interests of the other, the proximity or remoteness of the actor's conduct to the interference, and the relation between the parties. See Trimble v. City & Cty. of Denver, 697 P.2d 716, 726 (Colo. 1985). Evaluated in terms of the plausibility standard and its disregard of legal conclusions, whatever else the amended complaint may or may not have adequately

[2] Because Warne withdrew her argument that Hall failed to allege with adequate specificity the willful and wanton conduct required to overcome a defense of governmental immunity, see § 24-10-110(5)(a), (b), C.R.S. (2015), any separate statutory pleading requirements concerning willful and wanton conduct are not before us.

alleged, it failed to sufficiently allege that Warne acted improperly in inducing a breach or making performance of the contract between Hall and Ensign impossible.

¶26 While the complaint did not allege the specific terms of the purchase agreement between Hall and Ensign, the entirety of its allegations made clear that the agreement contemplated the town's approval of a site development plan before the property could be used for the purpose for which Ensign desired its purchase. The thrust of Hall's complaint, therefore, was that Warne induced a breach of the purchase agreement or effectively made the purchase impossible by improperly imposing conditions on the plan that were not agreeable to Ensign. The allegations of the complaint bearing on the question of the wrongfulness or impropriety of Warne's conduct were of two broad, and at times overlapping, kinds: allegations that Warne's actions were motivated by malice toward Hall and allegations that the conditions and the manner of their imposition were unauthorized, unlawful, or unreasonable.

¶27 Much as was the case in both Twombly and Iqbal, the allegations of Hall's complaint were insufficient to state a claim because a number of them were conclusory and therefore not at all entitled to an assumption that they were true, and because the remainder insufficiently alleged plausible grounds for relief, largely because they were equally consistent with non-tortious conduct. See Iqbal, 556 U.S. at 680–84; Twombly, 550 U.S. at 564–70. The broad allegations that Warne's actions were motivated by malice or animosity toward Hall were unchallengeably conclusory allegations of a kind elsewhere held to be incapable of supporting a plausible claim for relief. See, e.g., Emmons v. City Univ. of N.Y., 715 F. Supp. 2d 394, 425 (E.D.N.Y. 2010) (allegation that

defendant acted out of "bad faith, self-interest, malice, and personal animosity" deemed conclusory and insufficient to support a claim for tortious interference with contract); cf. Iqbal, 556 U.S. at 686 (bald allegation of discriminatory intent held insufficient to support unlawful discrimination claim). Similarly, the allegations that the conditions allegedly imposed by mayoral order were unlawful, arbitrary, or unreasonable, without reference to any particular law prohibiting them or any factual allegation specifying how or why they should be considered unreasonable, were bare, conclusory assertions. Even alleging that the conditions were disproportionate to any impact Ensign would have on the town, without alleging the reasons why and manner in which the conditions were disproportionate, could only be considered formulaic or conclusory and therefore not entitled to be assumed true. In any event, without factual allegations establishing that the imposition of disproportionate conditions exceeded Warne's authority or was otherwise prohibited, the complaint's conclusory allegation of disproportionality fails to plausibly suggest improper conduct, even if we were to assume its truth. Cf. Twombly, 550 U.S. at 566 (allegation of parallel conduct held insufficient to support antitrust claim requiring proof of an agreement).

¶28 To the extent the complaint included allegations of specific examples of conduct that could be taken as previous exhibitions of "animosity" toward Hall, like Warne's asking how and for how much he acquired the property in question and opposing Ensign's plan despite its having had the support of the town board, these allegations were, as was similarly the case in both Twombly and Iqbal, equally consistent with non-tortious explanations for her conduct, namely attempting to fulfill her duty to the

town by acting in its best interests. See id. at 567–68 (while alleged parallel conduct by antitrust defendants was consistent with an illegal agreement, it was equally consistent with each defendant acting independently according to its own economic interest); Iqbal, 556 U.S. at 680–81 (discrimination complaint against government officials held insufficient where there was an "obvious alternative explanation" for the challenged conduct). As the Supreme Court itself has emphasized, scrutinizing a complaint for allegations that are not as consistent with proper conduct may be particularly important with regard to the actions of government officials, who "must be neither deterred nor detracted from the vigorous performance of their duties." See Iqbal, 556 U.S. at 685–86. Even assuming, as Hall was allegedly advised, that Warne stated she was not going to allow Ensign to do business in Gilcrest, and taking as true the belief of a town official that Warne would have used any means at the disposal of the town to ensure that Ensign would never meet the requirements to build, those alleged statements do not plausibly suggest malice towards Hall any more than, or perhaps even as much as, merely an objection to doing business with Ensign, whether justified on legitimate grounds or not. Land use decisions can clearly involve a complex array of policy considerations as well as heated personal interactions, and therefore in the absence of factual allegations plausibly suggesting Warne was acting out of unrelated personal animus towards Hall or to the detriment, rather than the benefit, of the town for personal reasons, even angrily opposing Ensign's development plan does not plausibly allege impropriety.

IV.

¶29 In his answer brief, the plaintiff requests that he be permitted to amend his complaint in the event his complaint is deemed insufficient according to the plausibility standard. Rule 15(a) of our Rules of Civil Procedure provides that leave to file amended pleadings "shall be freely given when justice so requires." Although our opinion today does not result in an amendment to the language of our rules of procedure, it clearly signals a shift in the considerations according to which a motion to dismiss is to be evaluated and, therefore, a change in the terms in which a complaint may have to be expressed to avoid dismissal. Because the plaintiff has not until today had notice of the terms in which his claim must be pled, justice requires that he be given an opportunity to amend the allegations of this claim for relief before any ruling on a motion to dismiss for failure to state a claim. Only if the plaintiff fails to overcome a motion to dismiss his newly amended complaint will an order of attorney fees become appropriate.

V.

¶30 Because the plaintiff's complaint, when evaluated in light of the more recent and nuanced analysis of Twombly and Iqbal, fails to state a plausible claim for relief, the judgment of the court of appeals finding the complaint to be sufficient is reversed, and the matter is remanded with instruction to permit further proceedings consistent with this opinion.

JUSTICE GABRIEL dissents, and **JUSTICE MÁRQUEZ** and **JUSTICE HOOD** join in the dissent.

JUSTICE GABRIEL, dissenting.

¶31 Today, the majority jettisons a rule that has stood the test of time for over fifty years, based largely on an asserted preference for maintaining uniformity with federal court interpretations of analogous federal rules of procedure. In reaching this result, the majority misperceives the existing state of the law in Colorado and grafts onto C.R.C.P. 8 a "plausibility" requirement that the rule does not contain and that other courts have correctly recognized results in a loss of clarity, stability, and predictability. Even more concerning, the majority's preferred standard allows a single district judge, at the incipient stages of a case, to weigh what the judge speculates the plaintiff will plausibly be able to prove, based on the individual judge's subjective experience and common sense, and then to decide whether the plaintiff's action is viable.

¶32 I cannot subscribe to such a standard, which I believe will deny access to justice for innumerable plaintiffs with legitimate complaints. Indeed, the majority's application of its newly adopted standard in this case demonstrates the overreaching nature and ultimate unfairness of that standard.

¶33 Accordingly, I respectfully dissent.

I. Current Law and the Plausibility Standard

¶34 As the majority correctly observes, in Conley v. Gibson, 355 U.S. 41, 45–46 (1957), abrogated by Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 563 (2007), the United States Supreme Court concluded that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove "no set of facts" in support of his or her claim. Maj. op. ¶ 1. The majority also correctly observes that this

standard was first cited in an opinion of this court over fifty years ago. See Sprott v. Roberts, 390 P.2d 465, 467 (Colo. 1964) (Frantz, J., concurring in the result). We have consistently adhered to that standard, without apparent difficulty or controversy, ever since.

¶35 Notwithstanding this fifty-year history, the majority now assails the Conley standard. In doing so, however, the majority does not acknowledge either our long-established rules of notice pleading or the well-settled principles that inform how the Conley standard has been implemented in practice.

¶36 It has been settled since before Conley that a plaintiff need not set out in detail the facts on which his or her claim is based. See Conley, 355 U.S. at 47. To the contrary, both Fed. R. Civ. P. 8(a)(2) and C.R.C.P. 8(a)(2) require only a "short and plain statement" of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests. Conley, 355 U.S. at 47; Smith ex rel. Leech v. Mills, 225 P.2d 483, 484 (Colo. 1950); see also Erickson v. Pardus, 551 U.S. 89, 93 (2007) ("Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'") (quoting Fed. R. Civ. P. 8(a)(2); Twombly, 550 U.S. at 555).

¶37 It is likewise settled that in considering a motion to dismiss for failure to state a claim, a court assesses the "well-pleaded" factual allegations of a complaint and ignores conclusory allegations or allegations purporting to assert principles of law. See Ruiz v.

McDonnell, 299 F.3d 1173, 1181 (10th Cir. 2002) (noting that for purposes of Fed. R. Civ. P. 12(b)(6), all well-pleaded facts, as distinguished from conclusory allegations, must be taken as true); Fernandez-Montez v. Allied Pilots Ass'n, 987 F.2d 278, 284 (5th Cir. 1993) ("[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss."); Gray v. Univ. of Colo. Hosp. Auth., 2012 COA 113, ¶ 37, 284 P.3d 191, 198 (noting that conclusory allegations are insufficient to defeat a C.R.C.P. 12(b)(5) motion to dismiss for failure to state a claim); Vickery v. Evelyn V. Trumble Living Tr., 277 P.3d 864, 869 (Colo. App. 2011) (noting that for purposes of a C.R.C.P. 12(b)(5) motion, courts must accept all well-pleaded facts as true but are not required to accept as true legal conclusions couched as factual allegations).

¶38 These principles, which are central to the Conley standard, recognize the practical limitations on how much a plaintiff can reasonably be required to plead, particularly given that the plaintiff often lacks information that is in the defendant's exclusive possession and has no means of obtaining that information absent discovery. See Conley, 355 U.S. at 47–48 (noting that (1) the civil rules' simplified notice pleading standard was made possible by the liberal opportunity for discovery and other pretrial procedures established by the rules to allow the parties to flesh out more precisely the basis of a plaintiff's claim and (2) "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits").

¶39 As amicus curiae Colorado Plaintiff Employment Lawyers Association observes, this kind of "information asymmetry" is especially acute in cases in which a plaintiff must prove the defendant's motives and state of mind. See Br. of Amicus Curiae Colorado Plaintiff Employment Lawyers Ass'n, at 6–7. See generally Arthur R. Miller, From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure, 60 Duke L.J. 1, 43–46 (2010) (describing in detail the information asymmetry problem posed by Twombly and Ashcroft v. Iqbal, 556 U.S. 662 (2009), particularly in cases involving questions of intent and malice). Indeed, as discussed more fully below, the information asymmetry in this case underlies the majority's conclusion that Hall's complaint should be dismissed for failure to state a claim on which relief can be granted. Maj. op. ¶¶ 25–28.

¶40 The foregoing principles do not, however, allow a plaintiff to allege a claim and then rely on compulsory process to discover whether grounds for the action existed in the first place, as the majority suggests. See maj. op. ¶ 17. As noted above, a complaint must contain and is assessed based on its "well-pleaded allegations," and not on any conclusory allegations or allegations of law. Moreover, all allegations of a complaint (and any other pleading) are subject to the requirements of C.R.C.P. 11, which requires all pleadings of a party represented by an attorney to be signed by at least one attorney of record, and which further provides:

> The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for

> any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Accordingly, a plaintiff may not properly make baseless allegations and then later rely on discovery tools to try to find evidence to support such claims.

¶41 For all of these reasons, I believe that the Conley standard, as it has been refined over time, has worked precisely as it was intended. Neither trial nor appellate courts in Colorado have had any difficulty in applying this standard. Nor have I seen any evidence that this standard has contributed to a flood of frivolous cases overwhelming our legal system, or that courts properly exercising their ample case management authority have had any difficulty in weeding out unmeritorious claims or in protecting defendants from needless expense and harassment. Accordingly, I am not persuaded that the existing standard has posed a problem in need of a solution, much less the sea change in pleadings practice that I believe the majority opinion will effect.

¶42 Notwithstanding the foregoing, the majority chooses to adopt the Twombly and Iqbal plausibility standard, see Iqbal, 556 U.S. at 679 (noting that to survive a motion to dismiss, a complaint must state a "plausible" claim for relief); Twombly, 550 U.S. at 556 (same), principally based on an asserted need for uniformity between how federal courts construe Fed. R. Civ. P. 8 and how Colorado courts construe the Colorado analogue, C.R.C.P. 8. For a number of reasons, I am unpersuaded.

¶43 First, although we look to federal decisions interpreting federal rules for guidance, we are not bound to interpret our rules of civil procedure in the same way that the United States Supreme Court interprets its rules. See Garcia v. Schneider

Energy Servs., Inc., 2012 CO 62, ¶ 10, 287 P.3d 112, 115. This is particularly true when, as here, the language of our respective rules differs.

¶44 As pertinent here, both Fed. R. Civ. P. 8 and C.R.C.P. 8 require "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); C.R.C.P. 8(a)(2). Both rules also require that each allegation of a pleading be "simple, concise, and direct." Fed. R. Civ. P. 8(d)(1); C.R.C.P. 8(e)(1). Unlike its federal counterpart, however, the Colorado rule proceeds to allow a pleader who lacks direct knowledge to make allegations "upon information and belief." C.R.C.P. 8(e)(1). This difference suggests to me a preference in the Colorado rules for a more lenient pleading standard than the "plausibility" standard adopted in Twombly, 550 U.S. at 556, 570, and expanded in Iqbal, 556 U.S. at 678.

¶45 Second, the Twombly and Iqbal "plausibility" standard is neither set forth in nor required by Fed. R. Civ. P. 8 or Fed. R. Civ. P. 12(b)(6) (governing motions to dismiss for failure to state a claim on which relief can be granted). Nor do I perceive any language in Colorado's corresponding provisions, C.R.C.P. 8 or C.R.C.P. 12(b)(5), that supports the adoption of such a standard. To the contrary, I believe that such a standard is inconsistent with the purposes of the foregoing rules generally and with several of our pleading rules in particular.

¶46 C.R.C.P. 8, C.R.C.P. 12(b)(5), and their federal counterparts require only fair notice of a claim, and they envision the use of proper case management and other devices set forth in the civil rules to clarify and address the merits of that claim. See,

e.g., Conley, 355 U.S. at 47–48; Smith ex rel. Leech, 225 P.2d at 484. The plausibility rule is contrary to these purposes.

¶47 Likewise, the "factual enhancement" that the plausibility standard requires, see Twombly, 550 U.S. at 557, is inconsistent with (1) C.R.C.P. 8(a)(2), which mandates only "a short and plain statement of the claim showing that the pleader is entitled to relief," see Walsh v. U.S. Bank, N.A., 851 N.W.2d 598, 605 (Minn. 2014) (noting that the plausibility standard raises the bar for claimants and thereby conflicts with Minnesota's counterpart to C.R.C.P. 8, which preferred non-technical, broad-brush pleadings), and (2) C.R.C.P. 8(e)(2), which allows for hypothetical pleading.

¶48 And the "factual enhancement" requirement is inconsistent with C.R.C.P. 9, which sets forth when certain matters must be pleaded with additional specificity or particularity, and which expressly provides that "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally." C.R.C.P. 9(b). Under a plausibility standard, all matters, including matters relating to a person's state of mind, arguably must be pleaded with specificity, and this would be difficult, if not impossible, when the information that the plaintiff needs to satisfy such an enhanced pleading standard is within the defendant's exclusive possession and control. See Miller, 60 Duke L.J. at 43 ("It is uncertain how plaintiffs with potentially meritorious claims are expected to plead with factual sufficiency without the benefit of some discovery, especially when they are limited in terms of time or money, or have no access to important information that often is in the possession of the defendant, especially when the defendant denies access.") (footnotes omitted). As a result, the plausibility standard

will likely result in the disproportionate dismissal of meritorious claims, thereby closing the courthouse doors to many deserving claimants when the pleading rules were, in fact, designed to open the doors for them. See Twombly, 550 U.S. at 575 (Stevens, J., dissenting) ("Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial.").

¶49 Third, I believe that the "plausibility" standard is unworkable and gives far too much authority to judges to dismiss claims, even before the defendant has been required to answer the complaint, based on subjective and inherently speculative factors. In Iqbal, 556 U.S. at 679, the Court explained what it meant by "plausible": "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." See also Plausible, Webster's Third New Int'l Dictionary (2002) (defining "plausible," in pertinent part, as "superficially worthy of belief : CREDIBLE").

¶50 Such a standard, which is subjective on its face, allows motions to dismiss to turn on the "judicial experience and common sense" of the particular judge who happens to be assigned to the case. Moreover, such a standard requires the judge to speculate as to the evidence that a plaintiff will likely be able to present and then to weigh that presumed evidence—before the defendant has even submitted an answer to the complaint—to decide whether a claim based on such evidence would be "plausible" (itself an inherently amorphous concept). See Webb v. Nashville Area Habitat for

Humanity, Inc., 346 S.W.3d 422, 431–32 (Tenn. 2011) ("[T]he plausibility standard incorporates an evaluation and determination of the likelihood of success on the merits—a judicial weighing of the facts pleaded to see if they 'plausibly' present a claim for relief—at the earliest stage of the proceedings, before a sworn denial is even required."). In this regard, the "plausibility" standard approaches a summary judgment test, albeit without any evidentiary record. Cf. Andersen v. Lindenbaum, 160 P.3d 237, 239 (Colo. 2007) ("To avoid summary judgment, the evidence presented in opposition to such a motion must . . . be sufficient to demonstrate that a reasonable jury could return a verdict for the non-moving party.").

¶51 I cannot see how such a standard represents an advance over our present rule, which requires courts to assess the well-pleaded allegations of the complaint to determine whether, if true, such allegations set forth a viable claim for relief. To the contrary, I agree with the Tennessee Supreme Court's assessment that Twombly and Iqbal have resulted in "a loss of clarity, stability, and predictability in federal pleadings practice." Webb, 346 S.W.3d at 431. I fear that the same outcome is now likely in Colorado.

¶52 Fourth, in trumpeting the need for uniformity between the state and federal standards, the majority suggests that adopting a plausibility standard is necessary to expedite litigation and avoid unnecessary expense. See maj. op. ¶ 19. The majority, however, does not adequately account for the case management tools that we have recently implemented to achieve the majority's desired ends. Specifically, although the majority's concern for expediting litigation and avoiding unnecessary costs, particularly

with respect to discovery, is appropriate, we recently adopted significant amendments to our rules of civil procedure to address these very concerns. See generally Richard P. Holme, New Pretrial Rules for Civil Cases—Part II: What is Changed, 44 Colo. Law. 111 (July 2015) (discussing the series of amendments to the Colorado Rules of Civil Procedure that became effective on July 1, 2015 and that were designed to reduce significantly the costs and delays in litigation, particularly with respect to discovery matters). I have every confidence in our trial judges' abilities to implement these rules to achieve the desired ends. I therefore see no reason to alter our longstanding pleading rules, particularly in the context of this litigation as opposed to through the normal rulemaking process, to try to achieve the same ends.

¶53 Finally, I am unconvinced by the majority's suggestion that adopting the plausibility standard is necessary to avoid the undesirability of having "vastly different outcomes result from nothing more than a choice of forums." Maj. op. ¶ 17. The federal and Colorado standards have been different for nine years, and I have seen no evidence to suggest that these different standards have resulted in a spike in forum-shopping or in "vastly different outcomes" (although I would anticipate that under the federal standard, some meritorious complaints likely have been dismissed).

¶54 For these reasons, I see no compelling reason to overturn more than fifty years of precedent in order to adopt a plausibility standard that I believe is unworkable and unfair. See Walsh, 851 N.W.2d at 604 ("The doctrine of stare decisis directs us to adhere to our former decisions in order to promote the stability of the law and the integrity of the judicial process. We therefore require 'a compelling reason' to overrule our

precedent. . . . [The defendant] has not presented a compelling textual reason to overrule [the cases setting forth the prevailing pleading standards in Minnesota].") (quoting Oanes v. Allstate Ins. Co., 617 N.W.2d 401, 406 (Minn. 2000)).

II. Application

¶55 The overreaching nature and unfairness of the plausibility standard that I have identified above are well demonstrated by the majority's application of that standard in this case.

¶56 The majority concludes that Hall's complaint failed to sufficiently allege that Warne acted improperly in inducing a breach or making performance of the contract between Hall and Ensign impossible. Maj. op. ¶ 25. In reaching this conclusion, the majority deems Hall's allegations to be conclusory and sees no factual allegations plausibly suggesting that Warne was acting out of unrelated personal animus toward Hall or to the detriment, rather than the benefit, of the town for personal reasons. Id. at ¶¶ 27–28. I do not agree with the majority's reading of Hall's complaint.

¶57 To establish a claim for intentional interference with contract, a plaintiff must prove that the defendant (1) was aware of a contract between two parties, (2) intended that one of the parties breach the contract, and (3) induced the party to breach or make it impossible for the party to perform the contract. Krystkowiak v. W.O. Brisben Cos., 90 P.3d 859, 871 (Colo. 2004). In addition, the defendant must have acted "improperly" in causing the result. Id.

¶58 To determine whether the defendant acted improperly, courts consider the following factors:

(a) the nature of the actor's conduct,

(b) the actor's motive,

(c) the interests of the other with which the actor's conduct interferes,

(d) the interests sought to be advanced by the actor,

(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,

(f) the proximity or remoteness of the actor's conduct to the interference and

(g) the relations between the parties.

Restatement (Second) of Torts § 767 (1979); accord Memorial Gardens, Inc. v. Olympian Sales & Mgmt. Consultants, Inc., 690 P.2d 207, 210 & n.7 (Colo. 1984).

¶59 Here, Hall alleged, in substance, the following facts:

- Hall entered into a contract to sell certain property in the Town of Gilcrest to Ensign.

- In subsequent meetings with the Town Planner and the Town Board, the Town imposed a series of conditions on Ensign. These conditions were onerous, and many of them had no lawful basis either in the Town's own ordinances or in any other applicable laws or regulations.

- In May and June 2007, the Town made additional baseless demands on Ensign. As a result, Ensign became increasingly frustrated and began to look elsewhere for its business expansion.

- At a July 16, 2007 meeting of the Town Board, which Warne, the Town's mayor, attended, Hall explained that if the Town continued to demand more and more conditions of Ensign that were not tied to applicable law or regulations, then Ensign would withdraw from the contract to buy Hall's property and find somewhere else to do business.

- The Board then unanimously approved Ensign's site plan and application (Warne did not vote).

- After this unanimous vote, Warne stormed out of the meeting room and stated that she was not going to allow Ensign to do business in Gilcrest.

- A former mayor and planning commission member stated that Warne exercised control over all land use matters and would have used any means at the Town's disposal to ensure that Ensign would never meet the requirements necessary to build, regardless of what had been approved by the Board.

- Consistent with this statement, after the Board unanimously approved Ensign's site plan and application, and notwithstanding the fact that Hall had advised the Board (and Warne) that further conditions would cause Ensign to terminate its contract with Hall, the Town imposed still more conditions on Ensign. These conditions again imposed requirements beyond those required by the Town code; they were not connected to, or were disproportionate to, any impact that Ensign's operations would have had on the Town; and they were not reasonably related to the public health, safety, or welfare of the Town or its residents.

- As a result of these new requirements and exactions, Ensign terminated its contract with Hall, as it said it would do (and as Warne was advised it would do).

- Warne had previously exhibited animosity toward Hall, the additional exactions and conditions were imposed at Warne's insistence and on her order, and Warne's actions were motivated by malice toward Hall.

¶60 In my view, and as the division below concluded, Hall v. Town of Gilcrest, No. 12CA0719, slip op. at 7–12 (Colo. App. Jan. 23, 2014), these allegations more than adequately alleged the requisite elements of an intentional interference with contract claim. Indeed, I would so conclude even were I to apply the plausibility standard.

¶61 Specifically, it appears undisputed that Hall properly alleged the existence of a contract between himself and Ensign and that Warne knew of this contract. Hall has also alleged specific facts to establish that Warne intended for Ensign to terminate this

contract and that she either induced Ensign to breach the contract or made Ensign's performance impossible. For example, as noted above, Hall alleged that (1) Warne was told that Ensign would terminate the contract if more conditions were imposed; (2) she stated her intention to ensure that Ensign would not do business in Gilcrest; and (3) knowing that Ensign would terminate the contract if further conditions were imposed, she orchestrated the imposition of additional unreasonable (and legally unfounded) conditions, which, in fact, induced Ensign to terminate its contract with Hall.

¶62 Finally, Hall has sufficiently alleged that Warne's conduct was improper. As noted above, he alleged that after the Town Board had unanimously approved Ensign's site plan and application, Warne acted unilaterally to impose unprecedented and unreasonable conditions that were inconsistent with the Town code, and Hall alleged that Warne did so out of malice toward him and with the intent of ensuring that Ensign would terminate its contract with him. In my view, such allegations are not at all conclusory, and they clearly and sufficiently assert that Warne was acting out of unrelated personal animus toward Hall, rather than for the Town's benefit (the Town Board, after all, had unanimously approved the deal).

¶63 Although the majority deems Hall's allegations insufficient, it is not clear to me, and the majority does not indicate, what more Hall could possibly have alleged. This case reflects precisely the type of information asymmetry scenario discussed above, in which a party is required to make allegations about another party's state of mind. Absent an ability to read Warne's mind, Hall could do no more than plead conduct

reflecting her improper motives, and he has done that with what I perceive to be ample specificity.

¶64 In these circumstances, it is clear to me that Warne has received the reasonable notice of the nature and basis of Hall's claim to which she was entitled under C.R.C.P. 8. It is equally clear to me that Hall has pleaded a viable intentional interference with contract claim. Indeed, as pleaded, the complaint sets forth what I view to be a prototypical intentional interference case.

¶65 In holding otherwise, the majority has effectively granted Warne summary judgment before she was even required to respond to the complaint and before giving Hall a fair opportunity to conduct discovery to establish facts that are in Warne's exclusive possession and control. In doing so, I believe that the majority has denied Hall the fair day in court to which he was entitled.

III. Conclusion

¶66 For these reasons, I respectfully dissent.

I am authorized to state that JUSTICE MÁRQUEZ and JUSTICE HOOD join in this dissent.

SECTION 1-27
JUDICIAL EXPECTATIONS FOR PROFESSIONALISM AND CIVILITY

1. General Principle.

Attorneys, as members of the legal profession, are representatives of clients, privileged participants in the legal process, and public citizens having special responsibilities for the administration of justice. Judicial officers appropriately expect attorneys appearing before them to act with integrity, honesty, diligence, respect, courtesy, cooperation, and competence in all their professional interactions.

2. Civility in Legal Proceedings.

(a) Attorneys will be civil and courteous in their conduct and their communications with the court, court personnel, parties, witnesses, and counsel, whether in person or in writing.

(b) Attorneys will extend reasonable cooperation to all participants in the legal process. For example, attorneys will not unreasonably withhold consent or delay responding to requests for appropriate scheduling or logistical accommodations; attorneys will allow adequate time for response to inquiries or demands; and attorneys will not condition their cooperation or accommodations on disproportionate or unreasonable demands.

(c) Attorneys will not demonstrate disrespect toward the court or other participants in the legal process.

3. Timeliness.

(a) Attorneys will be punctual while participating in all aspects of judicial proceedings, including, but not limited to, appearing at hearings, mediations, depositions, conferences, and trial; filing papers or other materials with the court; and communicating with judges, court personnel, counsel, and clients.

(b) Attorneys will avoid unnecessary delay and facilitate the just, speedy, and inexpensive determination of every action. Attorneys will respond in a timely manner to motions, communications, offers of settlement, and other interactions with counsel, and will confer in a timely manner with clients.

(c) Attorneys will not file or serve motions, pleadings, or other papers in such a manner as to unfairly limit the opportunity to respond.

4. Candor to the Court.

(a) Consistent with their duties to a client, attorneys will not knowingly allow the court to proceed under a misperception of fact or law.

(b) If the court orders an attorney to prepare a proposed order, as provided in C.R.C.P. 121, Sec. 1-16, that attorney will work cooperatively with all counsel and pro se parties to produce an accurate order that correctly states the findings, conclusions, and orders of the court, and will timely submit the order to the court for its review and approval.

5. Candor and Fairness to Counsel and Parties.

(a) Attorneys will not use the discovery rules and procedures, or any other aspect of the judicial process, for the purpose of harassing parties or counsel, or as a means of impeding the timely, efficient, and cost-effective resolution of a case or dispute.

(b) Attorneys will attempt in good faith to stipulate to undisputed matters and to resolve disputes and procedural issues without court intervention.

(c) Attorneys will clearly identify all changes made in any document exchanged or under discussion.

6. Attorney Conduct in Deposition.

Attorneys will conduct themselves during deposition practice with the same integrity, honesty, diligence, respect, courtesy, cooperation, and competence expected of attorneys appearing before a court.

7. **Attorney Conduct During Judicial Proceedings.**

(a) Attorneys will make only objections that are concise, specific, and supported by applicable law.

(b) Arguments, objections, and remarks will be directed to the court and not to counsel or parties, or to any other person present in the courtroom.

(c) When examining a witness or addressing the court or other persons present in the courtroom, attorneys will conform to the decorum rules of the court in which they are appearing.

(d) Attorneys will request and receive permission from the court before approaching a witness or court personnel, or before approaching a demonstrative exhibit or aid, unless local custom dictates otherwise or as instructed by the court.

(e) Attorneys will not engage in conduct that will impair the attorney's physical or mental ability to engage in judicial proceedings.

8. Enforcement.

(a) **Scope and Effect.** Attorneys should not construe this practice standard as permission to interpose unnecessary or inappropriate motions. Judicial officers should expect that adherence to this practice standard will diminish the filing of a wide variety of motions that impose unnecessary demands on the court's time and resources.

(b) **Judicial Powers and Discretion.** After giving the attorney whose conduct is questioned under this practice standard notice and an opportunity to be heard, the court may impose sanctions it deems appropriate under the circumstances, including, but not limited to:

i. A formal or informal reprimand; or

ii. Monetary sanctions, including, but not limited to, the reasonable costs, including attorney fees, resulting from the attorney's misconduct.

(c) **Factors to be Considered.** In determining the sanctions to be imposed against an attorney who has violated this practice standard, the court will consider all relevant factors, including, but not limited to:

i. The willfulness of the attorney's misconduct;

ii. The effect of the misconduct on the proceedings and affected persons;

iii. Whether the attorney's misconduct was an isolated event or a pattern of behavior; and

iv. Other sanctions imposed in the proceeding against the attorney for misconduct, including, but not limited to, contempt of court.

COMMITTEE COMMENT

This practice standard does not limit attorneys' obligations to their clients under the Colorado Rules of Professional Conduct. See People v. Schultheis, 638 P.2d 8 (Colo. 1981).

Judicial officers should be mindful that lawyers cannot be sanctioned for exercising their First Amendment right to freedom of speech. For example, attorneys may not be sanctioned for expressing an opinion that a judicial officer is racially biased, bigoted, or has a particular bent of mind. However, under this practice standard, such comments must be expressed professionally. Objectively false statements about a judicial officer are not protected by the First Amendment. See In re Green, 11 P.3d 1078, 1086 (Colo. 2000).

Action taken under this practice standard does not constitute discipline as contemplated by C.R.C.P. 251.6, nor does imposition of a sanction under this practice standard preclude the reporting of an attorney's misconduct to the Office of Attorney Regulation Counsel. The sanctions applicable under this practice standard may be imposed independently or in conjunction with other available remedies.

C.R.C.P. 121, Sec. 1-27(2)(b) does not modify the standard for determining a motion for continuance as set forth in C.R.C.P. 121, Sec. 1-11.

Under C.R.C.P. 121, Sec. 1-27(8)(a), abuse of remedial measures provided by the Colorado Rules of Civil Procedure, including this practice standard, may itself be unprofessional conduct that warrants action from the court pursuant to this practice standard.

Should the attorney misconduct at issue occur during a judicial proceeding, the "opportunity to be heard" referenced in C.R.C.P. 121, Sec. 1-27(8)(b) does not require the court to set a separate hearing concerning the attorney's misconduct. The opportunity to be heard may be given in conjunction with, or at the conclusion of, the hearing in which the alleged misconduct occurred.

In lieu of, or in addition to, the sanctions set forth in C.R.C.P. 121, Sec. 1-27(8)(b), the court may take such other actions to address unprofessional behavior as it deems appropriate, including, but not limited to, referral of the attorneys to bar association professionalism assistance groups, the Colorado Lawyer Assistance Program (COLAP), or other appropriate programs. Referrals to COLAP are particularly appropriate in cases in which the attorney's physical or mental ability to participate in a judicial proceeding is in question, yet conclusive evidence as to the nature of the impairment has not been established. See C.R.C.P. 254.

TO: JUDGE BERGER

FROM: LEE STERNAL

RE: REPORT OF C.R.C.P. 52 SUBCOMMITTEE

DATE: SEPT. 23, 2016

The C.R.C.P. 52 subcommittee[1] respectfully submits the following report.

EXECUTIVE SUMMARY

The last sentence of Rule 52 provides, "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b)." C.R.C.P. 52. The subcommittee was formed to address practitioner concerns that this sentence sometimes excuses trial courts from explaining their rulings, even when the explanation might be useful to the parties, their attorneys, or a reviewing court.

Initially, the subcommittee favored deleting this sentence and adding a comment encouraging — but not requiring — trial courts to explain their rulings. This remains the recommendation of a three member majority of the subcommittee which, in the

[1] The subcommittee consists of Lee Sternal (chair), Brad Levin, Judge Kane, Judge Lemon, and Judge Webb.

alternative, recommends leaving the rule as is, except for a minor, non-substantive revision to correct an inaccuracy. Further reflection and announcement of *Warne v. Hall*, 2016 CO 50, have led to a minority position that favors replacing the sentence with language which would require findings of fact or conclusions of law for rulings on written motions.

I. BACKGROUND

A. The Federal and State Rules

The last sentence of C.R.C.P. 52 was derived from the counterpart federal rule. According to the 1946 comment to Fed. R. Civ. P. 52, "[t]he last sentence of Rule 52(a) as amended will remove any doubt that findings and conclusions are unnecessary upon decision of a motion, particularly one under Rule 12 or Rule 56, except as provided in amended Rule 41(b)."

In 2007, Fed. R. Civ. P. 52 was restructured. Fed. R. Civ. P. 52(a)(3) now provides, "**For a Motion**. The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion." According to the Advisory Committee Notes, this language

change is "intended to be stylistic only." The entire federal rule is attached as Exhibit 1.

Arguably, this language is somewhat disconnected from the concern that trial judges do not always explain important rulings. Such explanations could, but would not always, be in the form of findings and conclusions. Of course, a trial court cannot make factual findings under either Rule 12 or 56 because the former accepts well-pleaded facts and the latter turns on the absence of disputed issues of material fact. But as for conclusions of law, it would be potentially useful to the trial attorney to know, *e.g.*, why the judge concluded that the complaint failed the new plausibility standard under *Warne* or what factual disputes precluded entry of summary judgment.

A review by the Supreme Court Law Library staff of the other 49 states' approach to the last sentence of Rule 52 revealed that the majority of other states' counterpart rules include a sentence similar to C.R.C.P. 52. (Eighteen do not.) Only three states — New Jersey (requires finding and conclusions on "every motion decided by a written order that is appealable as of right"), North Carolina (requires finding and conclusions on "any motion or order ex mero

motu only when requested by a party and as provided by Rule 41(b) . . .”), and Vermont (see below) — have mandatory language as to certain motions. No state’s rule requires findings and conclusions in rulings on all motions. The Vermont rule is the most thoroughly developed:

> (3) Other Required Findings. In all determinations of motions in which (a) the decision of the court is based upon a contested issue of fact, (b) the decision is or could be dispositive of a claim or action, and (c) a party has, within five days of the notice of decision, requested findings of fact and conclusions of law, the court shall, on the record or in writing, find the facts and state its conclusions of law.

B. Stakeholder Input

The subcommittee sought input from the CBA Civil Litigation section, the C.D.L.A., and the C.T.L.A. Also, a district judge member polled an email listserv of the district court judges, using the same question put to the above organizations. The results of these queries are as follows.

Colorado Bar Association Civil Litigation Section: The section forwarded an email chain, with its view — subject to the strong dissent of a district judge — being encompassed in the following:

> I vote to amend the last sentence of CRCP 52 to require findings of fact and conclusions of law on decisions on Rule 12(b) and Rule 56 motions. I don't understand that the Rule 41(b) exception cover such motions. My experience is that most judges prepare findings and conclusions on Rule 12(b) and Rule 56 motions as a matter of practice but I think they should be required. Typically a proposed Order and the briefing on such motions will include suggested findings and conclusions to assist the judge. I don't think findings and conclusions are needed for non-dispositive motions which most often can be resolved without them.

C.D.L.A.: The C.D.L.A., which intends to have a representative at the September 30 meeting, stated its position as:

> In anticipation of the committee's September 30 meeting, the Colorado Defense Lawyer's Association has reviewed C.R.C.P. 52 and supports a position of amending the final sentence to require a short plain statement by the court articulating its ruling and basis therefore.

C.T.L.A.: The C.T.L.A. stated its position as:

> [T]he last sentence of Rule 52 be deleted with an explanatory comment that the deletion not be interpreted as requiring judges to make findings of fact and conclusions of law.

Poll of District Court Judges: The judge member who did this polling provided the following summary:

1. Leave the sentence as is: 16
2. Replace it with broad requirement to state the basis for decision: 1 (but only 'substantive' motions)
3. Just remove the sentence: 3
4. Delete with comment: 2
5. Insert "denying" in the sentence: 4
(Suggested by [1] and 3 'me, too's.[']

Narrative responses submitted from some of the judges polled are attached as Exhibit 2.

II. THE DIFFERENT POINTS OF VIEW

A. The Majority Position

A majority of the subcommittee, while strongly opposing the addition of mandatory language to the rule, recognizes that aspirational language in a comment could encourage trial courts to offer more explanations for their rulings. Specifically, the majority supports deleting the last sentence, while adding the following comment:

> The final sentence, "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b)," was deleted because of requirements for findings and conclusions in rules other than Rule 41(b) and in some statutes, as well as concern that the phrase "are unnecessary" could discourage judges from including in decisions on motions explanation that would

> be useful to either the parties or a reviewing court. Even where such findings and conclusions are not required, however, the better practice is to explain in a decision on any written motion the court's reasons for granting or denying the motion.

Limiting the comment to "written motions" would have at least the following benefits:

- because written motions are usually more important than oral motions, the value of an explanation for a ruling will likely be greater;
- because written motions usually do not require an immediate ruling, a district judge would have more time in which to provide an explanation; and
- the written motion, presumably a written response, and any briefing, should provide the judge with resources from which to provide an explanation, even if only by specific reference to what was seen as persuasive in the briefing.

The majority's alternative position would be to leave the last sentence as is, subject to the following non-substantive change:

> **Current**: Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).

> **New**: Findings of fact and conclusions of law are unnecessary on decisions on motions under Rule 12 or 56 or any other motion except as provided in these rules or other law.[2]

The majority positions rest on three premises. First, substantive rule changes should not be made except to address significant problems because the doctrine of unintended consequences is unavoidable. A rule curtailing judicial discretion should not be adopted in the absence of substantial evidence that it is necessary to solve a serious problem. There has been no showing of a significant problem that would be solved by the proposed mandatory language. The input provided by the lawyer group stakeholders does not contain any showing of a problem, not even anecdotal examples. The majority believes that the trial judges should continue to be trusted to exercise their sound judgment with respect to how to rule on the myriad motions they must decide.

Second, the proposed mandatory language would impose additional burdens on already strained trial court resources that

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[2] Although the sentence now says that findings and conclusions are not necessary in rulings on most motions, some other rules, and a few statutes, require findings and conclusions. *See* Exhibit 3.

would substantially outweigh any offsetting benefit. The trial judges on the subcommittee, and others who have been consulted, worry that the proposed rule change, added to the burdens imposed by last year's rule changes (coupled with the potential impact of *Warne* on dismissal motions), will negatively impact case durations statewide.

Third, the majority believes that adoption of the proposed mandatory language, and perhaps anything more than correcting the existing error in the last sentence, would be contrary to the Colorado Supreme Court's strong statement in favor of federal and state uniformity in *Warne.* There, the court stated:

> The desirability and importance of procedural uniformity in our unique, federal form of government has been a critical factor not only in the development of federal rules capable of serving as a model for the states, but also for our own decision to adopt a version of the federal rules and construe them accordingly. It cannot seriously be disputed that the Colorado Rules of Civil Procedure were modeled almost entirely after the corresponding federal rules, with the principal goal of establishing uniformity between state and federal judicial proceedings in this jurisdiction. . . . Far from a novel concept, the prevailing policy in this country has been to favor procedural uniformity between state and

> federal court practice virtually since the founding of our Union.

Warne, ¶¶ 15-16.

However, a member pointed out that in other cases, the court has relied on differences between C.R.C.P. and the federal rules to support its holding. In *Antero Resources Corp. v. Strudley*, 2015 CO 26, ¶ 12, for example, the court said:

> We begin with the history of *Lone Pine* orders and explain that the federal courts that impose this type of order acquire their authority to do so from the express language of Federal Rule of Civil Procedure 16(c). We then make clear that authority interpreting a federal rule is persuasive only when the Colorado rule is similar. Through a comparison of C.R.C.P. 16 and Fed. R. Civ. P. 16, we highlight the differences in the provisions. We also consider C.R.C.P. 16 within the context of our other rules of civil procedure and then examine our prior case law interpreting the relevant Colorado rules. We conclude that C.R.C.P. 16(c) does not currently authorize a trial court to impose a *Lone Pine* order.

And a few years earlier, the court declined to follow the federal circuits' interpretation of Fed. R. Civ. P. 23, explaining:

> While we recognize that the preponderance of the evidence standard appears to be gaining momentum among the federal courts, we decline to follow this emerging trend due to the important differences between C.R.C.P. 23 and

> Fed. R. Civ. P. 23 and our view of C.R.C.P 23 as a case management tool.

Jackson v. Unocal Corp., 262 P.3d 874, 882–83 (Colo. 2011). In this member's view, the "case management tool" approach finds no support whatsoever in federal law.

As to the effect of the last sentence on limiting appellate reversal of district court rulings merely for being too sparse, several decisions already decline to offer any relief on this basis. In *City and County of Denver v. Ameritrust Co. National Ass'n*, 832 P.2d 1054, 1059 (Colo. App. 1992), for example, the division rejected the contention that trial court had made insufficient findings on C.R.C.P. 65(c), explaining:

> While such findings generally are required for a judgment entered after a trial to the court, they are unnecessary on motions under C.R.C.P. 12 or 56 or any other motion except as provided in C.R.C.P. 41(b).

Given the wording of the last sentence in C.R.C.P. 52, this result is unsurprising. But it provides no insight into whether greater appellate scrutiny of unduly sparse orders would improve or degrade the quality of civil litigation in Colorado.

Also, some members believe that the playing field may have been tilted by the recent decision in *Warne*. In *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (cited in *Warne*), the Supreme Court referred to the trial court performing a context-specific task that draws on judicial experience and common sense in determining whether a complaint states a plausible claim for relief. In the view of one trial judge member, trial judges now may need to make some form of findings and conclusion in determining motions under C.R.C.P. 12(b)(5).

B. The Minority Position.

Consistent with the input from two of the practitioner organizations, the minority favors deleting the last sentence and replacing it with mandatory language.

To begin, deleting the last sentence would at least avoid confusion. Although the sentence says that findings and conclusions are not necessary in rulings on most motions, some other rules, and a few statutes, require findings and conclusions. *See* Exhibit 3.

More importantly, a rule telling judges that they need not make findings and conclusions reduces the likelihood that judges

will do so, even where the findings and conclusions would have value. Evidence of judges telling lawyers, "I will not explain my ruling because I do not have to — read the rule," is purely anecdotal. Although the magnitude of the problem with inadequately explained rulings is indeterminable, as one court observed, albeit in a different context, "in this world where perception is reality to so many we open ourselves to the public perception of arbitrariness and caprice." *Byrd v. Biloxi Reg'l Med. Ctr.*, 722 So. 2d 166, 170 (Miss. Ct. App. 1998). In the minority's view, alone the risk of such a public perception warrants a rule change, substantive or not.[3]

The minority respectfully disagrees that imposing a requirement on trial judges would be an unmanageable burden, would create an undue restriction on discretion, or could lead to unintended consequences.

As to burden, presumably written motions will be granted or denied in written orders. Of course, before ruling on a written

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[3] The concept of procedural fairness has gained traction in recent years. *See Procedural Fairness for Judges and Courts*, Proceduralfairness.org (last visited Sept. 14, 2016). The minority questions whether one-word rulings meet this emerging standard.

motion, the district judge must have identified — in his or her own mind — the basis for granting or denying the motion. And adding a sentence or two of explanation would not significantly hamper the process.

Nor is the minority persuaded by the plea to trust trial judges "to exercise their sound judgment with respect to how to rule on the myriad motions they must decide." In addition to the "written motion" restriction, mandatory language could be limited to "contested" motions that are decided by resolving a factual issue. With respect, the minority does not understand how exercising discretion in favor of a one-word ruling would be sound in these circumstances.

Although the majority also alludes to "unintended consequences," none is identified. The minority believes that the benefits of intended consequences — rulings that are understood by parties, their attorneys, and appellate courts — outweigh the risks of unspecified unintended consequences.

The minority's suggestions for such new mandatory language include:

> 1. In any ruling on a written motion, whether written or oral, the basis relied upon as persuasive shall be identified with particularity.
>
> 2. Except as otherwise expressly provided by any of these rules, every decision on a written motion should contain a brief explanation of the court's reasoning and shall include findings of fact for any decision that resolves a factual dispute.
>
> 3. The decision on any contested written motion that is decided, in whole or in part, by resolving a factual issue or a disputed question of law shall declare or identify the facts or law found to be persuasive, unless the procedural context makes the basis clear. While it is desirable that the resolution of oral motions similarly inform the parties, such explanation information is not necessary.

In presenting these alternatives, the minority hopes that the standing committee will recognize the benefits of mandatory language, but provide further direction as to the optimal wording, which the subcommittee could further consider before the October 28 meeting. If, however, the decision is to delete the last sentence and not replace it, the minority position is for the comment to be:

> Except as otherwise provided by any of these rules or by statute, every ruling on a contested written motion should (a) contain a brief explanation of the court's reason, unless the reason is obvious from the context of the

> existing record, and (b) include findings of fact or conclusions of law, if the ruling depends on resolution of a factual dispute.

In the minority's view, "should" for rather than "shall" would make clear to the judges that — as with the majority's proposed comment — explanations are at least encouraged.

But if new mandatory language replaces the existing last sentence, then the minority's suggested form of the comment is:

> The final sentence of the Rule was deleted and replaced because of requirements for findings and conclusions in rules other than Rule 41(b) and in some statutes, as well as concern that the phrase "are unnecessary" discouraged judges from providing explanations for their rulings. The absence of a brief explanation, however, does not constitute a "defect in any ruling or order" under C.R.C.P. 61.

The minority believes that the last sentence removes the specter of needless appellate requests to reverse for the reason the challenged order is too sparse.

The minority notes that despite the existing Rule 52 language, numerous cases have vacated judgments and remanded for further

findings to supplement the record with exactly what the present Rule 52 language says is not necessary.[4]

The minority also believes that an explanation may facilitate further meritorious proceedings before the trial court, such as an amended complaint following a dismissal under *Warne*, a second summary judgment motion based on a more fully developed factual record, a Rule 121, section 1-15(11) motion to reconsider, or agreement upon the form of a C.A.R. 4.2 interlocutory appeal. Specifically, unless counsel knows the trial court's reasons, further action in respect to not only these possibilities but to overall future progress can be the proverbial shot in the dark. Also, even where the explanation will not facilitate further trial court proceedings, it may assure a litigant who has incurred significant legal fees in the motion and briefing that the litigant received procedural fairness and not a precipitous, "rubber stamp" decision.

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[4] A trial judge member points out that most of these remands for further findings are in the context of oral challenges for cause during jury selection, which the proposed rule change will not cover, and grants or denials of attorney fee awards, which are already required by rule and statute to include findings.

The minority position produced spirited debate. Trial judge members were quick to point out that any requirement will force district courts that are already operating at capacity to triage their resources in ways that may ultimately degrade the quality of justice. Specifically, the time that a court must invest to explain a decision could reduce the time available to perform another task. And that task may sometimes be more important than providing an explanation.

A trial judge member also offered that lawyers are hungry to know as much as possible as to "what the judge is thinking" about their case. But by the time cases went to trial, it may be much different than they had appeared at the summary judgment stage. In other words, the adage that the trial judge always, or even usually, knows a case well at the motion practice stage is not necessarily true. The reason this matters is that what the judge may say with incomplete information pretrial could distort the parties' approaches to settlement and trial – precisely because they set so much store in everything judges say.

Thus, saying more than necessary is often a burden, rather than a benefit, to the litigants. As with dictum in an appellate

opinion, less is often more. How much to say is a matter of judicial restraint, and judges should have discretion to exercise it. In sum, the fact that lawyers always want to know more about what their judge is thinking does not mean that the judge should be required, against his or her better judgment, to say more. The minority view is that such examples of judicial lack of early knowledge and involvement are exactly what the recent rule amendments are intended to prevent, if not correct, and should diminish as those amendments are implemented.

D. An Appellate Perspective.[5] .

The benefits to a reviewing court of a trial court's explanation for its ruling vary enormously, depending on the scope of review. The explanation would have no value where rulings are subject to de novo review, such as motions under C.R.C.P. 12(b)(5), under C.R.C.P. 56, and most under C.R.C.P. 59. The same could probably be said of any motion that does not involve a factual determination by the trial court.

[5] At its full court conference on September 1, 2016, the Court of Appeals considered the issue before the subcommittee but declined to take a position. Hence, the views expressed in this section are solely those of Judge Webb.

Motions reviewed for an abuse of discretion present an intermediate category. The question on review is whether the specific ruling was within the range of reasonable options that a trial court could reach under the specific circumstances presented to it. If the ruling was an objectively reasonable exercise of discretion, it should be affirmed, whether or not the trial court expressed its thinking on the record. If the ruling was not an objectively reasonable exercise of discretion, it should be reversed, again whether or not the trial court expressed its thinking on the record.

Still, the lack of explanation has sometimes bedeviled appellate review:

> However, the record in this case bespeaks neither a showing by DMC nor a finding by the court of any such cause for denial of leave [to amend]. Under these circumstances "the outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the . . . Rules."

Varner v. Dist. Court, 618 P.2d 1388, 1391 (Colo. 1980) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)); *see also In the Interest of A.B.-B.*, 215 P.3d 1205 (Colo. App. 2009).

Knowing why the district court granted or denied a motion to amend a pleading, for example, would help focus appellate review. (Did the trial court consider the motion untimely, conclude that the opposing party would be prejudiced, absent a continuance, or consider the amendment futile? Futility would trigger a different standard of review.) Even so, the appellate court could still affirm on any basis supported by the record, even if not presented to or addressed by the trial court.

At the other end of the spectrum are motions that were — or should have been — decided by resolving factual disputes. A common example is the criteria for an attorney fees award under section 13-17-102, C.R.S. 2016. And an appellate court is ill-suited to make findings, regardless of the clarity of the record.

III. CONCLUSION

In summary, although there is clear and present disagreement among the sub-committee members as to the substance of most, if not all, of the possible outcomes, the overall attitude is one of openness to possible agreement upon receipt of further direction from the standing committee.

RESPECTFULLY SUBMITTED,

_____/s/_____

Lee Sternal

EXHIBIT 1

Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings.

(a) Findings and Conclusions.

(1) ***In General.*** In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.

(2) ***For an Interlocutory Injunction.*** In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.

(3) ***For a Motion.*** The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion.

(4) ***Effect of a Master's Findings.*** A master's findings, to the extent adopted by the court, must be considered the court's findings.

(5) ***Questioning the Evidentiary Support.*** A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

(6) ***Setting Aside the Findings.*** Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

(b) Amended or Additional Findings. On a party's motion filed no later than 28 days after the entry of judgment, the court may

amend its findings--or make additional findings--and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

(c) Judgment on Partial Findings. If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

EXHIBIT 2

Specific Judge comments: if something is in [], I inserted it for clarity.

David Prince (4th):

The current standard works well. I'd leave it as is.

Carlos Samour (18th):

I vote for option 4 [Delete with comment]. I propose including in the comments language encouraging judges to make written findings and provide the basis of the decision in the vast majority of cases. I don't like option 2 [rule requirement]because it would impose a requirement in every case. I believe there may be rare cases in which an explanation and findings are not necessary.

John Wheeler (18th):
My opinion on the last sentence in Rule 52 is not necessarily a popular one among judges and can appear smug or self-righteous. In ten years, I have not failed to enter written findings of law and fact on every Rule 56 and Rule 12 motion, every evidentiary dispute, every Rule 59 and 60 motion, and every motion for reconsideration that has crossed my desk. The primary reason is that this what I wanted when I was practicing law. I also would rather have an immediate and intelligent motion to reconsider based on an error I made in my analysis in an Order than an appeal after the fact.
Is this going to work for every judge? Of course not, nor do I expect it to. If I had a family, I would not have the time to write orders every evening and 10 hours on the weekend (where I am at the moment). If any change is made to the language in Rule 52, I would recommend: "Findings of fact and conclusions of law are recommended, but not required . . ."

Greg Werner (4th):

I don't see any need for a change. First of all, Rule 52(a)(3) of the Federal Rules states: "The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion." In light of the Colorado Supreme Court's recent expression of the "desirability and importance of procedural uniformity," Warne v. Hall, 2016 CO 50, paragraph 15, between the Colorado and Federal Rules of Civil Procedure, it doesn't seem to me that we should change our rule.

I also question what problem the rule change is supposedly designed to address. The constant refrain I hear from some attorneys is that he or she just wants to know "what the judge thinks." However, requiring a trial court to set forth findings on a record that has not been adequately developed will likely lead to the issuance of something akin to an advisory opinion. In addition, I have had more than one attorney tell me they want the findings so they can make a decision about how to negotiate the case. I even had one attorney suggest that if I were to issue a ruling finding certain things to be in dispute, he or she would then know he or she would not need to present trial evidence on the issues I didn't specifically mention. I don't think Rule 52 should serve any of these purposes. In addition, denying a Rule 12 or 56 Motion leaves the party in precisely the same position the party was in prior to filing the Motion – resolve the issue at trial.

Kim Karn (10th):

I believe the rule should remain as is. As a matter of practice, I attempt to explain why I am entering an order and the basis for that. However, there are many times when it is simply not necessary and this places a huge burden on the judges who have limited time and lots of cases demanding our attention.

David Bottger (21st):

My personal preference is to remove the sentence. Saying findings and conclusions are unnecessary, as the current rule says, only discourages making them. Saying nothing leaves it up to the judge,

which is as it should be. I cannot imagine granting a Rule 12 or 56 motion without explaining my reasoning. I can imagine denying one without much explanation if the motion is facially meritless, but not otherwise. I think it's too hard to draft a rule which will cover the myriad of possibilities.

John Madden (2nd):

This would not only be an effort to fix a non-existent problem (which always has unintended consequences), it will exacerbate an actual problem. [Talking about problem with age of cases getting worse statewide.] Making judges include findings or explanations on every ruling will make those numbers worse.

Judges already explain decisions that need explaining. Personally, I write longer explanations when needed because I know that it helps attorneys and increases the parties' satisfaction with and understanding of the process. On top of that, it is a factor in our judicial retention and if we fail to explain something that needed explaining, it tends to come back on appeal. In other words, I cannot imagine that judges who routinely fail to make findings keep doing it for long.
However, the discretion to decide when and if an order needs an explanation should remain with the judge. In fact, the need to triage and sometimes grant or deny a motion without further comment when appropriate is an essential tool to controlling our dockets and dealing with the wave of filings and pleadings we get.
If you think about not only motions we handle, but the routine matters that get handled initially by staff, there are hundreds and hundreds of filings – and not every ruling needs findings or explanations. Judges have to be able to balance the benefits of explaining a ruling with the need to issue hundreds of rulings in a timely fashion. Taking away discretion destroys that.

Ed Moss (1st):

On the merits, I don't much care. I try to make written findings in Rule 12 and 56 motions either way, although denials of summary

judgment motions can be pretty brief when the factual conflicts are obvious.
Generally, I have an initial question about the rule change (it's the same question I asked when I was mayor): WHAT IS THE PROBLEM WE ARE TRYING TO FIX? Is this really, really a system wide problem - - or just one or two lawyers with a burr under their saddle arising from less than 1% of the total Rule 12 and Rule 56 orders issued each year? We don't need to jump through hoops based on anecdotal complaints. After all, we trial judges are required to base our decisions on EVIDENCE. Where's the evidence of a systemic problem? Where's the beef?

Russell Granger (5th):

This does seem to be a solution in search of a problem. A denial is generally a very brief order as it is not an appealable order, the reasoning is usually obvious, and the remedy is trial. In the very rare occasions that the order is granted it is an appealable order that requires a full analysis and justification. It is difficult to create a rule that will envision all possible situations. That's why we have judges and judicial discretion, which gets back to if this is really is a problem. If we are to draft full orders on non-appealable issues, are we going to make those issues subject to an interlock appeal?

EXHIBIT 3

- Rule 19 – case law requires court's orders on motions re: indispensable parties to be supported by findings on factors set forth in the rule.
- Rule 23 – requires findings of fact on specific factors set forth in the rule when court grants or denies class certification.
- Rule 41(b) – dismissals for failure to prosecute.
- Rule 47 – case law requires rulings on challenges for cause and Batson challenges in jury selection to be supported by specific findings of fact.
- Rule 52 – grants or denials of TROs and preliminary injunctions.
- Rule 54(b) – express determination "that there is no just reason for delay" of entry of judgment.
- Rule 105 – Court must make findings of fact and describe property in quiet title orders.
- Rule 107 – very detailed express findings required to support contempt orders.
- Rule 121 §1-22(c) – findings of fact required to support determination of motion for attorney's fees.
- Section10-3-538 – in ruling on disputed claims re: insurance company liquidation, court to submit findings of fact.
- Section 13-17-102-03 – when granting (cf. Rule 121 1-22) attorney fees for frivolous/groundless filings, court must specifically set forth its reasons.
- Section 13-21-115 – in premises liability cases, court must make findings re: status of both plaintiff and defendant.
- Section 13-64-204 – award of certain damages must be made by separate findings.
- Section 14-10-110 – specific finding required that marriage is irretrievably broken.
- Section 14-10-112 – finding of unconscionability required to not enforce certain parts of separation agreement.
- Section 19-1-104 – specific findings of fact required in order for involuntary medical or mental health treatment.
- Section 19-1-117 – grandparent visitation orders made over parental objection must include findings of fact on specific enumerated factors.

- Section 19-4-124 – findings of the court required to support changes to birth certificates.
- Section 24-10-101 – CGIA jurisdictional rulings (usually motions to dismiss) require (by case law) findings of fact.
- Section 38-35-204 – grants of relief on spurious lien claim must be supported by findings of fact.
- Section 39-21-105 – trial court required to make de novo findings of fact in 'appeals' from Dept. of Revenue.

However, not all of these statutes address rulings on motions.

SECOND SUPPLEMENTAL REPORT

The Civil Rules' Committee, Subcommittee regarding Special Masters, met July 6, 2016. The Subcommittee met to consider and address questions raised at the full committee meeting in May, 2016. The following individuals were present at the January, 2016 meeting:

Judge Christopher Zenisek, (Chair)
Richard Holme, Esq.
Brent Owen, Esq.
Gregory Whitehair, Esq.
David Tenner, Esq.

The following members were unable to attend:

Judge Michael Berger (Full Committee Chair)
Chief Judge Janice Davidson (Ret.)

The questions raised at the full committee meeting were:

1. The Committee requested that the Subcommittee research what the term "de novo" means in the draft rule, section (f)(3). Does it mean a new hearing, or review by the trial court akin to a review by an appellate court?

2. Some committee members raised concern over access to justice. Namely, how should we ensure that courts do not appoint special masters in circumstances where some litigants cannot afford it, or where the economics circumstances might favor a better funded party over a lesser-funded party?

3. What is the proper directive over the circumstances that should allow for appointment of a special master? In particular, should judges be permitted to appoint special masters because a case demands so much of the judge's time that she or he cannot effectively and timely address the case?

Question 1: What does the term "de novo" mean in section (f)(3). Does it mean a new hearing, or review by the trial court akin to a review by an appellate court?

The Subcommittee answers that the term "de novo" in Section (f)(3) is a review, not a new hearing. However, the Committee should keep in mind that a new hearing by the judge remains permitted by Section (f)(1). Thus, the proposed rule would allow the judge to review the

master's findings, or to hold a new hearing if the judge believed that to be appropriate.

Subcommittee member Gregory Whitehair prepared a memorandum and presented it to the full committee in June. Footnote 13 of the memorandum cites to the 2003 Committee Note regarding Federal subsection (g). The Note reads, "The requirement that the court must afford an opportunity to be heard can be satisfied by taking written submissions when the court acts on the report without taking live testimony."

In addition, Section (f)(1) of the proposed rule reads that "In acting on a master's order, report, or recommendations, the court must give the parties notice and an opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions."

Based on the Federal Committee Note, and the fact that Section (f)(1) permits a new hearing, the Subcommittee concludes that the term "de novo" in Section (f)(3) means a review of the prior proceedings, not a mandatory new hearing.

Finally, the Subcommittee notes that the review in the proposed rule is to "decide de novo all objections to findings of fact made or recommended." This standard may, or may not, have a different application than a "de novo" appellate review.

Question 2: How should we ensure that courts do not appoint special masters in circumstances where some litigants cannot afford it, or where the economics circumstances are such that an appointment favors a better funded party over a lesser-funded party?

The Subcommittee views that the draft rule accommodates these concerns by directing the district court to consider the fairness of expense (section (a)(3)), and by requiring the Court to consider the parties' means and other factors with regard to the allocation of payment (section (g)(3)).

However, the Subcommittee views that further directive for the court to consider the proportionality of the appointment to the issues and needs of the case would be beneficial. Thus, the Subcommittee recommends added language in section (a)(3) to that effect. The revised proposed rule is included herein.

The red-line indicates differences between the Subcommittee's current proposed rule and the **Federal rule**.

Question 3: What is the proper directive over the circumstances that should allow for appointment of a special master? Should judges be permitted to appoint special masters because a case demands so much of the judge's time that she or he cannot effectively and timely address the case?

Following the last consideration of this rule, the Subcommittee received a request from Judge Webb to consider adding the following language to the introductory paragraph:

"A reference to a master shall be the exception and not the rule, and should be utilized only when the proceeding will involve factual findings that require special expertise not likely held by the court."

The Subcommittee believes that this added language would remove an important function of special masters: to assist with the administration of justice in extraordinary cases that judges cannot reasonably undertake on their own. One example was a case where thousands of documents are claimed as privileged, requiring the judge to conduct in camera review. Members of the subcommittee viewed that appointing a special master to assist in the review likely would be appropriate in these circumstances. Members of the subcommittee who have served as special masters articulated that, functionally, this is the reasoning behind most special master appointments today.

The Subcommittee further viewed that the Rule's section (a)(1)(C) expressly allows for this type of appointment. Thus, should the Committee wish to consider this proposal, the Committee also should consider deletion of proposed section (a)(1)(C).

Ultimately, the Subcommittee discussed and acknowledged that judges should not be permitted to "privatize disputes" for their own convenience, or because a certain case is distasteful to work on, or because the attorneys are behaving poorly. However, the Subcommittee views that overwhelming matters which cannot reasonably be administered while keeping up a full docket would create an appropriate circumstance for appointment of a master, so long as the financial considerations of sections (a)(3) and (g)(3) warrant it.

Thus, the Subcommittee recommends no change with regard to scope of permissible appointment.

Ultimately, the Subcommittee views that the options presented are (a) to amend the present rule; or (b) to leave the present rule as-is. Although elimination of special masters may be an appropriate consideration for the Committee, the Subcommittee understands that its directive is to consider the proper wording of the rule, not to decide whether or not a rule should be in place.

Final Amendment

The Subcommittee discussed the remainder of the proposed rule in general. The Subcommittee voted to place the word "trial" back into section (a)(1)(B). The Subcommittee understands the intent of this rule is to have three distinct sections for appointment: by consent; for trial; or for pre-trial or post-trial matters. In the Subcommittee's view, this distinction is wise, as it makes clear that there are very few circumstances that permit a master to hold a trial, but that the standard for having a pre- or post-trial master would be more permissive than the standard required for a trial.

C.R.C.P. 53 (PROPOSED)

(a) Appointment.

(1) ***Scope.*** A reference to a master shall be the exception and not the rule. Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by:

(i) some exceptional condition; or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pretrial and posttrial matters that cannot be effectively and timely addressed by ~~an available~~the appointed district judge ~~or magistrate judge of the district~~.

(2) ***Disqualification.*** A master must not have a relationship to the parties, attorneys, action, or court that would require disqualification of a judge under ~~28 U.S.C. § 455,~~ the Colorado Code of Judicial Conduct, Rule 2.11, unless the parties, with the court's approval, consent to the appointment after the master discloses any potential grounds for disqualification.

(3) ***Possible Expense or Delay.*** In appointing a master, the court must consider the proportionality of the appointment to the issues and needs of the case, consider the ~~-~~fairness of imposing the likely expenses on the parties, and ~~must~~ protect against unreasonable expense or delay.

(b) Order Appointing a Master.

(1) ***Notice.*** Before appointing a master, the court must give the parties notice and an opportunity to be heard. If requested by the Court, ~~A~~any party may suggest candidates for appointment.

(2) ***Contents.*** The appointing order must direct the master to proceed with all reasonable diligence and must state:

(A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);

(B) the circumstances, if any, in which the master may communicate ex parte with the court or a party;

(C) the nature of the materials to be preserved and filed as the record of the master's activities;

(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's

orders, findings, and recommendations; and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(g).

(3) ***Issuing.*** The court may issue the order only after:

(A) the master files an affidavit disclosing whether there is any ground for disqualification under the Colorado Code of Judicial Conduct, Rule 2.11, ~~28 U.S.C. § 455~~; and

(B) if a ground is disclosed, the parties, with the court's approval, waive the disqualification.

(4) ***Amending.*** The order may be amended at any time after notice to the parties and an opportunity to be heard.

(5) *Meetings.* When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 14 days after the date of the order of reference and shall notify the parties or their attorneys.

(c) Master's Authority.

(1) ***In General.*** Unless the appointing order directs otherwise, a master may:

(A) regulate all proceedings;

(B) take all appropriate measures to perform the assigned duties fairly and efficiently; and

(C) if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence.

(2) ***Sanctions.*** The master may by order impose on a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

(d) Master's Orders. A master who issues ~~an~~ a written order must file it and promptly serve a copy on each party. The clerk must enter the written order on the docket. A master's order shall be effective upon issuance subject to the provisions of section (f) of this Rule.

(e) Master's Reports. A master must report to the court as required by the appointing order. The master must file the report and promptly serve a copy on each party, unless the court orders otherwise. A report is final upon issuance. A master's report shall be effective upon issuance subject to the provisions of section (f) of this Rule.

(f) Action on the Master's Order, Report, or Recommendations.

(1) ***Opportunity for a Hearing; Action in General.*** In acting on a master's order, report, or recommendations, the

court must give the parties notice and an opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions.

(2) ~~***Time to Object or Move to Adopt or Modify.*** A party may file objections to or a motion to adopt or modify the master's order, report, or recommendations no later than 21 days after a copy is served, unless the court sets a different time.~~ ***Time to Object or Move to Modify.*** A party may file objections to or a motion to modify the Master's proposed rulings, order, report or recommendations no later than 7 days after service of any of those matters, except when the Master held a hearing and took sworn evidence, in which case objections or a motion to modify shall be filed no later than 14 days after service of any of those matters.

(3) ***Reviewing Factual Findings.*** The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, stipulate that:

(A) the findings will be reviewed for clear error; or

(B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.

(4) ***Reviewing Legal Conclusions.*** The court must decide de novo all objections to conclusions of law made or recommended by a master.

(5) ***Reviewing Procedural Matters.*** Unless the appointing order establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

(g) Compensation.

(1) ***Fixing Compensation.*** Before or after judgment, the court must fix the master's compensation on the basis and terms stated in the appointing order, but the court may set a new basis and terms after giving notice and an opportunity to be heard.

(2) ***Payment.*** The compensation must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(3) ***Allocating Payment.*** The court must allocate payment among the parties after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

~~**(h) Appointing a Magistrate Judge.** A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge states that the reference is made under this rule.~~

Comment In appointing special masters, judges should be mindful of C.R.C.P. 122 regarding appointed judges. In this regard, Section (a)(1)(B) of this Rule should be utilized only when the appointment

requires special expertise not likely held by a former judge, such as that of an accountant, engineer or doctor.

Dear Judge Berger and Ms. Moore,

Attached are Dave and my proposals for forms to use in conjunction with C.R.E. 902(11) and 902(12). There are forms for both district court and county court. Form 10 is the county court certification and Form 41 is the district court certification. Form 10 and 41 are essentially identical, they just have separate numbering because of the number of already existing forms for each rule. Dave and I have included two versions of Form 10 and 41. They have the same information, just presented in a different fashion. We would like the committee to decide which they prefer. The instructions are the same regardless of which form is preferred. Forms 11 and 42 are the disclosure form to be used in conjunction with forms 10 and 41, respectively. They are also essentially identical. If the committee is satisfied with the forms and instructions, we would propose approving them and sending them to the Supreme Court.

Sincerely,

Damon Davis

Killian Davis Richter & Mayle, P.C.

202 North 7th Street

Grand Junction, CO 81502

Ph. 970-241-0707

Fax. 970-242-8375

INSTRUCTIONS FOR FORMS 10 AND 11

Records of a regularly conducted activity, often business records, may be admissible by affidavit if Colorado Rules of Evidence 902(11) or 902(12) are followed. Forms 10 and 11 provide a means to comply with the requirements of C.R.E. 902(11) and 902(12) to allow the admission of the records of a regularly conducted activity (otherwise known as business records). These forms are not the exclusive means of complying with the rules and parties may use their own forms so long as they comply with the requirements of the rules.

Form 10

Form 10 should be completed by the person in charge of the records at the business or organization, or by another person who is familiar with how the records are kept. It must be notarized. If the business or organization does not have a notary, it may be necessary to find a notary willing to go to the business.

Form 10 may be provided to the business or organization at the time records are requested, in person, by letter, or by subpoena. The form may then be completed at the time the records are provided. However, completion of the form is voluntary and the business or organization may refuse.

If a party desires a business or organization to complete Form 10 after the documents have been provided, it may be necessary to give the business a copy of the documents, so it can verify exactly what was earlier provided.

Form 10 calls for a description of the documents being certified. This description may be brief, such as: "medical records;" "architects notes and blue prints;" or "repair estimates." The number of pages should be included to assist in identifying what records are certified by the affidavit.

Form 10 calls for a date range for the documents. This is to assist in determining what specific documents have been certified. If the documents are undated, and the date range cannot be ascertained, then this may be left blank.

The completed Form 10 must accompany the documents when they are offered at trial or a hearing.

Form 11

C.R.E. 902(11) and 902(12) require advance notice if documents will be offered into evidence through a certification of the records. Form 11 provides a means to provide this notice.

Form 11 should list each record that may be offered through a certification, unless all records may be offered in this manner, in which case Form 11 may state "all records." By way of

example, the records may be listed by name or description, Bate's number, or trial exhibit number.

Both the records to be offered and the certifications must be provided to all adverse parties, or at least made available for inspection and copying. If the records or certifications have not already been provided, they should be attached to Form 11 or be made available for inspection and copying. The serving party need only attach those records and certifications that have not already been provided.

Form 11 must be served on all adverse parties before of the use of the records at a trial or hearing. For the sake of simplicity, it may be desirable to serve all parties, and not just all adverse parties. The service must be sufficiently in advance of the trial or hearing that the adverse parties may prepare to address the documents.

What constitutes sufficient advance notice is decided on a case-by-case basis. But Form 11 should be served sufficiently in advance of the trial or hearing that the adverse parties have an opportunity to raise any concerns with the court and to subpoena witnesses to testify about the documents if they so desire.

INSTRUCTIONS FOR FORMS 41 AND 42

Records of a regularly conducted activity, often business records, may be admissible by affidavit if Colorado Rules of Evidence 902(11) or 902(12) are followed. Forms 41 and 42 provide a means to comply with the requirements of C.R.E. 902(11) and 902(12) to allow the admission of the records of a regularly conducted activity (otherwise known as business records). These forms are not the exclusive means of complying with the rules and parties may use their own forms so long as they comply with the requirements of the rules.

Form 41

Form 41 should be completed by the person in charge of the records at the business or organization, or by another person who is familiar with how the records are kept. It must be notarized. If the business or organization does not have a notary, it may be necessary to find a notary willing to go to the business.

Form 41 may be provided to the business or organization at the time records are requested, in person, by letter, or by subpoena. The form may then be completed at the time the records are provided. However, completion of the form is voluntary and the business or organization may refuse.

If a party desires a business or organization to complete Form 41 after the documents have been provided, it may be necessary to give the business a copy of the documents, so it can verify exactly what was earlier provided.

Form 41 calls for a description of the documents being certified. This description may be brief, such as: "medical records;" "architects notes and blue prints;" or "repair estimates." The number of pages should be included to assist in identifying what records are certified by the affidavit.

Form 41 calls for a date range for the documents. This is to assist in determining what specific documents have been certified. If the documents are undated, and the date range cannot be ascertained, then this may be left blank.

The completed Form 41 must accompany the documents when they are offered at trial or a hearing.

Form 42

C.R.E. 902(11) and 902(12) require advance notice if documents will be offered into evidence through a certification of the records. Form 42 provides a means to provide this notice.

Form 42 should list each record that may be offered through a certification, unless all records may be offered in this manner, in which case Form 42 may state "all records." By way of

example, the records may be listed by name or description, Bate's number, or trial exhibit number.

Both the records to be offered and the certifications must be provided to all adverse parties, or at least made available for inspection and copying. If the records or certifications have not already been provided, they should be attached to Form 42 or made available for inspection and copying. The serving party need only attach those records and certifications that have not already been provided.

Form 42 must be served on all adverse parties before of the use of the records at a trial or hearing. For the sake of simplicity, it may be desirable to serve all parties, and not just all adverse parties. The service must be sufficiently in advance of the trial or hearing that the adverse parties may prepare to address the documents.

What constitutes sufficient advance notice is decided on a case-by-case basis. But Form 42 should be served sufficiently in advance of trial or hearing that the adverse parties have an opportunity to raise any concerns with the court and to subpoena witnesses to testify about the documents if they so desire.

Form 10. CERTIFICATION OF RECORDS UNDER C.R.E. 902(11) AND 902(12)

Name of Organization or Business: _____

Address: _____

_____

City/State/Zip Code: _____

Telephone Number: _____

I am the custodian of the attached records, or I am an employee familiar with the manner and process in which these records are created and maintained by virtue of my duties and responsibilities. I swear or affirm that to the best of my knowledge and belief the following is true for the attached documents, which are _____ (*describe documents*), consisting of _____ number of pages, dated from _____ to _____:

1) The records were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; 2) Were kept in the course of the regularly conducted activity; 3) Were made by the regularly conducted activity as a regular practice.

Date: _____ Signature: _____

Subscribed and affirmed or sworn before me on this _____ day of_____,

20___, in the County of _____, State of _____.

Name: _____ Signature: _____

Witness my hand and official seal.

My commission expires_____.

_____

Notary Public

Form 10. CERTIFICATION OF RECORDS UNDER C.R.E. 902(11) AND 902(12)

Name of Organization or Business: _____

Address: _____

_____

City/State/Zip Code: _____

Telephone Number: _____

I am the custodian of the attached records, which are _____ (*describe documents*), consisting of _____ number of pages, dated from _____ to _____, or I am an employee familiar with the manner and process in which these records are created and maintained by virtue of my duties and responsibilities. I swear or affirm that to the best of my knowledge and belief the following is true for the attached documents: 1) The records were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; 2) Were kept in the course of the regularly conducted activity; 3) Were made by the regularly conducted activity as a regular practice.

Date: _____ Signature: _____

Subscribed and affirmed or sworn before me on this _____ day of_____,

20___, in the County of _____, State of _____.

Name: _____ Signature: _____

Witness my hand and official seal.

My commission expires_____.

_____

Notary Public

FORM 11. DISCLOSURE OF RECORDS TO BE OFFERED THROUGH A CERTIFICATION OF RECORDS PURSUANT TO C.R.E. 902(11) AND 902(12)

COUNTY COURT, _____ COUNTY, COLORADO Address: _____ Plaintiff(s): v. Defendant(s): _____ Attorney or Party Without Attorney (Name and Address): Telephone Number: E-Mail: FAX Number: Atty. Reg. #:	**COURT USE ONLY** Case No. Div.

[NAME OF PARTY] DISCLOSURE OF RECORDS TO BE OFFERED THROUGH A CERTIFICATION OF RECORDS

[Name of Party] Hereby submits this Disclosure of Records to be Offered Through A Certification of Records.

[Name of Party provides notice to all adverse parties of the intent to offer the following records through a certification of records pursuant to C.R.E. 902(11) and 902(12):

[List all records to be offered through a certification of records. If you intend to offer all records through a certification, you may state "all records." Use additional Pages if necessary]

_____

_____

_____

_____

_____

_____

These records with the accompanying certification (*check applicable line*):

_____ Have already been provided to all adverse parties.

_____ Are being provided to all adverse parties with this Disclosure.

_____ Have been provided to all adverse parties in part, with the remainder being provided with this Disclosure

_____ Are available for inspection and copying on reasonable notice at this location:

_____

Date: _____ _____

(*Signature of Party or Attorney*)

CERTIFICATE OF SERVICE

I certify that on _____ (*date*) a copy of this **DISCLOSURE OF RECORDS TO BE OFFERED THROUGH A CERTIFICATION OF RECORDS** was served on the following parties (*list all parties served by name and address, use extra pages if necessary*):

_____ _____

_____ _____

_____ _____

_____

(*Signature of Party or Attorney*)

Form 41. CERTIFICATION OF RECORDS UNDER C.R.E. 902(11) AND 902(12)

Name of Organization or Business: _____

Address: _____

_____

City/State/Zip Code: _____

Telephone Number: _____

I am the custodian of the attached records, or I am an employee familiar with the manner and process in which these records are created and maintained by virtue of my duties and responsibilities. I swear or affirm that to the best of my knowledge and belief the following is true for the attached documents, which are _____ (*describe documents*), consisting of _____ number of pages, dated from _____ to _____:

1) The records were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; 2) Were kept in the course of the regularly conducted activity; 3) Were made by the regularly conducted activity as a regular practice.

Date: _____ Signature: _____

Subscribed and affirmed or sworn before me on this _____ day of_____,

20___, in the County of _____, State of _____.

Name: _____ Signature: _____

Witness my hand and official seal.

My commission expires_____.

_____

Notary Public

Form 41. CERTIFICATION OF RECORDS UNDER C.R.E. 902(11) AND 902(12)

Name of Organization or Business: _____

Address: _____

_____

City/State/Zip Code: _____

Telephone Number: _____

I am the custodian of the attached records, which are _____ (*describe documents*), consisting of _____ number of pages, dated from _____ to _____, or I am an employee familiar with the manner and process in which these records are created and maintained by virtue of my duties and responsibilities. I swear or affirm that to the best of my knowledge and belief the following is true for the attached documents: 1) The records were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; 2) Were kept in the course of the regularly conducted activity; 3) Were made by the regularly conducted activity as a regular practice.

Date: _____ Signature: _____

Subscribed and affirmed or sworn before me on this _____ day of_____,

20___, in the County of _____, State of _____.

Name: _____ Signature: _____

Witness my hand and official seal.

My commission expires_____.

_____

Notary Public

FORM 42. DISCLOSURE OF RECORDS TO BE OFFERED THROUGH A CERTIFICATION OF RECORDS PURSUANT TO C.R.E. 902(11) AND 902(12)

DISTRICT COURT, _____ COUNTY, COLORADO Address: _____ Plaintiff(s): v. Defendant(s): _____ Attorney or Party Without Attorney (Name and Address): Telephone Number: E-Mail: FAX Number: Atty. Reg. #:	**COURT USE ONLY** Case No. Div.

[NAME OF PARTY] DISCLOSURE OF RECORDS TO BE OFFERED THROUGH A CERTIFICATION OF RECORDS

[Name of Party] Hereby submits this Disclosure of Records to be Offered Through A Certification of Records.

[Name of Party] provides notice to all adverse parties of the intent to offer the following records through a certification of records pursuant to C.R.E. 902(11) and 902(12):

[List all records to be offered through a certification of records. If you intend to offer all records through a certification, you may state "all records." Use additional Pages if necessary]

_____

_____

_____

_____

_____

_____

These records with the accompanying certification (*check applicable line*):

_____ Have already been provided to all adverse parties.

_____ Are being provided to all adverse parties with this Disclosure.

_____ Have been provided to all adverse parties in part, with the remainder being provided with this Disclosure

_____ Are available for inspection and copying on reasonable notice at this location:

_____

Date: _____ _____

(*Signature of Party or Attorney*)

CERTIFICATE OF SERVICE

I certify that on _____ (*date*) a copy of this **DISCLOSURE OF RECORDS TO BE OFFERED THROUGH A CERTIFICATION OF RECORDS** was served on the following parties (*list all parties served by name and address, use extra pages if necessary*):

_____ _____

_____ _____

_____ _____

_____

(*Signature of Party or Attorney*)

Jenny,

As we have previously discussed, effective November 1, 2016, the Colorado Courts' E-filing system will no longer be named ICCES, it will just be called "Colorado Courts E-Filing". "Integrated" and "System" have been dropped from the name. There are a few places in rules and comments where there is currently a reference to the "Integrated Colorado Courts E-Filing System" with a link to access the system. Users of the listed link will be re-directed to a renamed link that no longer has "ICCES" in the name. I am writing to ask that the link or name in the rules be changed and new comments inserted to indicate the change as well. The following is a list of Rules affected by this change:

C.R.C.P. 121, Section 1-26, Committee Comment

C.R.C.P. 305.5, Committee Comment

Crim. P. 49.5(a)

C.A.R. 30, Committee Comment

The new link will be www.jbits.courts.state.co.us/efiling/

Thank you and if you need additional information, please contact me.

Best Regards,

Terri

Terri S. Morrison

Legal Counsel, Colorado Judicial Department

1300 Broadway Suite 1200 | Denver, CO 80203

RULE 121. LOCAL RULES--STATEWIDE PRACTICE STANDARDS

(a) – (c) [NO CHANGE]

SECTION 1-1 to 1-25 [NO CHANGE]

SECTION 1-26

ELECTRONIC FILING AND SERVICE SYSTEM

1 – 15 [NO CHANGE]

~~COMMITTEE~~ COMMENTS

2000

[1] C.R.C.P. 77 provides that courts are always open for business. This Practice Standard is intended to comport with that rule.

2013

[2] The Court authorized service provider for the program is the Integrated Colorado Courts E-Filing System (www.jbits.courts.state.co.us/icces/). "Editable Format" is one which is subject to modification by the court using standard means such as Word or WordPerfect format.

2016

[3] Effective November 1, 2016, the name of the court authorized service provider will change from the "Integrated Colorado Courts E-Filing System" to "Colorado Courts E-Filing" (www.jbits.courts.state.co.us/efiling/).

Rule 305.5. Electronic Filing and Serving

(a) – (q) [NO CHANGE]

~~COMMITTEE~~ COMMENTS

2009

[1] The Court authorized service provider for the program is the Integrated Colorado Courts E-Filing System (www.jbits.courts.state.co.us/icces/).

[2] "Editable Format" is one which is subject to modification by the court using standard means such as Word or WordPerfect format.

[3] C.R.C.P. 377 provides that courts are always open for business. This Rule 305.5 is intended to comport with that rule.

2016

[4] Effective November 1, 2016, the name of the court authorized service provider will change from the "Integrated Colorado Courts E-Filing System" to "Colorado Courts E-Filing" (www.jbits.courts.state.co.us/efiling/).