Appointed Judges Under New C.R.C.P. 122: A Significant Opportunity for Litigants

by Richard P. Holme

This article describes the background, provisions, and uses of C.R.C.P. 122. This new Rule allows parties to have a former judge appointed to handle all or part of a lawsuit, while maintaining the right to a jury trial and full appellate remedies. Although parties must pay the expenses for Appointed Judges, savings in legal fees and time may make this a desirable alternative for clients.

Suppose there is a state court lawsuit where the client cannot justify the added monetary expense (or the emotional stress) that will almost inevitably be caused by indeterminate prolongation of the dispute. This expense can result from vacated and rescheduled pretrial hearings, delays in completing discovery, multiple trial settings with the consequent need for repeated preparation by lawyers and experts, and inconvenience to out-of-state witnesses. Suppose there is a case that is time-sensitive or complex and requires special attention, but the parties believe that the court will be unable to give the case the prompt handling or careful analysis it needs.

Alternatively, suppose the parties and issues in a dissolution case need more seasoned attention or scrutiny than a magistrate may be able to provide. Finally, suppose clients want or need the assurance of a speedy resolution to their disputes, but one of the parties wants a jury trial or wants to preserve the ability to appeal from any final judgment, so arbitration is unacceptable. Relief is at hand. The Colorado Supreme Court has given new life to a rarely used option that can address these real—indeed routine—problems.

New C.R.C.P. 122 ("Rule 122") is effective July 1, 2005 and applicable to all new and pending cases.[1] It provides rules for parties who agree to the appointment of a specific former judge. This judge will be invested with the full powers of an active judge to hear any part of or the entirety of a case, with or without a jury, and subject to full appellate review by the Colorado appellate courts. Clients may be delighted at this new option, while the courts should have more time to attend to their remaining dockets.

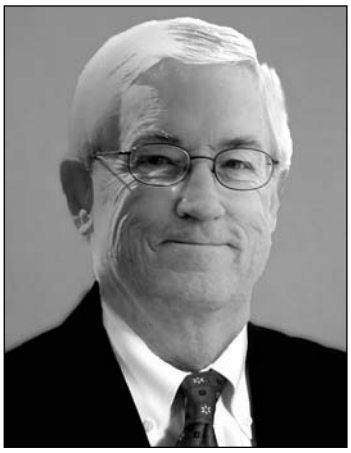
Nothing in Rule 122 is intended to be critical of the active judiciary who faces the enormous problems of an overloaded, under-supported, and too frequently unappreciated role. Colorado judges struggle daily with backbreaking dockets, woefully inadequate staffs, and never-ending demands from litigants, victims of crime, legislators, and even judicial administrators. They perform an admirable, critical, and difficult task. Perhaps, however, this new Rule will provide some modicum of relief, both to judges and to those who find themselves thrust into the judicial system.

This article briefly outlines the background of this new Rule 122. It then examines in some detail the provisions and application of the new Rule and a related new Canon 9 of the Code of Judicial Conduct ("Canon 9"). Finally, it discusses some of the considerations to weigh in deciding when and whether to use the new Rule.

BACKGROUND OF RULE 122

Almost half of the states in the United States have provided additional procedures to deal with cases that may warrant special attention, certainty, procedures of scheduling, or cost containment. The result has been a plethora of special statutory or even constitutional provisions allowing the use by litigants of "private judges"; "special judges"; "temporary judges"; senior and retired judges; judges selected from special lists of former judges; "special magistrates"; and, probably most famously, California's so-called rent-a-judge.[2]

As long ago as 1981, the Colorado legislature adopted a similar provision: CRS § 13-3-111 (1982). As originally enacted, on agreement of the parties, the Chief



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Justice was given the discretion to appoint a retired judge to hear a case after the case was at issue and all discovery was concluded. The parties were required to pay the judge's salary at the standard rate paid by the state.

Although the Colorado Supreme Court was empowered to promulgate rules to implement that statute, it did not do so.[3] The absence of any rule created substantial procedural uncertainty as to how to use the system and was at least one of the identified causes for the Bar's failure to take advantage of these special appointed judges.[4]

By 1998, the legislature had broadened the statute. At this time, the parties themselves were allowed to select the retired or senior judge they wanted to handle the case—subject to the approval of the Chief Justice. The time at which the parties could take advantage of the statutory procedure was moved up so that they could agree to an appointed judge at any time after the case was at issue. Furthermore, the parties and the former judge could now agree on the rate of pay, thus providing an incentive for former judges to agree to provide their services.[5]

In both versions of the legislation, appointed judges' orders were given the same force, effect, and appealability as those issued by a regular sitting judge. The Supreme Court was empowered to promulgate appropriate rules[6] and, significantly, the legislature required that the use of any such system of appointed judges be without expense to the state.[7]

The ability to select a special judge to hear a case, however, has languished largely unused and is probably unknown to most litigators and practitioners.[8] In the last five years, appointed judges were requested on an average of only five times a year. All of these requests were for trials to the bench and virtually all were domestic relations cases.[9]

In 2004, largely as a result of the diminishing judicial resources and increasing demands on the existing judicial system, Chief Justice Mary Mullarkey asked the Supreme Court's Judicial Advisory Council[10] to examine the possibility of preparing a rule that would increase awareness of the statutory authority to use appointed judges. It also was asked to create a uniform and predictable procedure and to implement, encourage, and increase the accessibility of those judges.[11]

A subcommittee of the Judicial Advisory Council was formed and additional non-Council members were included on the subcommittee for their added insight and experience.[12] Following several months of subcommittee meetings, presentations to the entire Council, and an opportunity for review by the Supreme Court Standing Committee on Civil Rules, proposed Rule 122[13] was submitted to the Supreme Court. Proposed Rule 122 was then published for comment and a public hearing.[14] On June 23, 2005, the Supreme Court adopted the Rule, effective on July 1, 2005.[15] It is applicable to all cases, including cases that were filed before that date.

A related provision adopted by the Supreme Court is new Canon 9 of the Code of Judicial Conduct.[16] This Canon is specifically tailored to address the more limited set of ethical factors that must be considered by Appointed Judges (*see* discussion of Canon 9 below).

PROCEEDINGS BEFORE APPOINTED JUDGES

New Rule 122 allows agreeing parties to select a former judge to handle some or all of their case, as long as they are willing to pay the related salaries and expenses of the judge, any necessary personnel (for example, a bailiff and reporter), and any costs associated with the location of the proceedings.[17] An appointment can be made only on a motion addressed to the discretion of the Chief Justice of the Supreme Court. Once an appointment is made, however, the proceedings will look quite familiar. The same rules of procedure and evidence will apply that govern similar cases tried before sitting judges: (1) the same kind of record will be maintained; (2) proceedings may be in the same courthouse, if space is available; (3) jury panels will be selected and *voir dire* conducted in the same manner; (4) proceedings, filings, and trials will be open to the public to the same extent they would be before a regular sitting judge; and (5) judgments and orders will be as enforceable and appealable as if issued by an active judge.

Basic Provision for Appointing Judges

Rule 122(a) contains the basic authority for the appointment of judges in particular cases. This section closely tracks the wording of CRS § 13-3-111, with some changes for clarity or to make the Rule more consistent with language usage in the Colorado Rules of Civil Procedure.

Types of Cases

This Rule is broad in its application. First, it can be used in any type of civil action except juvenile delinquency proceedings. Thus, Appointed Judges can be sought in normal civil litigation, domestic relations, probate, water, and even non-delinquency juvenile proceedings. The breadth of this provision, therefore, is immediately distinguishable from C.R.C.P. 16 and 16.1, which expressly exclude application to "domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, C.R.C.P. 106 and 120, and other similar expedited proceedings." Additionally, the scope of Rule 122 is not limited by the monetary amount of the claims or the types of relief sought.[18]

The primary type of non-criminal, judicial proceedings excluded from consideration for Appointed Judges is a juvenile delinquency proceeding. A juvenile delinquency proceeding, although technically civil in nature, is much closer to a criminal proceeding in the basic procedures that apply and in the impact and interest of the community concerning its handling and disposition.[19] Thus, for purposes of Rule 122, the handling of juvenile delinquency proceedings has been left exclusively under the domain of the public judicial system.

The request for an Appointed Judge may be made at any time after a civil action is filed in a trial court of record. The only obvious limitation on this timing is that such a request cannot be made until all of the parties to the case have been served and have agreed to join in such a request. On the one hand, this flexibility as to when a request can be made is important because parties desiring to use an Appointed Judge may frequently wish to have the Appointed Judge determine initial motions, such as C.R.C.P. 12, 17, or 19 motions, filed at the outset of the case. On the other hand, parties might not agree to seek an Appointed Judge until much later in the proceedings, such as following discovery and before trial. Even such a late decision is acceptable under section (a) of the Rule.[20]

Rule 122(a) provides that the parties can designate a *specific* former judge to be appointed. This authority creates a significant ability in the parties to select former judges whom they believe would be especially experienced, knowledgeable, or capable of handling the specific lawsuit in which they are involved. The parties can select: (1) a former probate judge to handle

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estate litigation; (2) a former water court judge to handle a water case; or (3) a former judge particularly adept in family law to handle a domestic relations suit.[21]

The former judge sought by the parties must consent to the terms of the appointment. Thus, unlike the situation confronting active judges, the prospective Appointed Judge has the opportunity to decline a case based on his or her work schedule, lack of interest in the case or its subject matter, or other factors that might reduce the judge's effectiveness.

In addition to agreeing on a prospective judge, the parties also must agree that one or more of them will pay the compensation to the Appointed Judge, together with other compensation and expenses incurred. It is significant that the Rule, like the statute, authorizes parties to agree on payment that is not equally shared by all parties or by all the plaintiffs and all the defendants. Thus, for example, a party with a greater incentive to obtain an expeditious hearing in a case might agree to pay the entire expense of the special proceeding, even if the other parties were unable or unwilling to bear that expense.[22]

Once the parties have requested appointment of a former judge, the Chief Justice is given full discretion concerning the appointment. The Chief Justice can reject or approve any of the suggestions or conditions agreed to by the parties and can impose any other requirements—specifically those that may be necessary to ensure that there is no expense to the state of Colorado.[23] Furthermore, the Chief Justice also has the power to approve or reject the rate of compensation to be paid to the Appointed Judge. If, for example, the Chief Justice believed that the agreed rate of compensation was excessive and unjustified, the Chief Justice could refuse to approve that rate of compensation.[24] However, if the Chief Justice chooses to reject or modify any of the provisions of the parties' agreement, the parties retain the option of withdrawing the request for appointment and leaving the case in the court in which it is being handled.[25]

Orders Fully Enforceable And Appealable

Rule 122(a)(4) incorporates perhaps the most important provision relating to the use of Appointed Judges. It creates the clear distinction between Appointed Judges and arbitrators. Subsection (a)(4) provides that Appointed Judges have the same authority as full-time sitting judges and that the Appointed Judges' orders, decrees, verdicts, and judgments shall have the same force and effect as those of a sitting judge. Thus, unlike an arbitration award, a judgment from an Appointed Judge is an enforceable, executable judgment. The parties would not need to seek collateral enforcement of the judgment.

Furthermore, orders of an Appointed Judge are immediately enforceable by contempt or other sanctions to the same extent as if those orders had been issued by a regular judge handling the case. Execution may be had on judgments without the need for collateral proceedings such as those applied to foreign judgments[26] or arbitration awards.[27] Moreover, the judgments of the Appointed Judge are directly appealable to the Colorado Court of Appeals or Supreme Court in the same manner as all other ordinary judgments.

Qualifications for Appointed Judges

Rule 122(b) sets forth the eligibility requirements for persons who would serve as Appointed Judges. Again, the available list of former judges is broad. Essentially, any senior judge or retired or resigned appellate judge or trial judge who has served in a Colorado state court for at least six years is eligible to serve as an Appointed Judge. Indeed, if a judge has served in both the Colorado state court system and the federal court system for a total of six years, that judge also is eligible to serve as an Appointed Judge.[28] The only additional limitation is that a person serving as an Appointed Judge currently must be licensed to practice law in Colorado.

Under Rule 122(b), parties also may select former county court judges to hear cases, even those filed in the district court. In a number of smaller counties, county court judges sit by designation as district court judges, and have sufficient experience to be appealing candidates for parties seeking an Appointed Judge. Moreover, in some counties, former county court judges may be substantially more accessible than former district court judges who may live several counties away.

A former judge is not disqualified from serving as an Appointed Judge merely because the former judge is presently engaged in the active practice of law. The absence of any such limitation is particularly reflected in new Canon 9, discussed below.

Things to Include in Motion for Appointed Judge

- Name of Judge
- Judge's compensation
- Agreement by judge to comply with Canon 9 and provide disciplinary information
- Estimate of expenses
- Who is to pay expenses—before and after the trial
- Agree that Colorado will bear no expense
- Judge's oath of office
- Any other matters bearing on motion
- Form of order of appointment
- Acknowledgment that Chief Justice may reject or amend.

Motion for Appointment

Rule 122(c) establishes the requirements for the contents of a motion to obtain the appointment of an Appointed Judge. The request can be made only on the agreement of all parties and with the consent of the former judge they seek to have appointed. Therefore, the motion must be filed by all parties to the case and must be signed as approved by the former judge who is being proposed for appointment.

Section (c) also contains the first evidence of Rule 122's repeated provisions for openness and transparency of proceedings conducted by Appointed Judges. This section requires that the original of any motion filed to seek an Appointed Judge must be filed with the Supreme Court and that a copy of the motion also must be filed in the originating court—that is, the court in which the case was originally filed or the court to which the case had been previously transferred. Thus, the motion will be a matter of public record both at the Supreme Court and trial court levels. Clearly, one of the advantages of seeking Appointed Judges is *not* that a case may be tried in secret and without normal public scrutiny.

The remainder of this section (c) discusses the contents of the motion for appointment, as delineated by the following subsections of Rule 122(c):

(1) Include the identity of the prospective Appointed Judge.

(2) Include the proposed rate of compensation for the Appointed Judge (as noted above, this compensation rate must be approved by the Chief Justice).

(3) There must be an agreement by the proposed Appointed Judge to be bound by new Canon 9, which is described below.[29] Additionally, an Appointed Judge must agree that the Chief Justice may obtain any record of imposed or pending discipline concerning the Appointed Judge from the Office of Attorney Regulation Counsel and Colorado Commission on Judicial Discipline.

(4)-(5) The estimate of expenses is required, as well as a statement as to who will be responsible, both at the outset and ultimately, for payment of those expenses. These provisions undoubtedly will be the most difficult and time-consuming parts of the motion. Because these requirements relate to several of the other provisions of Rule 122, they are discussed further below under the section entitled "Provisions Relating to the Expenses of a Proceeding."

(6) The motion must include an explicit acknowledgement of the agreement by the parties and the Appointed Judge that none of the expenses of the proceeding shall be paid by the state of Colorado. As discussed below, Rule 122(e) requires an escrow or trust account to be administered under the control of the Appointed Judge. The parties should include the details of such an account in this portion of their motion.

(7) A signed copy of the Appointed Judge's oath of office must be submitted with the motion. The form of the oath, set forth in Rule 122(c)(6), is identical to the oath required of all judges in the state of Colorado.

(8) If there are any special matters the parties wish the Chief Justice to consider in ruling on the motion, such matters are to be included in the motion itself. Such items should include any proposed provisions limiting the powers or duration of the Appointed Judge or any of the other rules or provisions that would normally be applied under Rule 122. For example, the parties might agree to use an Appointed Judge only with respect to overseeing discovery in a complex case where the parties could not agree to transfer the entire proceeding to an Appointed Judge.[30] The parties also might agree to loosened application of the Rules of Evidence or discuss their specific reasons for supporting the use of an Appointed Judge. However, it seems unlikely that the Chief Justice is going to be particularly concerned about the parties' motives unless the case is of such notoriety as to arouse the Chief Justice's curiosity or concern about the desirability of removing the case from the regular judicial system.

(9) The parties are to attach a form of order approving the appointment so that the Chief Justice can either approve it without having to prepare a separate order or can indicate any revisions directly on the form of order presented by the parties.

(10) The parties must include a statement acknowledging that the Chief Justice can approve, reject, or modify the provisions of the order. If the Chief Justice chooses to modify the order, it can be done only with the approval of all the parties. If the parties did not agree to any such modification, the Chief Justice will be left with the options of either approving or rejecting

the proposed order in the original, submitted form.

Once the Chief Justice has ruled on a request for an Appointed Judge, that ruling is to be filed with the originating court. Again, this will keep the actions on all such requests open for public inspection. [*See* the Appendix to this article for a sample form of motion.]

Duration of the Appointed Judge's Service

Rule 122(d) provides the authority and flexibility necessary for the parties to limit the duties of any Appointed Judge. Normally, the parties seeking an Appointed Judge will want that judge to handle the case through the completion of the case at the trial court level. Indeed, unless the motion specifies to the contrary, the presumptive appointment lasts until the entry of a final, appealable judgment, order, or decree. Nonetheless, this section (d) allows the parties to agree on a more limited appointment. Thus, for example, if the parties wish to have an Appointed Judge solely for the purpose of handling discovery matters or for ruling on certain pretrial motions, they would be able to seek such an appointment.

There is a slightly different provision with respect to dissolution of marriage actions. Here, the presumptive duration of the appointment is until the entry of Permanent Orders. A potential problem that was revealed in some of the previous cases before an Appointed Judge under CRS § 13-3-111 was the issue of what to do when a party requested an amendment to the Permanent Orders (for example, relating to custody or child support payments), when such a request occurred months or even years following the entry of Permanent Orders. Under those circumstances, it was uncertain whether the rulings on such subsequent motions should be handled by the Appointed Judge or by a judge in the originating court. This section (d) assumes that the appointment will terminate as of the entry of Permanent Orders.

If the parties wish for the Appointed Judge to remain involved following that time, they will need to reach agreement with the proposed Appointed Judge and include such an expanded duration in their motion for appointment. Even if the parties fail to provide for such an expanded appointment, there is nothing in Rule 122 that would preclude them from filing a new motion for appointment of the Appointed Judge at such time as any request for amendments to the Permanent Orders were filed.

Indeed, there is some uncertainty as to the potential existence of any such motion, when it might occur, and what other issues might have arisen for the Appointed Judge in the meantime. Thus, the parties and the Appointed Judge may wish to defer requesting an expanded appointment until and unless any such subsequent motions are presented. Under circumstances where the Appointed Judge had taken the case through the issuance of Permanent Orders, it would seem highly unlikely that the Chief Justice would decline to allow reappointment of the same person to handle additional, supplemental matters relating to the case, as long as the parties and the Appointed Judge agree.

Provisions Relating to the Expenses of a Proceeding

As mentioned above, perhaps the most difficult part of obtaining an Appointed Judge will be the process of estimating the costs and expenses for the handling of the case. In view of the legislative demand that the use of Appointed Judges create no expense for the state, Rule 122 was designed specifically to prevent that occurrence.

Expenses that Must be Included in the Motion

A significant aspect of the motion for appointment under Rule 122(c)(4) is the preparation of a realistic estimate of all compensation and expenses in connection with proceedings before an Appointed Judge. These expenses will include not only the compensation for the services provided by the Appointed Judge, but also compensation for any additional needed personnel, such as a bailiff and court reporter.

Hearings before an Appointed Judge may take place in the courthouse. When matters can be heard at the courthouse, Rule 122(h)(2) acknowledges that the expense of the courtroom and use of existing equipment (expenses that would still be incurred by the State Judicial Department, even if not being used by the Ap-

pointed Judge) are not a cost to the state and thus need not be reimbursed by the parties. In some cases, parties who could not afford to use the Appointed Judge system may be able to find a former judge willing to serve without compensation (as some have already volunteered to do). If those cases can be heard in the courthouse, even indigent parties would be able to use Appointed Judges because they would not have to face costs of an alternative location.

Given the congested dockets for most courts, however, it is more likely that hearings in cases using Appointed Judges will need to be held in alternative locations. The expense estimate therefore must include an estimate for the amount of rental that needs to be paid for such an alternative facility. Rule 122(h)(4) requires that where hearings are held outside of the courthouse, there must be sufficient premises liability insurance to cover any injury to a party, participant, or spectator. The cost of such additional insurance, if needed, must be included in the expense estimate.

Additionally, where a jury is requested, the realistic expense estimate must include the anticipated expenses for the jury, including the statutory daily pay, meals, transportation, and insurance for getting jurors to any alternative location outside of the courthouse. If there is other compensation or expenses that can be reasonably anticipated, such as the expense of additional travel, lodging, and meals for the Appointed Judge, other personnel, and jurors, such expenses also should be included in the estimate.

Finally, the motion needs to include provisions ensuring that all those expenses will be paid by the parties. This last provision of Rule 122(c)(4) does not appear to require any sort of cost bond. Nonetheless, it should contain clear assurances that the attorneys and/or parties understand that they ultimately will be responsible for paying those costs. The parties can expect that this portion of the motion for appointment explaining expenses may attract special scrutiny by the Chief Justice in the exercise of the discretion to grant the motion.

Agreement as to Allocation Of Expenses

Rule 122(c)(5) requires the parties to determine and include in their motion for appointment provisions as to who will make the initial payments for the compensation and expenses of the proceedings. As noted above, this can be allocated among the parties in any way they choose. Additionally, however, the parties are to identify who is responsible for the compensation and expenses related to the Appointed Judge on entry of judgment. The parties could agree: (1) to use the same allocation that is used for the initial payment; (2) that the loser reimburses all expenses related to the Appointed Judge proceeding to the parties who paid them at the outset; (3) that a party who pays a lower share of the initial costs will reimburse up to some level those who pay the higher share; or (4) to use some other system.

The Rule does not require any particular formula; it requires only that the parties agree in advance and state the method in the motion. The main purposes of this requirement are to assure that under any circumstances the state does not get stuck with the costs and to foreclose subsequent disputes among the parties. Because the expenses that the parties will pay have not been considered historically in cases analyzing the normal award of "costs" at the conclusion of a case, there is no existing basis on which to determine how these new expenses should be allocated. This Rule leaves it up to the parties to negotiate the solution before the motion is filed.

Although not specifically mentioned in the Rule, another factor the parties should consider in determining the ultimate allocation of the expenses of the proceeding is how they will deal with any balance of the initial payment that might remain unexpended. Unexpended money may be a result of an early settlement; a ruling granting a dispositive motion; greater efficiency, causing unanticipated savings; or even an unduly high initial estimate.

Procedures for Processing Expenses

Rule 122(e) provides the procedural mechanism for ensuring payment of the costs and expenses of the proceeding. The Rule requires that once an Appointed Judge is named, the parties must deposit in an escrow or trust account enough money to pay the estimated compensation and expenses of the case. Such special account is to be administered by the Appointed Judge or someone designated by the Appointed Judge who is acceptable to the parties. To the extent it can be done, the parties should include those specific provisions in their motion for appointment as part of their assurance that the compensation and expenses will be paid.

Rule 122(e) also gives the Appointed Judge authority to order the parties to deposit additional funds if the Appointed Judge determines that the funds already on deposit are insufficient to cover all further compensation expenses. Furthermore, if the parties do not make the necessary additional deposits, section (e) allows the Appointed Judge to withdraw after reasonable notice and with permission of the Chief Justice. In that event, the

case reverts to the originating court for further proceedings. Finally, and again consistent with the Rule's emphasis on openness and transparency, at the conclusion of the handling of the Appointed Judge's duties, the parties are to file in the court record in the originating court a report of the compensation paid for the Appointed Judge's services, as well as the total expenses paid by the parties in the case.

Rules Applicable to the Proceedings

Rule 122(f) provides that proceedings before an Appointed Judge are to be conducted pursuant to the rules that would otherwise be applicable were the case to remain in the originating court. Thus, for example, cases transferred from the probate court for handling by an Appointed Judge would be tried pursuant to the Colorado Rules of Probate Procedure. If all parties agree to an Appointed Judge for a water case, the applicable rules would be the Colorado Rules of Civil Procedure as supplemented by the Uniform Local Rules for All State Water Court Divisions. Likewise, an Appointed Judge handling domestic relations cases would apply the provisions of C.R.C.P. 16.2 and, if applicable, portions of the Colorado Rules of Juvenile Procedure.

Although it seems highly unlikely that county court cases would be handled by Appointed Judges, if such a circumstance were to exist, the Appointed Judge would apply the Colorado Rules of County Court Civil Procedure. Because most civil cases are subject to the Colorado Rules of Evidence, those rules will remain in effect and be applicable to Appointed Judge proceedings. In short, the procedural aspects of a proceeding handled by an Appointed Judge should be essentially indistinguishable from those that would have been used in the originating court.

Court Record

The trial court record in a proceeding before an Appointed Judge is to be maintained in essentially the same way as if the case had remained in the originating court. Essentially, two factors compel this result. First, because proceedings before an Appointed Judge can be appealed to the appropriate Colorado appellate court, it is important that the record be maintained in as complete a form as possible. Rather than relying on persons who are not completely familiar with the procedures of preparing an appellate record, Rule 122(g)(1) requires that the original of each filing in all proceedings before an Appointed Judge be filed with the clerk of the originating court. This clerk also will be responsible for compiling any appellate record. (These expenses would be incurred if the case remained in the originating court, so they are not additional or incremental costs to the state.)

Subsection (g)(1) also requires that a copy of each filing be provided directly to the Appointed Judge. This subsection, however, does not change the standard rules with respect to what matters are to be filed with the court. For example, C.R.C.P. 26 specifically instructs that copies of disclosed documents or of discovery papers should not be filed with the court and that rule is also applicable in proceedings before an Appointed Judge.

The second reason for the requirement of filing the original of each filing with the clerk of the originating court is to ensure that the cases remain open and available to the public and that the proceedings be as transparent as they would be if the case had never been transferred.

Rule 122(g) requires the parties and Appointed Judge to comply with all applicable rules and Chief Justice Directives relating to the reporting, filing, and maintaining of the record. Thus, in cases transferred from originating courts that mandate electronic filing ("e-filing"), the parties will continue to need to e-file with the clerk of the originating court. Copies of all tendered trial exhibits also are to be filed with the clerk of the originating court.

The parties are authorized in Appointed Judge proceedings to have the proceedings recorded by a court reporter or, where acceptable to the parties, on any other recording equipment. Although the parties normally will want a court reporter whenever there is an evidentiary hearing or at trial, the parties can agree to have electronically recorded proceedings that involve arguments on motions or other matters that do not require more sophisticated reporting. Whatever form of recording is used, the originals of any reporter's notes or the original of any recording medium (whether audiotape or videotape or use of some future electronic recording media) are to be filed with the clerk of the originating court.

The handling of any reporter's notes is governed by C.R.C.P. 80(d), which provides that reporter's notes are the property of the state and are to be retained for twenty-one years. The cost of any court reporter or reporting equipment is to be borne by the parties.

Location of Proceedings

According to Rule 122(h), the presumptive location for evidentiary proceedings and for the trial is to be in the county in which venue lies under C.R.C.P. 98. Thus, normally the presumptive location would be in the county of the originating court. Nonetheless, the parties can agree to hold the hearing or trial in a different county if the Appointed Judge agrees. For example, an action contesting ownership of an eastern Colorado ranch in Kiowa County, Colorado, might exist between parties who live in El Paso and Mesa Counties and who are using Boulder and Fort Collins lawyers. Convenience of the parties, attorneys, and Appointed Judge might suggest that a more efficient location for the trial would be in any of those locations rather than in Kiowa County. Under Rule 122, the parties would have flexibility to hold the proceedings in any of those locations, with the approval of the Appointed Judge.

Relocation may be easier to accomplish than when a detailed motion has to be filed under Rule 98(f), when a sitting judge has to worry about the logistics and problems created for the receiving court, or when the convenience of the parties is not clear from the factual record.[31] The ability to select the location for the trial may provide the opportunity for substantial cost savings for the parties as well.

As noted above, for the location of an evidentiary proceeding or trial to be held in a county other than that in which venue properly exists, the Appointed Judge must approve the change of location. Historically, the purpose for provisions relating to proper venue and location for the trial have involved some choice on the plaintiff's part as to where the trial should be held, considerations of convenience of the parties, the justice of requiring a defendant to respond in a particular locale, and the public interest of the local community in the proper handling and outcome of the case. Although all parties may not agree to a different location if it might be contrary to their convenience or considered unfair, the issue of the public interest in the dispute could still influence the Appointed Judge's willingness to agree with the a change of location.

For example, a water case, or a probate case involving a particular local beneficiary, could create genuine public interest in

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the locality in which the case was filed. Prior to ruling on the parties' request for a different location for the trial, the Appointed Judge could properly take into account the ability of the public to observe the proceedings and of the local media to provide contemporaneous reports. An Appointed Judge also might decline to transfer a dissolution of marriage action involving a community's mayor and spouse or involving leading citizens because of the public's interest in the political or social impact of the outcome of the proceedings, even though the involved spouses might wish to have the location changed to a distant part of the state.

The issue of local community concern is probably less likely to occur in the Denver metropolitan area. Thus, it should not normally create significant problems for a case filed in the Arapahoe County District Court to be tried in a facility in Denver, or even Golden. Even in cases where the location of evidentiary proceedings and the trial are to be held in the county of the originating court, Rule 122 does not require that hearings on motions or other non-evidentiary procedural matters necessarily must be held in that county. Indeed the parties, attorneys, and Appointed Judge can choose to conduct such matters in any location that is more convenient to the participants—or even telephonically.

Once the general location of the proceedings is known, the parties and the Appointed Judge must arrange an appropriate facility in which to hold the proceedings. In some Colorado counties, the county courthouse may be the location of first preference. Because many of the same communities have relatively small courthouses, it will be important for the parties and the Appointed Judge to be certain that rooms will be available for use during the evidentiary proceedings or trial. It may be that a courtroom is available for some proceedings, but not others. When courthouse facilities are used, the parties will not have to pay for those rooms or equipment.[32] Rule 122(h)(2) specifically contemplates that all, some, or none of the proceedings may be held in the courthouse.

Where courtrooms are not available, the parties are largely free to select any other location. However, since Appointed Judge proceedings are still public proceedings, a location must be selected that will accommodate the possibility of members of the public or the press being in attendance. Thus, it is not expected that a proper location would be the office of one of the lawyers or of the Appointed Judge. However, hearings might be held in hotel or motel ballrooms or conference rooms, school auditoriums, and the like.

For evidentiary proceedings and trials being held in the Denver metropolitan area, the parties even might be able to arrange for hearings in a courtroom at the University of Denver College of Law or the University of Colorado Law School.[33] Additionally, some law firms and mediation firms have rooms that are suitable for proceedings and could accommodate a reasonable number of public attendees.

In accordance with the concept that Appointed Judge proceedings are to be available to the public, Rule 122(h)(3) requires that, whenever proceedings are scheduled in advance, the Appointed Judge must file a notice of hearing with the clerk of the originating court. The notice must state the date, time, nature, and location of the proceedings so that anyone interested in reviewing the court file will know where such proceedings are to take place. This requirement for notice of proceedings is not limited to evidentiary proceedings and trial, and should include hearings on motions and other procedural arguments and hearings as well, if they are not conducted spontaneously at the request of the parties.

As noted above, if the proceedings are not going to be held in a courthouse, the parties must make sure that there is sufficient premises liability insurance to cover any injury to a party, participant, or spectator at the proceedings.[34] Further, the parties must be certain that the insurance policy names the state of Colorado as an additional insured.[35] This latter requirement was inserted to help ensure that the state of Colorado will not bear any of the expense of these proceedings.

Jury Trials

One of the significant and unusual provisions of Rule 122 is its authority for Appointed Judges to conduct jury trials.[36] Although the Judicial Advisory Council considered several different methods of selecting jurors for use in Appointed Judge trials, it was ultimately concluded that, as in most matters to be handled by Appointed Judges, the methods, rules, and procedures should be as similar as possible to those used in cases tried before regular courts. Thus, it was decided that juries should be selected and impaneled in the same manner and in the same place they would be in an ordinary civil trial.

The Colorado Uniform Jury Selection and Service Act[37] will apply to trials before an Appointed Judge.[38] Therefore, jurors will be summoned, subjected to *voir dire*, selected, compensated, and regulated pursuant to that Act. Parties who choose to use Appointed Judges for jury trials should take particular notice of the requirement that juries are to be selected from the county in which the originating court is located.[39] Where a jury is requested, the traditional local interest in having jurors from the county in which the case originates to decide the cases will then be satisfied.

Rule 122(i)(2) provides that before setting a case for trial, an Appointed Judge must coordinate the start of the trial with the jury commissioner and the district administrator for the originating court. Furthermore, the prospective jurors are to be summoned to, and *voir dire* of the jurors is to be held in, the courthouse of the originating court. In promulgating this Rule, it was deemed important that jurors commence their service in proceedings held before an Appointed Judge with the sense that the case is neither more nor less important than any other jury case tried in that locale.

Thus, jurors would be summoned in the ordinary course and not be told that the case for which they were being selected was to be held before an Appointed Judge, any more than they would be told that any case was to be tried by any particular judge. The reason for the requirement that there be coordination prior to setting the case for trial is to make sure: (1) that the jury commissioner and district administrator summon enough prospective jurors for the start of the trial to fill the jury; and (2) to set the start of a trial on a date in which there is a courtroom available in the courthouse for *voir dire* and selection of the jurors.

Although jurors are to be summoned to and selected in the courthouse of the originating court, it is still permissible to hold the actual trial in a different location. If the trial is to be held outside the courthouse, Rule 122 requires that the jurors be instructed that the different location of the trial does not affect their responsibility as jurors or the importance of their service.[40] Jurors are not accustomed to having trials in locations other than the courthouse. Therefore, it was felt important to assure them that the existence of a different location was not to be interpreted as either more or less important than normal jury service.

In those situations in which the jury trial is to be held outside of the courthouse, Rule 121(i)(3) imposes on the parties the responsibility for offering transportation from the courthouse to the location of the trial for the duration of the trial. Just as in an ordinary case, jurors are expected to reach the courthouse on their own. However, if their service is to take place at a different location, the parties must provide them with any additional transportation. Individual jurors may choose to go directly to the new location on their own, which is certainly permissible.

Jury transportation to and from the courthouse is to be provided at no cost to the jurors or to the state and, as in the situation with respect to the location itself, the parties are to make sure there is sufficient liability insurance to cover any injury to a juror arising out of that transportation. Again, the insurance must name the state of Colorado as an additional insured.

The parties are required by Rule 122 (i)(4) to pay the jurors their statutory compensation within three days following the conclusion of their service. In most instances, this payment presumptively would come from the account maintained by the Appointed Judge.

Furthermore, the parties also are required to pay for related costs, such as the jurors' meals and the cost of the bailiff. The bailiff's statutory duties are to preserve order in the court, attend the jury, open and close the court, and to perform such other duties as may be required by the court.[41] Finally, if the jury is cancelled, postponed, or waived, the Appointed Judge is to notify the jury commissioner as soon as possible to avoid the unnecessary summoning of prospective jurors.[42]

Removal of and Immunity For Appointed Judges

Once an Appointed Judge is appointed by the Chief Justice, that judge is to preside on all matters throughout the duration of the appointment. However, the Appointed Judge is still subject to being replaced if recused or removed under C.R.C.P. 97 or due to death or incapacity. Under any of those eventualities, the proceedings in the case revert to the originating court. Finally, Rule 122(k) provides that Appointed Judges will have the same immunity as that provided for any other judge in Colorado.[43]

CANON 9 OF THE CODE OF JUDICIAL CONDUCT

Active judges in Colorado are subject to the provisions of Canons 1 to 7 of the Colorado Code of Judicial Conduct. These Canons contain a variety of provisions, ranging from the aspirational to the prohibitory. An aspirational Canon, for example, states that a judge is encouraged to engage in quasi-judicial activities to improve the law, the legal system, and the administration of justice;[44] a prohibitory Canon, on the other hand, states that a judge should avoid impropriety and the appearance of impropriety in all the judge's activities.[45] Among other things, the Canons prohibit judges from practicing law[46] and authorize judges to allow expanded media coverage (television and newspaper photography) under certain circumstances.[47]

However, due to the varying circumstances of different types of judges, Canon 8 of the Code provides certain exceptions from the requirements of Canons 1 to 7

for part-time judges[48] and for senior and retired judges.[49] Provisions related to the senior judges apply while they are under contract, which provides certain additional benefits in exchange for their service as regular judges for up to as much as sixty days a year.[50] The provisions relating to retired judges apply during the period in which they are recalled and acting temporarily as a judge.[51] For example, senior judges are not allowed to engage in the practice of law while under contract pursuant to the senior judge program; retired judges are not allowed to practice law during any period in which they are temporarily recalled and acting as a judge (other than as an Appointed Judge).[52]

Because all Appointed Judges are, by definition, retired or senior judges, it was felt that some of the Canons should apply to persons serving as Appointed Judges, but that there were a number of provisions that had little or no relevance to their service as an Appointed Judge. Appointed Judges would be acting only on specific cases during the times that activity was needed; otherwise, they may be actively engaged in the practice of law. Therefore, it was felt to be undesirable and unnecessary that Appointed Judges should have to relinquish their practice of law on being appointed, for probably sporadic duty, in a specific case.

Originally, it was contemplated that a new section could be added to Canon 8 that would exempt Appointed Judges from compliance with certain designated portions of Canons 1-7. However, it was ultimately decided that the better course would be to adopt a new Canon 9 that would apply specifically and affirmatively to Appointed Judges.[53]

The ethical provisions that will apply to Appointed Judges should not be problematic for any Appointed Judge or party. New Canon 9 and its §§ 9.1 through 9.5 are essentially adapted from applicable portions of Canons 1, 2, 3, 5, and 7 of the Code of Judicial Conduct, provisions that should already be familiar to anyone eligible to serve as an Appointed Judge. In short, Appointed Judges are required to uphold the integrity and dignity of the judiciary;[54] avoid impropriety and the appearance of impropriety, including not being a member of any organization that practices invidious discrimination;[55] perform their duties impartially and diligently;[56] and refrain from financial and business dealings directly related to the case.[57]

Three matters relating to Appointed Judges are particularly noteworthy. First, Appointed Judges, as all other judges, are prohibited from personally soliciting funds for a political organization, acting as a leader or officeholder in a political organization, or publicly endorsing a candidate for public office.[58] This restriction was considered important for purposes of maintaining the judiciary's historic stance of independence from partisan politics.

Second, although Canon 5.F prohibits all other active, retired, and senior judges from practicing law, there is no provision in Canon 9 that precludes an Appointed Judge from simultaneously engaging in the practice of law on matters unrelated to the issues from which the Appointed Judge has been appointed under Rule 122. Indeed, Canon 9.A and the Commentary to new Canon 9 specifically note that Appointed Judges are allowed to practice law while serving as Appointed Judges. Finally, and consistent with the continuing concept of openness and transparency for proceedings, Appointed Judges are given specific authority to allow expanded media coverage (such as television, radio, and still photography of the proceedings), pursuant to Canons 3.A(7) and (8).[59]

CONSIDERATIONS FOR THE USE OF APPOINTED JUDGES

A number of relatively obvious factors should encourage litigants to consider the use of Appointed Judges. These include the following:

• The parties may select a judge of their own choosing rather than a judge assigned by blind draw. This may be a judge who has special knowledge or experience with the subject of the case or one with a reputation for fairness, efficiency, and expedience in deciding cases. In any event, such a judge must be acceptable to all parties. This serves as a substantial check on judges who are biased or might be influenced by hopes of gaining additional referrals from any particular party or lawyer.

• The parties can anticipate much closer attention to their case and a faster resolution. The parties will be motivated to select a judge whose workload will allow the judge to hear and determine the case quickly. More important, the person selected as an Appointed Judge will not have a caseload docket of hundreds of cases competing for and interfering with his or her time and attention.

• Settings for hearings and trial should be firm and not subject to being vacated due to competing cases, thus reducing attorney and expert fees and inconvenience to parties and witnesses.

• Trial days should be able to be full-length days, uninterrupted by other hearings or the extended coffee and lunch breaks frequently used by regular judges to deal with other cases and emergencies. This, too, will save expense.

• Many jurors complain about and become frustrated by the large amount of time during trials they perceive to be "wasted." The ability to complete trials in a shorter time should reduce not only the cost of jurors, but also some of the juror displeasure and frequent annoyance with one party or another for seemingly interminable delays.

• It should be easier to set trials and hearings at locations that are more convenient to all participants.

• Many of the foregoing factors also may lead to significant savings in attorney fees and costs.

Even the statewide judicial system and persons who cannot or choose not to use Appointed Judges should benefit from reduced caseloads created when parties choose to use Appointed Judges. These reduced demands on regular, full-time judges should give them more time to devote to handling their remaining dockets.

Potential Benefits of Appointed Judges

- Selection of a judge with special experience or skill
- Appointed Judges will have much smaller caseloads
- Motion hearings set promptly and held on time
- Greater likelihood of a trial date certain, avoiding costs of vacated trials
- Likelihood of full-length trial days, allowing for shorter trials and less expense
- Avoidance of wasted time and delays common in regular courtroom trials
- Greater ability to choose convenient location
- Consequent savings of attorney and expert fees
- Quicker resolutions of cases.

Perhaps the consideration that will give most clients pause is the obvious and upfront costs of using an Appointed Judge. Moreover, one of the repeated complaints about using special judges is that it provides a "two-tier" system of justice that gives special treatment and advantages to wealthy litigants. Nonetheless, in California, where the system has been most heavily used, studies of the system do not support that concern.[60]

A rough estimate of the cost of using an Appointed Judge may show that the total cost of using an Appointed Judge is lower, perhaps substantially, even for cases of average size and complexity. The costs may be offset by savings for all parties in attorney fees, expert witness fees, expenses for witnesses, and even prejudgment interest. Moreover, the costs of the following can quickly surpass the compensation for the Appointed Judge who is billing only for time actually spent working on the case: fees for preparing for one or two vacated and reset trial dates; fees for hours waiting in court for a case to get called for each motion hearing; attorney fees for the hours to review the facts and law of a motion frequently filed months earlier; and attorney and expert witness fees for the hours of delay in each trial day, most of which are billed to the clients.

Although not billed and paid by check, a real cost is created by extended litigation in terms of the time, energy, distraction, and stress on business executives and employees. Also, delays in receiving compensation for an injury frequently create financial difficulties that end up outweighing recoveries of pre-judgment interest years later.

The "cost" side of the equation of whether it is effective and desirable to use an Appointed Judge also may be compared against the costs of extended periods of time before reaching necessary decisions in a dissolution of marriage case dealing with custody and childcare or in creating closure for a defendant in a personal injury case who caused an accident. Thus, a careful and thoughtful analysis by clients early in a lawsuit (almost any lawsuit) may justify discussion among counsel of the desirability of using an Appointed Judge under new Rule 122.

CONCLUSION

Hopefully, new Rule 122 will provide a useful and practical alternative for civil litigants who need faster and less expensive methods of resolving their disputes than a currently understaffed and underfinanced judiciary can provide. In the best of all worlds, it may also alleviate, to some degree, the dockets of Colorado's active judges.

NOTES

1. The full text of the rule can be found in "Court Business," 34 *The Colorado Lawyer* 159 (Aug. 2005); on the CBA website, it is available at http://www.cobar.org/tcl (click on the August 2005 issue and then Court Business). It also can be found on the Supreme Court website at http://www.courts.state.co.us/supct/rules/2005/2005(10).doc.

2. *See, e.g.*, Ark. Const. Amend 80, § 13; Cal. Rules of Court, Rule 244; Ind. Code. Ann. § 33-38-10 (West 2004); Kan. Stat. Ann. § 20-310b; Mich. Comp. Laws Ann. § 600.557 (West 2004); Minn. Stat. Ann. § 484.74.2a (2004); Ohio Rev. Code Ann. § 2701.10 (2004); R.I. Gen. Laws § 8-17-1 (2004); Tenn. Code Ann. § 17-2-121 (2004); Tex. Civ. Prac & Rem. § 151.001. The details of California's system of temporary judges are set forth in Rule 244 of the California Rules of Court.

3. In 1996, Chief Justice Vollack did promulgate a Chief Justice Directive, No. 96-04, relating to implementation of the statutory authority to appoint judges, but that Directive was never widely disseminated, publicized, or even known by trial lawyers. *See* http://www.dgslaw.com/documents/reference/holme4.pdf.

4. *See* Prince, "A Practical Guide to Trials by 'Appointment' Under CRS § 13-3-111," 26 *The Colorado Lawyer* 69 (Nov. 1997).

5. CRS § 13-3-111 (1999).

6. CRS § 13-3-111(7) (1982 and 1999).

7. CRS § 13-3-111(2).

8. This statutory authority to use retired and senior judges to handle cases is not to be confused with C.R.C.P. 53's provisions for special masters. Special masters are appointed by the sitting judge, need not be agreed to or approved by the parties, and need not be lawyers. Normally, they prepare reports that are presented to the trial court for further actions under the Rule. On the other hand, the Colorado statutes also allow for the parties to have a trial heard by a special master, who would have full judicial powers, if a trial date has not been fixed by the court in any civil action within ninety days of the case being at issue. CRS § 13-1-131.

9. *See 8/4/05 Memo Regarding Chief Justice Appointments under Section13-3-111* to the Judicial Advisory Council (on file with the author). *See* http://www.dgslaw.com/documents/reference/holme1.pdf.

10. The Judicial Advisory Council is a group of about twenty-five judges, lawyers, court administrative personnel, and laypersons that normally meets quarterly.

11. *See 6/3/04 Memorandum to Judicial Advisory Council and Justice Hobbs from Chief Justice Mullarkey re Section 13-3-111, 5 C.R.S. (2003)* (on file with the author), available at http://www.dgslaw.com/documents/reference/holme2.pdf; *Private Judging Reference Materials for Judicial Advisory Council Subcommittee, A Discussion Memorandum Draft 7/6/2004* (on file with the author). *See* http://www.dgslaw.com/documents/reference/holme3.pdf.

12. The members of the subcommittee were: Jonathan D. Asher, John T. Baker, Linda Bowers, Judge James S. Casebolt, Debra Crosser, Carol Haller, Dale R. Harris, Justice Gregory J. Hobbs, William L. Hunnicutt, Justice Rebecca

Love Kourlis, Julie Lambert, Retired Judge Karen Metzger, Gerald Moore, Retired Judge Connie L. Peterson, and Cynthia Savage. The author was one of the added members and a scrivener of the Rule.

13. This Rule number was selected as being the next number available in the main body of the Colorado Rules of Civil Procedure.

14. *See* "Court Business," 34 *The Colorado Lawyer* 127 (May 2005).

15. *See* note 1, *supra*.

16. Canon 9, in its entirety, can be found at the sources cited in note 1, *supra.*

17. As discussed in more detail below, in a number of situations these costs may be more than offset by savings in attorney fees and other costs of the parties.

18. In water cases, all of the objectors would presumably have to consent to the appointment. In some water cases, there are numerous objectors, some of whom may choose not to consent. On the other hand, water cases may be uniquely suited for this procedure in that they involve complex issues, trials to the bench, and long trial periods with many experts. The possibility of being able to choose the judge and have a firm setting for a lengthy trial may be very appealing. The use of an Appointed Judge in cases with large numbers of parties may be assisted by Rule 122(c)(4) that allows one or more parties with the greatest stake in the litigation to pay the costs of an Appointed Judge.

19. Colorado's Children's Code says the Colorado Rules of Juvenile Procedure shall apply in all proceedings under the Code. CRS § 19-1-106. Colorado Rules of Juvenile Procedure, Rule 1 states: "Proceedings are civil in nature and where not governed by these rules or the procedures set forth in Title 19 . . . shall be conducted according to the Colorado Rules of Civil Procedure. Proceedings in delinquency shall be conducted in accordance with the Colorado Rules of Criminal Procedure, except as otherwise provided by statute or by these rules." *See, e.g., A.C., IV v. People*, 16 P.3d 240 (Colo. 2001); *S.A.S. v. District Ct.*, 623 P.3d 58, 60 (Colo. 2001) (finding "a petition in delinquency is classified as civil in character"). Nonetheless, given the criminal nature of most delinquency charges and the necessity to apply some constitutional procedural protections applicable in criminal cases, Colorado courts have adopted a "case-by-case approach analyzing the nature of rights asserted by juveniles under due process standards, giving appropriate weight to the state's interest in 'informality, flexibility, or speed' in juvenile proceedings." *In re T.M.*, 742 P.2d 905, 908 (Colo. 1987) (citing *McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971)).

20. CRS § 13-3-111 appears to be more restrictive than Rule 122(a) because the statute provides for appointment of judges "at any time after the action *is at issue*." (*Emphasis added.*) *Id*. at (3). Since the legislature first adopted the "at issue" phrase in the 1981 version of this statute, it could not have been relying on the carefully crafted definition of "at issue" adopted in 1994 by the Colorado Supreme Court in C.R.C.P. 16(b)(1). ("A case shall be deemed at issue at such time as all parties have been served and all pleadings permitted by C.R.C.P. 7 have been filed or defaults or dismissals have been entered against all non-appearing parties, . . ."). Furthermore, there is no apparent reason why the statute would prevent the appointment of judges prior to rulings on significant, substantive motions under C.R.C.P. 12. Of much greater importance to the timing of the request for appointment is the fact that all of the parties can participate and agree on the use and identity of an Appointed Judge. Even if the term "at issue" in the statute were defined in the same way as C.R.C.P. 16(b)(1), that rule allows the court to determine whatever date it deems to be the "at issue" date. Thus, the parties might simply stipulate that the at issue date should be deemed to have occurred prior to the filing of their request for an Appointed Judge. Finally, a party who has agreed at the outset to the use of an Appointed Judge will probably have waived any objection that such an appointment was made prematurely.

21. For more information on using Appointed Judges and other private alternatives to active judges in domestic relations cases, *see* St. Joan, "Privatizing Family Law Adjudications: Issues and Procedures," 34 *The Colorado Lawyer* 95 (Aug. 2005).

22. Rule 122(a)(1) appointment is allowed "[U]pon agreement that *one or more* of the parties shall pay the agreed upon compensation. . . ." (*Emphasis added.*)

23. Rule 122(a)(2).

24. Rule 122(a)(3).

25. This will be the court in which the case was filed, unless it has been transferred because of improper venue or convenience of the parties.

26. CRS §§ 13-53-101 *et seq.*

27. CRS §§ 13-22-222 to -224.

28. Several former and current federal court judges have served as Colorado state judges and, following retirement, would be eligible to serve as an Appointed Judge.

29. Senior judges who serve as Appointed Judges, however, will be subject to the broader provisions of Canons 1-8, as mandated under Canon 8.D.

30. *See* discussion of Rule 122(d) in the section entitled "Duration of the Appointed Judge's Service," *below*.

31. *See, e.g., Tillery v. District Ct.*, 692 P.2d 1079 (Colo. 1984). Of course, if the parties do not agree on a different location, one party can still move the Appointed Judge to change location pursuant to C.R.C.P. 98(f)(2).

32. Rule 122(h)(2).

33. The law schools might be enthusiastic hosts for actual trials that their students could observe.

34. Rule 122(h)(4).

35. Amending policies to add named insureds is usually easily accomplished with most insurance companies.

36. Rule 122(i).

37. CRS §§ 13-71-101 *et seq.*

38. Rule 122(i)(1).

39. *See* Rule 122(i)(2).

40. Rule 122(i)(5).

41. CRS § 13-5-126.

42. Rule 122(i)(6).

43.This rule of judicial immunity was stated in *Merrick v. Burns, Wall, Smith & Mueller*, 43 P.3d 712, 714 (Colo.App. 2001), *cert. denied:* "[J]udges are immune from civil liability for their judicial acts, even if such acts are in excess of their jurisdiction. This absolute immunity applies to actions in a legal proceeding no matter how erroneous, how injurious the consequences, or how malicious the motive. Only judicial acts done in the absence of all jurisdiction will deprive a judge of absolute immunity." (C*itations omitted*.)

44. Canon 4.

45. Canon 2.

46. Canon 6.F.

47. Canon 3.A(7)-(8).

48. Canon 8.B.

49. Canon 8.D.

50. CRS § 24-51-1105; Colo. Const. Art. VI § 5(3).

51. Canon 8.D.

52. *Id.*

53. *See* Canon 9.A.

54. Canon 9.1, which is largely derived from Canon 1.

55. Canon 9.2, which is largely derived from Canon 2.

56. Canon 9.3, which is based on portions of Canon 3.

57. Canon 9.4, w hich is based on portions of Canon 5.C.

58. Canon 9.5, which is a substantially reduced version of Canon 7.

59. Canon 9.3A(7).

60. *See* Chernick, Bendix, and Barrett, *Private Judging: Privatizing Civil Justice*, 34-36 (Wash., D.C.: National Legal Center for the Public Interest, 1997). This work also discusses and allays a number of the other concerns that have been raised about the use of Private Judges. *Id.* at 36-49. ■

APPENDIX
Sample Motion for Appointment of Appointed Judge Under Rule 122

SUPREME COURT, STATE OF COLORADO Colorado State Judicial Building 2 East 14th Avenue Denver, Colorado 80203	
Originating court: ___ Judicial District, Case No. __[CV]__, Judge _____	
Plaintiff(s) below: ***[Insert]*** v. **Defendant(s) below:** ***[Insert]***	▲ COURT USE ONLY ▲ Case No.:
[Insert attorney and party representatives]	

MOTION FOR APPOINTED JUDGE PURSUANT TO C.R.S § 13-3-111 AND C.R.C.P. 122

All parties to this action move the Chief Justice, pursuant to C.R.S. § 13-3-111 and C.R.C.P. 122, for an order appointing Judge *[name of Proposed Appointed Judge]* to serve as an Appointed Judge in Case No._____, presently pending in the District Court for the _____ Judicial District, to which Judge *[name of judge in originating court]* currently is assigned.

1. All parties in this action below have been served and have entered appearances *(and/or special appearances)* in the trial court. *[Name of Proposed Appointed Judge]* ("Judge _____"), is acceptable to all parties and has agreed to serve, if approved by the Chief Justice, in the capacity as Appointed Judge for the purposes and duration set forth below.

a. Judge _____ is a (Senior)(retired)(resigned) judge who served at least six years as a judge (in one or more courts of record in Colorado) (both in the Colorado State Court System and in the Federal Court System). *[Consider detailing the judge's judicial experience, especially if unlikely to be well known to the Chief Justice.]*

b. Judge _____ is currently licensed to practice law in Colorado.

2. The parties and Judge _____ have agreed that (he)(she) be compensated at the rate of $_____ per hour for services on this case *[or some other set compensation for designated portions of a case]*.

3. Judge _____, by approving this motion, agrees to be bound by Canon 9 of the Colorado Code of Judicial Conduct, and agrees that the Chief Justice may ask the Office of Attorney Regulation Counsel and the Colorado Commission on Judicial Discipline for any record of (his)(her) discipline or pending discipline, if any.

4. The following is a realistic estimate of all compensation and related expenses as described in C.R.C.P. 122(c)(4) for the Appointed Judge proceedings:

Total Estimated Costs: $_____

5. Upon the granting of this motion, the parties shall deposit forthwith in an escrow or trust account to be administered by Judge _____ *[or some other person agreed to by all parties and the Proposed Appointed Judge]*, the foregoing Total Estimated Costs.

a. The Total Estimated Costs will be allocated among and paid by the parties as follows: *[insert description of who will pay what portion of the costs]*. The parties further agree that if, at any time, Judge _____ determines that the funds on deposit are insufficient to cover all further compensation and expenses, Judge _____ may order the parties promptly to deposit sufficient additional funds to cover such amount. The parties acknowledge that if such order is not complied with, Judge _____ may, with the permission of the Chief Justice, withdraw and the case proceedings shall revert to the originating court.

Appendix continues on next page.

b. Upon the conclusion of the case at the trial court level, the parties agree that the compensation and costs of the Appointed Judge proceedings shall be allocated as follows: *[insert agreement, such as: they will be awarded to the prevailing party; they will be awarded at the discretion of the Appointed Judge; they will not be awarded as costs and each party shall bear the costs paid at the outset; etc. This agreement can, but need not, include how costs and attorney fees awardable under other rules or statutes shall be handled.]*

c. Upon conclusion of Judge _____'s duties, the parties shall file in the record of the case in the originating court a report of the total compensation paid for Judge _____'s services and the total expenses paid by the parties for the Appointed Judge proceedings.

6. The parties and Judge _____ agree that none of the compensation and expenses for the Appointed Judge proceedings shall be paid by the state of Colorado.

7. A signed copy of the oath of Judge _____ is set forth below.

8. The duration of the Appointed Judge's appointment shall be until *[state the occurrence of some event:* e.g.*, the conclusion of discovery; the ruling on motions for summary judgment; entry of a final, appealable judgment; in a dissolution action, entry of Permanent Orders; including ruling on costs and attorney fees; etc.].*

[If desired, insert other matters the Chief Justice may consider in exercising his or her discretion, such as the complexity of the case, the special reasons for using this particular former judge, whether the parties have agreed to use any special procedures or modifications to the Rules that will apply to this case, the need for a speedy resolution, the ability to hold down the ultimate costs of this lawsuit, etc.]

9. Submitted herewith is a form of Order appointing Judge _____ to serve as an Appointed Judge under C.R.S. § 13-3-111 and C.R.C.P. 122. *[The form of Order should include most of the foregoing provisions of this motion.]*

10. The parties acknowledge that the Chief Justice may approve or reject the Order or, upon agreement of the parties and Judge _____, may change any of the provisions of the Order.

A copy of this motion is being filed in the originating court contemporaneously with the filing of this motion in the Colorado Supreme Court and a copy of the Chief Justice's ruling on this motion also will be filed in the originating court.

WHEREFORE, with the approval of Judge _____, the parties request that the Chief Justice appoint Judge _____ to serve as the Appointed Judge in this matter.

Dated: _____

Respectfully submitted,

_____
Attorney(s) for Plaintiff(s)

_____
Attorney(s) for Defendant(s)

APPROVED:

I, Judge _____, approve the terms of the foregoing motion.

_____

OATH OF APPOINTED JUDGE

I, _____, do solemnly swear or affirm by the ever living God, that I will support the Constitution of the United States and of the State of Colorado, and faithfully perform the duties of the office upon which I am about to enter.

_____
Appointed Judge