

RULE CHANGE 2015(05)

COLORADO RULES OF CIVIL PROCEDURE

**Chapters 1 and 2
Rules 1, 12, 16, and 16.1**

**Chapter 4
Rules 26, 30, 31, 33, 34, and 37**

**Chapter 6
Rule 54**

**Chapter 17A
Rule 121, Section 1-22**

**New Form
JDF 622 – Proposed Case Management Order**

Rule 1. Scope of Rules

(a) Procedure Governed. These rules govern the procedure in the supreme court, court of appeals, district courts, ~~and superior courts~~ and in the juvenile and probate courts of the City and County of Denver, in all actions, suits and proceedings of a civil nature, whether cognizable as cases at law or in equity, and in all special statutory proceedings, with the exceptions stated in Rule 81. ~~The~~ se rules shall be liberally construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action.

Rules of civil procedure governing county courts shall be in accordance with Chapter 25 of this volume. Rules of Procedure governing probate courts and probate proceedings in the district courts shall be in accordance with these rules and Chapter 27 of this volume. (In case of conflict between rules, those set forth in Chapter 27 shall control.) Rules of Procedure governing juvenile courts and juvenile proceedings in the district courts shall be in accordance with these rules and Chapter 28 made effective on the same date as these rules. In case of conflict between rules those set forth in Chapter 28 shall control. Rules of Procedure in Municipal Courts are in Chapter 30.

(b)–(c) [NO CHANGE]

Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.

COMMENTS

2015

[1] The 2015 amendments are the next step in a wave of reform literally sweeping the nation. This reform movement aims to create a significant change in the existing culture of pretrial

discovery with the goal of emphasizing and enforcing Rule 1's mandate that discovery be administered to make litigation just, speedy, and inexpensive. One of the primary movers of this reform effort is a realization that the cost and delays of the existing litigation process is denying meaningful access to the judicial system for many people.

[2] The changes here are based on identical wording changes proposed for the Federal Rules of Civil Procedure. They are designed to place still greater emphasis on the concept that litigation is to be treated at all times, by all parties and the courts, to make it just, speedy, and inexpensive, and, thereby, noticeably to increase citizens' access to justice.

**Rule 12. Defenses and Objections—When and How Presented—by Pleading or Motion—
Motion for Judgment on Pleadings**

(a) When Presented.

(1) A defendant shall file his answer or other response within 21 days after the service of the summons and complaint ~~on him~~. The filing of a motion permitted under this Rule alters these periods of time, as follows:

(A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleadings shall be filed within 14 days after notice of the court's action;

(B) if the court grants a motion for a more definite statement, or for a statement in separate counts or defenses, the responsive pleadings shall be filed within 14 days after the service of the more definite statement or amended pleading.

(2) If, pursuant to special order, a copy of the complaint is not served with the summons, or if the summons is served ~~without~~side of Colorado~~the state~~, or by publication, ~~a defendant shall file his answer or other response~~ the time limit for filings under subsections (a)(1) and (e) of this Rule shall be within 35 days after the service thereof ~~on him~~.

(3) A party served with a pleading stating a cross-claim against ~~him~~ that party shall file an answer ~~or other response~~ thereto within 21 days after the service thereof upon him.

(4) The plaintiff shall file ~~a~~his reply to a counterclaim in the answer within 21 days after the service of the answer.

(5) If a reply is made to any affirmative defense, such reply shall be filed within 21 days after service of the pleading containing such affirmative defense.

~~(6) If a pleading is ordered by the court, it shall be filed within 21 days after the entry of the order, unless the order otherwise directs. The filing of a motion permitted under this Rule alters these periods of time, as follows: (1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleadings shall be filed within 14 days after notice of the court's action; (2) if the court grants a motion for a more definite statement, or for a statement in separate counts or defenses, the responsive pleadings shall be filed within 14 days after the service of the more definite statement or amended pleading.~~

(b) How Presented. Every defense, in law or in fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by separate motion filed on or before the date the answer or reply to a pleading under C.R.C.P. 12(a) is due:

(1) Lack of jurisdiction over the subject matter;

- (2) lack of jurisdiction over the person;
- (3) insufficiency of process;
- (4) insufficiency of service of process;
- (5) failure to state a claim upon which relief can be granted; or
- (6) failure to join a party under C.R.C.P. rule 19. ~~A motion making any of these defenses shall be made before pleading if a further pleading is permitted.~~

No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or with any other motion permitted under this Rule 12 or C.R.C.P. Rule 98. If a pleading sets forth a claim for relief to which the adverse party is not required to file a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in C.R.C.P. rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by C.R.C.P. Rule 56.

(c) – (d) [NO CHANGE]

(e) Motion for Separate Statement, or for More Definite Statement. ~~Before responding to a pleading or, if no responsive pleading is permitted by these rules, w~~ Within the time limits for filings under subsections (a)(1) and (a)(2) of this Rule, 21 days after the service of the pleading upon him, ~~a~~ the party may file a motion for a statement in separate counts or defenses; or for a more definite statement of any matter ~~which that~~ is not averred with sufficient definiteness or particularity to enable the party him properly to prepare ahis responsive pleading. If the motion is granted and the order of the court is not obeyed within 14 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to Strike. Upon motion filed by a party ~~before within the time for~~ responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion filed by a party within 21 days after the service of any pleading, motion, or other paper, or upon the court's own initiative at any time, the court may order any redundant, immaterial, impertinent, or scandalous matter stricken from any pleading, motion, or other paper. The objection that a responsive pleading or separate defense therein fails to state a legal defense may be raised by motion filed under this section (f).

(g) Consolidation of Defenses in Motion. A party who makes a motion under this Rule may join with it any other motions herein provided for and then available to that party him. If a party makes a motion under this Rule but omits therefrom any defense or objection then available to that party him which this Rule permits to be raised by motion, that party he shall not thereafter

make a motion based on the defense or objection so omitted, except a motion as provided in section (h)(2) of this Rule on any of the grounds there stated.

(h) [NO CHANGE]

Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.

COMMENTS

2015

[1] The practice of pleading every affirmative defense listed in C.R.C.P. 8(c), irrespective of a factual basis for the defense, is improper under C.R.C.P. 11(a). The pleading of affirmative defenses is subject not only to C.R.C.P. 8(b), which requires a party to “state in short and plain terms his defense to each claim asserted,” but also to C.R.C.P. 11(a): “The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” Some affirmative defenses are also subject to the special pleading requirements of C.R.C.P. 9. To the extent a defendant does not have sufficient information under Rule 11(a) to plead a particular affirmative defense when the answer must be filed but later discovers an adequate basis to do so, the defendant should move to amend the answer to add the affirmative defense.

Rule 16. Case Management and Trial Management

(a) [NO CHANGE]

(b) **Presumptive Case Management Order.** Not later than 42 days after the case is at issue and at least 7 days before the case management conference, the parties shall file, in editable format, a proposed Case Management Order consisting of the matters set forth in subsections (1)–(17) of this section and take the necessary actions to comply with those subsections. This proposed order, when approved by the court, shall constitute the Case Management Order and shall control the course of the action from the time the case is at issue until otherwise required pursuant to section (f) of this Rule or unless modified upon a showing of good cause. Use of the “Proposed Case Management Order” in the form and content of Appendix to Chapters 1 to 17A, form (JDF 622), shall comply with this section. ~~Except as provided in sections (c)–(e) of this Rule, the parties shall not file a Case Management Order and subsections (1)–(10) of this section shall constitute the Case Management Order and shall control the course of the action from the time the case is at issue until otherwise required pursuant to section (f) of this Rule.~~

(1) **At Issue Date.** ~~For the purposes of this Rule,~~ A case shall be deemed at issue ~~at such time as~~ when 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, or at such other time as the court may direct. The proposed order shall state the at issue date.

(2) **The Responsible Attorney.** ~~For purposes of this Rule,~~ “The responsible attorney²² shall mean plaintiff’s counsel, if the plaintiff is represented by counsel, or if not, the defense counsel who first enters an appearance in the case. The responsible attorney shall schedule conferences among the parties, and prepare and ~~file the certificates of compliance, prepare and~~ submit the Proposed Modified Case Management Order, ~~if applicable,~~ and ~~prepare and submit the proposed~~ Trial Management Order. The proposed order shall identify the responsible attorney and provide that attorney’s contact information.

(3) **Meet and Confer.** No later than 14 days after the case is at issue, lead counsel for each party and any party who is not represented by counsel shall confer with each other in person, by telephone, or video conference about:

(A) the nature and basis of the claims and defenses;

(B) the matters to be disclosed pursuant to C.R.C.P. 26(a)(1);

(C) the Proposed ~~and whether a Modified~~ Case Management Order;

(D) mutually agreeable dates for the case management conference; and

(E) based thereon shall obtain from the court a date for the case management conference.

The proposed order shall state the date of and identify the attendees at any meet and confer conferences ~~is necessary pursuant to subsection (c) of this Rule.~~

(4) Trial Setting Description of the Case. ~~The proposed order shall provide a brief description of the case and identification of the issues to be tried. The description of the case and identification of the issues to be tried shall consist of not more than one page, double-spaced, per side. No later than 42 days after the case is at issue, the responsible attorney shall set the case for trial pursuant to C.R.C.P. 121 § 1-6, unless otherwise ordered by the Court.~~

(5) Pending Motions Disclosures. ~~The proposed order shall list all pending motions that have been filed and are unresolved. The court may decide any unresolved motion at the case management conference. No later than 35 days after the case is at issue, the parties shall serve their C.R.C.P. 26(a)(1) disclosures. The parties shall disclose expert testimony in accordance with C.R.C.P. 26(a)(2).~~

(6) Evaluation of Proportionality Factors Settlement Discussions. ~~The proposed order shall provide a brief assessment of each party's position on the application of any factors to be considered in determining proportionality, including those factors identified in C.R.C.P. 26(b)(1). No later than 35 days after the case is at issue, the parties shall explore the possibilities of a prompt settlement or resolution of the case.~~

(7) Initial Exploration of Prompt Settlement and Prospects for Settlement Certificate of Compliance. ~~The proposed order shall confirm that the possibility of settlement was discussed, describe the prospects for settlement and list proposed dates for any agreed upon or court-ordered mediation or other alternative dispute resolution. No later than 49 days after the case is at issue, the responsible attorney shall file a Certificate of Compliance. The Certificate of Compliance shall state that the parties have complied with all requirements of subsections (b)(3)-(6), inclusive, of this Rule or, if they have not complied with each requirement, shall identify the requirements which have not been fulfilled and set forth any reasons for the failure to comply.~~

(8) Proposed Deadlines for Amendments Time to Join Additional Parties and Amend Pleadings. ~~The proposed order shall provide proposed deadlines for amending or supplementing pleadings and for joinder of additional parties, which unless otherwise provided by law, shall be not later than 105 days (15 weeks) after the case is at issue, and shall provide a deadline for identification of non-parties at fault, if any, pursuant to C.R.S. §13-21-111.5. No later than 119 days (17 weeks) after the case is at issue, all motions to amend pleadings and add additional parties to the case shall be filed.~~

(9) Disclosures Pretrial Motions. ~~The proposed order shall state the dates when disclosures under C.R.C.P. 26(a)(1) were made and exchanged and describe any objections to the adequacy of the initial disclosures. No later than 35 days before the trial date, pretrial motions shall be filed, except for motions pursuant to C.R.C.P. 56, which must be filed no later than 91 days (13 weeks) before the trial and except for motions challenging expert testimony pursuant to C.R.E. 702, which must be filed no later than 70 days (10 weeks) before the trial.~~

(10) Computation and Discovery Relating to Damages Discovery Schedule. ~~If any party asserts an inability to disclose fully the information on damages required by C.R.C.P. 26(a)(1)(C), the proposed order shall include a brief statement of the reasons for that party's~~

inability as well as the expected timing of full disclosure and completion of discovery on damages. Discovery shall be limited to that allowed by C.R.C.P. 26(b)(2). Except as provided in C.R.C.P. 26(d), discovery may commence 42 days after the case is at issue. The date for completion of all discovery shall be 49 days before the trial date.

(11) Discovery Limits and Schedule. Unless otherwise ordered by the court, discovery shall be limited to that allowed by C.R.C.P. 26(b)(2). Discovery may commence as provided in C.R.C.P. 26(d) upon service of the Case Management Order. The deadline for completion of all discovery, including discovery responses, shall be not later than 49 days before the trial date. The proposed order shall state any modifications to the amounts of discovery permitted in C.R.C.P. 26(b)(2), including limitations of awardable costs, and the justification for such modifications consistent with the proportionality factors in C.R.C.P. 26(b)(1).

(12) Subjects for Expert Testimony. The proposed order shall identify the subject areas about which the parties anticipate offering expert testimony; whether that testimony would be from an expert defined in C.R.C.P. 26(a)(2)(B)(I) or in 26(a)(2)(B)(II); and, if more than one expert as defined in C.R.C.P. 26(a)(2)(B)(I) per subject per side is anticipated, the proposed order shall set forth good cause for such additional expert or experts consistent with the proportionality factors in C.R.C.P. 26(b)(1) and considering any differences among the positions of multiple parties on the same side as to experts.

(13) Proposed Deadlines for Expert Disclosures. If any party desires proposed deadlines for expert disclosures other than those in C.R.C.P. 26(a)(2)(C), the proposed order shall explain the justification for such modifications.

(14) Oral Discovery Motions. The proposed order shall state whether the court does or does not require discovery motions to be presented orally, without written motions or briefs, and may include such other provisions as the court deems appropriate.

(15) Electronically Stored Information. If the parties anticipate needing to discover a significant amount of electronically stored information, the parties shall discuss and include in the proposed order a brief statement concerning their agreements relating to search terms to be used, if any, and the production, continued preservation, and restoration of electronically stored information, including the form in which it is to be produced and an estimate of the attendant costs. If the parties are unable to agree, the proposed order shall include a brief statement of their positions.

(16) Trial Date and Estimated Length of Trial. The proposed order shall provide the parties' best estimate of the time required for probable completion of discovery and of the length of the trial. The court shall include the trial date in the Case Management Order, unless the court uses a different trial setting procedure.

(17) Other Appropriate Matters. The proposed order shall describe other matters any party wishes to bring to the court's attention at the case management conference.

(18) Entry of Case Management Order. The proposed order shall be signed by lead counsel for each party and by each party who is not represented by counsel. After the court's review and revision of any provision in the proposed order, it shall be entered as an order of the court and served on all parties.

(c) ~~Pretrial Motions Modified Case Management Order.~~ Unless otherwise ordered by the court, pretrial motions, including motions in limine, shall be filed no later than 35 days before the trial date, except for motions pursuant to C.R.C.P. 56, which must be filed no later than 91 days (13 weeks) before the trial and except for motions challenging the admissibility of expert testimony pursuant to C.R.E. 702, which must be filed no later than 70 days (10 weeks) before the trial. Any of the provisions of section (b) of this Rule may be modified by the entry of a Modified Case Management Order pursuant to this section and section (d) of this Rule. If a trial is set to commence less than 182 days (26 weeks) after the at issue date as defined in C.R.C.P. 16(b)(1), and if a timely request for a modified case management order is made by any party, the case management order shall be modified to allow the parties an appropriate amount of time to meet case management deadlines, including discovery, expert disclosures, and the filing of summary judgment motions. The amounts of time allowed shall be within the discretion of the court on a case-by-case basis.

(1) ~~Stipulated Modified Case Management Order.~~ No later than 42 days after the case is at issue, the parties may file a Stipulated proposed Modified Case Management Order, supported by a specific showing of good cause for each modification sought including, where applicable, the grounds for good cause pursuant to C.R.C.P. 26(b)(2). Such proposed order only needs to set forth the proposed provisions which would be changed from the presumptive Case Management Order set forth in section (b) of this Rule. The Court may approve and enter the Stipulated Modified Case Management Order, or may set a case management conference.

(2) ~~Disputed Motions for Modified Case Management Orders.~~ If any party wishes to move for a Modified Case Management Order, lead counsel and any unrepresented parties shall confer and cooperate in the development of a proposed Modified Case Management Order. A motion for a Modified Case Management Order and one form of the proposed Order shall be filed no later than 42 days after the case is at issue. To the extent possible, counsel and any unrepresented parties shall agree to the contents of the proposed Modified Case Management Order but any matter upon which all parties cannot agree shall be designated as "disputed" in the proposed Modified Case Management Order. The proposed Order shall contain specific alternate provisions upon which agreement could not be reached and shall be supported by specific showing of good cause for each modification sought including, where applicable, the grounds for good cause pursuant to C.R.C.P. 26(b)(2). Such motion only needs to set forth the proposed provisions which would be changed from the presumptive case management Order set forth in section (b) of this Rule. The motion for a modified case management order shall be signed by lead counsel and any unrepresented parties, or shall contain a statement as to why it is not so signed.

(d) Case Management Conference.

(1) The responsible attorney shall schedule the case management conference to be held no later than 49 days after the case is at issue, and shall provide notice of the conference to all parties.

(2) Lead counsel and unrepresented parties, if any, shall attend the case management conference in person, except as provided in subsection (d)(3) of this Rule. The court may permit the parties and/or counsel to attend the conference and any subsequent conferences by telephone. At that conference, the parties and counsel shall be prepared to discuss the proposed order, issues requiring resolution, and any special circumstances of the case.

(3) If all parties are represented by counsel, counsel may timely submit a proposed order and may jointly request the court to dispense with a case management conference. In the event that there appear to be no unusual issues, that counsel appear to be working together collegially, and that the information on the proposed order appears to be consistent with the best interests of all parties and is proportionate to the needs of the case, the court may dispense with the case management conference.

~~If there is a disputed modified case management order or if any counsel or unrepresented party believes that it would be helpful to conduct a case management conference, a notice to set case management conference shall be filed stating the reasons why such a conference is requested. If a Notice to Set Case Management conference is filed concerning a disputed Modified Case Management Order, or if the Court determines that such a conference should be held, the Court shall set a Case Management Conference. The conference may be conducted by telephone. The court shall promptly enter a Modified Case Management Order containing such modifications as are approved by the Court.~~

~~(e) Amendment of the Case Management Order. At any time following the entry of the Case Management Order, a~~ A party wishing to extend a deadline or otherwise amend the presumptive Case Management Order ~~or a Modified Case Management Order~~ shall file a motion stating each proposed amendment and a specific showing of good cause for the timing and necessity for each modification sought including, where applicable, the grounds for good cause pursuant to C.R.C.P. 26(b)(2)(F).

(f) - (g) [NO CHANGE]

Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.

COMMITTEE COMMENTS

1995

History and Philosophy

[1] Effective differential case management has been a long-term goal of the Bench, Bar, and Public. Adoption by the Colorado Supreme Court of C.R.C.P. 121 and its practice standards in 1983; revised C.R.C.P. 16 in 1988 to require earlier disclosure of matters necessary for trial; and

the Colorado Standards for Case Management--Trial Courts in 1989 were a continuing and evolving effort to achieve an orderly, fair and less expensive means of dispute resolution. Those rules and standards were an improvement over prior practice where there was no prescribed means of case management, but problems still remained. There were problems of discovery abuse, late or inadequate disclosure, lack of professionalism, slow case disposition, outrageous expense and failure to achieve an early settlement of those cases that ultimately settled.

[2] In the past several years, a recognition by the organized Bar of increasing unprofessional conduct by some attorneys led to further study of problems in our civil justice system and new approaches to resolve them. New Federal Rules of Civil Procedure were developed to require extensive early disclosure and to limit discovery. The Colorado Bar Association's Professionalism Committee made recommendations concerning improvements of Colorado's case management and discovery rules.

[3] After substantial input through surveys, seminars and Bench/Bar committees, the Colorado Supreme Court appointed a special Ad Hoc Committee to study and make recommendations concerning Colorado's Civil Rules pertaining to case management, disclosure/discovery and motions practice. Reforms of Rules 16, 26, 29, 30, 31, 32, 33, 34, 36, 37, 51, 121 § 1-11, 121 § 1-12, 121 § 1-15, and 121 § 1-19 were developed by this Committee.

[4] The heart of the reform is a totally rewritten Rule 16 which sets forth a new system of case management. Revisions to Rules 26, 29, 30, 31, 32, 33, 34, 36, and 37 are patterned after December 1, 1993, revisions to Federal Rules of the same number, but are not in all respects identical. Colorado Rules 16, 26, 29, 30, 31, 32, 33, 34, 36, and 37 were developed to interrelate with each other to provide a differential case management/early disclosure/limited discovery system designed to resolve difficulties experienced with prior approaches. Changes to C.R.C.P. 121 §§ 1-11, 1-12, 1-15, and 1-19 are designed to interrelate with the case management/disclosure/discovery reform to improve motions practice. In developing these rules, the Committee paid particular attention to the 1993 revisions of the Federal Rules of Civil Procedure and the work of the Colorado Bar Association regarding professionalism.

Operation

[5] New Rule 16 and revisions of Rules 26, 29, 30, 31, 32, 33, 34, 36, 37, 51, and 121 §§ 1-11, 1-12, 1-15, and 1-19 are designed to accomplish early purposeful and reasonably economical management of cases by the parties with Court supervision. The system is based on communication, including required early disclosure of persons with knowledge and documents relevant to the case, which disclosure should lead in many cases to early evaluation and settlement efforts, and/or preparation of a workable Case Management Order. Lead attorneys for each party are to communicate with each other in the spirit of cooperation in the preparation of both the Case and Trial Management Orders. Court Case Management Conferences are available where necessary for any reasonable purpose. The Rules require a team effort with Court leadership to insure that only appropriate discovery is conducted and to carefully plan for and conduct an efficient and expeditious trial.

[6] Rules 16 and 26 should work well in most cases filed in Colorado District Courts. However, where a case is complex or requires special treatment, the Rules provide flexibility so that the parties and Court can alter the procedure. The importance of economy is encouraged and fostered in a number of ways, including authorized use of the telephone to conduct in-person attorney and Court conferences.

[7] The Committee acknowledges the greater length of the Rules comprising this reformed system. However, these Rules have been developed to describe and to eliminate “hide-the-ball” and “hardball” tactics under previous Disclosure Certificate and Discovery Rules. It is expected that trial judges will assertively lead the management of cases to ensure that justice is served. In the view of the Committee, abuses of the Rules to run up fees, feed egos, bludgeon opponents into submission, force unfair settlements, build cases for sanctions, or belittle others should not be tolerated.

[8] These Rules have been drafted to emphasize and foster professionalism and to de-emphasize sanctions for non-compliance. Adequate enforcement provisions remain. It is expected that attorneys will strive diligently to represent their clients' best interests, but at the same time conduct themselves as officers of the Court in the spirit of the recently adopted Rules of Professional Conduct.

(a)

The purpose and scope of Rule 16 are as set forth in subsection (a). Unless otherwise ordered by the Court or stipulated by the parties, Rule 16 does not mandatorily apply to domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, Rule 120, or other expedited proceedings. Provisions of the Rule could be used, however, and Courts involved in those proceedings should consider their possible applicability to particular cases.

(b)

The “Case Management Order” is the central coordinating feature of the Rule 16 case management system. It comes at a relatively early but realistic time in the case. The Case Management Order governs the trial setting; contains or coordinates disclosure; limits discovery and establishes a discovery schedule; establishes the deadline for joinder of additional parties and amendment of pleadings; coordinates handling of pretrial motions; requires a statement concerning settlement; and allows opportunity for inclusion of other provisions necessary to the case.

[9] Lead counsel for each of the parties are required to confer about the nature and bases of their claims and defenses, discuss the matters to be disclosed and explore the possibilities of a prompt settlement or other resolution of the case. As part of the conferring process, lead counsel for each of the parties are required to cooperate in the development of the Case Management Order, which is then submitted to the Court for approval. If there is disagreement about any aspect of the proposed Case Management Order, or if some aspect of the case requires special treatment, the parties are entitled to an expeditious Case Management Conference. If any party is appearing pro se an automatic mandatory Case Management Conference is triggered.

[10] A time line is specified in C.R.C.P. 16(b) for the C.R.C.P. 26(a)(1) disclosures, conferring of counsel and submission of the proposed Case Management Order. The time line in section (b) is triggered by the “at issue” date, which is defined at the beginning of C.R.C.P. 16(b).

[11] Disclosure requirements of C.R.C.P. 26, including the duty to timely supplement and correct disclosures, together with sanction provisions of C.R.C.P. 37 for failure to make disclosure, are incorporated by reference. Because of mandatory disclosure, there should be substantially less need for discovery. Presumptive limitations on discovery are specified in C.R.C.P. 26(b)(2). The limitations contained in C.R.C.P. 26 and Discovery Rules 29, 30, 31, 32, 33, 34, and 36 are incorporated by reference and provision is made for discovery above presumptive limitations if, upon good cause shown (as defined in C.R.C.P. 26(b)(2)), the particular case warrants it. The system established by C.R.C.P. 16(b)(1)(IV) requires the parties to set forth and obtain Court approval of a schedule of discovery for the case, which includes the timing and number of particular forms of discovery requests. The system established by C.R.C.P. 16(b)(1)(IV) also requires lead counsel for each of the parties to set forth the basis of and necessity for all such discovery and certify that they have advised their clients of the expenses and fees involved with each such item of discovery. The purpose of such discovery schedule and expense estimate is to bring about an advanced realization on the part of the attorneys and clients of the expense and effort involved in the schedule so that decisions can be made concerning propriety, feasibility, and possible alternatives (such as settlement or other means of obtaining the information). More stringent standards concerning the necessity of discovery contained in C.R.C.P. 26(b)(2) are incorporated into C.R.C.P. 16(b)(1)(IV). A Court should not simply “rubber-stamp” a proposed discovery schedule even if agreed upon by counsel.

[12] A Court Case Management Conference will not be necessary in every case. It is anticipated that many cases will not require a Court Case Management Conference, but such conference is available should the parties or the Court find it necessary. Regardless of whether there is a Court Case Management Conference, there will always be the Case Management Order which, along with the later Trial Management Order, should effectively govern the course of the litigation through the trial.

(c)

The Trial Management Order is jointly developed by the parties and filed with the Court as a proposal no later than thirty days prior to the date scheduled for the trial (or at such other time as the Court directs). The Trial Management Order contains matters for trial (see specific enumeration of elements to be contained in the Trial Management Order). It should be noted that the Trial Management Order references the Case Management Order and, particularly with witnesses, exhibits, and experts, contemplates prior identification and disclosure concerning them. Except with permission of the Court based on a showing that the witness, exhibit, or expert could not have, with reasonable diligence, been anticipated, a witness, exhibit, or expert cannot be revealed for the first time in the Trial Management Order.

[13] As with the Case Management Order, Trial Management Order provisions of the Rule are designed to be flexible so as to fit the particular case. If the parties cannot agree on any aspect of the proposed Trial Management Order, a Court Trial Management Conference is triggered. The Court Trial Management Conference is mandatory if any party is appearing in the trial pro se.

[14] As with the Case Management Order procedure, many cases will not require a Court Trial Management Conference, but such a conference is available upon request and encouraged if there is any problem with the case that is not resolved and managed by the Trial Management Order.

[15] The Trial Management Order process will force the attorneys to make decisions on which claims or defenses should be dropped and identify legal issues that are truly contested. Both of those requirements should reduce the expenses associated with trial. In addition, the requirement that any party seeking damages define and itemize those damages in detail should facilitate preparation and trial of the case.

[16] Subsection (c)(IV), pertaining to designation of “order of proof,” is a new feature not contained in Federal or State Rules. To facilitate scheduling and save expense, the parties are required to specifically identify those witnesses they anticipate calling in the order to be called, indicating the anticipated length of their testimony, including cross-examination.

(d)

Provision is made in the C.R.C.P. 16 case management system for an orderly advanced exchange and filing of jury instructions and verdict forms. Many trial courts presently require exchange and submission of a set of agreed instructions during the trial. C.R.C.P. 16(d) now requires such exchange, conferring, and filing no later than three (3) days prior to the date scheduled for the commencement of the trial (or such other time as the Court otherwise directs).

2015

[17] The previous substantive amendment to Rule 16(b) established presumptive discovery limits and procedures which caused filing of detailed Case Management Orders and appearing before a judge to become rare. While this reduced lawyers’ time in preparing detailed orders, it also resulted in judges not being involved in pretrial case management.

[18] Among the key principles adopted by the Federal Advisory Committee on Rules of Civil Procedure, as well as the Civil Access Pilot Project (“CAPP”), is that cases move more efficiently if judges are involved directly and early in the process. (See also, “Working Smarter, Not Harder: How Excellent Judges Manage Cases,” at 7-20 (2014), available at <http://www.actl.com>).

[19] Particularly in conjunction with the principle that discovery should be in proportion to the genuine needs of the case, it was deemed important for judges, in addition to litigants, to be involved early in the pretrial process in deciding how much discovery was appropriate. Both judges and lawyers have noted that some lawyers have a financial incentive not to limit discovery. Perhaps more significant was the recognition that many lawyers engage in “over discovery” because of the fear (justifiable or not) that failing to engage in every conceivable means of discovery until a judge orders one to “stop!” could expose a trial lawyer to subsequent expensive malpractice litigation. These problems are greatly alleviated with the intervention of

trial judges placing reasonable limitations on discovery and potentially excessive pretrial practices at the earliest meaningful stage of the case.

[20] CAPP required in-person initial case management conferences with the judge. These conferences followed submission of a report from the parties which included information relevant to the evaluation of proportionality as well as how the case should be handled. The analysis of CAPP reflects that this practice was widely liked by both lawyers and judges. It is desirable that there be an official order arising from the case management conference reflecting the court's input and which, importantly, provides enforcement power. Thus, Rule 16(b) has completely rewritten the rule to include requiring a joint report to the court in the form of a proposed Case Management Order. It can be approved or modified by the court to become the official order. It is to be filed with the court not later than 42 days after the case is at issue, but at least 7 days before the case management conference.

[21] The new rule lists the required contents of the proposed Case Management Order and also provides a form that can be downloaded for preparation of the proposed order. Although at first glance the new rule appears somewhat onerous, most of the information sought is relatively easy to include and should be discussed by opposing counsel or parties, in any event, at the outset of the case.

[22] The joint report/proposed Case Management Order must contain the following information, which is unchanged from former Rule 16(b)(1)-(3): the "at issue" date; contact information for the "responsible attorney"; and a description of the "meet and confer" discussions. The joint report must also provide:

- a brief description of the case from each side, and of the issues to be tried (one page per side);
- a list of pending, unresolved motions;
- an evaluation of the proportionality factors from C.R.C.P. 26(b)(1);
- a confirmation that the parties discussed settlement and description of prospects for settlement;
- proposed deadlines for amending the pleadings;
- the dates when disclosures were made and any objections to those disclosures;
- an explanation of why, if applicable, full disclosure of damages has not been completed and when it will be;
- subjects for expert testimony with a limit of only one expert per side per subject unless good cause is established consistent with proportionality;
- acknowledgement that oral discovery motions may be required by the court;
- provision for electronic discovery when significant electronic discovery is anticipated;
- estimated time to complete discovery and length of trial so the court can set trial at the case management conference; and
- a catchall for other appropriate matters.

[23] The former provisions in Rule 16(c) related to Modified Case Management Orders are repealed as moot but are replaced with the deadlines for pretrial motions presently contained in Rule 16(b)(9).

[24] Rule 16(d) is rewritten to require personal or telephonic attendance at the case management conference by lead counsel. In anticipation that judges will not want (or need) to hold in person case management conferences in all cases, Rule 16(d)(3) allows the court to dispense with a case management conference if it is satisfied that the lawyers are working together well and the joint report contemplates appropriate and proportionate pretrial activity. However, the rule recommends that case management conferences always be held if one or more of the parties is self-represented. This gives the court the opportunity to try to keep the case and self-represented party focused and on track from the beginning.

Rule 16.1 Simplified Procedure for Civil Actions

(a) – (e) [NO CHANGE]

(f) **Case Management Orders.** In actions subject to Simplified Procedure pursuant to this Rule, the presumptive case management order requirements of C.R.C.P. 16(b)(1), (2), (3) ~~(5)~~ and ~~(7)~~⁶ shall apply even though a proposed Case Management Order is not required to be prepared or filed.

(g) [NO CHANGE]

(h) **Certificate of Compliance.** No later than 49 days after the case is at issue, the responsible attorney shall also file a Certificate of Compliance stating that the parties have complied with all the requirements of sections (f), ~~and (g)~~ and (k)(1) of this Rule or, if they have not complied with each requirement, shall identify the requirements ~~that~~^{which} have not been fulfilled and set forth any reasons for the failure to comply.

(i) – (l) [NO CHANGE]

Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; ~~Methods to Discover Additional Matter.~~

Unless otherwise ordered by the court or stipulated by the parties, provisions of this Rule shall not apply to domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, C.R.C.P. 120, or other expedited proceedings.

(1) **Disclosures.** Except to the extent otherwise directed by the court, a party shall, without awaiting a discovery request, provide to other parties the following information, whether or not supportive of the disclosing party's claims or defenses:

(A) ~~t~~The name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to the claims and defenses of any party ~~disputed facts alleged with particularity in the pleadings, identifying who the person is and the subjects~~ and a brief description of the specific information that each such individual is known or believed to possess;

(B) ~~a~~A listing, together with a copy of, or a description by category, of the subject matter and location of; all documents, data compilations, and tangible things in the possession, custody; or control of the party that are relevant to ~~disputed facts alleged with particularity in the pleadings,~~ the claims and defenses of any party, making available for inspection and copying ~~such~~the documents ~~and~~ other evidentiary material, not privileged or protected from disclosure, as though a request for production of those documents had been served pursuant to C.R.C.P. 34;

(C) ~~a~~A description of the categories of damages sought and a computation of any category of economic damages claimed by the disclosing party, making available for inspection and copying pursuant to C.R.C.P. 34 the documents or other evidentiary material relevant to the damages sought, not privileged or protected from disclosure, as though a request for production of those documents had been served pursuant to C.R.C.P. 34; and

(D) ~~a~~Any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment, making such agreement available for inspection and copying pursuant to C.R.C.P. 34.

Disclosures shall be served within 28 days after the case is at issue as defined in C.R.C.P. 16(b)(1). A party shall make the required disclosures based on the information then known and reasonably available to the party and is not excused from making such disclosures because the party has not completed investigation of the case or because the party challenges the sufficiency of another party's disclosure or because another party has not made the required disclosures. Parties shall make these disclosures in good faith and may not object to the adequacy of the disclosures until the case management conference pursuant to C.R.C.P. 16(d).

~~The timing of disclosures shall be within 35 days after the case is at issue as defined in C.R.C.P. 16(b). A party shall make the required disclosures based on the information then known and reasonably available to the party and is not excused from making such disclosures because the~~

~~party has not completed investigation of the case or because the party challenges the sufficiency of another party's disclosures or because another party has not made the required disclosures.~~

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by subsection (a)(1) of this Rule, a party shall disclose to other parties the identity of any person who may present evidence at trial, pursuant to Rules 702, 703, or 705 of the Colorado Rules of Evidence together with an identification of the person's fields of expertise.

(B) Except as otherwise stipulated or directed by the court, ~~this disclosure shall:~~

(I) **Retained Experts.** With respect to a witness who is retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve giving expert testimony, ~~the disclosure shall be~~ made accompanied by a written report ~~or summary signed by the witness.~~ The report ~~or summary~~ shall include contain:

(a) a complete statement of all opinions to be expressed and the basis and reasons therefor;

(b) a list of the data or other information considered by the witness in forming the opinions;

(c) references to literature that may be used during the witness's testimony;

(d) copies of any exhibits to be used as a summary of or support for the opinions;

(e) the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;

(f) the ~~compensation~~ fee agreement or schedule for the study, preparation and testimony;

(g) an itemization of the fees incurred and the time spent on the case, which shall be supplemented 14 days prior to the first day of trial; and

(h) a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

The witness's direct testimony shall be limited to matters disclosed in detail in the report. In addition, if a report is issued by the expert it shall be provided.

(II) **Other Experts.** With respect to a party or witness who may be called to provide expert testimony but is not retained or specially employed within the description contained in subsection (a)(2)(B)(I) above, the disclosure shall be made by a written ~~the~~ report or statement that summary shall include contain:

(a) ~~the qualifications of the witness and~~ a complete description ~~statement describing the substance~~ of all opinions to be expressed and the basis and reasons therefor;

(b) a list of the qualifications of the witness; and

(c) copies of any exhibits to be used as a summary of or support for the opinions. If the report has been prepared by the witness, it shall be signed by the witness.

If the witness does not prepare a written report, the party's lawyer or the party, if self-represented, may prepare a statement and shall sign it. The witness's direct testimony expressing an expert opinion shall be limited to matters disclosed in detail in the report or statement.

(C) Unless otherwise provided in the Case Management Order, the timing of the disclosures shall be as follows:

(I) The disclosure by a claiming party under a complaint, counterclaim, cross-claim, or third-party claim shall be made at least 126 days (18 weeks) before the trial date.

(II) The disclosure by a defending party shall be made within 28 days after service of the claiming party's disclosure, provided, however, that if the claiming party serves its disclosure earlier than required under subparagraph 26(a)(2)(C)(I), the defending party is not required to serve its disclosures until 98 days (14 weeks) before the trial date.

(III) If the evidence is intended to contradict or rebut evidence on the same subject matter identified by another party under subparagraph (a)(2)(C)(II) of this Rule, such disclosure shall be made no later than 77 days (11 weeks) before the trial date.

(3) [There is no Colorado Rule--see instead C.R.C.P. 16(c).]

(4) Form of Disclosures; Filing. All disclosures pursuant to subparagraphs (a)(1) and (a)(2) of this Rule shall be made in writing, in a form pursuant to C.R.C.P. 10, signed pursuant to C.R.C.P. 26(g)(1), and served upon all other parties. Disclosures shall not be filed with the court unless requested by the court or necessary for consideration of a particular issue.

(5) Methods to Discover Additional Matters. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, pursuant to C.R.C.P. 34; physical and mental examinations; and requests for admission. Discovery at a place within a country having a treaty with the United States applicable to the discovery must be conducted by methods authorized by the treaty except that, if the court determines that those methods are inadequate or inequitable, it may authorize other discovery methods not prohibited by the treaty.

(b) Discovery Scope and Limits. Unless otherwise ~~modified~~ ~~limited~~ by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Subject to the limitations and considerations contained in subsection (b)(2) of this Rule, parties may obtain discovery regarding any matter, not privileged, that is relevant to

the claim or defense of any party; and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. ~~including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information within the scope of discovery~~ need not be admissible in evidence to be discoverable. ~~at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.~~

(2) Limitations. Except upon order for good cause shown and subject to the proportionality factors in subsection (b)(1) of this Rule, discovery shall be limited as follows:

(A) A party may take one deposition of each adverse party and of two other persons, exclusive of persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2). The scope and manner of proceeding by way of deposition and the use thereof shall otherwise be governed by C.R.C.P. ~~Rules~~ 26, 28, 29, 30, 31, 32, and 45.

(B) A party may serve on each adverse party 30 written interrogatories, each of which shall consist of a single question. The scope and manner of proceeding by means of written interrogatories and the use thereof shall otherwise be governed by C.R.C.P. ~~Rules~~ 26 and 33.

(C) A party may obtain a physical or mental examination (including blood group) of a party or of a person in the custody or under the legal control of a party pursuant to C.R.C.P. 35.

(D) A party may serve each adverse party requests for production of documents or tangible things or for entry, inspection or testing of land or property pursuant to C.R.C.P. 34, except such requests for production shall be limited to 20 in number, each of which shall consist of a single request.

(E) A party may serve on each adverse party 20 requests for admission, each of which shall consist of a single request. A party may also serve requests for admission of the genuineness of up to 50 separate documents that the party intends to offer into evidence at trial. The scope and manner of proceeding by means of requests for admission and the use thereof shall otherwise be governed by C.R.C.P. 36.

(F) In determining good cause to modify the limitations of this subsection (b)(2), the court shall consider the following:

(i) ~~w~~Whether the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) ~~w~~Whether the party seeking discovery has had ample opportunity by disclosure or discovery in the action to obtain the information sought;

~~(IIIiii) wWhether the burden or expense of the proposed discovery is outside the scope permitted by C.R.C.P. 26(b)(1) outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues in the litigation, and the importance of the proposed discovery in resolving the issues; and~~

~~(IViv) wWhether because of the number of parties and their alignment with respect to the underlying claims and defenses, the proposed discovery is reasonable.~~

~~[Subsections (E)(i)–(iv) are moved to new paragraph (F).]~~

(3) Trial Preparation: Materials. Subject to the provisions of subsection (b)(4) of this Rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of C.R.C.P. 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is:

(A) ~~a~~ written statement signed or otherwise adopted or approved by the person making it, or

(B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert disclosed pursuant to subsection 26(a)(2)(B)(I) of this Rule whose opinions may be presented at trial. Each deposition shall not exceed 6 hours. On the application of any party, the court may decrease or increase the time permitted after considering the proportionality criteria in subsection (b)(1) of this Rule. Except to the extent otherwise stipulated by the parties or ordered by the court, no discovery, including depositions, concerning either the identity or the opinion of experts shall be conducted until after the disclosures required by subsection (a)(2) of this Rule.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of

litigation or preparation for trial, and who is not expected to be called as a witness at trial only as provided by C.R.C.P. 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subsection (b)(4); and (ii) with respect to discovery obtained pursuant to subsection (b)(4)(B) of this Rule, the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(D) Rule 26(b)(3) protects from disclosure and discovery drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded, and protects communications between the party's attorney and any witness disclosed under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(I) relate to the compensation for the expert's study, preparation, or testimony;

(II) identify facts or data that the party's attorney provided and which the expert considered in forming the opinions to be expressed; or

(III) identify the assumptions that the party's attorney provided and that the expert relied on in forming opinions to be expressed.

(5)(A) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information required to be disclosed or provided in discovery by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

~~[This subsection has been moved from section (a)(6) and amended.]~~

(B) If information produced in disclosures or discovery is subject to a claim of privilege or of protection as trial-preparation material the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must not review, use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and shall give notice to the party making the claim within 14 days if it contests the claim. If the claim is not contested within the 14-day period, or is timely contested but resolved in favor of the party claiming privilege or protection of trial-preparation material, then the receiving party must also promptly return, sequester, or destroy the specified information and any copies that the receiving party has. If the claim is contested, the party making the claim shall ~~within 14 days after receiving such notice~~ present the information to the court under seal for a determination of the claim within 14 days after receiving such notice, or the claim is waived. The producing party must preserve the

information until the claim is resolved, and bears the burden of proving the basis of the claim and that the claim was not waived. All notices under this Rule shall be in writing.

(c) Protective Orders. Upon motion by a party or by the person from whom disclosure is due or discovery is sought, accompanied by a certificate that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place or the allocation of expenses;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

(d) Timing and Sequence of Discovery. Except when authorized by these Rules, by order, or by agreement of the parties, a party may not seek discovery from any source before service submission of the proposed Case Management Order pursuant to C.R.C.P. 16**(b)(18)**. Any discovery conducted prior to issuance of the Case Management Order shall not exceed the limitations established by C.R.C.P. 26(b)(2). Unless the parties stipulate or the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Disclosures, and Responses, and Expert Reports and Statements. A party is under a duty to supplement its disclosures under section (a) of this Rule when the party learns that in some material respect the information disclosed is incomplete or incorrect in some material respect and if the additional or corrective information has not otherwise been made known to the other parties during the disclosure or discovery process, including information

relating to anticipated rebuttal but not including information to be used solely for impeachment of a witness. A party is under a duty to amend a prior response to an interrogatory, request for production or request for admission when the party learns that the prior response is ~~in some material respect~~ incomplete or incorrect in some material respect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process. With respect to experts, the duty to supplement or correct extends both to information contained in the expert's report or ~~statement summary~~ disclosed pursuant to section ~~(a)(2)(B)~~ of this Rule and to information provided through any deposition of ~~or interrogatory responses by~~ the expert. If a party intends to offer expert testimony on direct examination that has not been disclosed pursuant to section (a)(2)(B) of this Rule on the basis that the expert provided the information through a deposition, the report or statement previously provided shall be supplemented to include a specific description of the deposition testimony relied on. Nothing in this section requires the court to permit an expert to testify as to opinions other than those disclosed in detail in the initial expert report or statement except that if the opinions and bases and reasons therefor are disclosed during the deposition of the expert by the adverse party, the court must permit the testimony at trial unless the court finds that the opposing party has been unfairly prejudiced by the failure to make disclosure in the initial expert report. Supplementation shall be performed in a timely manner.

(f) - (g) [NO CHANGE]

Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.

COMMITTEE COMMENTS

1995

SCOPE

[1] Because of its timing and interrelationship with C.R.C.P. 16, C.R.C.P. 26 does not apply to domestic relations, mental health, water law, forcible entry and detainer, C.R.C.P. 120, or other expedited proceedings. However, the Court in those proceedings may use C.R.C.P. 26 and C.R.C.P. 16 to the extent helpful to the case. In most instances, only the timing will need to be modified.

COLORADO DIFFERENCES

[2] Revised C.R.C.P. 26 is patterned largely after Fed.R.Civ.P. 26 as amended in 1993 and 2000 and uses substantially the same numbering. There are differences, however. The differences are to fit disclosure/discovery requirements of Colorado's case/trial management system set forth in C.R.C.P. 16, which is very different from its Federal Rule counterpart. The interrelationship between C.R.C.P. 26 and C.R.C.P. 16 is described in the Committee Comment to C.R.C.P. 16.

[3] The Colorado differences from the Fed.R.Civ.P. are: (1) timing and scope of mandatory automatic disclosures is different (C.R.C.P. 16(b)); (2) the two types of experts in the Federal Rule are clarified by the State Rule (C.R.C.P. 26(a)(2)(B)), and disclosure of expert opinions is

made at a more realistic time in the proceedings (C.R.C.P. 26(a)(2)(C)); (3) sequenced disclosure of expert opinions is prescribed in C.R.C.P. 26(a)(2)(C) to avoid proliferation of experts and related expenses; (4) the parties may use a summary of an expert's testimony in lieu of a report prepared by the expert to reduce expenses (C.R.C.P. 26(a)(2)(B)); (5) claiming privilege/protection of work product (C.R.C.P. 26(b)(5)) and supplementation/correction provisions (C.R.C.P. 26(e)) are relocated in the State Rules to clarify that they apply to both disclosures and discovery; (6) a Motion for Protective Order stays a deposition under the State Rules (C.R.C.P. 121 § 1-12) but not the Federal Rule (Fed.R.Civ.P. 26(c)); (7) presumptive limitations on discovery as contemplated by C.R.C.P. 16(b)(1)(VI) are built into the rule (see C.R.C.P. 26(b)(2)); (8) counsel must certify that they have informed their clients of the expense of the discovery they schedule (C.R.C.P. 16(b)(1)(IV)); (9) the parties cannot stipulate out of the C.R.C.P. 26(b)(2) presumptive discovery limitations (C.R.C.P. 29); and (10) pretrial endorsements governed by Fed.R.Civ.P. 26(a)(3) are part of Colorado's trial management system established by C.R.C.P. 16(c) and C.R.C.P. 16(d).

[4] As with the Federal Rule, the extent of disclosure is dependent upon the specificity of disputed facts in the opposing party's pleading (facilitated by the requirement in C.R.C.P. 16(b) that lead counsel confer about the nature and basis of the claims and defenses before making the required disclosures). If a party expects full disclosure, that party needs to set forth the nature of the claim or defense with reasonable specificity. Specificity is not inconsistent with the requirement in C.R.C.P. 8 for a "short, plain statement" of a party's claims or defenses. Obviously, to the extent there is disclosure, discovery is unnecessary. Discovery is limited under this system.

FEDERAL COMMITTEE NOTES

[5] Federal "Committee Notes" to the December 1, 1993 and December 1, 2000 amendments of Fed.R.Civ.P. 26 are incorporated by reference and where applicable should be used for interpretive guidance.

[6] The most dramatic change in C.R.C.P. 26 is the addition of a disclosure system. Parties are required to disclose specified information without awaiting a discovery demand. Such disclosure is, however, tied to the nature and basis of the claims and defenses of the case as set forth in the parties' pleadings facilitated by the requirement that lead counsel confer about such matters before making the required disclosures.

[7] Subparagraphs (a)(1)(A) and (a)(1)(B) of C.R.C.P. 26 require disclosure of persons, documents and things likely to provide discoverable information relative to disputed facts alleged with particularity in the pleadings. Disclosure relates to disputed facts, not admitted facts. The reference to particularity in the pleadings (coupled with the requirement that lead counsel confer) responds to the concern that notice pleading suggests a scope of disclosure out of proportion to any real need or use. To the contrary, the greater the specificity and clarity of the pleadings facilitated by communication through the C.R.C.P. 16(b) conference, the more complete and focused should be the listing of witnesses, documents, and things so that the parties can tailor the scope of disclosure to the actual needs of the case.

[8] It should also be noted that two types of experts are contemplated by Fed.R.Civ.P. and C.R.C.P. 26(a)(2). The experts contemplated in subsection (a)(2)(B)(II) are persons such as treating physicians, police officers, or others who may testify as expert witnesses and whose opinions are formed as a part of their occupational duties (except when the person is an employee of the party calling the witness). This more limited disclosure has been incorporated into the State Rule because it was deemed inappropriate and unduly burdensome to require all of the information required by C.R.C.P. 26(a)(2)(B)(I) for C.R.C.P. 26(a)(2)(B)(II) type experts.

2002

2001 COLORADO CHANGES

[9] The change to C.R.C.P. 26(a)(2)(C)(II) effective July 1, 2001, is intended to prevent a plaintiff, who may have had a year or more to prepare his or her case, from filing an expert report early in the case in order to force a defendant to prepare a virtually immediate response. That change clarifies that the defendant's expert report will not be due until 90 days prior to trial.

[10] The change to C.R.C.P. 26(b)(2)(A) effective July 1, 2001 was made to clarify that the number of depositions limitation does not apply to persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2).

[11] The special and limited form of request for admission in C.R.C.P. 26(b)(2)(E) effective July 1, 2001, allows a party to seek admissions as to authenticity of documents to be offered at trial without having to wait until preparation of the Trial Management Order to discover whether the opponent challenges the foundation of certain documents. Thus, a party can be prepared to call witnesses to authenticate documents if the other party refuses to admit their authenticity.

[12] The amendment of C.R.C.P. 26(b)(1) effective January 1, 2002 is patterned after the December, 2000 amendment of the corresponding Federal rule. The amendment should not prevent a party from conducting discovery to seek impeachment evidence or evidence concerning prior acts.

2015

[13] Rule 26 sets the basis for discovery of information by: (1) defining the scope of discovery (26(b)(1)); (2) requiring certain initial disclosures prior to discovery (26(a)(1)); (3) placing presumptive limits on the types of permitted discovery (26(b)(2)); and (4) describing expert disclosure and discovery (26(a)(2) and 26(b)(4)).

[14] Scope of discovery.

Perhaps the most significant 2015 amendments are in Rule 26(b)(1). This language is taken directly from the proposed Fed. R. Civ. P. 26(b)(1). (For a more complete statement of the changes and their rationales, one can read the extensive commentary proposed for the Federal Rule.) First, the slightly reworded concept of proportionality is moved from its former hiding place in C.R.C.P. 26(b)(2)(F)(iii) into the very definition of what information is discoverable.

Second, discovery is limited to matters relevant to the specific claims or defenses of any party and is no longer permitted simply because it is relevant to the “subject matter involved in the action.” Third, it is made clear that while evidence need not be admissible to be discoverable, this does not permit broadening the basic scope of discovery. In short, the concept is to allow discovery of what a party/lawyer *needs* to prove its case, but not what a party/lawyer *wants* to know about the subject of a case.

[15] Proportionality analysis.

C.R.C.P. 26(b)(1) requires courts to apply the principle of proportionality in determining the extent of discovery that will be permitted. The Rule lists a number of non-exclusive factors that should be considered. Not every factor will apply in every case. The nature of the particular case may make some factors predominant and other factors insignificant. For example, the amount in controversy may not be an important consideration when fundamental or constitutional rights are implicated, or where the public interest demands a resolution of the issue, irrespective of the economic consequences. In certain types of litigation, such as employment or professional liability cases, the parties’ relative access to relevant information may be the most important factor. These examples show that the factors cannot be applied as a mathematical formula. Rather, trial judges have and must exercise discretion, on a case-by-case basis, to effectuate the purposes of these rules, and, in particular, abide by the overarching command that the rules “shall be liberally construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action.” C.R.C.P. 1.

[16] Limitations on discovery.

The presumptive limitations on discovery in Rule 26(b)(2)— *e.g.*, a deposition of an adverse party and two other persons, only 30 interrogatories, etc.—have not been changed from the prior rule. They may, however, be reduced or increased by stipulation of the parties with court approval, consistent with the requirement of proportionality.

[17] Initial disclosures.

Amendments to Rule 26(a)(1) concerning initial disclosures are not as significant as those to Rule 26(b)(1). Nonetheless, it is intended that disclosures should be quite complete and that, therefore, further discovery should not be as necessary as it has been historically. In this regard, the amendment to section (a)(1) adds to the requirement of disclosing four categories of information and that the disclosure include information “whether or not supportive” of the disclosing party’s case. This should not be a significant change from prior practice. In 2000, Fed. R. Civ. P. 26(a)(1) was changed to narrow the initial disclosure requirements to information a party might use to support its position. The Colorado Supreme Court has not adopted that limitation, and continues to require identification of persons and documents that are relevant to disputed facts alleged with particularity in the pleadings. Thus, it was intended that disclosures were to include matter that might be harmful as well as supportive. (Limiting disclosure to supportive information likely would only encourage initial interrogatories and document requests that would require disclosure of harmful information.)

Changes to subsections (A) (persons with information) and (B) (documents) of Rule 26(a)(1) require information related to claims for relief and defenses (consistent with the scope of discovery in Rule 26(b)(1)). Also the identification of persons with relevant information calls for a “brief *description* of the *specific* information that each individual is known or believed to possess.” Under the prior rule, disclosures of persons with discoverable information identifying “the subjects of information” tended to identify numerous persons with the identification of “X is expected to have information about and may testify relating to the facts of this case.” The change is designed to avoid that practice and obtain some better idea of which witnesses might actually have genuinely significant information.

[18] Expert disclosures.

Retained experts must sign written reports much as before except with more disclosure of their fees. The option of submitting a “summary” of expert opinions is eliminated. Their testimony is limited to what is disclosed in detail in their report. Rule 26(a)(2)(B)(I).

“Other” (non-retained) experts must make disclosures that are less detailed. Many times a lawyer has no control over a non-retained expert, such as a treating physician or police officer, and thus the option of a “statement” must be preserved with respect to this type of expert, which, if necessary, may be prepared by the lawyers. In either event, the expert testimony is to be limited to what is disclosed in detail in the disclosure. Rule 26(a)(2)(B)(II).

[19] Retained or non-retained experts.

Non-retained experts are persons whose opinions are formed or reasonably derived from or based on their occupational duties.

[20] Expert discovery.

The prohibition of depositions of experts was perhaps the most controversial aspect of CAPP. Many lawyers, particularly those involved in professional liability cases, argued that a blanket prohibition of depositions of experts would impair lawyers’ ability to evaluate cases and thus frustrate settlement of cases. The 2015 amendment permits limited depositions of experts. Retained experts may be deposed for up to 6 hours, unless changed by the court, which must consider proportionality. Rule 26(b)(4)(A).

The 2015 amendment also requires that, if a deposition reveals additional opinions, previous expert disclosures must be supplemented before trial if the witness is to be allowed to express these new opinions at trial. Rule 26(e). This change addresses, and prohibits, the fairly frequent and abusive practice of lawyers simply saying that the expert report is supplemented by the “deposition.” However, even with the required supplementation, the trial court is not required to allow the new opinions in evidence. *Id.*

The 2015 amendments to Rule 26, like the current and proposed version of Fed. R. Civ. P. 26, emphasize the application of the concept of proportionality to disclosure and discovery, with robust disclosure followed by limited discovery.

[21] Sufficiency of disclosure of expert opinions and the bases therefor.

This rule requires detailed disclosures of “all opinions to be expressed [by the expert] and the basis and reasons therefor.” Such disclosures ensure that the parties know, well in advance of trial, the substance of all expert opinions that may be offered at trial. Detailed disclosures facilitate the trial, avoid delays, and enhance the prospect for settlement. At the same time, courts and parties must “liberally construe[], administer[] and employ[]” these rules “to secure the just, speedy, and inexpensive determination of every action.” C.R.C.P. 1. Rule 26(a)(2) does not prohibit disclosures that incorporate by specific page reference previously disclosed records of the designated expert (including non-retained experts), provided that the designated pages set forth the opinions to be expressed, along with the reasons and basis therefor. This Rule does not require that disclosures match, verbatim, the testimony at trial. Reasonableness and the overarching goal of a fair resolution of disputes are the touchstones. If an expert’s opinions and facts supporting the opinions are disclosed in a manner that gives the opposing party reasonable notice of the specific opinions and supporting facts, the purpose of the rule is accomplished. In the absence of substantial prejudice to the opposing party, this rule does not require exclusion of testimony merely because of technical defects in disclosure.

Rule 30. Depositions Upon Oral Examination

(a) – (c) [NO CHANGE]

(d) Schedule and Duration; Motion to Terminate or Limit Examination. (1) Any objection during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. An instruction not to answer may be made during a deposition only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion pursuant to subsection (d)(3) of this Rule.

(2) (A) Unless otherwise authorized by the court or stipulated by the parties, a deposition of a person other than a retained expert disclosed pursuant to C.R.C.P. 26(a)(2)(B)(I) whose opinions may be offered at trial is limited to one day of ~~6~~seven hours. Upon the motion of any party By order, the court may limit the time permitted for the conduct of a deposition to less than ~~6~~seven hours, or may allow additional time if needed for a fair examination of the deponent and consistent with C.R.C.P. 26(b)(2), or if the deponent or another person impedes or delays the examination, or if other circumstances warrant. If the court finds such an impediment, delay, or other conduct that frustrates the fair examination of the deponent, it may impose upon the person responsible therefor an appropriate sanction, including the reasonable costs and attorney fees incurred by any parties as a result thereof.

(B) Depositions of a retained expert disclosed pursuant to C.R.C.P. 26(a)(2)(B)(I) whose opinions may be offered at trial are governed by C.R.C.P. 26(b)(4).

(3) At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in C.R.C.P. 26(c). If the order made terminates the examination, it may be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of C.R.C.P. 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) – (g) [NO CHANGE]

Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.

~~COMMITTEE~~ COMMENTS

1995

[1] Revised C.R.C.P. 30 is patterned in part after Fed.R.Civ.P. 30 as amended in 1993 and now interrelates with the differential case management features of C.R.C.P. 16 and C.R.C.P. 26. Because of mandatory disclosure, substantially less discovery is needed.

[2] A discovery schedule for the case is required by C.R.C.P. 16(b)(1)(IV). Under the requirements of that Rule, the parties must set forth in the Case Management Order the timing and number of depositions and the basis for the necessity of such discovery with attention to the presumptive limitation and standards set forth in C.R.C.P. 26(b)(2). There is also the requirement that counsel certify they have advised their clients of the estimated expenses and fees involved in the discovery. Discovery is thus tailored to the particular case. The parties in the first instance and ultimately the Court are responsible for setting reasonable limits and preventing abuse.

[3] Language in C.R.C.P. 30(c) and C.R.C.P. 30(f)(1) differs slightly from the language of Fed.R.Civ.P. 30(c) and Fed.R.Civ.P. 30(f)(1) to facilitate the taking of telephone depositions by eliminating the requirement that the officer recording the deposition be the person who administers the oath or affirmation.

2015

[4] Rule 30 is amended to reduce the time for ordinary depositions from 7 to 6 hours, so that they can be more easily accomplished in a normal business day.

Rule 31. Depositions Upon Written Questions

(a) Serving Questions; Notice.

(1) A party may take the testimony of any person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (2) of this section. The attendance of witnesses may be compelled by the use of subpoena as provided in C.R.C.P. 45.

(2) A party must obtain leave of court, and the court must grant leave to the extent consistent with C.R.C.P. 26(b)(2). ~~Leave of court must be obtained pursuant to C.R.C.P. Rules 16(B)(1) and 26(B);~~ if:

(A) ~~a~~A proposed deposition, if taken, would result in more depositions than set forth in the Case Management Order;

(B) ~~t~~The person to be examined already has been deposed in the case;

(C) ~~a~~A party seeks to take a deposition before the time specified in C.R.C.P. 26(d); or

(D) ~~t~~The person to be examined is confined in prison.

(3) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating:

(~~A~~1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs; and

(~~B~~2) the name or descriptive title and address of the officer before whom the deposition is to be taken.

A deposition upon written questions may be taken of a public or private corporation, or a partnership, or association, or governmental agency in accordance with the provision of C.R.C.P. 30(b)(6).

(4) Within 21 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 14 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 7 days after being served with redirect questions, a party may serve re-cross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) – (c) [NO CHANGE]

Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.

~~COMMITTEE~~ COMMENTS

1995

[1] Revised C.R.C.P. 31 now interrelates with the differential case management features of C.R.C.P. 16 and C.R.C.P. 26. Because of mandatory disclosure, substantially less discovery is needed.

[2] A discovery schedule for the case is required by C.R.C.P. 16(b)(1)(IV). Under the requirements of that Rule, the parties must set forth in the Case Management Order the timing and number of depositions and the basis for the necessity of such discovery with attention to the presumptive limitations and standards set forth in C.R.C.P. 26(b)(2). There is also the requirement that counsel certify they have advised their clients of the estimated expenses and fees involved in the discovery. Discovery is thus tailored to the particular case. The parties in the first instance and ultimately the Court are responsible for setting reasonable limits and preventing abuse.

Rule 33. Interrogatories to Parties

(a) [NO CHANGE]

(b) **Answers and Objections.**

(1) An objection must state with specificity the grounds for objection to the Interrogatory and must also state whether any responsive information is being withheld on the basis of that objection. A timely objection to an Interrogatory stays the obligation to answer those portions of the Interrogatory objected to until the court resolves the objection. No separate motion for protective order pursuant to C.R.C.P. 26(c) is required. ~~Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable.~~

(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 35 days after the service of the interrogatories. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties pursuant to C.R.C.P. 29.

(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection will be deemed to be waived unless the party's failure to object is excused by the court for good cause shown.

(5) The party submitting the interrogatories may move for an order pursuant to C.R.C.P. 37(a) with respect to any objection to or other failure to answer an interrogatory.

(c) – (e) [NO CHANGE]

Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.

COMMITTEE COMMENTS

1995

[1] Revised C.R.C.P. 33 now interrelates with the differential case management features of C.R.C.P. 16 and C.R.C.P. 26. Because of mandatory disclosure, substantially less discovery is needed.

[2] A discovery schedule for the case is required by C.R.C.P. 16(b)(1)(IV). Under the requirements of that Rule, the parties must set forth in the Case Management Order the timing and number of interrogatories and the basis for the necessity of such discovery with attention to the presumptive limitation and standards set forth in C.R.C.P. 26(b)(2). There is also the

requirement that counsel certify they have advised their clients of the estimated expenses and fees involved in the discovery. Discovery is thus tailored to the particular case. The parties in the first instance and ultimately the Court are responsible for setting reasonable limits and preventing abuse.

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(a) [NO CHANGE]

(b) Procedure. The request shall set forth the items to be inspected either by individual item or by category, and describe each item ~~and~~ or category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 35 days after the service of the request. A shorter or longer time may be directed by the court or agreed to in writing by the parties pursuant to C.R.C.P. 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, or state with specificity the grounds for objecting to the request unless the request is objected to, in which event the reasons for objection shall be stated. The responding party may state that it will produce copies of information instead of permitting inspection. The production must then be completed no later than the time for inspection stated in the request or another reasonable time stated in the response. An objection must state whether any responsive materials are being withheld on the basis of that objection. If objection is made to part of an item or category, the part shall be specified. A timely objection to a request for production stays the obligation to produce which is the subject of the objection until the court resolves the objection. No separate motion for protective order pursuant to C.R.C.P. 26(c) is required. The party submitting the request may move for an order pursuant to C.R.C.P. 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) Persons Not Parties. As provided in C.R.C.P. 45, ~~t~~h~~is~~ R~~u~~~~l~~~~e~~ does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.

~~COMMITTEE~~ COMMENTS

1995

[1] Revised C.R.C.P. 34 now interrelates with the differential case management features of C.R.C.P. 16 and C.R.C.P. 26. Because of mandatory disclosure, substantially less discovery is needed.

[2] A discovery schedule for the case is required by C.R.C.P. 16(b)(1)(IV). Under the requirements of that Rule, the parties must set forth in the Case Management Order the timing and number of requests for production and the basis for the necessity of such discovery with attention to the presumptive limitation and standards set forth in C.R.C.P. 26(b)(2). There is also the requirement that counsel certify they have advised their clients of the estimated expenses and fees involved in the discovery. Discovery is thus tailored to the particular case. The parties in the first instance and ultimately the Court are responsible for setting reasonable limits and preventing abuse.

2015

[3] Rule 34 is changed to adopt similar revisions as those proposed to Fed. R. Civ. P. 34, which are designed to make responses to requests for documents more meaningful and transparent. The first amendment is to avoid the practice of repeating numerous boilerplate objections to each request which do not identify specifically what is objectionable about each specific request. The second amendment is to allow production of documents in place of permitting inspection but to require that the production be scheduled to occur when the response to the document request is due, or some other specific and reasonable date. The third amendment is to require that when an objection to a document request is made, the response must also state whether, in fact, any responsive materials are being withheld due to that objection. The fourth and final amendment is simply to clarify that a written objection to production under this Rule is adequate to stop production without also filing a motion for a protective order.

Rule 37. Failure to Make Disclosure or Cooperate in Discovery: Sanctions

(a) Motion for Order Compelling Disclosure or Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery and imposing sanctions as follows:

(1) Appropriate Court. An application for an order to a party or to a person who is not a party shall be made to the court in which the action is pending.

(2) Motion. (A) If a party fails to make a disclosure required by C.R.C.P. 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion shall be accompanied by a certification that the movant in good faith has conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted pursuant to C.R.C.P. Rules 30 or 31, or a corporation or other entity fails to make a designation pursuant to C.R.C.P. Rules 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted pursuant to C.R.C.P. 33, or if a party, in response to a request for inspection submitted pursuant to C.R.C.P. 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion shall be accompanied by a certification that the moving party in good faith has conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(3) Evasive or Incomplete Disclosure, Answer, or Response. For purposes of this subsection an evasive or incomplete disclosure, answer, or response shall be deemed a failure to disclose, answer, or respond.

(4) Expenses and Sanctions. (A) If a motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court may, after affording an opportunity to reasonable notice and an opportunity to be heard, if requested, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified or that other circumstances make an award of expenses manifestly unjust.

(B) If a motion is denied, the court may make such protective order as it could have made on a motion filed pursuant to C.R.C.P. 26(c) and may, after affording an opportunity to be heard if requested, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses manifestly unjust.

(C) If the motion is granted in part and denied in part, the court may make such protective order as it could have made on a motion filed pursuant to C.R.C.P. 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply with Order.

(1) Non-Party Deponents-Sanctions by Court. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in which the action is pending or from which the subpoena is issued, the failure may be considered a contempt of court.

(2) Party Deponents-Sanctions by Court. If a party or an officer, director, or managing agent of a party, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this Rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

COMMITTEE COMMENT

~~Subsection (b)(1) was modified to reflect that orders to deponents under subsection (a)(1), when the depositions are taking place within this state, are sought in and issued by the court where the action is pending or from which the subpoena is issued pursuant to Section 13-90-111, C.R.S., and it is that court which will enforce its orders. Deponents appearing outside the state are beyond the jurisdictional limits of the Colorado courts. For out of state depositions, any problems should be addressed by the court of the jurisdiction where the deponent has appeared for the deposition under the laws of that jurisdiction.~~

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting ~~that party~~^{him} from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring ~~the party~~^{him} to produce another for examination, such orders as are listed in subparagraphs (A), (B), and (C) of

this subsection (2), unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order, or the attorney advising the party~~him~~, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit. (1) A party that without substantial justification fails to disclose information required by C.R.C.P. ~~Rules~~ 26(a) or 26(e) shall not, ~~unless such failure is harmless,~~ be permitted to present any evidence not so disclosed at trial or on a motion made pursuant to C.R.C.P. 56, unless such failure has not caused and will not cause significant harm, or such preclusion is disproportionate to that harm. ~~In addition to or in lieu of this sanction, the court, on motion after affording an opportunity to be heard, may impose other appropriate sanctions, which, in addition to requiring payment of reasonable expenses including attorney fees caused by the failure, may include any of the actions authorized pursuant to subsections (b)(2)(A), (b)(2)(B), and (b)(2)(C) of this Rule. The court, after holding a hearing if requested, may impose any other sanction proportionate to the harm, including any of the sanctions authorized in subsections (b)(2)(A), (b)(2)(B) and (b)(2)(C) of this Rule, and the payment of reasonable expenses including attorney fees caused by the failure.~~

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested pursuant to C.R.C.P. 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that

(A) the request was held objectionable pursuant to C.R.C.P. 36(a), or

(B) the admission sought was of no substantial importance, or

(C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or

(D) there was other good reason for the failure to admit.

(d) [NO CHANGE]

Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.

COMMITTEE COMMENTS

1990

[1] Subsection (b)(1) was modified to reflect that orders to deponents under subsection (a)(1), when the depositions are taking place within this state, are sought in and issued by the court where the action is pending or from which the subpoena is issued pursuant to Section 13-90-111, C.R.S., and it is that court which will enforce its orders. Deponents appearing outside the state are beyond the jurisdictional limits of the Colorado courts. For out-of-state depositions, any problems should be addressed by the court of the jurisdiction where the deponent has appeared for the deposition under the laws of that jurisdiction.

1995

[2] Revised C.R.C.P. 37 is patterned substantially after Fed.R.Civ.P. 37 as amended in 1993 and has the same numbering. There are slight differences: (1) C.R.C.P. 37(4)(a) and (b) make sanctioning discretionary rather than mandatory; and (2) there is no State Rule 37(e) [pertaining to sanctions for failure to participate in framing of a discovery plan]. As with the other disclosure/discovery rules, revised C.R.C.P. 37 forms a part of a comprehensive case management system. See Committee Comments to C.R.C.P. 16, 26, 30, 31, 33, 34, and 36.

2015

[3] The threat and, when required, application, of sanctions is necessary to convince litigants of the importance of full disclosure. Because the 2015 amendments also require more complete disclosures, Rule 37(a)(4) now authorizes, for motions to compel disclosures or discovery, imposition of sanctions against the losing party unless its actions “were substantially justified or that other circumstances make an award of expenses *manifestly* unjust.” This change is intended to make it easier for judges to impose sanctions.

[4] On the other hand, consistent with recent supreme court cases such as *Pinkstaff v. Black & Decker (U.S.), Inc.*, 211 P.3d 698 (Colo. 2009), Rule 37(c) is amended to reduce the likelihood of preclusion of previously undisclosed evidence “unless such failure has not caused or will not cause significant harm, or such preclusion is disproportionate to that harm.” When preclusion applied “unless the failure is harmless,” it has been too easy for the objecting party to show *some* “harm,” and thereby cause preclusion of otherwise important evidence, which, in some circumstances, conflicts with the court’s decisions.

Rule 54. Judgments; Costs

(a) – (c) [NO CHANGE]

COMMITTEE COMMENT

~~The amendment to C.R.C.P. 54(c) is to eliminate what has been perceived as a possible conflict between that section and the recent change to C.R.C.P. 8(a) which prohibits statement of amount in that ad damnum. The amendment simply strikes the words “or exceed in amount” to make the section consistent with C.R.C.P. 8(a). Relief sought in the prayer is now described rather than stated as an amount. It is, therefore, not necessary to have an amount limitation in C.R.C.P. 54(c).~~

(d) **Costs.** Except when express provision therefor is made either in a statute of this state or in these rules, reasonable costs shall be allowed as of course to the prevailing party considering any relevant factors which may include the needs and complexity of the case and the amount in controversy. ~~unless the court otherwise directs;~~ But costs against the state of Colorado, its officers or agencies, shall be imposed only to the extent permitted by law.

(e) – (h) [NO CHANGE]

Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.

COMMENTS

1989

[1] The amendment to C.R.C.P. 54(c) is to eliminate what has been perceived as a possible conflict between that section and the recent change to C.R.C.P. 8(a) which prohibits statement of amount in that ad damnum. The amendment simply strikes the words “or exceed in amount” to make the section consistent with C.R.C.P. 8(a). Relief sought in the prayer is now described rather than stated as an amount. It is, therefore, not necessary to have an amount limitation in C.R.C.P. 54(c).

2015

[2] Rule 54(d) is amended to require that cost awards be “reasonable” by directing courts to consider any relevant factors, which may include the needs and complexity of the case, and the amount in controversy.

[3] The reasonableness requirement is consistent with §13-16-122, C.R.S., which lists matters included in cost awards, because it can hardly have been the intent of the legislature to authorize unreasonable awards.

[4] Cost shifting must be addressed in the Case Management Order required by C.R.C.P. 16.

**Rule 121. Local Rules – Statewide Practice Standards
Section 1-1 through 1-21 [NO CHANGE]**

**Section 1-22
COSTS AND ATTORNEY FEES**

1. COSTS. A party claiming costs shall file a Bill of Costs within 21 days of the entry of order or judgment, or within such greater time as the court may allow. The Bill of Costs shall itemize and provide a total of costs being claimed. Taxing and determination of costs shall be in accordance with C.R.C.P. 54(d) and Practice Standard § 1-15. Any party that may be affected by the Bill of Costs may request a hearing within the time permitted to file a reply in support of the Bill of Costs. Any request shall identify those issues that the party believes should be addressed at the hearing. When required to do so by law, the court shall grant a party’s timely request for a hearing. In other cases where a party has made a timely request for a hearing, the court shall hold a hearing if it determines in its discretion that a hearing would materially assist the court in ruling on the motion.

2. [NO CHANGE]

Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.

COMMITTEE COMMENTS

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[1] —COSTS. This Standard establishes a uniform, optimum time within which to claim costs. The 15 day requirement encourages prompt filings so that disputes on costs can be determined with other post-trial motions. This Standard also requires itemization and totaling of cost items and reminds practitioners of the means of determining disputes on costs. C.R.S. 13-16-122 (1981) sets forth those items generally awardable as costs.

[2] —ATTORNEY FEES. Subject to certain exceptions, this Standard establishes a uniform procedure for resolving attorney fee disputes in matters where the request for attorney fees is made at the conclusion of an action or where attorney fees are awarded to the prevailing party (see “Scope”). Unless otherwise ordered by the court, attorney fees under C.R.S. 14-10-119 should be heard at the time of the hearing on the motion or proceeding for which they are requested.

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[3] The prior version of Rule 121, Section 1-22(2) addressed when and under what circumstances a party is entitled to a hearing regarding an award of attorney fees, but no rule addressed the circumstances regarding a hearing on costs. The procedural mechanisms regarding awards of attorney fees and awards of costs should be the same, and thus the rule change adds the existing language regarding hearings on attorney fees to awards of costs.

Section 1-23 through 1-26 [NO CHANGE]

District Court _____ County, Colorado Court Address: <hr/> Plaintiff(s): <hr/> v. Defendant(s): <hr/>	▲ COURT USE ONLY ▲
Responsible attorney or if no responsible attorney pursuant to C.R.C.P. 16(b)(2), Plaintiff's name and address: Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
PROPOSED CASE MANAGEMENT ORDER	

Pursuant to C.R.C.P. 16(b), the parties should discuss each item below. If they agree, the agreement should be stated. If they cannot agree, each party should state its position briefly. If an item does not apply, it should be identified as not applicable.

This form shall be submitted to the court in editable format. When approved by the court, it shall constitute the Case Management Order for this case unless modified by the court upon a showing of good cause.

This form must be filed with the court no later than 42 days after the case is at issue and at least 7 days before the date of the case management conference.

The case management conference is set for _____, 20____ at __:___.m.

1. The "at issue date" is: _____.

2. Responsible attorney's name, address, phone number and email address:

3. The lead counsel for each party, _____,
 and any party not represented by counsel, _____,
 met and conferred in person or by telephone concerning this Proposed Order and each of the
 issues listed in Rule 16(b)(3)(A) through (E) on _____, 20 ____.

4. Brief description of the case and identification of the issues to be tried (not more than one page, double-spaced, for each side): _____

5. The following motions have been filed and are unresolved:

6. Brief assessment of each party's position on the application of the proportionality factors, including those listed in C.R.C.P. 26(b)(1): _____

7. The lead counsel for each party, _____, and any party not represented by counsel, _____, met and conferred concerning possible settlement. The prospects for settlement are:

8. Deadlines for:

a. Amending or supplementing pleadings: (Not more than 105 days (15 weeks) from at issue date.)

b. Joinder of additional parties: (Not more than 105 days (15 weeks) from at issue date.)

c. Identifying non-parties at fault: _____

9. Dates of initial disclosures: _____
Objections, if any, about their adequacy: _____

10. If full disclosure of information under C.R.C.P. 26(a)(1)(C) was not made because of a party's inability to provide it, provide a brief statement of reasons for that party's inability and the expected timing of full disclosures _____, and completion of discovery on damages: _____

11. Proposed limitations on and modifications to the scope and types of discovery, consistent with the proportionality factors in C.R.C.P. 26(b)(1): _____

Number of depositions per party (C.R.C.P. 26(b)(2)(A) limit 1 of adverse party + 2 others + experts per C.R.C.P. 26(b)(4)(A)): _____

Number of interrogatories per party (C.R.C.P. 26(b)(2)(B) limit of 30): _____

Number of requests for production of documents per party (C.R.C.P. 26(b)(2)(D) limit of 20): _____

Number of requests for admission per party (C.R.C.P. 26(b)(2)(E) limit of 20): _____

Any physical or mental examination per C.R.C.P. 35: _____

Any limitations on awardable costs: _____

State the justifications for any modifications in the foregoing C.R.C.P. 26(b)(2) limitations:

12. Number of experts, subjects for anticipated expert testimony, and whether experts will be under C.R.C.P. 26(a)(2)(B)(I) or (B)(II):

If more than one expert in any subject per side is anticipated, state the reasons why such expert is appropriate consistent with proportionality factors in C.R.C.P. 26(b)(1) and any differences among the positions of multiple parties on the same side:

13. Proposed deadlines for expert witness disclosure if other than those in C.R.C.P. 26(a)(2):

a. production of expert reports:

i. Plaintiff/claimant: _____

ii. Defendant/opposing party: _____

b. production of rebuttal expert reports: _____

c. production of expert witness files: _____

State the reasons for any different dates from those in C.R.C.P. 26(a)(2)(C): _____

14. Oral Discovery Motions. The court (does)(does not) require discovery motions to be presented orally, without written motions or briefs.

15. Electronically Stored Information. The parties (do)(do not) anticipate needing to discover a significant amount of electronically stored information. The following is a brief report concerning their agreements or positions on search terms to be used, if any, and relating to the production, continued preservation, and restoration of electronically stored information, including the form in which it is to be produced and an estimate of the attendant costs.

16. Parties' best estimate as to when discovery can be completed: _____

Parties' best estimate of the length of the trial: _____

Trial will commence on (or will be set by the court later): _____

17. Other appropriate matters for consideration:

DATED this ____ day of _____, 20__.

Signature

Attorney for Plaintiff

Signature

Attorney for Defendant

CASE MANAGEMENT ORDER

IT IS HEREBY ORDERED that the foregoing, including any modifications made by the court, is and shall be the Case Management Order in this case.

Dated this ____ day of _____, 20__.

BY THE COURT:

District Court Judge

Amended and Adopted by the Court, En Banc, May 28, 2015, effective July 1, 2015 for cases filed on or after July 1, 2015.

By the Court:

Allison H. Eid
Justice, Colorado Supreme Court