Burns Figa & Will P.C.

November 26, 2008

Ms. Susan J. Festag
Clerk of the Supreme Court
2 East 14th Avenue
Denver, CO 80203

Re: Proposed Changes to Uniform Water Court Rules

Dear Ms. Festag:

This letter contains our comments to the Colorado Supreme Court on the currently proposed changes to the Uniform Water Court Rules, particularly those to Rules 6 and 11.

We appreciate the significant time and effort already devoted to these proposed changes by Justice Hobbs, Justice Bender and other members of the Court's Water Court Committee. This process has yielded some constructive recommendations for the water court process, including several of the proposed changes to the Water Court Rules and to C.R.C.P. Rule 90. We appreciate the Committee's attention to concerns for delay and costs in the Water Court process, and their efforts to propose new rules to address those concerns. However, as explained below, we are concerned that a few of the proposed changes are more likely to substantially increase the costs of water court participation for many parties.

We are shareholders with the law firm of Burns, Figa & Will, P.C., practicing primarily in the area of water law. Collectively, we have participated in over 1,000 cases in Colorado's water courts. We are counsel of record in over 100 cases currently pending in Water Divisions 1, 2, 4 and 5. Collectively, we have nearly 40 years of experience in Colorado water courts, along with several more years of other water-related practice before other state and federal courts and agencies. In addition, Stephen Leonhardt served on the Colorado Bar Association Water Law Section's committees that proposed amendments to the Water Court Rules adopted by this Court in 1995 and 2004, and Lee Miller previously served as First Assistant Attorney General leading the unit of the Attorney General's Office that represents the State and Division Engineers, Colorado Water Conservation Board and other state agencies in water court proceedings.

We submit these comments not on behalf of any client or clients, but as members of the Bar. In doing so, we are mindful of the effects the proposed revisions to the Rules likely would have not only on our clients, but on the water court system and its various participants. In particular, we are concerned that some of the proposed revisions to the Water Court Rules would substantially and unnecessarily increase the cost of many parties' participation in water court proceedings.

BURNS FIGA & WILL P.C.
ATTORNEYS AT LAW
6400 S. Fiddler's Green Circle, Suite 1000 ▪ Greenwood Village, CO 80111 ▪ P: 303 796 2626 ▪ F: 303 796 2777 ▪ www.bfw-law.com

In our experience, the vast majority of water court cases (including those that are rereferred to the Water Judge) settle, usually when the parties reach consensus on terms and conditions of a proposed decree. Some of the proposed Rule changes would help to facilitate such settlements, but others would impede such settlements in many cases. Even in cases that go to trial in water court, many opposers often settle with the applicant before trial. To the extent some of the rule changes would impede settlement (as discussed in further detail below), the water court system and the parties will bear additional costs that could have been avoided, and desirable outcomes will be more difficult to obtain. In addition, some of the proposed rule changes (as further discussed below) would impose additional costs on parties, especially for use of expert witnesses, without corresponding benefits to parties or to the process. The proposed rules should be modified to reduce the potential for such unnecessary costs, a result we do not believe this Court intends.

I. Revisions to Rule 6

The proposal before the Supreme Court would overhaul and expand Rule 6 of the Uniform Local Rules for All State Water Court Divisions ("Rule 6"). Rule 6 relates to referral to the Water Referee, case management, rulings and decrees. While some of those changes are useful to clarify the Water Referee's authority, others of those proposed changes impose deadlines that are too stringent, and may inhibit settlement discussions and cause added expense for many parties before the Water Court.

A. Allowing the Water Referee and Water Clerk to Ensure an Application is Complete Prior to Publication Will Enable All Parties to Have a Better Understanding of the Case before filing Statements of Opposition.

Proposed Rule 6(b) allows the Water Referee to work with the water clerk to ensure that all information that is required to be included in the Application is included prior to publication of the resume of an application. This change, together with the proposed changes to C.R.C.P. 90 and Rule 3 regarding what constitutes a complete application, provide a helpful framework for ensuring that an application contains all required information prior to publication and review by opposers. This requirement will save opposers time and money by ensuring that information needed to review an application, including but not limited to location of the diversion structure and location of use, is included in any Application published in the water resume.

B. Imposing a Deadline for a Ruling of the Referee within One Year of the Filing of Statements of Opposition Likely will be Unworkable.

Proposed Rule 6(d) states that the goals of the Water Referee include ruling on every unopposed application within sixty days after the last day on which statements of opposition may be filed, and on all other Applications as promptly as possible. This is a laudable goal that is consistent with C.R.S. § 37-92-303(1). Proposed Rule 6(e) continues that, for good cause, upon agreement of the parties or *sua sponte*, the Water Referee may extend the time

for ruling on the application beyond sixty days after the last day on which statements of opposition may be filed, but not to exceed a total of one year following the deadline for filing statements of opposition, except that the Water Referee may extend the time for a specified period upon a finding of exceptional circumstances. Currently, however, the time frame for a water referee's ruling as prescribed by C.R.S. § 37-92-303(1) is frequently extended beyond one year from the time for filing statements of opposition. While it is worthwhile to strive for more rulings within one year and to encourage rulings of the Referee as soon as possible, the rule changes promulgated by the Colorado Supreme Court should recognize that a ruling within one year will not necessarily be possible in many contested cases that need not be rereferred. Implementing a new rule requiring (absent exceptional circumstances) a Ruling of the Referee within one year for filing statements of opposition has several problems: 1) it does not provide a way of handling the backlog of pending cases that exist in some Water Court Divisions; 2) it fails to recognize the unique circumstances of each case; 3) it is likely to promote litigation and increase costs for numerous parties, including local government entities on mandated budgets; and 4) it fails to take into account the unique circumstances of each case. Instead, an applicant should be allowed to proceed with due diligence and take advantage of the Referee's case management as an attempt to resolve disputes without protracted litigation.

1. **A One-Year Deadline Will not Allow the Water Referee Sufficient Time to Handle the Pending Cases and the Newly Filed Cases and will Make Resolution of all those Cases within One Year More Expensive for the Court and the Parties.**

Some Water Court Divisions currently have a large number of cases pending before the Water Referee, most of which have been pending for well over a year. This proposed rule does not contain a methodology by which those pending cases could be resolved while resolving all newly filed cases within one year of the deadline for filing statements of opposition. Thus, one of three things is likely to happen: 1) all new cases would be pressed forward for an expedited Ruling of the Referee, leaving the pending cases to linger in front of the Water Referee, allowing them to get further behind; 2) the courts will have a general backlog of cases as the Water Referee tries to make an informed ruling on not only all newly filed cases but also on all pending cases within one year of the effective date of these rules; or 3) the parties will rerefer many cases to the water judge in an attempt to either have the decision makers focus on the case or have more time for negotiations.

In addition to creating a large volume of cases for the Referee and judicial staff, imposition of such tight deadlines, which could reasonably be waived only in "exceptional" cases, would create problems for many parties including local government entities that are on legally constrained budgets and tend to be involved in numerous Water Court cases, both as applicants and as opposers desiring to protect their decreed water rights. Particularly in a time where local government revenues are limited, an increased burden on attorneys and judicial officers could create a practical inability to either move cases along within the one

year deadline, or a denial of justice due to the financial inability of the parties or the court to thoroughly evaluate every case pending before the Water Referee.

2. A One-Year Deadline for a Ruling of the Referee Fails to Recognize the Unique Circumstances of Each Case.

Imposition of a strict one-year deadline for entry of a Ruling of a Referee inhibits the ability of the Referee to exercise discretion based upon the unique circumstances of each case. As evidenced by the data presented to the Supreme Court Water Committee on February 11, 2008 by the Office of the Colorado State Court Administrator, the average number of statements of opposition filed per case has risen since 2002. This average does not reflect the relatively few cases where ten, twenty or more statements of opposition are filed. Decisions on case management for these cases that involve a large number of statements of opposition should necessarily be different than those applications that are either unopposed or have only one or two opposers. Thus, a case with ten or more statements of opposition filed may have no reason to be referred to the Water Judge, but still may take substantially more than a year to be ready for a Ruling of the Water Referee. As written, this proposed rule gives a Water Referee no discretion to determine that, while the parties may be diligently moving forward toward an acceptable Ruling of the Referee, the number of parties involved makes resolution in less than a year either more difficult or impossible.

3. A One-Year Deadline Would Create an Additional Burden on the Court and Parties.

Currently, there are a number of cases pending before the Referee in most Water Divisions. Proposed Rule 6 does not state whether or how it should be applied to pending cases. If the water rules impose deadlines on a Water Referee that are more stringent than that which is workable for the parties, a party is likely to rerefer the case to the Water Judge. This would place more cases on a litigation calendar, delaying the time by which a trial can be held on any particular matter. While extending the time between rereferral and trial would give parties additional time to pursue settlement negotiations, it would also further burden the judges' dockets. Particularly, when a case is rereferred early in the process, there tend to be numerous parties involved. This means that the parties will ask for an extended trial that may be several weeks in length. The setting of multiple trials that are several weeks in length would crowd the water judge's calendar and further delay setting both water matters and other cases that need to be resolved.

4. An Applicant Should be Allowed to Proceed Before the Water Referee So Long as it is Proceeding with Reasonable Diligence.

C.R.S. § 37-92-301 gives the Referee in each Water Division the authority and duty to rule upon determinations of water rights, conditional water rights, and the amount and priority thereof. All water rights adjudicated in a previous decree are senior to water rights adjudicated in a subsequent decree on the same stream, regardless of their dates of

appropriation. C.R.S. § 37-92-306. The date an application was filed with the Water Court is critical to determining the relative priority of a water right. Thus, in an application for conditional water rights, an applicant must demonstrate that the decreed conditional appropriation is being pursued in a manner that possession, control and beneficial use of water can and will occur in the state, justifying reservation of the ante-dated priority pending perfection of the water right. *Mun. Subdistrict, N. Colo. Water Conservancy Dist. v. OXY USA*, 990 P.2d 701, 707 (Colo. 1999). During the pendency of its Application, an applicant for a conditional water right must pursue his Application with diligence. *Colorado River Water Conservation Dist. v. City and County of Denver*, 642 P.2d 510, 514 (Colo. 1982). Whether an applicant pursues its application with diligence is subject to determination by the Water Court. While an applicant may diligently pursue an application, it may still take more than a year for resolution by settlement with all paties and/or adjudication. Nonetheless, as seen in *Colorado River Water Conservation District v. Denver*, if an applicant does not diligently pursue that application, the application for a conditional water right may be denied.

An applicant should not be relieved of the burden of proceeding forward with reasonable diligence, as described in C.R.S. § 37-92-301. Thus, rather than a strict timeline that can only be extended under extraordinary circumstances, it may make more sense to have a goal of having the Water Referee rule on opposed applications as promptly as possible, but allowing the Water Referee discretion as to what a reasonable time frame might be in an initial status conference, with the possibility that for good cause shown, a deadline for resolution could be further extended. If the rules impose too tight of a deadline, it may be that rather than even attempt to negotiate an acceptable resolution to a particular case, the parties will simply rerefer the case and allow for a trial in front of the Water Court. Thus, rather than imposition of a one-year deadline for entry of a Ruling of the Referee, the Rules should state a goal of determining of entry of a ruling within one year, but allow the Water Referee flexibility in setting a case management schedule based on the individual nature of the case, which may indicate good cause for continuing on the Referee's docket past one year.

C. Proceedings Before the Water Referee are Akin to Alternative Dispute Resolution and Encourage Negotiation and Resolution Without Involvement of the Court.

By having cases in front of the Water Referee, the parties have an opportunity to discuss settlement. Unlike many civil cases, the parties to a Water Court adjudication have repeated dealings with each other. Additionally, due to the statutory and constitutional requirements for adjudication of a water right, there is no alternative to going to Water Court. Given that the water rights they seek to protect are on the same stream, negotiations in a water court adjudication are often involve issues outside the case itself, resolution of which can help to avoid litigation in the future. Additionally, all the parties rely on expert analysis for determination of injury. The time in which these negotiations take place is often governed by the time for expert review as well as the number of parties and issues involved.

With appropriate use of discretion, the Water Referee can set reasonable deadlines for dissemination of technical information as well as circulation of a proposed decree, which can facilitate these complex negotiations. In such a role, the Water Referee is more akin to a mediator, and can promote other methods of alternative dispute resolution. These negotiations, if facilitated appropriately, not only allow for resolution of a particular outcome in a water rights matter, but they foster cooperation among water users in a particular geographic area.

This Court has historically looked to dispute resolution as a promising method for resolving disputes with minimal Court involvement. One of the purposes of the Office of Dispute Resolution Advisory Committee, which this Court established in 2005, is to "make recommendations concerning the creation, expansion, administration and evaluation of dispute resolution programs throughout the state." Order, Office of the Chief Justice, Supreme Court of Colorado, November 17, 2005. Similarly, this Court has encouraged the expansion of ADR by directing all attorneys to "advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought." Rule 2.1, Colorado Rules of Professional Conduct. Similarly, in 1997, the General Assembly passed a joint resolution encouraging the Judicial Department and courts in each judicial district "to find and use other techniques and programs that will permit and encourage the resolution of disputes without the necessity for litigation." H.J.R. 1997-1020. Due to Colorado's unique constitutional and statutory requirements regarding water rights, it is not possible to resolve an adjudication of a water right without filing a case in water court and obtaining a decree. Nonetheless, the Court system can and has used the Water Referee as a means to facilitate settlement among parties. By setting a general rule with a strict timeframe that is not appropriate for all cases, rather than taking advantage of use of the Water Referee as a facilitator of the settlement process, the Court would encourage parties to rerefer more cases and have them decided by the Water Court and discourage negotiations and resolution through settlement.

D. **Initial Status Conferences, Case Management Plan, Temporary Waiver of the Right to Rerefer and Shared Experts Are Good Ideas but Should be Modified to Ensure that Cases are Treated Individually.**

As described in the proposed amendments to Rule 6, the initial status conferences where a Water Referee sets a case management plan and the parties temporarily waive their right to rerefer are generally good ideas that help promote case management by the Referee and settlement of the parties. It may be useful to have an initial status conference before the Water Referee where the Referee determines how long is a reasonable time to enter a Ruling of the Referee. The parties and the Water Referee can then determine an appropriate case management plan that will facilitate entry of a Ruling within the specified time frame. As part of that case management plan, the Water Referee should set a deadline for the applicant to provide a proposed decree and engineering. Without such a deadline, it is difficult for objectors to set schedules for comment on a proposed decree and engineering.

In this initial status conference, the parties may also discuss the use of a single expert as discussed in proposed Rule 6(i). However, to encourage parties to use a single expert, the default cost sharing should provide for the applicant to pay at least 50% of the cost of such an expert. Given that it is the applicant's burden to demonstrate that any application does not injure other affected water rights, objectors are unlikely to agree to each pay as much as the applicant for expert witness costs.

E. Allowing the Water Referee to Make Independent Investigation of the Application Prior to Entry of a Ruling is a Good Idea, but Should be Subject to Certain Limitations to Avoid Undue Intrusion onto Private Property.

Proposed Rule 6(k) allows the Water Referee to make investigations without conducting a formal hearing, including making site visits. While allowing the Water Referee to make independent visits to property affected by an application and requesting the parties to provide additional information to support either their concerns with the application or the water rights requested, is a good idea, the Water Referee's right to demand information or site visits from the parties should not be unbridled. If a party wishes to make a site visit as part of the discovery process, that party must comply with the terms of C.R.C.P. 34, which requires specification in advance of a reasonable time, place and manner of making the site visit. Pursuant to the proposed change in Rule 6(k), the Water Referee has no limitation by which he or she may make a site visit and no obligation to notify the parties in advance or to specify a reasonable time, place or manner for such a site visit. While, as a practical matter, Water Referees are likely to designate a reasonable time, place and manner for any site visit, and are likely to provide all parties advanced notice of any such visit, the proposed Rule 6 should specify a procedure for site visits to ensure that site visits will not be abused.

II. Revisions to Rule 11

A. Meetings of Experts

Proposed Rule 11(b)(5)(D) reflects a sound principle, that the experts for the opposing parties should meet during the process of preparing their responsive disclosures, in order to discuss issues on which their opinions are given and to identify which issues can be resolved or are undisputed, and which issues remain in dispute. From our experience, such discussion among the experts often takes place as experts are working on their responsive reports, and usually is beneficial to all parties. In particular, such discussion often can help to narrow and to clarify the disputed issues for trial, or for any remaining settlement negotiations. In cases where an expert has not conferred with the opposing parties' experts, that expert's testimony often is less helpful to the court and to the parties.

1. Timing of Meeting and Disclosures

However, the required schedule for the first meeting of experts (in proposed Rule 11(b)(5)(D)(I)) will significantly increase costs to some parties. Some of our clients have staff personnel with significant technical expertise and experience in the water court process, and retain outside expert witnesses only when needed in a particular case. In many cases, an opposer is not in a position to decide whether it is necessary to retain an outside expert, let alone engage the expert and familiarize that person with the case, until after receiving both the applicant's expert disclosures and a proposed decree.[1] This is because in some cases, the applicant's disclosures and proposed decree will provide a sound basis for settlement, while in other cases, the applicant's expert report and proposed decree will clarify those issues for which the opposer needs to retain an outside expert. By requiring opposers' experts to participate in a meeting within 45 days after the applicant's initial expert disclosures, proposed Rule 11(b)(5)(D)(I) would penalize those opposers who do not engage experts until after receiving the applicant's disclosures. Forty-five days is simply is not sufficient time, in most cases, to review the applicant's disclosures and proposed decree, decide whether an expert should be retained and on what issues, locate an expert witness, enter into a contract for the expert's services (which may require some negotiation, followed by approval of both parties), and then familiarize the expert with the case and the applicant's disclosures so that the objector's new expert can meaningfully participate in the meeting of experts. The 45-day deadline would make it even more difficult for multiple opposers to jointly retain an expert witness, a practice which often is beneficial to those parties and to the water court, but which requires further time for discussion and reaching agreement on such issues as cost-sharing.

Therefore, to allow sufficient time for opposers to decide whether experts are needed, and then retain experts who can participate meaningfully in the meeting of experts, Rule 11(b)(5)(D)(I) should be amended to require that the applicant's expert disclosure shall be made at least 270 days before trial (an additional 30 days), and proposed Rule 11(b)(5)(D)(I) should be revised to provide for the experts to meet within 75 days after the applicant's initial expert disclosures. This will still allow 75 days after the meeting for the opposers' experts to prepare their reports for disclosure, while allowing the minimum necessary time for opposers and their experts to review the applicant's disclosure and prepare for the meeting, even if the opposer retains an expert after the applicant's disclosure.

2. Participants in Meeting

Proposed Rule 11(b)(5)(D)(III) would require that meetings of experts "shall not include the attorneys for the parties or the parties themselves." While we can understand the

---

[1] The C.B.A. Water Law Section's comments to this Court on current Rule 11 recognized that opposers "may not even know if an expert will be needed until the applicant's expert disclosure is received." Letter from Dennis Montgomery, Esq. (Sept. 1, 2004) at 2.

value, in many instances, of a meeting of experts without attorneys or clients present, this requirement poses two problems. First, the exclusion of "the parties themselves" seems to raise an obstacle to participation of experts who are also employees, and in some instances management employees, of parties to the case. We believe the participation of such party-experts in the meeting would be very helpful to the objective of resolving issues and identifying those remaining in dispute. Therefore, the proposed rule should be revised to allow such participation.

Second, we believe most water attorneys can play a very constructive role, especially in communication with the other parties' attorneys, in preparing the "written statements setting forth the disputed issues arising from the expert disclosures" that the experts believe remain for trial, as required by proposed Rule 11(b)(5)(D)(II). Many issues that are the subject of experts' disclosures in water court cases are mixed technical and legal issues. In many instances, the attorneys can assist the experts in defining such issues, and dialogue among the parties' attorneys can help to resolve or clarify such issues. Thus, proposed Rule 11(b)(5)(D)(III) should be modified so as not to preclude subsequent discussion of the issues among the experts and attorneys, nor the participation of attorneys in preparing the experts' joint statement under subsection (II).

B. Proposed Decree Tied to Expert Disclosures

We strongly support proposed Rule 11(b)(5)(F), requiring that the applicant provide a proposed decree (including findings of fact and conclusions of law) at the time of its initial expert disclosure, that opposers provide comments on the proposed decree (including language of specific provisions deemed necessary) with their expert disclosures, and that the applicant respond to such comments with a revised proposed decree at the time of rebuttal. In many water cases, proposed decrees and specific comments are exchanged on a similar schedule, if not much earlier. We believe the schedule set forth in the proposed rule will prove helpful in facilitating settlement, narrowing the issues for trial, and focusing the experts' reports and disclosures on specific issues as they will need to be addressed by the water court.

However, the Court may wish to add a sentence to this proposed Rule, to the effect that nothing in the Rule precludes the parties from providing a proposed decree or comments thereon at any time prior to providing their expert disclosures. Such a clarification may prove helpful in dealing with parties or attorneys who may resist meaningful settlement negotiations at earlier stages of the case.

C. Declaration of Expert

1. Scope of Requirement and Content of Declaration

Proposed Rule 11(b)(5)(E) would require that each expert witness's disclosure contain a declaration by the expert, in the form also proposed. We believe this requirement

should apply only to those disclosed expert witnesses who must provide a written report pursuant to C.R.C.P. Rule 26(a)(2)(B)(I). It should not apply to those disclosed expert witnesses covered by C.R.C.P. Rule 26(a)(2)(B)(II), who are not required to provide reports with the disclosure of their testimony. The proposed Declaration of Expert refers repeatedly to "my report." Such a declaration should not be required of those experts who do not provide a written report, and are not required to do so by the applicable Rules of Civil Procedure. Expert witnesses covered by C.R.C.P. Rule 26(a)(2)(B)(II) (those who are not retained or specially employed for expert testimony, or whose duties as a party's employee do not regularly involve giving expert testimony) often do provide a constructive rule in water court proceedings, providing opinions based on their expertise that assist the Water Judge in understanding and deciding disputed issues. Such an expert should not be required to sign a declaration that presumes the expert has prepared a report, nor should he or she be required to prepare a report as a prerequisite to testifying. Such a requirement would be contrary to the Colorado Rules of Civil Procedure, and is not necessary in water court proceedings.

For expert witnesses who prepare reports, much of the content of the proposed "Declaration of Expert" is quite beneficial to the water court process. In particular, the declaration reinforces the principle that the expert witness's primary duty is to assist the court to understand the evidence and determine facts at issue, based on the expert's own professional judgment and opinions. The Declaration also confirms the expert's responsibility for the contents of the report provided and opinions to be given. Finally, the proposed Declaration clarifies, consistent with C.R.C.P. 26(a)(2)(B)(I), the necessity for the expert's report to disclose the expert's assumptions and bases for each opinion.

2. **Required Disclosure of Others' Participation in Report**

However, the last sentence of paragraph 3 of the proposed Declaration, requiring the expert to disclose "whether, and to what extent, the content of my written report was drafted or changed by any other person," raises several concerns. First, the word "content" is undefined. Unless that term is defined narrowly, the disclosure requirement likely would have a chilling effect on much beneficial collaboration of expert witnesses with their colleagues, clients and attorneys, and would spawn costly and unproductive collateral litigation over the extent and content of such disclosures.

Successful presentation and resolution of water court cases usually requires extensive collaboration between each party's attorney and expert witness, and often between the expert and his or her colleagues. The preparation of the expert's report is one step in this larger collaborative process. Thus, to the extent the client, attorney or expert's colleagues may provide comments or suggestions relating to the expert's draft report, such collaboration also carries over into settlement negotiations or other aspects of case preparation. To the extent the proposed disclosure requirement would require disclosure of such communications relating to the expert's report, it likely would discourage the expert and others from engaging in such communications. This would have a chilling effect on the

larger collaborative process, impeding many of the beneficial communications that are important to preparation and resolution of water court cases.

It appears that the Water Court Committee's real concern, in proposing this requirement, is not to discourage such collaboration, but to discourage "ghost writing" of the expert's report by an attorney or others, and to require disclosure of such ghost writing when it occurs. Several federal court decisions have addressed concerns with ghost writing of experts' opinions. At least one has defined the practice: "Ghost writing a testifying expert's report is the preparation of the substance or writing of the report by someone other than the expert purporting to have written it." *Trigon Ins. Co. v. United States*, 204 FRD 277, 291 (E.D. Va. 2001). In that case, the court held that ghost writing an expert report violates Fed. R. Civ. P. 26(a)(2)(B), which requires that a disclosed expert report must be "prepared and signed by the [expert] witness."[2] In *Trigon*, the court held that ghost writing occurs when counsel has "provided the **substance of the opinions** of the testifying experts, **not just editorial assistance.**" *Id.* at 295 (*emphasis added*).

Other federal decisions have found ghost writing where the expert's opinions have been formed as a result of "appeasement or because of intimidation or some undue influence" by counsel, *Marek v. Moore*, 171 FRD 298, 302 (D. Kan. 1997); where an attorney attempted "to change the opinions and reports of expert witnesses," *Id.* at 302; or where counsel prepared the expert's opinion from "whole cloth" and then asked the expert to sign it if inclined to adopt it. *Manning v. Crockett*, 1999 WL 342715, *2-3 (N.D. Ill. 1999). Similarly, ghost writing was found where an expert report was remarkably similar in language and conclusions to reports of other experts disclosed by the same attorney in other cases, so the court concluded that "the substantial similarity among the three expert witness reports derived from the authorship of their common language by plaintiff's counsel." *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 1999 U.S. Dist. Lexis 17153 (W.D. Mich. 1999).

On the other hand, Federal courts have found ghost writing likely does not occur where counsel assists an expert in preparing a report in order to assure complete disclosure of the necessary information, so long as the report reflects the testimony the expert is to give and is signed by expert. *Marek*, 171 FRD at 301. Similarly, a court was unconcerned where an attorney drafted a Rule 26 disclosure of the expert's opinions, but the expert himself prepared an attached report containing his opinions and the bases for them. *Ind. Ins. Co. v. Hussey Seating Co.*, 176 FRD 291, 292 (S.D. Ind. 1997). Moreover, it was not problematic for an attorney to assist an expert by "fine-tuning a disclosure with the expert's input to insure that it complies with the rules," even if the expert's report was "remarkably similar" to the original complaint the attorney filed. *Manning*, 1999 WL 342715, *1-3.

---

[2] In Colorado, C.R.C.P. Rule 26(a)(2)(B) does not include such a requirement. However, the current proposed Declaration of Expert implies such a requirement, which may be beneficial for water court cases.

Moreover, if the required disclosure of "content" is interpreted broadly, so that experts disclose any drafting contributions or edits suggested by others to any portion of the report, in many cases such disclosures will likely spawn collateral discovery, whether by request for production of documents or deposition of the expert or other persons disclosed by the expert, further delving into the report drafts, revisions made, and likely the entire collaborative process. Such far-reaching collateral discovery has occurred in federal court practice in many jurisdictions, likely due to the broad latitude federal district courts have in allowing expert witness discovery under the Federal Rules of Civil Procedure. The Federal Civil Rules Advisory Committee, in its 2008 report, identified such collateral discovery as a significant problem, and now recommends extending work-product protection from discovery to encompass draft expert reports and communications between attorneys and expert witnesses. *See* Report of the Civil Rules Advisory Committee to Standing Committee on Rules of Practice and Procedure (May 9, 2008, as supplemented June 30, 2008), and recommendations therein for revisions to Fed. R. Civ. P. 26(a)(2) and 26(b)(4), available at http://www.uscourts.gov/rules/Reports/CV_Report.pdf. Like the Federal Civil Rules Advisory Committee, this Court should recognize the unnecessary expense and burdens inherent in collateral discovery of draft expert reports and related attorney-expert communications. Accordingly, the disclosure requirement in paragraph 3 of the Declaration of Expert should be limited to those instances that would involve "ghost writing," as defined in *Trigon* and other decisions cited above, and should not require disclosure of further communications that likely will spawn unnecessary collateral discovery.

To avoid these harmful consequences of the disclosure requirement, paragraph 3 of the Declaration of Expert should be modified to apply more narrowly. Disclosure should be required only for whether, and to the extent, the **substance of the expert's opinions, and the bases for those opinions**, in the expert's written report were drafted or changed by any other person. With such revision, the disclosure requirement still would effectively address the real concern of attorneys or others ghost writing an expert's report. Such revision also would minimize the danger of disclosures triggering collateral discovery.

We have recently seen the alternative recommendation on this point provided by the Water Court Committee's Expert Subcommittee, dated November 21, 2008. We believe this proposal is preferable to the disclosure requirement contained in the proposed Declaration, and sufficiently addresses our concerns on this point. Rather than discourage suggestions by others, or require their disclosure, the alternative would require the expert to form his or her "own independent view" on such matters addressed in the report. This is far more consistent with the purpose of the proposed Declaration.

D. **Schedule for Modified Case Management Order**

We support the proposed revisions to Rule 11(c)(1) and (2), extending the time for requesting a modified case management order (whether stipulated or disputed) to 75 days after the case is at issue. The current deadline (45 days after the case is at issue) is often unworkable, largely because it falls before the deadline for trial setting (60 days after the

case is at issue), and most of the deadlines addressed in the presumptive case management order are tied to the trial date. Thus, in most cases, it is impossible for most parties to determine whether a modified case management order will be needed until after the trial date is established. The proposed change, moving the modified case management order deadlines to after the trial setting deadline, are beneficial in that they make it more likely that parties and counsel can make an informed decision whether to seek a modified case management order.

However, the Court may wish to consider tying the modified case management order deadlines expressly to the time when the trial date is set, rather than to the at-issue date. We suggest the court consider further modification to Rule 11(c)(1) and (2), to provide for the modified case management order filings to be made within 20 days after the case has been set for trial. This would establish an earlier deadline for developing the case management order, in those cases where trial is set prior to the 60-day deadline, and an appropriate later deadline after trial setting in those occasional cases where trial cannot be set within 60 days after the case is at issue.

We appreciate the opportunity to comment on the proposed changes to the Water Court Rules.

Respectfully submitted,

BURNS, FIGA & WILL, P.C.

Stephen H. Leonhardt

Lee E. Miller

Alix L. Joseph

cc: Mark Hamilton, Esq.
Mark Hermundstad, Esq.
David Robbins, Esq.
Mike Shimmin, Esq.
Casey Shpall, Esq.
James Witwer, Esq.