AGENDA

COLORADO SUPREME COURT
COMMITTEE ON THE
RULES OF CIVIL PROCEDURE

Friday, October 27, 2017, 1:30p.m.
Ralph L. Carr Colorado Judicial Center
2 E.14th Ave., Denver, CO 80203
Fourth Floor, Supreme Court Conference Room

I. Call to order

II. Approval of September 29, 2017 minutes **[Page 1 to 4]**

III. Announcements from the Chair

Formation of C.R.C.P. 79 and 379 subcommittee—Judge Webb to chair

IV. Business

A. Judicial Department Forms (JDF)—(Judge Berger and Steven Vasconcellos) **[Page 5 to 8]**

1. Background—Lockdown of forms by SCAO and direction from Chief Justice's office to countermand that action
2. Addition of copyright notice on some forms—Sample form—Writ of continuing garnishment, JDF 26
3. Addition of check boxes on some forms requiring filer to state whether text of form has been modified and copyright notice removed
4. Objections to check boxes—Email from Jacque Machol Jr.
5. Role of Committee regarding civil forms

B. County Court jurisdiction (Chief Judge Davidson) **[Page 9 to 13]**—Request by Supreme Court for Committee to take a final look at the proposed county court jurisdiction limit of $35,000 with an emphasis on whether this proposal (which has also been approved by the Court Services Committee), coupled with prior amendments to C.R.C.P. 16 and proposed amendments to C.R.C.P. 16.1, work together as a package. No public hearing.

C. C.R.C.P. 16.1 (Richard Holme) **[Page 14 to 24]**— Proposed response to Supreme Court to comments and objections to the proposed rule changes by the Colorado Defense Lawyers Association; Dick Holme's markup of CDLA letter.

D. Letter stating Richard Holme's concerns about the Supreme Court's decision in *Catholic Health Initiatives Colorado v. Eric Swensson Assoc's, Inc*., 2017 CO 94 (October 2, 2017). **[Page 25 to 43]**

E. C.R.C.P. 6 & 59 (Judge Jones)—Approval of final language proposed by subcommittee—approved in principle by a divided vote at September 2017 meeting **[Page 44 to 51]**

F. C.R.C.P. 26—(Damon Davis & Richard Holme) **[Page 52 to 56]**

G. C.R.C.P. 107—(Lisa Hamilton-Fieldman)

V. New Business

VI. Adjourn—Next meeting (last meeting in 2017) is **November 17, 2017 at 1:30pm**

Michael H. Berger, Chair
michael.berger@judicial.state.co.us
720 625-5231

Jenny Moore
Rules Attorney
Colorado Supreme Court
jenny.moore@judicial.state.co.us
720-625-5105

Conference Call Information:

Dial (720) 625-5050 (local) or 1-888-604-0017 (toll free) and enter the access code, 73665959, followed by # key.

Colorado Supreme Court Advisory Committee on the Rules of Civil Procedure
September 29, 2017 Minutes

A quorum being present, the Colorado Supreme Court Advisory Committee on Rules of Civil Procedure was called to order by Judge Michael Berger at 12:00 p.m., in the Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Colorado Judicial Center. Members present or excused from the meeting were:

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

I. Attachments & Handouts

September 29, 2017 agenda packet

II. Announcements from the Chair

- The June 23, 2017 minutes were approved as submitted;
- Justice Eid has been nominated to the 10th Circuit Court of Appeals; she had her hearing before the Senate Judiciary Committee last week. It has some consequence here, because she is the committee's liaison justice. If Justice Eid leaves, Justice Gabriel is her successor;
- Last year, in conjunction with Rule 16.1, the committee recommended a county court jurisdictional increase. Many people were upset, because there were concerns that a jurisdictional increase and the proposed amendments to Rule 16.1 may substantially increase county court filings. The Chief Justice referred the proposed jurisdictional increase to Court Services, a group at SCAO who work in resource allocation. Judge Berger presented to the Court Services Committee this summer, and they voted to approve the Civil Rules Committee's proposal. In conjunction with the proposed increase, the court has asked the Civil Rules Committee to take a final look at Rule 16.1 to make sure it and the proposed jurisdictional increase fit together. As a reminder, Rule 16.1 was posted for public comment, and the court received one comment from CDLA. Richard Holme has drafted a response, which will be circulated with the October meeting materials. The committee will take a final vote on Rule 16.1 at the next meeting; and
- Many members' terms expire on December 31, so please email Judge Berger if you'd like to renew. Renewal terms this year and next year may be a little longer than the usual 3 years to get all members on the same renewal schedule.

III. Business

A. C.R.C.P. 57(j)

Stephanie Scoville stated she reviewed Rule 57(j) as it relates to section 13-51-115, C.R.S., and the proposed amendments are clarifying: the title of subsection (j) has been amended to reflect that it refers to municipal ordinances and state statute challenges; and the text of subsection (j) has been modified to clarify that a party must give notice to the municipality, if challenging a municipal ordinance, or to the state and the attorney general's office, if challenging a state statute, not the court.

The committee asked, if Rule 57(j) is amended as recommended, would the committee need to make an amendment to Rule 121 § 1-15, alerting practitioners to the requirement to serve a municipality or the state. Some members thought Rule 121 § 1-15 should be amended to provide notice, while others thought that because Rule 57 only applies to declaratory judgments, the notification in subsection (j) was sufficient. After discussion, there was a motion to adopt the rule as amended and make no amendment to Rule 121 § 1-15. The motion passed 12:9.

B. C.R.C.P. 58 & 59

Judge Jones began and reminded the committee that he brought this based on his experience on a motions division. There, the parties involved lost the ability to file under Rule 59, because the court didn't immediately serve them under Rule 58. A subcommittee was formed and issues expanded. The subcommittee achieved consensus on one thing: it agreed not to change Rule 58. However, there was substantial disagreement about Rules 6 & 59 and two extremes emerged, do nothing or adopt the approach in the federal rules. The subcommittee would like the committee to weigh-in, because it doesn't have a recommendation.

Extending the time to file in Rule 59 from 14 to 28 days was met with approval by some members; others thought a change to 28 days would be inconsistent with other state court time frames, and may lead to additional timing changes in other rules. Some members thought nothing should be done, because issues surrounding these rules could be solved by other means, such as training. Also, there were many different recommendations about how the last clause of Rule 6(b)(2) could be amended.

There seemed to be a slight preference for what the what the committee was describing as the "federal option", where the last clause of Rule 6(b)(2) would be struck or amended and the timing in Rule 59(a) would be changed from 14 to 28 days. The committee took a straw vote on the "federal option" that passed 13:11. The subcommittee will draft and present specific language for the committee to consider at the next meeting, where a final vote will be taken.

C. C.R.C.P. 80

Judge Espinosa stated that the rule had been generally updated, but the major revision was in subsection (a) where the rule was made discretionary, not mandatory. A member asked if the subcommittee had considered repealing the rule and citing to CJD 05-03, because it covers most, if not all, issues related to court reporters. Another member stated that having two sources of authority on the same topic, a CJD and a court rule, could be problematic. The subcommittee stated it had discussed many alternatives and it believed keeping the rule was the best option. It provided trial court judges with another source of authority to cite if they wanted to ask their chief judge for a court reporter, and if the CJD was ever dramatically modified or repealed, the court rule would still be operational.

Next, the quality of an electronic record versus transcripts created by a court reporter was discussed. The audio quality of an electronic record can be poor; also, there are instances where someone forgets to turn on the machine or the machine malfunctions and doesn't record. Alternatively, a transcript is only as good as its court reporter, and court reporters are expensive and hard to get, especially in rural districts. The committee generally agreed that Rule 80 describes a state that doesn't exist, and in most civil trials, the party that wants a court reporter must pay for it. A motion was made to repeal Rule 80 and add a comment stating that the rule has been repealed and see CJD 05-03 for issues relating to court reporters. The motion passed 12:4. The subcommittee will draft comment language.

D. C.R.C.P. 26
Tabled to the October 27, 2017 meeting.

E. C.R.C.P. 69
Tabled to the October 27, 2017 meeting.

F. C.R.C.P. 79 & 379
Cheryl Layne began and stated that clerks of court from around the state had met and revised Rules 79 & 379. The rules had been modernized to reflect current court practice and to repeal out-of-date sections. A member asked if a signed written judgment is actually entered into the courts' computer systems. Ms. Layne explained that an order is signed and entered, but it may be a signed paper order or it may be an electronically signed electronic order. There were many questions about the process by which judgement is entered, and discussion turned to Casper v. Guarantee Trust Life Insurance Company, 2016 COA 167. In Casper, the trial court entered an oral order, and plaintiff died before the court had reduced its oral order into a written judgment; certiorari has been granted on three issues. Based on discussion, the committee decided to have a subcommittee broadly look at issues surrounding the proposal.

G. C.R.C.P. 107
Subcommittee chair, Lisa Hamilton-Fieldman, asked for clarification on the scope of the subcommittee's mandate. She reviewed the letter asking the committee to consider amending the rule so an award of attorney fees would be available to the prevailing party. Ms. Hamilton-Fieldman asked if the committee wanted the subcommittee to address the issue raised in the letter or should the rule receive broader study. The committee advised the subcommittee to make broad or narrow recommendations, whatever it thinks is best. Also, Judge Berger recommended the subcommittee consult with Judge Ray Satter, who has written extensively about contempt.

H. New business
A member asked the committee if there was any interest in discussing why "interrogatories" aren't referred to as "questions." The committee discussed this last fall when Rule 33 and Form 20, Pattern Interrogatories, were amended. At that time, the committee decided to keep using the word "interrogatories." The committee had no interest in discussing this again, and it was tabled.

IV. Future Meeting
October 27, 2017

The Committee adjourned at 2:00 p.m.

Respectfully submitted,
Jenny A. Moore

From: Ben Vinci [mailto:ben@vincilaw.com]
Sent: Wednesday, September 27, 2017 10:16 AM
To: berger, michael <michael.berger@judicial.state.co.us>; 'Claire.Walker@judicial.state.co.us'
Subject: JDF Forms

Judge Berger and Claire

The new JDF forms have this check box now regarding the copyright use or non-use. I have no idea what the purpose is and how it was added. These forms have been around since at least 1989 and I don't know what would have prompted this change. I do not recall this ever going through the committee and it is causing a lot of confusion. Can you find out any information as who did this and what purpose it serves?

LICENSED IN COLORADO, NEBRASKA, WYOMING AND UTAH.

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From: Jacques Machol Jr. [mailto:Jacques.MacholJr@mjfirm.com]
Sent: Thursday, October 12, 2017 3:09 PM
To: berger, michael
Cc: Jonathan A. Hagn; Jonathan Steiner; 'Ben Vinci'; Randall D Johannes
Subject: New copyright box check off requirements

Your Honor, respectfully it is requested that you use your influence to remove the requirements placed on every court form above the signature block requiring attorneys to check one of the two boxes to indicate that one is using a form without modification; or, if one is using a form that was modified that they have removed the JDF number and copyright at the bottom of the form.

In your response to Attorney Ben Vinci, you indicated that you thought that it was proper to have some indication that the preprinted forms had been modified. I would like to point out that in the Introductory Statement to the court forms as number 1 is: "The following forms are intended for illustration only." Thus, it is clear that either the forms are intended to be used "as is" or are actually expected to be modified. The recipient of any form as filed with the court, whether it be the clerk or the judge or an attorney, should read the form carefully as filed and it should make no difference and be no need to alert the recipient that the filed form had been modified.

Further, to create language on a form that requires clerks to take additional time and effort to determine whether that form as filed should be rejected because it doesn't comply with the approved form is not efficient. With regard to garnishments, in 2016 there were 93,905 Writs of Garnishment filed and a similar number of writs will be filed annually. It would put a substantial burden on the clerks of the courts to examine each writ as filed to see if one of two boxes above the signature block were properly checked. Since it is believed that 95% of the writs of garnishment as now being filed are modified, putting the two blocks for checkoff on the Writs of Garnishment is wasted effort and would serve no purpose other than to take a court clerk's time to additionally review the filed writ.

As to the issue of the copyright, it appears that someone believes that putting a copyright notation at the bottom of each of the court forms magically enhances the form just as in the past putting a gold notary seal by the notary signature made the form official. What department is going to enforce some alleged infringement of a court form simply because it had a copyright notation at the bottom? The copyright notation is useless as the forms are only for use with the Colorado courts and certainly no other state is going to take any of the Colorado forms to use for its own purpose and thus infringe a copyrighted Colorado form.

It is certainly inappropriate that the Probate Committee be empowered to make a requirement for all court forms without that requirement being processed through the Rules Committee. Even though this activity was approved by Chief Justice Rice, it doesn't mean that it was properly presented and properly thought out. Thus, this

spurious format should be reconsidered immediately and canceled as quickly as possible. If there is some rational reason for the Probate Committee to have the notice of modification on the probate forms, then that format as relates to Probate should go through the Rules Committee and not circumvent the Rules Committee and require all court forms to be subject to a similar requirement that is not necessary.

Please take such action as you can to reverse the activity of putting the two blocks relating to modification on each Colorado court form.
Thank you very much for your thoughtful consideration,

Respectfully,

Jacques Machol Jr. | Attorney

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☐ County Court ☐ District Court _____ County, Colorado Court Address: Plaintiff(s)/Petitioner(s): v. Defendant(s)/Respondent(s):	▲ COURT USE ONLY ▲
Judgment Creditor's Attorney or Judgment Creditor (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

WRIT OF CONTINUING GARNISHMENT

Judgment Debtor's name, last known address, other identifying information: _____

_____

1. Original or Revived Amount of Judgment Entered on _____ (date) for $_____

   a. Effective Garnishment Period
   - ☐ 91 days (Judgment entered prior to August 8, 2001)
   - ☐ 182 days (Judgment entered on or after August 8, 2001)

2. Plus any Interest Due on Judgment (currently_____% per annum) $_____
3. Taxable Costs (including estimated cost of service of this Writ) $_____
4. Less any Amount Paid $_____
5. Principal Balance/Total Amount Due and Owing $_____

I affirm under penalty of perjury that I am authorized to act for the Judgment Creditor and this is a correct statement as of _____ (date).

☐ By checking this box, I am acknowledging I am filling in the blanks and not changing anything else on the form.

☐ By checking this box, I am acknowledging that I have made a change to the original content of this form. (Checking this box requires you to remove JDF number and copyright at the bottom of the form.)

_____
Print Judgment Creditor's Name

Address: _____

_____

By: _____
Signature (Type Name, Title, Address and Phone)

WRIT OF CONTINUING GARNISHMENT

THE PEOPLE OF THE STATE OF COLORADO to the Sheriff of any Colorado County or to any person 18 years or older and who is not a party to this action:
You are directed to serve **TWO COPIES** of this Writ of Continuing Garnishment upon _____, Garnishee, with proper return of service to be made to the Court.

TO THE GARNISHEE: YOU ARE SUMMONED AS GARNISHEE IN THIS ACTION AND ORDERED:

Court of Appeals

STATE OF COLORADO
2 EAST FOURTEENTH AVENUE
DENVER, COLORADO 80203
720-625-5000

Michael H. Berger
Judge

March 28, 2016

Honorable Allison Eid

Justice, Colorado Supreme Court

Re: Colorado Supreme Court Committee on Rules of Civil Procedure—Increasing the jurisdiction of the county courts

Dear Justice Eid:

I write to you in your capacity as the Liaison Justice to the Colorado Supreme Court Civil Rules Committee.

The Civil Rules Committee recommends that the Supreme Court support legislation to increase the jurisdiction of the county courts from the present $15,000 to $35,000.

I appointed a subcommittee to study this issue, chaired by former Chief Judge Janice Davidson. The other members of the Subcommittee are Judge Cathy Lemon, Judge Chris Zenisek, Richard Laugesen, Jeannette Kornreich, Richard Holme, Peter Goldstein, Debra Knapp, Cheryl Lane, Ben Vinci and Stephanie Scoville.

The Subcommittee's report dated March 11, 2016, is attached to this letter. I am also sending this letter, together with the

Subcommittee's report, to you electronically for the Court's convenience.

The Subcommittee's recommendations were addressed at the March 18, 2016 meeting of the full Committee. After discussion, the Committee voted 18-2 to recommend that the Supreme Court support legislation increasing the county court jurisdictional limits to $35,000.

In addition to the matters addressed in the Subcommittee's report, I note that this recommendation is consistent with the amendments (and the purpose of those amendments) made by the Supreme Court to the Colorado Rules of Civil Procedure in 2015. To meet the overarching objectives of C.R.C.P. 1—"the just, speedy, and inexpensive determination of every action" — it is essential that the procedures required by the Rules be tailored to the needs of the cases before the courts. Increasing the jurisdictional limits of the county courts will take relatively low dollar value cases outside of the more complex, expensive, and usually unnecessary procedures that govern district court actions.

Respectfully submitted,

Michael H. Berger, Chair

Civil Rules Committee

Cc: Hon. Janice Davidson

Hon. John R. Webb

Jenny Moore, Esq.

MEMORANDUM

TO: **Judge Michael Berger, Chair**
Supreme Court Civil Rules Committee

FROM: **Subcommittee on Increasing County Court Jurisdictional Levels –**
Senior Judge Janice Davidson, Chair; Judge Chris Zenisek; Jeannette Kornreich; Richard Laugesen; Richard Holme; Peter Goldstein; Debra Knapp; Judge Cathy Lemon; Cheryl Layne; Ben Vinci; Stephanie Scoville

DATE: **March 11, 2016**

RE: **Recommendations Concerning County Court Jurisdictional Levels**

The Subcommittee unanimously recommends that the Civil Rules Committee send to the Supreme Court a recommendation in favor of the Court's support for legislation increasing county court jurisdictional limits. The Subcommittee voted for an increase of $25,000-$35,000 as most appropriate. The reasons for this recommendation, as expressed by subcommittee members, include:

a. An increase would encourage the filing of currently unfiled cases by providing greater access to county court -- district court is far too technical for the average person.

b. It would increase the average person's access to justice because costs would be decreased. People are not going to court now because it is too expensive and complicated.

d. The county courts are more accessible and better designed to serve pro se litigants.

e. Data from other states supports an increase to at least $25,000. Most other states have jurisdictional limits higher than $15,000. (A table of Civil Jurisdiction Thresholds, compiled by the NCSC, is included with this Memorandum.).

Although a more significant increase – e.g., to $50,000 – was seriously considered, it was rejected on the grounds that such an increase could jeopardize county court simplified procedure by increasing requests for depositions/discovery and/or trigger a push to increase filing fees. It was agreed, therefore, that an increase that substantial would need to be further considered before implementation, to ensure it did not result in an increase in expenses to litigants and decrease access to justice. It was also suggested that an increase that high would simply be too great a shock.

The Subcommittee also seriously considered the concerns voiced by Jonathan Asher, Executive Director of the Colorado Legal Aid Society, who was invited to the November 24, 2015 meeting to share a legal services perspective. Mr. Asher thought that increasing the jurisdictional limit would simply increase default judgments, pointing out that it is collection agencies, not pro se litigants, who are filing the majority of cases in county court. He was concerned that a jurisdictional increase, rather than improving access to justice, could result in more judgments against indigent persons without counsel.

However, it was the consensus of the Subcommittee, in response to these concerns, that this was not a zero-sum, that is, an increase in collection cases does not impact an increased ability of a plaintiff (pro se or not) to afford to file his/her claim. Moreover, any increase in collection filings in county court would not be additional or "new" cases, but more likely, would come from a shift to the county court those cases seeking recovery over $15,000, but less than $25,000-$35,000, that would have been filed regardless in the district court. Furthermore, any decrease in litigation costs necessarily benefits both parties, not just the collection agencies.

Please note that, while the Subcommittee was not charged with determining resource impacts, if any, of a jurisdictional increase, its discussions were informed by data presented from the SCAO Division of Court Services and the Presiding Judge and County Court Administrator of Denver County Court. For informational

purposes, included is additional information presented at the November 24, 2015 meeting:

> The Division of Court Services, Jessica Brill, reported that the county courts should be able to absorb an increase under the current and forecasted workload studies at a level of $15,000, a middle value of national jurisdictional limits. At this level, the courts would lose only about 2.67 FTE but that amount should be easily absorbed by shifting work from the district courts to the county courts without much of an impact on staffing levels. There is some anticipation of increased filings because of the lower court fees charged in county court.
>
> Presiding Judge Marcucci and County Court Administrator Langham appeared on behalf of the Denver County Court and reported that Denver has had a drop in caseload the last couple of years, so the county court could handle an increase in the jurisdictional limit. Denver is in good shape based on time to disposition and the civil satisfaction survey. An increase to $25,000 would be okay for now and they would perhaps consider $35,000 down the road. PJ Marcucci expressed strong concern that $50,000 would be too big of a jump without further analysis. County Court Administrator Langham was supportive of starting at $25,000 but expressed concern with $35,000 as too high a limit to begin with. In Denver district court, less than 1% of cases go to trial and Denver's docket is down 30% in the last five years. Denver currently has three county court judges, but might move around one or half of one of the county court judges elsewhere.

Rule 16.1. Simplified Procedure for Civil Actions

(a) Purpose ~~and Summary~~ of Simplified Procedure.

~~(1) Purpose of Simplified Procedure.~~ The purpose of this rule, which establishes Simplified Procedure, is to provide maximum access to the district courts in civil actions; to enhance the provision of just, speedy, and inexpensive determination of civil actions; to ~~provide the earliest practical~~allow earlier trials; and to limit discovery and its attendant expense.

~~(2) Summary of Simplified Procedure. Under this Rule, Simplified Procedure generally applies to all civil actions, whether for monetary damages or any other form of relief unless expressly excluded by this Rule or the pleadings, or unless a party timely and properly elects to be excluded from its provisions. This Rule normally limits the maximum allowable monetary judgment to $100,000 against any one party. This Rule requires early, full disclosure of persons, documents, damages, insurance and experts, and early, detailed disclosure of witnesses' testimony, whose direct trial testimony is then generally limited to that which has been disclosed. Normally, no depositions, interrogatories, document requests or requests for admission are allowed, although examination under C.R.C.P. 34(a)(2) and 35 is permitted.~~

(b) Actions Subject to Simplified Procedure. ~~This Rule~~ Simplified Procedure applies to all civil actions other than:

(1) civil actions that are class actions, domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, C.R.C.P. 106 and 120, or other similar expedited proceedings, unless otherwise stipulated by the parties; or

(2) civil actions in which any one party seeks ~~a~~ monetary judgment from any other party of more than $100,000, exclusive of reasonable allowable attorney fees, interest and costs~~.~~, as shown by a statement on the Civil Cover Sheet by the party's attorney or, if unrepresented, by the party, that "In compliance with C.R.C.P. 11, based upon information reasonably available to me at this time, I certify that the value of this party's claims against one of the other parties is reasonably believed to exceed $100,000."

~~(3)~~**(c) Civil Cover Sheet.** Each pleading containing an initial claim for relief in a civil action, other than ~~a~~class actions, domestic relations, ~~probate, water,~~ juvenile, ~~or~~ mental health ~~action,~~, probate, water law, forcible entry and detainer, C.R.C.P. 106 and 120 shall be accompanied at the time of filing by a completed Civil Cover Sheet in the form and content of Appendix to Chapters 1 to 17A, Form 1.2 (JDF 601~~), at the time of filing.~~). Failure to file the ~~cover sheet~~Civil Cover Sheet shall not be considered a jurisdictional defect in the pleading but may result in a ~~clerk's~~clerk's show cause order requiring its filing.

~~(c) Limitations on Damages. In cases subject to this Rule, a claimant's right to a monetary judgment against any one party shall be limited to a maximum of $100,000, including any attorney fees, penalties or punitive damages, but excluding interest and costs. The $100,000 limitation shall not restrict an award of non-monetary relief. The jury shall not be informed of~~

~~the $100,000 limitation. If the jury returns a verdict for damages in excess of $100,000, the trial court shall reduce the verdict to $100,000.~~

(d) ~~Election~~**Motion for Exclusion from** ~~This Rule. This Rule~~**Simplified Procedure**. Simplified Procedure shall apply unless, no later than ~~35~~42 days after the case is at issue as defined in C.R.C.P. 16(b)(1), any party files a ~~written notice~~motion, signed by both the party and its counsel, if any, ~~stating that the party elects to be excluded~~establishing good cause to exclude the case from the application of Simplified Procedure~~, set forth in this rule 16.~~.

(1)~~. The use of a "Notice to Elect Exclusion From~~ Good cause shall be established and the motion shall be granted if a defending party files a statement by its attorney or, if unrepresented, by the party, that "In compliance with C.R.C.P. ~~16.1 Simplified Procedure" in the form and content of Appendix to Chapters 1 to 17, Form 1.3 (JDF 602), shall comply with this section. In the event a notice~~11, based upon information reasonably available to me at this time, I certify that the value of this party's claims against one of the other parties is ~~filed, C.R.C.P. 16 shall govern~~reasonably believed to exceed $100,000" or

(2) The trial court, in its discretion, may determine other good cause for exclusion, considering factors such as the complexity of the case, the ~~action~~importance of the issues at stake, the parties' relative access to relevant information, the parties' resources, the importance of discovery in resolving the issues, and whether the burden or expense of proposed discovery outweighs its likely benefit.

(e) Election for Inclusion Under ~~This~~**this Rule**. In actions excluded from Simplified Procedure by subsection (b)(2~~) of this Rule,~~), within ~~49~~42 days after the case is at issue, as defined in C.R.C.P. 16(b)(1), the parties may file a stipulation to be governed by this Rule. ~~In such event, they will not be bound by the $100,000 limitation on judgments contained in section (c) of this Rule.~~

(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~~),~~) and (7) shall apply, except that preparing and filing a Proposed Case Management Order is not required.

(g) Trial Setting. 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, section 1-6, unless otherwise ordered by the court.

(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), (g) and (k)(1) of this Rule or, if ~~they~~the parties 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.

(i) Expedited Trials. Trial settings, motions and trials in actions subject to Simplified Procedure ~~under this Rule~~ should be given early trial settings, hearings on motions and trials~~.~~, if possible.

(j) Case Management Conference. If any party believes that it would be helpful to conduct a case management conference, a notice to set a case management conference shall be filed stating the reasons why such a conference is requested. If any party is unrepresented 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.

(k) Simplified Procedure. Cases subject to Simplified Procedure ~~means that the action~~ shall not be subject to C.R.C.P. 16, 26-27, 31, 33~~, 34(a)(1), 34(c)~~ and 36, unless otherwise specifically provided in this Rule, and shall be subject to the following requirements:

(1**) Required Disclosures.**

(A) Disclosures in All Cases. Each party shall make disclosures pursuant to C.R.C.P. 26(a)(1), 26(a)(4), 26(b)(5), 26(c), 26(e) and 26(g~~),~~) no later than ~~35~~28 days after the case is at issue as defined in C.R.C.P. 16(b)(1). In addition to the requirements of C.R.C.P. 26(g), the disclosing party shall sign all disclosures under oath.

(B) Additional Disclosures in Certain Actions. Even if not otherwise required under subsection (A), matters to be disclosed pursuant to this Rule shall also include, but are not limited to, the following:

(i**)** ***Personal Injury Actions***. In actions claiming damages for personal or emotional injuries, the claimant shall disclose the names and addresses of all doctors, hospitals, clinics, pharmacies and other health care providers utilized by the claimant within five years prior to the date of injury who or which provided services which are related to the injuries and damages claimed, and shall produce all records from those providers or written waivers allowing the opposing party to obtain those records, subject to appropriate protective provisions ~~authorized by~~obtained pursuant to C.R.C.P. 26(c). The claimant shall also produce transcripts or tapes of recorded statements, documents, photographs, and video and other recorded images that address the facts of the case or the injuries sustained. The defending party shall disclose transcripts or tapes of recorded statements, any insurance company claims memos or documents, photographs, and video and other recorded images that address the facts of the case, the injuries sustained, or affirmative defenses. A party need not produce those specific records for which the party, after consultation pursuant to C.R.C.P. 26(c), timely moves for a protective order from the court~~;~~.

(ii**)** ***Employment Actions***. In actions seeking damages for loss of employment, the claimant shall disclose the names and addresses of all persons by whom the claimant has been employed for the ten years prior to the date of disclosure, and shall produce all documents which reflect or reference ~~claimant's~~the claimant's efforts to find employment since the ~~claimant's~~claimant's departure from the defending party, and written waivers allowing the ~~opposing~~defending party to obtain the ~~claimant's~~claimant's personnel files and payment histories from each employer, except with respect to those records for which the claimant, after consultation pursuant to C.R.C.P~~.~~ 26(c), timely moves for a protective order from the court. The

defending party shall produce the ~~claimant's~~claimant's personnel file and applicable personnel policies and employee handbooks~~;~~.

~~(iii) Requested Disclosures. Before or after the initial disclosures, any party may make a written designation of specific information and documentation that party believes should be disclosed pursuant to C.R.C.P. 26(a)(1). The other party shall provide a response and any agreed upon disclosures within 21 days of the request or at the time of initial disclosures, whichever is later. If any party believes the responses or disclosures are inadequate, it may seek relief pursuant to C.R.C.P. 37.~~

(C) Document Disclosure. Documents and other evidentiary materials disclosed pursuant to C.R.C.P. ~~26(a)(1) and~~ 16.1(k)(1)(B) and 26(a)(1) shall be made immediately available for inspection and copying to the extent not privileged or protected from disclosure.

(2) Disclosure of Expert Witnesses. The provisions of C.R.C.P. 26(a)(2)(A) and (B), 26(a)(4), 26(~~a)(6~~b)(4), 26(b)(5), 26(c), 26(e) and 26(g) shall apply to disclosure ~~for~~of expert witnesses. Written disclosures of experts shall be served by parties asserting claims 91 days (13 weeks) before trial; by parties defending against claims ~~56~~63 days (~~8~~9 weeks) before trial; and parties asserting claims shall serve written disclosures for any rebuttal experts ~~35 days before trial~~49 days before trial. The parties shall be limited to one expert witness per side retained pursuant to C.R.C.P. 26(a)(2)(B)(I), unless the trial court authorizes more for good cause shown.

(3) Mandatory Disclosure of ~~Non-expert~~ Trial Testimony. Each party shall serve written disclosure statements identifying the name, address, telephone number, and a detailed statement of the expected testimony for each witness the party intends to call at trial whose deposition has not been taken, and for whom expert reports pursuant to subparagraph (k)(2) of this Rule have not been provided. For adverse ~~party~~parties or hostile witnesses a party intends to call at trial, written disclosure of the expected subject matters of the ~~witness's~~witness' testimony, rather than a detailed statement of the expected testimony, shall be sufficient. Written disclosure shall be served by parties asserting claims 91 days (13 weeks) before trial; by parties defending against claims ~~56~~63 days (~~8~~9 weeks) before trial; and parties asserting claims shall serve written disclosures for any rebuttal witnesses ~~35~~49 days before trial.

(4) Permitted Discovery. The following discovery is permitted, to the extent allowed by C.R.C.P. 26(b)(1):

(A) Each party may take a combined total of not more than six hours of depositions noticed by the party;

(B) Not more than five requests for production of documents may be served by each party; and

(C) The parties may request discovery pursuant to C.R.C.P. 34(a)(2) (inspection of property) and C.R.C.P. 35 (medical examinations).

(5) Depositions ~~of Witnesses in Lieu of~~ **for Obtaining Documents and for Trial** ~~Testimony.~~. In addition to depositions allowed under subsection (k)(4)(A) of this Rule:

(A) Depositions may be taken for the sole purpose of obtaining and authenticating documents from a non-party; and

(B) A party who intends to offer the testimony of an expert or other witness may, pursuant to C.R.C.P. 30(b)(1)-(4) and (7), take the deposition of that witness for the purpose of preserving the ~~witness'~~witness' testimony for use at trial~~. Such~~ without being subject to the six-hour limit on depositions in subsection (k)(4)(A) of this Rule. Unless authorized by the court or stipulated to by the parties, such a deposition shall be taken at least ~~7~~21 days before trial. In that event, any party may offer admissible portions of the ~~witness'~~witness' deposition, including any cross-examination during the deposition, without a showing of the ~~witness'~~witness' unavailability. Any witness who has been so deposed may not be offered as a witness to present live testimony at trial by the party taking the preservation deposition.

~~**(5)** Depositions for Obtaining Documents. Depositions also may be taken for the sole purpose of obtaining and authenticating documents from a non-party.~~

(6) Trial Exhibits. All exhibits to be used at trial which are in the possession, custody or control of the parties shall be identified and exchanged by the parties at least 35 days before trial. Authenticity of all identified and exchanged exhibits shall be deemed admitted unless objected to in writing within 14 days after receipt of the exhibits. Documents in the possession, custody and control of third persons that have not been obtained by the identifying party pursuant to document deposition or otherwise, to the extent possible, shall be identified 35 days before trial and objections to the authenticity of those documents may be made at any time prior to their admission into evidence.

(7) Limitations on Witnesses and Exhibits at Trial. In addition to the sanctions under C.R.C.P. 37(c), witnesses and expert witnesses whose depositions have not been taken shall be limited to testifying on direct examination about matters disclosed in reasonable detail in the written disclosures, provided, however, that adverse parties and hostile witnesses shall be limited to testifying on direct examination to the subject matters disclosed pursuant to subparagraph (k)(3) of this Rule. However, a party may call witnesses for whom written disclosures were not previously made for the purpose of authenticating exhibits if the opposing party made a timely objection to the authenticity of such exhibits~~.~~ specifying the factual issues concerning the authenticity of the exhibits.

(8) Juror Notebooks and Jury Instructions. Counsel for each party shall confer about items to be included in juror notebooks as set forth in C.R.C.P. 47(t). At the beginning of

trial or at such other date set by the court, the parties shall make a joint submission to the court of items to be included in the juror notebook. Jury instructions and verdict forms shall be prepared pursuant to C.R.C.P. 16(g).

~~**(9) Voluntary Discovery.** In addition to the disclosures required by this Rule, voluntary discovery may be conducted as agreed to by all the parties. However, the scheduling of such voluntary discovery may not serve as the basis for a continuance of the trial, and the costs of such discovery shall not be deemed to be actual costs recoverable at the conclusion of the action. Disputes relating to such agreed discovery may not be the subject of motions to the court. If a voluntary deposition is taken, such deposition shall not preclude the calling of the deponent as a witness at trial.~~

(l) Changed Circumstances. In a case ~~governed by this Rule~~under Simplified Procedure, any time prior to trial, upon a specific showing of substantially changed circumstances sufficient to render the application of Simplified Procedure ~~under this Rule~~ unfair and a showing of good cause for the timing of the motion to terminate, the court shall terminate application of ~~this Rule and enter such orders as are appropriate under the circumstances~~Simplified Procedure and enter such orders as are appropriate under the circumstances. Except in cases under subsection (e) of this Rule, if, more than 42 days after the case is at issue, any party discloses damages against another party in excess of $100,000 – including actual damages, penalties and punitive damages, but excluding allowable attorney fees, interest and costs – that defending party may move to have the case removed from Simplified Procedure and the motion shall be granted unless the claiming party stipulates to a limitation of damages against the defending party, excluding allowable attorney fees, interest and costs, of $100,000. The stipulation must be signed by the claiming party and, if the claiming party is represented, by the claiming party's attorney.

COMMENTS

2017

[1] Rule 16.1, which established Simplified Procedure, took effect in 2004 to enhance the application of Rule 1's admonition that the civil rules be interpreted to provide just, speedy, and inexpensive determination of cases and to increase access to the courts and justice system, particularly for cases seeking damages of less than $100,000. As originally established, the application of Simplified Procedure was completely voluntary and parties could opt out without stating any reason or justification. A substantial majority of cases opted out of Simplified Procedure, minimizing its ability to advance its important justification and goals. However, lawyers and judges who have used Simplified Procedure strongly approve of it. *See* Gerety, "Simplified Pretrial Procedure in the Real World Under C.R.C.P. 16.1", 40 *The Colorado Lawyer* 23, 25 (April 2011).

[2] As a result, several significant revisions have been made to Rule 16.1. First, with the exception of several unique forms of civil actions, Simplified Procedure applies presumptively to all civil lawsuits.

[3] Excluded from Simplified Procedure are cases seeking damages from any single defending party of at least $100,000 (not including reasonable allowable attorney fees, interest and costs). This exclusion can be met in the mandated Civil Cover Sheet to be filed in all applicable civil cases if the attorney or unrepresented party executes a certification in the Cover Sheet as set forth in Rule 16.1(b)(2). This certification allows a party or the party's attorney to reasonably estimate the value of the case, but always subject to the requirements of Rule 11.

[4] Cases can also be exempted after the case is in progress if one of the parties discovers that the claimant's damages may exceed $100,000 and requests transfer of the case out of Simplified Procedure.

[5] Trial courts may exclude cases from Rule 16.1 even though the claims do not seek money damages reaching the $100,000 threshold after consideration of the factors contained in Rule 16.1(d)(2). Thus, cases with small or even no monetary damages that challenge the constitutionality of laws or procedures, seek declaratory judgments or injunctions, or raise other important and complex legal issues may be excluded from Simplified Procedure.

[6] Another important change in Simplified Procedure is that the previous cap on damage awards of $100,000 in Simplified Procedure cases has been removed.

[7] Simplified Procedure now requires disclosures of persons, documents, damages and insurance under Rule 26 and disclosure of proposed testimony from witnesses and experts. It also allows up to 6 hours of depositions per party and, if needed, additional preservation depositions; up to five requests for production of documents; inspection of property and things; and relevant medical examinations.

[8] Because of the limited discovery, it is particularly important to the just resolution of cases under Simplified Procedure, that parties honor the requirements and spirit of full disclosure. Parties should expect courts to enforce disclosure requirements and impose sanctions for the failure to comply with the mandate to provide full disclosures.

☐FORM 1.2. DISTRICT COURT CIVIL (CV) CASE COVER SHEET FOR INITIAL PLEADING OF COMPLAINT, COUNTERCLAIM, CROSS-CLAIM OR THIRD PARTY COMPLAINT AND JURY DEMAND

District Court _____ County, Colorado Court Address: _____ Plaintiff(s): v. Defendant(s):	▲ COURT USE ONLY ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number:
DISTRICT COURT CIVIL (CV) CASE COVER SHEET FOR INITIAL PLEADING OF COMPLAINT, COUNTERCLAIM, CROSS-CLAIM OR THIRD PARTY COMPLAINT AND JURY DEMAND	

1. This cover sheet shall be filed with ~~each~~the initial pleading ~~containing an initial claim for relief~~ of a complaint, counterclaim, cross-claim or third party complaint in every district court civil (CV) case. ~~and shall be served on all parties along with the pleading~~ It shall not be filed in Domestic Relations (DR), Probate (PR), Water (CW), Juvenile (JA, JR, JD, JV), or Mental Health (MH) cases. Failure to file this cover sheet is not a jurisdictional defect in the pleading by may result in a clerk's show cause order requiring its filing.

2. Simplified Procedure under C.R.C.P. 16.1 **applies** to this case **unless** (check one box below if this party asserts that C.R.C.P. 16.1 **does not** apply):

   ☐ This is a class action, forcible entry and detainer, Rule 106, Rule 120, or other similar expedited proceeding, **or**

   ☐ This party is seeking a monetary judgment against another party for more than $100,000.00, including any penalties or punitive damages, but excluding attorney fees, interest and costs, as supported by the following certification:

By my signature below and in compliance with C.R.C.P. 11, based upon information reasonably available to me at this time, I certify that the value of this party's claims against one of the other parties is reasonably believed to exceed $100,000."

Or

☐ Another party has previously filed a cover sheet stating that C.R.C.P. 16.1 does not apply to this case.

~~Check one of the following:~~
~~☐This case is governed by C.R.C.P. 16.1 because:~~
~~- The case is not a class action, domestic relations case, juvenile case, mental health case, probate case, water law case, forcible entry and detainer, C.R.C.P. 106, C.R.C.P. 120, or other similar expedited proceeding; AND~~
~~- A monetary judgment over $100,000 is not sought by any party against any other single party. This amount includes attorney fees, penalties, and punitive damages; it excludes interest and costs, as well as the value of any equitable relief sought.~~

~~☐This case is not governed by C.R.C.P. 16.1 because (check ALL boxes that apply):~~

~~☐The case is a class action, domestic relations case, juvenile case, mental health case, probate case, water law case, forcible entry and detainer, C.R.C.P. 106, C.R.C.P. 120, or other similar expedited proceeding.~~

~~☐A monetary judgment over $100,000 is sought by any party against any other single party. This amount includes attorney fees, penalties, and punitive damages; it excludes interest and costs, as well as the value of any equitable relief sought.~~

~~☐Another party has previously indicated in a Case Cover Sheet that the simplified procedure under C.R.C.P. 16.1 does not apply to the case.~~

~~NOTE: In any case to which C.R.C.P. 16.1 does not apply, the parties may elect to use the simplified procedure by separately filing a Stipulation to be governed by the rule within 49 days of the at-issue date. See C.R.C.P. 16.1(c). In any case to which C.R.C.P. 16.1 applies, the parties may opt out of the rule by separately filing a Notice to Elect Exclusion (JDF 602) within 35 days of the at-issue date. See C.R.C.P. 16.1(d).~~

~~☐A Stipulation or Notice with respect to C.R.C.P. 16.1 has been separately filed with the Court, indicating:~~

~~☐C.R.C.P. 16.1 applies to this case.~~
~~☐C.R.C.P. 16.1 does not apply to this case.~~

3. ☐ This party makes a **Jury Demand** at this time and pays the requisite fee. See C.R.C.P. 38. (Checking this box is optional.)

Date: _____ **_____**

Signature of Party or Attorney for Party

NOTICE
This cover sheet must be served on all other parties along with the initial pleading of a complaint, counterclaim, cross-claim, or third party complaint.

Mike – Here are my brief suggestions for a response.
Dick
9/29/17

August 31, 2017

Via E-mail: Cheryl.Stevens@judicial.state.co.us
Cheryl Stevens,
Chief Deputy Clerk of the Supreme Court,
2 East 14th Avenue,
Denver, CO 80203

RE: PROPOSED CHANGES TO C.R.C.P. 16.1

Dear Ms. Stevens:

On behalf of the Colorado Defense Lawyers Association, I would like to share the following concerns regarding proposed amendments to Rule 16.1. The CDLA consists of over 700 Colorado lawyers who primarily defend civil lawsuits. A principal mission of the organization includes promoting the highest standards of professionalism in the conduct of civil litigation and jury trials. I currently serve as the President of the CDLA.

First and foremost, the reader should know that defendants, and their counsel, value access to the courts as much or more than plaintiffs. At the same time, while discovery is not free, most defense lawyers, including myself, will tell you that pennies spent on discovery often save dollars on settlements and judgments, and avoid unnecessary trials. With this in mind, the CDLA believes comment #8 to the proposed revision is misguided. It now reads:

> *Because of the limited discovery, it is particularly important to the just resolution of cases under Simplified Procedure, that parties honor the requirements and spirit of full disclosure. Parties should expect courts to enforce disclosure requirements and impose sanctions for the failure to comply with the mandate to provide full disclosures.*

With due respect to the drafters of this comment, it should read:

> *It is particularly important to the just resolution of cases that parties honor the requirements and spirit of full disclosure in all cases. Courts should enforce disclosure requirements and impose sanctions for the failure to comply with the mandate to provide full disclosures.* This change is just fine.

Seriously limiting a defendants' ability to obtain discovery in exchange for a firm damages cap of $100,000 is often a very difficult sell to a client. [It should not be a tough sale when the Rules of Civil Procedure mandate and limit it.] An exposure of six figures is not insubstantial to most clients, self-insureds, and even insurance carriers. Under the current rule, however, defendants at least have the assurance of receiving a firm damages cap in exchange for voluntarily giving up their right to full discovery [First, it is not "voluntarily," it is mandatory. Second, the new rule defines what "full disclosure" means in cases under $100,000, and it is less that what is authorized in cases that cannot establish good cause for exclusion from simplified procedure under Rule 16.1(d)(2)]. The proposed revised rule would remove a critical safeguard to defendants, while significantly limiting the ability of defense counsel to obtain information critical to a determination of whether a case actually presents an exposure of six figures or more. [Most of these complaints relate to personal injury cases and not to the substantially larger portion of contract based cases. Nonetheless, the damages disclosure rules should

provide most if not all that is needed. Rule 16.1(k)(1)(B)(I) provides for substantially more mandatory disclosures in personal injury cases. Courts can always expand the time for defendants to file for exclusion if full disclosure is not forthcoming and after 42 days following the at issue date defendants can still move for exclusion under the final section of the Rule, 16.1(l). This provides time for 6 hours of depositions, five document requests and a Rule 35 medical examination.]

Requiring that a party who seeks a monetary judgment, and that party's attorney, to certify, in compliance with C.R.C.P. 11, that the value of a claim exceeds $100,000, seems appropriate, given that plaintiffs (and their counsel) often have years to gather information and documents and evaluate a case before the statute of limitations expires. However, requiring a defending party and their counsel to sign a motion to certify that the value of a newly filed case is reasonably believed to exceed $100,000, based upon information "voluntarily" disclosed within approximately two months of suit being filed simply to obtain the discovery needed to determine the true value of the suit, is patently unfair [see foregoing discussion re expansive means of excluding meritorious cases]. In addition to the fact that defendants are rarely on an equal footing as plaintiffs respecting damages at the outset of a case, such a filing could be used as an admission against interest for the certifying party regarding the value of a case.

In summary, while the CDLA appreciates the desire to limit the cost of discovery to litigants, it also is concerned about the fact that defense lawyers "don't know what they don't know." Discovery affords the members of the CDLA the opportunity to find out what they don't know about a particular claim so as to competently and objectively advise their clients of the risks of trial. Limiting that opportunity, without providing any incentive in return (such as the existing damages cap), unless defense counsel and his or her client are willing to certify that an opposing party's case is worth at least $100,000, puts all defendants and the lawyers who represent them in a no-win situation. They must either accept limited discovery, while hoping that the "requirements and spirit of full disclosure" are being honored by the other side, or certify the value of an opposing party's case simply to permit counsel to utilize all of the tools available to discern the true value of the case.

For the above-stated reasons, the CDLA has serious reservations regarding the proposed changes to CRCP 16.1 making limited discovery the norm, eliminating the damage cap imposed in cases with limited discovery, and requiring that defendants and their counsel certify the value of a new case in order to obtain the full discovery permitted by the Colorado Rules of Civil Procedure.

Very

ADVANCE SHEET HEADNOTE
October 2, 2017

2017 CO 94

No. 17SA62, Catholic Health v. Swensson—Expert Testimony—Discovery Sanctions.

In this case, the supreme court considers whether an amendment to Colorado Rule of Civil Procedure 26(a)(2)(B) providing that expert testimony "shall be limited to matters disclosed in detail in the [expert] report," mandates the exclusion of expert testimony as a sanction when the underlying report fails to meet the requirements of Rule 26. The court concludes this amendment did not create mandatory exclusion of expert testimony and that instead, the harm and proportionality analysis under Colorado Rule of Civil Procedure 37(c) remains the proper framework for determining sanctions for discovery violations. Accordingly, the court makes its rule to show cause absolute and remands for further proceedings.

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

2017 CO 94

Supreme Court Case No. 17SA62
Original Proceeding Pursuant to C.A.R. 21
Broomfield County District Court Case No. 16CV30055
Honorable Edward Charles Moss, Judge

In Re:

Plaintiff:

Catholic Health Initiatives Colorado d/b/a Centura Health – St. Anthony North Hospital,

v.

Defendant:

Earl Swensson Associates, Inc.

Rule Made Absolute
en banc
October 2, 2017

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JUSTICE BOATRIGHT delivered the Opinion of the Court.

¶1 In 2015, this court amended Colorado Rule of Civil Procedure 26(a)(2)(B) to provide that expert testimony "shall be limited to matters disclosed in detail in the [expert] report." In this case, the trial court concluded that this amendment mandates the exclusion of expert testimony as a sanction when the underlying report fails to meet the requirements of Rule 26. We conclude that the amendment created no such rule of automatic exclusion. Instead, we hold that the harm and proportionality analysis under Colorado Rule of Civil Procedure 37(c) remains the proper framework for determining sanctions for discovery violations. Because the trial court here did not apply Rule 37(c), we make our rule to show cause absolute and remand for further proceedings.

I. Facts and Procedural History

¶2 In March 2016, Catholic Health filed suit against architectural firm Earl Swensson Associates ("ESA") after ESA designed Catholic Health's new hospital, Saint Anthony North Health Campus ("Saint Anthony"). Catholic Health alleged that ESA breached its contract and was professionally negligent by failing to design Saint Anthony such that it could have a separately licensed and certified Ambulatory Surgery Center ("ASC").

¶3 In December 2016, Catholic Health filed its first expert disclosures, endorsing Bruce LePage and two others. Catholic Health described LePage as an expert with extensive experience in all aspects of preconstruction services such as cost modeling, systems studies, constructability, cost studies, subcontractor solicitation, detailed planning, client relations, and communications in hospital and other large construction projects. Catholic Health endorsed LePage to testify about the cost of adding an ASC to

Saint Anthony. LePage's expert report estimated that it would cost $11 million to "repair" the hospital. ESA then filed its own expert report, which opined that LePage's estimates were insufficiently detailed and, as such, unreasonable and unverifiable.

¶4 On March 6, 2017—the deadline to file pre-trial motions and thirty-five days before the trial was to begin—ESA filed a motion to strike Catholic Health's designation of LePage as an expert, arguing that his report failed to meet the requirements of Rule 26(a)(2)(B)(I). Specifically, ESA argued that LePage's report "fail[ed] to identify the information, facts, or assumptions on which he based his opinions, or the documents or other information that he considered." At a hearing on the motion, ESA argued that the lack of detail in LePage's report prevented ESA from being able to effectively cross-examine him. ESA further argued that striking LePage as an expert was the proper remedy because Rule 26(a)(2)(B)(I) limits expert testimony to opinions that comply with the Rule, and LePage offered no opinions in compliance.

¶5 In response, Catholic Health argued that the basis for LePage's opinion was his experience, which did not need to be included in the expert report or supplemented by a specific breakdown of cost estimates. Catholic Health also argued that, if LePage's report was insufficient, Rule 37(c) governed sanctions for these types of discovery violations. Specifically, Catholic Health contended that striking LePage, its only damages expert, would essentially end the case, and that such a drastic sanction was inappropriate under Rule 37(c)(1), as Catholic Health had not blatantly disregarded the rules, engaged in subterfuge, or made an untimely disclosure.

¶6 The trial court agreed with ESA and found that LePage's report included "bare numbers with little explanation" and lacked sufficient detail as to the basis for his opinions, meaning it did not comply with the requirements of Rule 26(a)(2)(B)(I). When determining the remedy, the trial court noted that it approached the issue with "trepidation" because Rule 26 had been recently amended. The court explained that the amendment to Rule 26 added a provision saying that expert testimony shall be limited to what is disclosed in detail in the expert's report. As such, the court decided to exclude LePage's expert report from evidence and to preclude LePage from testifying. The trial court explained that it believed Rule 26(a)(2)(B)(I) to be controlling on the question and that it did not consider Rule 37(c)(1) in its analysis.

¶7 Catholic Health then requested a continuance to amend and supplement LePage's expert report. After the trial court denied that request, Catholic Health filed a petition under C.A.R. 21, and we issued a rule to show cause. We chose to exercise our original jurisdiction under C.A.R. 21 because the improper exclusion of an expert witness would significantly prejudice Catholic Health by preventing any evidence of damages.

II. Standard of Review

¶8 We review a trial court's imposition of sanctions for discovery violations for an abuse of discretion. St. Jude's Co. v. Roaring Fork Club, L.L.C., 2015 CO 51, ¶ 39, 351 P.3d 442, 454. A trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair, or based on a misapprehension of the law. See id.; Battle

North, LLC v. Sensible Housing Co., 2015 COA 83, ¶ 17, 370 P.3d 238, 245. We interpret rules of procedure de novo. Garrigan v. Bowen, 243 P.3d 231, 235 (Colo. 2010).

III. Applicable Law and Analysis

¶9 To explain the relationship between Rule 26(a)(2)(B)(I) and Rule 37(c)(1) after the 2015 amendments to each of those rules, we first examine their text and then look to applicable jurisprudence and the comments that accompany the rules. Against this backdrop, we conclude that Rule 37(c)(1) remains the controlling authority for determining sanctions for Rule 26 discovery violations, and that the trial court erred by not conducting the harm and proportionality analysis required by Rule 37(c)(1).

¶10 Rule 26(a)(2)(B)(I) defines the disclosure requirements for expert testimony. It requires that experts provide, among other things, a written report including all opinions that the expert intends to express at trial and all data or information upon which the expert based his or her opinion. Before 2015, this subsection concluded: "In addition, if a report is issued by the expert it shall be provided." C.R.C.P. 26(a)(2)(B)(I) (2014) (repealed 2015). In 2015, we amended the rule by deleting that phrase and replacing it with the following: "The witness's direct testimony shall be limited to matters disclosed in detail in the report."[1] C.R.C.P. 26(a)(2)(B)(I). In other words, the rule now requires an expert to prepare and disclose a report.

¶11 Rule 37(c)(1) works in conjunction with Rule 26 to authorize the trial court to sanction a party for failing to comply with discovery requirements, including those

[1] The other 2015 amendments to Rule 26(a)(2)(B)(I) slightly altered the Rule's exact requirements for an expert report; those changes are not relevant to the question we address today.

found in Rule 26(a). This rule was also amended in 2015. Before the 2015 amendments, Rule 37(c)(1) provided that a party who failed to disclose information required by Rule 26(a) without substantial justification may not present that undisclosed evidence "unless such failure is harmless." C.R.C.P. 37(c)(1) (2014) (repealed 2015). It also provided that "[i]n addition to or in lieu of this sanction, the court, on motion after affording an opportunity to be heard, may impose other appropriate sanctions." Id. Now, Rule 37(c)(1) provides that if a party lacks substantial justification for failing to disclose the information required by Rule 26(a), that party may not present the undisclosed evidence at trial unless the non-disclosure "has not caused and will not cause significant harm" to the opposing party, "or such preclusion is disproportionate" to any harm caused. C.R.C.P. 37(c)(1). For clarity, the rule was amended as follows:

> (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.

Id. Both before and after being amended, Rule 37(c)(1)'s framework is flexible, not absolute, and the trial court has the discretion to fashion an appropriate sanction proportionate to any harm caused. See id.

¶12 Prior to the 2015 amendments, we clarified that Rule 37(c)(1) authorizes preclusion of undisclosed evidence under Rule 26(a) unless that sanction is not appropriate. Trattler v. Citron, 182 P.3d 674, 680 (Colo. 2008). When preclusion is inappropriate, the trial court should consider alternative sanctions. Id. In other words, when a party failed to disclose evidence as required by Rule 26(a), Rule 37(c)(1) was not an automatic rule of exclusion; rather, a trial court was required to examine the harm caused by the non-disclosure and to weigh the proportionality of any sanction it imposed. See id. at 680–82.

¶13 The 2015 amendment of Rule 26(a)(2)(B)(I) did not change this fundamental relationship between Rule 26(a) and Rule 37(c). By its plain text, Rule 37(c)(1) remains the enforcement mechanism for imposing sanctions for a "fail[ure] to disclose information required by [Rule] 26(a)." C.R.C.P. 37(c)(1). While, as the trial court noted, Rule 26(a)(2)(B)(I) does say that an expert's direct testimony "shall be limited," Rule 37(c)(1) still requires the trial court to assess the harm and determine the appropriate proportional sanction. Nothing in the text of amended Rule 26(a) altered this established scheme to create a rule of automatic exclusion.

¶14 In fact, a comment to Rule 26 addresses the amendment and emphasizes that "[r]easonableness and the overarching goal of a fair resolution of disputes are the touchstones." C.R.C.P. 26 cmt. 21. An automatic rule of exclusion is inconsistent with

that stated goal. Further, a comment accompanying the 2015 amendment of Rule 37 states: "Rule 37(c) is amended to reduce the likelihood of preclusion of previously undisclosed evidence . . . ." C.R.C.P. 37 cmt. 4. Again, interpreting the language in Rule 26(a)(2)(B)(I) to automatically exclude evidence because of non-disclosure would conflict with the stated goal of the amendment to Rule 37.

¶15 Accordingly, we hold that the harm and proportionality analysis under Colorado Rule of Civil Procedure 37(c)(1) remains the proper framework for determining sanctions for discovery violations. See, e.g., Todd v. Bear Valley Vill. Apartments, 980 P.2d 973, 978 (Colo. 1999) (laying out factors for the court to consider in its Rule 37(c)(1) analysis). As such, the trial court misapprehended the law and abused its discretion in excluding LePage as an expert without conducting the Rule 37(c)(1) harm and proportionality analysis.

IV. Conclusion

¶16 We conclude that Rule 37(c)(1)'s harm and proportionality analysis remains the analytical framework for the imposition of sanctions for discovery violations and that the trial court erred in not applying that analysis. We thus make our rule to show cause absolute and remand the case for the trial court to apply Rule 37(c)(1).

MEMORANDUM

TO: Judge Michael Berger
FROM: Richard Holme
DATE: October 10, 2017
SUBJECT: Enforcement of C.R.C.P. 26(a)(2)(B)(I)

I am genuinely concerned by what I believe are the negative implications of the Supreme Court's decision in *Catholic Health Initiatives Colorado v. Eric Swensson Asso's, Inc.*, 2017 CO 94 (Oct. 2, 2017) ("*Swensson*"), and what its strict application may mean to the speedy and inexpensive determination of actions.

The problem.

In *Swensson,* plaintiff claimed that defendant failed to design plaintiff's hospital so that it could have an Ambulatory Surgery Center. Plaintiff delivered its one and only expert opinion on damages which, without any support, opined solely and conclusory that plaintiff's damages were $11 million. The opinion contained no basis and reasons for the opinion; no data or other information the expert considered; and no specific breakdown or discussion of cost estimates. A month before trial, defendant requested the trial court to bar the expert's testimony at trial since the report was totally non-compliant with Rule 26(a)(2)(B)(I) (the "expert disclosure rule" – attached hereto). The last sentence of that sub-section of the rule provides that, "The witness's direct testimony shall be limited to matters disclosed in detail in the report."

The trial court struck the witness because there was nothing relevant he could testify to in compliance with the expert disclosure rule. This ruling also had the result that plaintiff's case would be barred for lack of any admissible evidence of damages. Plaintiff argued, and the Supreme Court unanimously agreed, that the trial court abused its discretion by not holding a hearing pursuant to Rule 37(c) and without specifically weighing harm to the parties and whether preclusion would be disproportionate to whatever harm was found.

Comment [21] to Rule 26 states, in pertinent part:

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 . . . 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. (Emphasis added; brackets and quotation marks in original.)

My concerns with *Swensson* start with its implicit assumption that Rule 37(c) always controls decisions as to whether testimony should be limited (or some testimony precluded). Under normal trial practice when an objection to expert testimony is raised, the judge would look at the expert's report and rule on the spot whether the report was detailed enough to give the defendant "reasonable notice of the specific opinions and supporting facts." Under *Swensson*, in any trial where a party begins to offer expert testimony that has not been previously disclosed in detail, the trial would have to stop while the opposing party moves for sanctions under Rule 37(c). Because the new undisclosed testimony is likely to be a surprise, the opposing party will need to learn what the proposed testimony will be; determine what harm it may cause to either or both parties for the testimony to be precluded or limited in part; and attempt to learn whether the prior omission has some justification or was merely laziness or sandbagging. Then the court must have a hearing and determine, mid-trial, whether precluding the testimony in whole or in part should cause a continuance, require further discovery (most likely a deposition of the expert); perhaps declare a mistrial and dismiss the jury.

When, as in *Swensson*. a party is given a useless opposing expert report and then tries to make the litigation speedier and less expensive by raising the exact same objection shortly before the trial to save time and expense of going through

most of a trial before it raises the same objection, it is told that it must undergo the above Rule 37(c) precess.

A second and related concern is that requiring the objecting party to use the full Rule 37(c) requirements, the courts are normally required to reward the discovery abuser at the expense of the party who has complied with the rules. It would be a rare situation where the abusing party cannot dream up some form of milder sanction that would avoid "preclusion" and not cause it any "prejudice." Experience shows that frequently the use of Rule 37(c) causes the trial court to grant a continuance to the contumacious party, which unavoidably adds time and expense to the innocent party. In *Swensson*, for example, a judge might well say that taking the expert's deposition is appropriate to avoid preclusion and loss of the plaintiff's case. But then the innocent party is forced to take a deposition it may have not wanted to take as a matter of strategy or cost savings. Without a useful report the adverse party is left with stabbing in the dark at the opposing expert's thinking.

Once having taken the expert's deposition, Rule 26(e) – also subject to Rule 37(c) – provides in part:

> **27(e) Supplementation of Disclosures, Responses, and Expert Reports and Statements.** . . . 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.

Under *Swensson*'s analysis, this issue, too, might have to undergo a Rule 37(c) analysis after the deposition has been taken.

The requirements of the expert disclosure rule are not difficult to understand. The purposes of the requirements are clearly spelled out in Comment [21], as quoted above. Those requirements have already built in reasonable flexibility to avoid injustice. Anyone reading the rule can see what will happen if the party does not comply with its requirements. There seems little reason, other than gamesmanship, a desire to intentionally drive up the opposing party's cost and time, or the party's lawyer's lack of attention the basic rules and compliance with the mandate of Rule 1, for a party not to prepare a decent report.

Further, when a disobedience to such a requirement is so patently obvious it is hard for an ordinary lawyer to understand why such disobedience necessitates a return to the trial court for analysis under an additional rule with its increased delay and expense.

The Civil Rules Committee understood that the new, more limited discovery and expansive disclosure rules could, in some cases, lead to "injustice." However, that occasional certainty was not deemed disabling when weighed against the absolute certainty that the previously existing rules regularly created injustice because of the delays and increased expenses of many cases created by the former rules.

A possible compromise.

There is a minor change in Rule 37 that is available in this instance which could alleviate games, time and cost of this type of proceeding.

Rule 26(a) – the controls for which under *Swensson* are subject to Rule 37(c) – contains requirements for two very different kinds of discovery.

First, Rule 26(a)(1), relates to initial disclosures of witnesses, documents, damages and insurance. These are fundamental and necessary at the beginning of a case. Failure to disclose properly is expected to be dealt with at the initial case management conference and, if not then, at the earlier stages of the case. For these items of information there is ample time for a party to move under Rule 37 for full disclosure without delaying the prospect of a "speedy and inexpensive" trial.

Rule 26(a)(1) does not contain any enforcement mechanism. Failure to disclose witnesses, exhibits or damages may or may not be a problem in the case and may require considering a substantial volume of related discovery. Rule 37 provides the only balancing test and a method of sanctioning non-disclosure of

information which the disclosing party may not want to be offered at a trial anyway.

Second, Rule 26(a)(2) relates to the expert disclosures of testimony. This information is frequently available only after much discovery is completed and relatively close to the trial date, when filing Rule 37 motions is time pressured and often likely to result in delays of the trial or forcing a disadvantaged party to take the expert's deposition without any basis for knowing what questions to ask. As described in Comment [21], quoted above, these are disclosures that should be instrumental in assisting the parties in settling the case. They are decidedly different from the initial disclosures.

Unlike Rule 26(a)(1), Rule 26(a)(2) contains its own enforcement mechanism, only relates to information that the disclosing party does want to introduce, and only requires the trial court to consider the proposed expert's report to decide whether enforcement of the rule is appropriate. This is not a "sanction" for noncompliance, it is simply applying and enforcing the clear terms of Rule 26(a)(2).

The differences between these two types of disclosures can be dealt with by two simple revisions to Rule 37, as shown below:

> **(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)(1) 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.

. . .

(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. 26(a)**(1)** ~~**or 26(e)**~~ shall not 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. 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.

In short, by the time parties are preparing expert disclosures, the parties should be sufficiently along in their trial preparation that they can be expected to do the final discovery/disclosures correctly and courts should be allowed to enforce the Rules to allow for a speedy and inexpensive determination of cases.

Colorado Rules of Civil Procedure

26(a)(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:

(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 by a written report signed by the witness. The report shall include:

(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 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.

(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 report or statement that shall include:

(a) a complete description 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.

C.R.C.P. 16

(b) Case Management Order.

(6) Evaluation of Proportionality Factors. The proposed order shall provide a brief assessment of **the facts supporting** each party's position ~~on~~**concerning** the application of any factors to be considered **by the court** in determining proportionality, including those factors identified in C.R.C.P. 26(b)(1).

(10) Computation and Discovery Relating to Damages. A claiming party shall state the categories of damages sought as disclosed pursuant to C.R.C.P. 26(a)(1)(C) and shall state its belief as to the total amount of damages at issue in the case. 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.

(16) Trial Date and Estimated Length of Trial. The proposed order shall provide the parties' best estimate of **the date when** the **parties can probably be ready for trial** ~~**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.

C.R.C.P. 26

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

(1) In General.

(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 **to the following presumptive maximum amounts** as follows:

(A) A party may take **up to** 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. 26, 28, 29, 30, 31, 32, and 45.

(B) A party may serve on each adverse party **up to** ~~**30**~~ **15** 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. 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**~~ **up** to 20 in number, each of which shall consist of a single request.

(E) A party may serve on each adverse party **up to** 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~~ **amounts of discovery authorized by** subsection (b)(2), the court shall consider the following:

(I) 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) whether the party seeking discovery has had ample opportunity by disclosure or discovery in the action to obtain the information sought;

(III) whether the proposed discovery is outside the scope permitted by C.R.C.P. 26(b)(1); and

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

C.R.C.P. 121.

Section 1-15 DETERMINATION OF MOTIONS

1. Motions and Briefs; When Required; Time for Serving and Filing -- Length.

(a) Except motions during trial or where the court orders that certain or all non-dispositive motions be made orally, any motions involving a contested issue of law shall be supported by a recitation of legal authority incorporated into the motion, which shall not be filed with a separate brief. Unless the court orders otherwise, motions and responsive briefs not under C.R.C.P. 12(b)(1) or (2), or 56 are limited to 15 pages (but not more than 4,000 words), and reply briefs to 10 pages (but not more than 2,500 words), not including the case caption, signature block, certificate of service and attachments. Unless the court orders otherwise, motions and responsive briefs under C.R.C.P. 12(b)(1) or (2) or 56 are limited to 25 pages (but not more than 6,500 words), and reply briefs to 15 pages (but not more than 4,000 words), not including the case caption, signature block, certificate of service and attachments. All motions and briefs shall be double-spaced, except for footnotes and quotes.

(b) **Except for a motion pursuant to C.R.C.P. 56, ~~T~~the** responding party shall have ~~21~~ 14 days after the filing of the motion or such lesser or greater time as the court may allow in which to file a responsive brief. **For a motion pursuant to C.R.C.P. 56, the responding party shall have 21 days after the filing of the motion or such lesser or greater time as the court may allow in which to file a responsive brief.** If a motion is filed 42 days or less before the trial date, the responding party shall have ~~14~~ **7** days after the filing of the motion or such lesser or greater time as the court may allow in which to file a responsive brief.

(c) Except for a motion pursuant to C.R.C.P. 56, the moving party shall have 7 days after the filing of the responsive brief or such greater or lesser time as the court may allow to file a reply brief. For a motion pursuant to C.R.C.P. 56, the moving party shall have 14 days after the filing of the responsive brief or such greater or lesser time as the court may allow to file a reply brief.

(d) A motion shall not be included in a response or reply to the original motion.

MEMORANDUM

TO: Civil Rules Committee

FROM: Judge Jones

RE: Suggested changes to C.R.C.P. 6(b) and 59(a)

At the last full committee meeting the committee narrowly (and only preliminarily) approved recommending to the Colorado Supreme Court that Rules 6(b) and 59(a) be changed to mimic their federal counterparts, in so far as extensions for time to file motions under Rules 59 and 60(b) are concerned.

The committee sent the matter back to the Rule 59 subcommittee to wordsmith the necessary changes to Rules 6(b) and 59(a). Those changes would be as follows:

1. The last clause of Rule 6(b) currently says, "but it may not extend the time for taking any action under Rules 59 and 60(b), except to the extent and under the conditions therein stated." Everything after "60(b)" would be deleted, and the last clause would read "but it may not extend the time for taking any action under Rules 59(a) and 60(b)."

2. Rule 59(a) currently says, "Within 14 days of entry of judgment as provided in C.R.C.P. 58 or such greater time as the court may allow, a party may move for post-trial relief including: . . . ." The time for filing such motions would be extended to 28 days, but no extensions of time to file such motions would be allowed. So Rule 59(a) would begin, "Within 28 days of entry of judgment as provided in C.R.C.P. 58, a party may move for post-trial relief including: . . . ."

No change to Rule 60(b) is needed because that rule doesn't say anything about extensions of time.

As I understand where the matter stands, the full committee must still hold a final vote on whether to recommend any changes to Rules 6(b) and 59(a).

MEMORANDUM

FROM: Judge Jones

TO: Civil Rules Committee

RE: The current proposal to revise C.R.C.P. 6(b) and 59(a) as informed by the historical evolution of Fed. R. Civ. P. 6(b) and 59.

As I see it, there are three problems with C.R.C.P. 6(b), 59(a), and 60(b) as they interrelate. First, though Rule 6(b) says that a court "may not extend the time for taking any action under Rules 59 and 60(b), except to the extent and under the conditions therein stated," and Rule 59(a) allows for extensions, Rule 59(a) doesn't say when such a motion should be made or under what "conditions" such a motion must be granted. Second, Rule 60(b) doesn't say anything at all about extensions of time, making the reference to that rule in the above-quoted portion of Rule 6(b) confusing. And third, allowing extensions for Rule 59(a) motions, and allowing such extensions for an apparently unlimited amount of time, runs counter to the strong public interest in finality of judgments, *see Davidson v. McClellan*, 16 P.3d 233, 236-38 (Colo. 2001)

(recognizing that interest), and creates opportunities for uncertainty in determining whether a judgment is final.

To remedy these problems, I (and perhaps others on the Rule 59 subcommittee) favor adopting the federal approach to extensions for post-trial motions — such extensions aren't allowed, except to file opposing counter-affidavits. I thought looking at the history of the federal rules on the issue was helpful, so I'm passing it on for whatever its worth.

As relevant to the issues before the committee, Fed. R. Civ. P. 6(b), as adopted in 1937, said the court "may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof . . . ." Fed. R. Civ. P. 59 (unlike C.R.C.P. 59 now) deals only with motions for a new trial. Subdivision (c) of that rule concerned the time for opposing parties to file counter-affidavits, which the court could extend by twenty days.

In 1946, federal Rule 6(b) was amended to prohibit extensions to file other types of motions — those under then federal Rules 25, 50(b), 52(b), 60(b), and 73(a) and (g) — "except to the extent and under the conditions stated in them." The purpose of the amendment was "to clarify the finality of judgments," and the

revisions answered the question "how far should the desire to allow correction of judgments be allowed to postpone their finality?" Advisory Committee Note of 1946 to Subdivision (b) of Fed. R. Civ. P. 6. The rules/motions added to the list of those for which an extension was prohibited permitted "the vacation or modification of judgment on various grounds." *Id.* Rule 50(b), for example, concerned motions for judgment notwithstanding the verdict, and Rule 52(b) concerned motions to amend findings or vacate verdicts. The committee said that the additions were "based on the view that there should be a definite point where it can be said a judgment is final; that the right method of dealing with the problem is to list in Rule 6(b) the various other rules whose time limits may not be set aside, and then, if the time limit in any of those other rules is too short, to amend that other rule to give a longer time." *Id.*

Thereafter, courts held that if a particular rule listed in the last clause of Rule 6(b) didn't contain a provision for extension of time, the court couldn't extend the time for filing motions under those rules. *See* 4B Charles Alan Wright, Arthur R. Miller & Adam J. Steinman, *Federal Practice and Procedure* § 1167 (2015). That is, the generally-applicable provisions for extensions in Rule 6(b) didn't

apply, and the clause "except to the extent and under the conditions stated in them" clearly limited the court's authority to grant extensions to situations where the listed rules (*e.g.*, 50(b), 52(b), 59, 60(b)), expressly allowed for extensions.

Over the years, the last clause of Rule 6(b) was amended to exclude references to Rules 25 (concerning substitution of parties) and 73 (which concerned the time for filing an appeal and which had been repealed), and to conform to the reformatting of rules governing post-trial motions.

By 2007, the last clause had become its own subdivision, 6(b)(2), and read, "A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b), except as those rules allow." (The advisory committee said that the 2007 changes, which included the change from "except to the extent and under the conditions stated in them" to "except as those rules allow," were "intended to be stylistic only." Advisory Committee Note of 2007 to Fed. R. Civ. P. 6.)

In 2009, the last clause of the rule was amended to delete the phrase "except as those rules allow." So Rule 6(b)(2) now reads in full, "A court must not extend the time to act under Rules 50(b) and

(d), 52(b), 59(b), (d), and (e), and 60(b)." Though the committee didn't say why "except as those rules allow" was deleted, I surmise it was because none of the listed rules allowed for any extensions, which is the case with our C.R.C.P. 60(b).[1]

As discussed in a previous memo, in 2009, Fed. R. Civ. P. 59 was amended to increase the time for filing motions for a new trial from 10 to 28 days. At the same time, Rules 50 and 52 were also amended to allow 28 days to file post-trial motions under those rules. But why were those rules amended to extend the time rather than to subject them to the generally-applicable extension provisions of Rule 6(b)? Here's what the Committee said: "These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introducing the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 28 days. Rule 6(b)

[1] Fed. R. Civ. P. 50(b) and (d) concern motions for judgment as a matter of law or for a new trial. Rule 52(b) concerns motions to amend findings. Rules 59(b), (d), and (e) concern motions for a new trial and motions to alter or amend the judgment. C.R.C.P. 59 covers all (or, perhaps, almost all) post-trial motions relating to the validity, form, or substance of a judgment.

continues to prohibit expansion of the 28-day period." Advisory Committee Note to 2009 Amendments to Fed. R. Civ. P. 59.

The upshot of all this is that the federal rules have long placed a priority on finality of judgments and greater certainty as to when judgments are final. So post-trial motions that may affect both the existence of finality and the time of finality are subject to strict time limits that can't be extended. Notably, for eighty years, or in some cases seventy years, post-trial motions have been subject to the prohibition of federal Rule 6(b). In all that time, the relevant rules have never been amended to allow courts to grant extensions of time. The approach has instead been to lengthen the time to file post-trial motions while retaining the prohibition against extensions.

I don't think Colorado courts are less concerned with finality and certainty than are the federal courts. And if they are, I don't think they should be. The federal approach, in my view, gives appropriate weight to those concerns while providing parties with a fair opportunity to file post-trial motions.

The Civil Rules Committee proposes the insertion of some additional language in Comment [18] of C.R.C.P. 26 relating to requirements for expert disclosures for non-retained experts. The Committee has received copies of motions and orders limiting opinion testimony by treating physicians unless they have prepared full expert reports as required from retained experts. Although those motions and orders presently predate the 2015 revisions to Rule 26, they are being pressed upon some trial courts now as being good law. The argument seems to be that if an opinion goes beyond what is in the medical records (or whatever records the non-retained expert keeps), it converts the expert to a retained expert. There also seems to be an argument that if the doctor/expert forms an opinion they did not have to form as part of their job, then offering that opinion converts them to a retained expert. In other words, if a doctor has an opinion on causation formed during treatment, but did not have to form that opinion in order to actually provide treatment, then offering the opinion makes the doctor a retained expert. This same line of argument could apply to police officers, in-house accountants, auto repair mechanics or any other type of non-retained experts.

This limitation and requirement is contrary to what the Committee thinks is the clear meaning of existing Rule 26(a)(2)(B)(II) and Comments [18] and [21]. Such limitations and requirements certainly violate the intent of the Committee when it was preparing the 2015 amendments to Rule 26(a)(2)(B)(II). The Committee believes that it could be several years before an appellate case would raise this issue for a judicial determination. Because the Committee believes these rulings are so clearly contrary to the intent of the Rule, it requests the Court to amend Comment [18] to limit the mischief that could occur in the interim.

The Committee believes a modest change to Comment [18] should clarify any possible confusion. The proposed change is taken virtually verbatim from the Colorado Lawyer article

describing the 2015 Civil Rules changes written by Richard Holme, *New Pretrial Rules for Civil Cases – Part II: What is Changed*, 44 *The Colorado Lawyer*, 111, 118 (July 2015).

Proposed revisions to Comment [18] to Rule 26.

[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. For example, in addition to the opinions and diagnoses reflected in a plaintiff's medical records, a treating physician may have reached an opinion as to the cause of those injuries gained while treating the patient. Those opinions may not have been noted in the medical records but, if sufficiently disclosed in a written report or statement as described in Comment [21], below, such opinions may be offered at trial without the witness having first prepared a full, retained expert report. In ~~either~~ any event, the expert testimony is to be limited to what is disclosed in detail in the disclosure. Rule 26(a)(2)(B)(II).

Dick: I understand that your proposed change to the comment on Rule 26(a)(2)(B)(II) will be on the agenda for the Civil Rules committee on 10/27/17. I will be out of town that day and may be able to participate by phone, but I thought I would set forth my view on this issue in writing.

I think we started down this path because Damon Davis reported a couple of anecdotes about judges not allowing treating physician experts under CRCP 26(a)(2)(B)(II) to testify about an opinion that was not set forth in medical records. That language is not expressly in the rule, but it does provide that a disclosure about the treating expert must include "a complete description of all opinions to be expressed and the basis and reasons therefor." So, if a party merely disclosed that the treater would testify consistently with the treatment records, and if the treatment records said nothing about causation, then I think the court acted properly in not allowing the opinion.

On the other hand, if the disclosure included the treater's causation opinion and the basis and reasons therefor, and if the opinion was truly formed based on treatment as opposed to specially hiring a causation expert, then the opinion can be given at trial, even though it was not stated in the medical records. That led to the suggestion that the comment be amended to address this alleged problem. You drafted some language (see attached) that speaks to this point very well, including stating that the treater had to reach the opinion during treatment and the opinion had to be properly disclosed under Rule 26(a)(2)(B)(II).

Nevertheless, I am concerned that the proposed amendment, while technically correct, may have an unintended consequence of giving lawyers a pathway to avoid the full disclosure obligation for the specially-retained expert. That is, once the lawsuit is contemplated or underway, the party or his or her attorney may ask that the treater,especially the family physician, see the party again and issue a further opinion on a subject such as causation. I had that happen in a case last year when 4 "treating" expert physicians were disclosed on the expert deadline with new causation opinions. We let it go and deposed the experts, but it led to problems because they had not made the full disclosures of a retained expert under Rule 26(a)(2)(B)(I), so we struggled in the depositions without information such as the medical literature they relied on.

I have since researched this issue and found that a number of federal courts have held that the treating physician is only exempt from the full disclosure required in FedRCivP 26(a)(2)(B) to the extent that his or her opinions were formed during treatment. Goodman v. Staples, 644 F.3d 817, 826 (9th Cir. 2011). That court added that when the treating expert "morphs" (the court's word) into a retained expert, the full report is required as to the additional opinions. Another court stated that the full report is not required for opinions formed "through actual treatment." Fielden v. CSX Transportation, Inc., 482 F. 3d 866, 871 ((6th Cir. 2007).

I must note that the federal rule has different language than our state rule, but FedRCivP 26(a)(2)(B) and (C) divide the experts and the disclosure obligations in a very similar manner, so I think that the federal cases are instructive. I also found that many of the federal cases are very fact specific as to when and how the treater learned more information or received a request that led to another opinion.

As a result, I would rather not have the proposed language added to the comment, put the anecdotes from Damon and me aside for now so we can see how much of a problem this becomes, and let the issue develop through the state courts which may want to follow the federal cases and stop parties from avoiding the full disclosure obligation in certain circumstances. Alternatively, I suggest adding to your proposed language a timing requirement. For example, adding to the end of your first sentence, "as long as the physician developed the opinion prior to a request from a party or its counsel made for purposes of litigation."

Please let me know if you have any questions about this.

Dave

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Discrepancy between C.R.C.P. 26(b)(2)(A) and JDF 622 regarding the Expert Deposition Limit

An associate in my firm recently pointed out that there is a discrepancy between Rule 26(b)(2)(A) and JDF 622 – the form case management order – regarding the expert deposition limit.

Rule 26(b)(2)(A) provides: "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)." In turn, Rule 26(a)(2) addresses both retained and non-retained experts. Thus, under the rule, the exclusion of experts from the expert deposition limit applies to both retained and non-retained experts. Hypothetically, if a party identified three retained experts and five non-retained experts, the opposing party could depose all of them.

JDF 622 ¶11 provides in part: "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))...." Assuming no changes are made to the parenthetical language, this would be the limitation in the case management order. However, Rule 26(b)(4)(A) only applies to retained experts. It refers to the depositions of "an expert disclosed pursuant to subsection 26(a)(2)(B)(I)...." Rule 26(a)(2)(B)(I) is the disclosure rule for retained experts. The form uses a rule to define the experts excluded from the limitations, and since that rule only applies to retained experts, only retained experts are excluded.

Thus, under the form CMO, only retained experts are excluded from the limitation on the number of depositions. Using the above hypothetical, the opposing party could depose all three retained experts, but only two of the five non-retained experts – and then could depose no other witnesses.

It seems to me that the form CMO should match the presumptive limits in the rules. While the trial court can certainly change the presumptive limits, this should be a conscious choice, not the result of a discrepancy. I would propose changing the forms language to read:

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

This change would make the form match the rule.