MEMORANDUM

To: J. Davidson

From: Rich Nielson

Date: November 4, 2016

Re: C.R.C.P. 16.1(c) "Limitations on Damages"

I. Background

I have reviewed your legal question concerning the damages limitations provisions in C.R.C.P. 16.1(c). Specifically, I attempted to ascertain whether the provisions limiting the right to a monetary judgment "to a maximum of $100,000," and requiring the district court to reduce any damages verdict exceeding that amount, are "procedural" and therefore properly the subject of a court rule or, instead, "substantive" and thus requiring legislative involvement.

My impression is that these damages cap provisions would likely be deemed substantive rather than procedural. However, it is difficult to be certain whether the supreme court would have a similar impression, mostly because of the historical difficulty and uncertainty surrounding judicial labeling of provisions as "procedural" or "substantive."

II. Law and Analysis

Colo. Const. art. VI, § 21 provides that the Colorado Supreme Court "shall make and promulgate rules governing the administration of all courts and shall make and promulgate rules governing practice and procedure in civil . . . cases." Under this section, the court may promulgate procedural rules, but "a determination must still be made whether a particular rule . . . is substantive or procedural." *J. T. v. O'Rourke In & For Tenth Judicial Dist.*, 651 P.2d 407, 411 n.2 (Colo. 1982). That is because "[t]he judiciary has exclusive jurisdiction over 'procedural' matters while the General Assembly has complete control over matters of 'substance.'" *People v. Deitchman*, 695 P.2d 1146, 1156 (Colo. 1985) (quoting *Page v. Clark*, 197 Colo. 306, 318, 592 P.2d 792, 800 (1979)).

The line that separates a substantive rule from a procedural one is amorphous and no legal test has been uniformly adopted. *J. T.*, 651 P.2d at 411. The supreme court has stated that it is often unclear "whether a particular rule or statute is 'procedural' and thus within the jurisdiction of this court, or 'substantive,' and thus within the province of the legislature." *Page*, 197 Colo. at 318, 592 P.2d at 800. The court further noted that "[n]o definitive line can be drawn between those rules . . . which are procedural and those which are substantive" and that "[a] particular rule may be

procedural in one context, substantive in another." *Id.*; *see also* Courtland H. Peterson, *Rule Making in Colorado: An Unheralded Crisis in Procedural Reform*, 38 U.Colo.L.Rev. 137, 164 (1965).

The supreme court has, however, twice referenced the following test to determine whether a court rule falls within its rulemaking authority:

> If the purpose of (a rule's) . . . promulgation is to permit a court to function and function efficiently, the rule-making power is inherent unless its impact is such as to conflict with other validly enacted legislative or constitutional policy involving matters other than the orderly dispatch of business.

Page, 197 Colo. at 319, 592 P.2d at 800 (quoting *People v. McKenna*, 196 Colo. 367, 371, 585 P.2d 275, 277 (1978)).[1]

Numerous other tests exist for determining whether a rule is procedural or substantive. *See Page*, 197 Colo. at 318-19, 592 P.2d at 800 ("The proper focus of inquiry has been stated in many ways."); *McKenna*, 196 Colo. at 370, 585 P.2d at 277) ("Although numerous tests have been proposed to assist in making such a determination, none has been uniformly accepted."). But all of these tests suffer from similar

[1] This test actually comes from a law review article which clarifies that the last part of the sentence should read "involving matters other than the orderly dispatch of *judicial* business." Charles W. Joiner & Oscar J. Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 Mich. L.Rev. 623, 630 (1957).

shortcomings in their application. They have been described as "provid[ing] little help in distinguishing substance and procedure . . . because they are susceptible to subjective interpretations and other weaknesses." Kent R. Hart, *Court Rulemaking in Utah Following the 1985 Revision of the Utah Constitution*, 1992 Utah L. Rev. 153 (1992). [2]

A. Arguments That C.R.C.P. 16.1(c)'s Damages Cap Provisions Are Substantive

In my view, the stronger position is that C.R.C.P. 16.1(c)'s $100,000 damages cap provisions are substantive and thus outside the court's rulemaking authority.

First, these provisions go to the seemingly substantive issue of precisely how much one party can be obligated to pay the other. They also appear to conflict with existing substantive Colorado law defining the scope of damages in various civil cases and providing that the amount of damages awardable is within the sole province of the jury, and cannot be disturbed unless completely unsupported by the record or

[2] Another potential layer of uncertainty exists. Although our supreme court has not done so, courts in other jurisdictions have upheld court-created rules even while expressly acknowledging that these rules impact litigants' substantive rights. *See, e.g.*, *State v. Leonardis*, 375 A.2d 607, 614 (N.J. 1977) ("[A]n absolute prohibition against rules which merely affect substantive rights or liabilities, however slight such effect may be, would seriously cripple the authority and concomitant responsibility . . . given to the Court . . . ."); *Laudenberger v. Port Auth. of Allegheny Cty.*, 436 A.2d 147, 155 (Pa. 1981) (upholding court rule creating right to prejudgment interest in certain cases even though rule impacted defendant's substantive rights by increasing amount owed to plaintiff and noting that although rule embodied both procedural and substantive elements, court "should not be prevented from exercising its duty to

so excessive as to indicate the jury acted out of passion, prejudice, or corruption. *See Averyt v. Wal-Mart Stores, Inc.*, 265 P.3d 456, 462 (Colo. 2011); *see also Leo Payne Pontiac, Inc. v. Ratliff*, 178 Colo. 361, 364, 497 P.2d 997, 999 (1972) ("It is . . . a basic rule that a trial judge may not change the substance of a jury's verdict upon his [or her] own motion."). Furthermore, damages, and issues surrounding them, are typically viewed as substantive rather than procedural. *See Target Corp. v. Prestige Maint. USA, Ltd.*, 2013 COA 12, ¶ 18 (holding that amount of evidence needed to support future damages award was substantive issue because damages measure liability, and citing numerous cases holding that issues relating to damages are substantive).

Second, in other contexts where courts must determine whether provisions are substantive or procedural, damages caps have been deemed substantive. For example in applying the *Erie* doctrine, the United States Supreme Court has strongly suggested that a statutory damages cap is substantive. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 428 (1996); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 457 (2010) (Ginsburg, J., dissenting) ("It is beyond debate that a statutory cap on damages would supply substantive law for Erie purposes."); 3 James Wm. Moore et al., *Moore's Federal*

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resolve procedural questions merely because of a collateral effect on a substantive right").

Practice § 124.07[3][a], at 124-50 (3d ed. 2015) (stating that for *Erie* doctrine purposes, "damages are a matter of substantive law").

Similarly, in resolving conflict of laws issues, courts have concluded that damages caps are substantive. *See*, *e.g.*, *Carter v. United States*, 333 F.3d 791, 794 (7th Cir. 2003) (treating damages caps as substantive is "sensible" because they reflect "a judgment about the severity of the sanction appropriate to regulate the activity of potential injurers"); *Black v. Leatherwood Motor Coach Corp.*, 606 A.2d 295, 300-01 (Md. Ct. Spec. App. 1992) (statutory cap on noneconomic damages held to be part of substantive state law). More generally, the measure of damages in a case has been deemed a substantive rather than a procedural matter. *See Firestone Tire & Rubber Co. v. Pearson*, 769 F.2d 1471, 1479 (10th Cir. 1985) (proper measure and elements of contract damages are matters pertaining to substance of the right, not the remedy); *Pirkey v. Hosp. Corp. of Am.*, 483 F. Supp. 770, 774 (D. Colo. 1980).

Another area in which the procedural/substantive distinction applies is the decision whether a new statutory provision applies retroactively. In this context too, provisions that limit damages have been deemed substantive. *See*, *e.g.*, *Lavieri v. Ulysses*, 180 A.2d 632, 636 (Conn. 1962) ("[B]y limiting the amount of the damages recoverable to $25,000,

[the amendment] went far beyond any mere question of procedure. It sharply curtailed a substantive right.").

Third, in *Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C.*, 95 P.3d 571, 582 (Colo. 2004), the supreme court concluded that the statutory damages caps in Colorado's Health Care Availability Act do not infringe impermissibly on the judicial role in the separation of powers. Notably, the court described the caps as involving a "substantive" exercise of the legislature's power to define and limit a cause of action. The court specifically referenced the Supreme Court's *Gasperini* decision suggesting that statutory damages caps are substantive law for *Erie* purposes. *Id.*

In sum, a strong argument exists that although the purpose of promulgating C.R.C.P. 16.1 is to permit the courts to function more efficiently, its damages cap provisions conflict with "other validly enacted legislative or constitutional policy involving matters other than the orderly dispatch of business" — namely the existing substantive damages laws applicable in a broad range of civil actions.

B. Arguments That C.R.C.P. 16.1(c)'s Damages Cap Provisions Are Procedural.

One could argue that a court's authority to reduce jury awards through remittitur is essentially procedural and that the damages cap provisions in C.R.C.P. 16.1(c) are akin to that authority. This argument appears vulnerable, however, given

the clear differences between a damages cap and judicial remittitur. The supreme court has expressly distinguished the two concepts, noting that damages caps apply equally to all covered cases, whereas remittitur operates based on a case-by-case analysis. *See Garhart ex rel. Tinsman*, 95 P.3d at 582; *see also Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1056 (Alaska 2002) (noting that damages caps alter common law remedies and that this alteration is not remittitur because it is a general alteration applied to all cases, and is not case and fact specific like remittitur).

There is some limited authority suggesting that, in the area of choice or conflicts of laws, the type, category, or "head" of damages recoverable is a substantive issue, whereas the measure or quantification of those damages is a question of procedure. *See Matter of Bethlehem Steel Corp.*, 435 F. Supp. 944, 947 (N.D. Ohio 1976); *see also* Restatement (Second) of Conflict of Laws § 171 cmt. f (1971) ("The forum will follow its own local practices in determining whether the damages awarded by a jury are excessive."). At least one case has treated the measure of damages as a procedural or remedial question for choice of law or conflicts purposes. *See Kilberg v. Ne. Airlines, Inc.*, 172 N.E.2d 526, 529 (N.Y. 1961). But treating the measure of available damages as procedural has been criticized as "monstrous" because the "[q]uantification of damages is the bottom line. Everything else is mere prologue." Russell J. Weintraub, *"At Least, to Do No Harm": Does the*

Second Restatement of Conflicts Meet the Hippocratic Standard?, 56 Md. L. Rev. 1284, 1303 (1997).

III. Conclusion

Predicting whether a court will treat a provision as procedural or substantive is difficult because (1) the tests courts apply are malleable and (2) procedure and substance often overlap. However, I think a strong possibility exists that C.R.C.P. 16.1(c)'s damages cap provisions could be deemed substantive (i.e., creating or impacting substantive law concerning damages in civil cases) and, therefore, beyond the supreme court's rulemaking authority.

PROPOSAL FOR AMENDMENT TO RULE 16.1 (SIMPLIFIED PROCEDURE)

(11/14/16~~10/18/16~~)

Rule 16.1 was adopted a number of years ago in hopes that lawyers and parties would use it as a way to increase access to the courts and diminish the cost of litigation for cases under $100,000. Well over 50% of the civil cases filed in Colorado seek relief in amounts less than $100,000. Utilization of Rule 16.1 is voluntary and has become primarily used for collection cases, with most other eligible cases opting out. Those lawyers who have used it and judges who have seen it operating strongly approve of it. *See* Gerety, *Simplified Pretrial Procedure in the Real World Under C.R.C.P. 16.1,* 40 The Colo. Lwr. 23, 25 (April 2011),

The Colorado Supreme Court has approved a number of changes designed to improve access to justice for all civil cases, and has requested the Civil Rules Committee to consider possible changes to Rule 16.1. Based on surveys and analyses of court dockets there appear to be several articulated reasons why lawyers and parties opt out of 16.1. The primary ones are (1) the fact that the $100,000 limit includes attorney fees; (2) voluntarily agreeing to limited discovery might expose a lawyer to malpractice claims; and (3) the Rule banned *any* depositions. (Rarely admitted are that some clients believe that using excessive discovery will force better settlements and lawyers' general distaste for anything new and different.) *See, e.g.,* Stuart Jorgenson, "A Rule That is Ready for Retirement," 42 *The Colorado Lawyer* 53 (Feb. 2013).

The attached proposal tries to deal with these major criticisms. It would exempt from the $100,000 limit claims for attorney fees. It would allow up to 6 hours of depositions per party, along with 5 requests for production of documents. And finally, it will apply to all applicable civil cases unless, upon a party's motion showing good cause, the court allows the case to proceed under the normal litigation rules.

One of the additional benefits for leaving cases under Rule 16.1 is that those cases would not have to comply with the proposed requirements for filing a Proposed Case Management Order and attendance at the in-person Case Management Conference, which otherwise may increase the burden on the smallest of cases and should normally be unnecessary for those cases.

Attached is a version of the proposals for changing Rule 16.1.

PROPOSED REVISIONS TO RULE 16.1. SIMPLIFIED PROCEDURE FOR CIVIL ACTIONS (11/14/16~~10/18/16~~)

(a) 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 earlier trials; and to limit discovery and its attendant expense.

(b) Actions Subject to Simplified Procedure and Civil Cover Sheet. 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 party seeks 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 and believe that ~~at least one of~~ my claims in this case against one of the other parties ~~in this case~~ have a fair expectation of being in excess of $100,000."

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

~~**(c) Limitations on Damages.** In cases subject to Simplified Procedure, a claimant's right to a monetary judgment against any one party shall be limited to a maximum of $100,000, including penalties or punitive damages, but excluding allowable reasonable attorney fees, 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) Motion for Exclusion from 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 motion, signed by both the party and its counsel, if any, establishing good cause to exclude the case from the application of Simplified Procedure.

(i) 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. 11, based upon information reasonably available to me at this time, I certify and believe that claims in this case against one of the parties have a fair expectation of being in excess of $100,000," or

(ii) Alternatively, ~~In~~in determining whether good cause has been established, the court should ~~may consider~~ determine whether the asserted grounds are relevant to the claim or defense of any party and are proportionality to ~~, including~~ the needs of the case, considering the importance of the issues at stake in the action, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit~~, without giving weight to the amount in controversy.~~.

(e) Election for Inclusion Under this Rule. In actions excluded by subsection (b)(2) of Simplified Procedure, within 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 , the case management order requirements of C.R.C.P. 16(b)(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 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 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 should be given early trial settings, hearings on motions and trials.

(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 shall not be subject to C.R.C.P. 16, 26-27, 31, 33 and 36, unless otherwise specifically provided in this Rule, and shall be subject to the following requirements:

(l) 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 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 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 efforts to find employment since the claimant's departure from the defending party, and written waivers allowing the opposing party to obtain the 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 personnel file and applicable personnel policies and employee handbooks;

(C) Document Disclosure. Documents and other evidentiary materials disclosed pursuant to C.R.C.P. 26(a)(1) and 16.1(k)(1)(B) 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(b)(4)(B)-(D), 26(b)(5), 26(c), 26(e) and 26(g) shall apply to disclosure for expert witnesses. Written disclosures of experts shall be served by parties asserting claims 91 days (13 weeks) before trial; by parties defending against claims 63 days (7 weeks) before trial; and parties asserting claims shall serve written disclosures for any rebuttal experts 49 days before trial. The parties shall be limited to one expert witness retained pursuant to C.R.C.P. 26(a)(2)(B)(I), per side, unless the trial court authorizes more for good cause shown.

(3) Mandatory Disclosure of 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 or hostile witnesses a party intends to call at trial, written

disclosure of the expected subject matters of the 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 63 days (9 weeks) before trial; and parties asserting claims shall serve written disclosures for any rebuttal witnesses 49 days before trial.

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

(i) Each party may take a combined total of not more than six hours of depositions.

(ii) 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), take the deposition of that witness for the purpose of preserving the witness' testimony for use at trial. Such a deposition shall be taken at least 7 days before trial. In that event, any party may offer admissible portions of the witness' deposition, including any cross-examination during the deposition, without a showing of the 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.

(iii) Not more than five requests for production of documents may be served by each party.

(iv) 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 for Obtaining Documents from a Non-Party. In addition to depositions allowed under subsection (k)(4)(i) and (ii) of this Rule, 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 section (k)(1) of this Rule and the discovery permitted by section (k)(4) of 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 under Simplified Procedure, any time prior to trial, upon a specific showing of substantially changed circumstances sufficient to render the application of Simplified Procedure unfair and a showing of good cause for the timing of the motion to terminate, the court shall terminate application of Simplified Procedure and enter such orders as are appropriate under the circumstances. Except in cases under subsection (e) of this Rule, if any party discloses damages in excess of $100,000 – including actual damages, penalties and punitive damages, but excluding allowable attorney fees, interest and costs – the opposing 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, excluding allowable attorney fees, interest and costs, of $100,000. The stipulation must be signed by the party and, if the party is represented, by the party's attorney.

PROPOSED REVISIONS TO RULE 16.1. SIMPLIFIED PROCEDURE FOR CIVIL ACTIONS (11/14/16)

(CLEAN VERSION)

(a) 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 earlier trials; and to limit discovery and its attendant expense.

(b) Actions Subject to Simplified Procedure and Civil Cover Sheet. 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 party seeks 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 and believe that my claims in this case against one of the other parties have a fair expectation of being in excess of $100,000."

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

(d) Motion for Exclusion from Simplified Procedure. Simplified Procedure shall apply unless, no later than 42 days after the case is at issue as defined in C.R.C.P. 16(b)(1), any party files a motion, signed by both the party and its counsel, if any, establishing good cause to exclude the case from the application of Simplified Procedure.

(i) Good cause shall be established and a motion shall be granted if a defending party files a statement on by the its 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 and believe that claims in this case against one of the parties have a fair expectation of being in excess of $100,000," or

(ii) Alternatively, in determining whether good cause has been established, the court should determine whether the asserted grounds are relevant to the claim or defense of any party and are proportional to the needs of the case, considering the importance of the issues at stake in the action, the parties' relative access to relevant information, the parties' resources, the importance

of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

(e) Election for Inclusion Under this Rule. In actions excluded by subsection (b)(2) of Simplified Procedure, within 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.

(f) Case Management Orders. In actions subject to Simplified Procedure , the case management order requirements of C.R.C.P. 16(b)(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 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 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 should be given early trial settings, hearings on motions and trials.

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

(l) 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 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 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 efforts to find employment since the claimant's departure from the defending party, and written waivers allowing the opposing party to obtain the 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 personnel file and applicable personnel policies and employee handbooks;

(C) Document Disclosure. Documents and other evidentiary materials disclosed pursuant to C.R.C.P. 26(a)(1) and 16.1(k)(1)(B) 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(b)(4)(B)-(D), 26(b)(5), 26(c), 26(e) and 26(g) shall apply to disclosure for expert witnesses. Written disclosures of experts shall be served by parties asserting claims 91 days (13 weeks) before trial; by parties defending against claims 63 days (7 weeks) before trial; and parties asserting claims shall serve written disclosures for any rebuttal experts 49 days before trial. The parties shall be limited to one expert witness retained pursuant to C.R.C.P. 26(a)(2)(B)(I), per side, unless the trial court authorizes more for good cause shown.

(3) Mandatory Disclosure of 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 or hostile witnesses a party intends to call at trial, written disclosure of the expected subject matters of the 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 63 days (9 weeks) before trial; and parties asserting claims shall serve written disclosures for any rebuttal witnesses 49 days before trial.

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

(i) Each party may take a combined total of not more than six hours of depositions.

(ii) 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), take the deposition of that witness for the purpose of preserving the witness' testimony for use at trial. Such a deposition shall be taken at least 7 days before trial. In that event, any party may offer admissible portions of the witness' deposition, including any cross-examination during the deposition, without a showing of the 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.

(iii) Not more than five requests for production of documents may be served by each party.

(iv) 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 for Obtaining Documents from a Non-Party. In addition to depositions allowed under subsection (k)(4)(i) and (ii) of this Rule, 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).

(l) Changed Circumstances. In a case under Simplified Procedure, any time prior to trial, upon a specific showing of substantially changed circumstances sufficient to render the application of Simplified Procedure unfair and a showing of good cause for the timing of the motion to terminate, the court shall terminate application of Simplified Procedure and enter such orders as are appropriate under the circumstances. Except in cases under subsection (e) of this Rule, if any party discloses damages in excess of $100,000 – including actual damages, penalties and punitive damages, but excluding allowable attorney fees, interest and costs – the opposing 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, excluding allowable attorney fees, interest and costs, of $100,000. The stipulation must be signed by the party and, if the party is represented, by the party's attorney.

☐**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: Division Courtroom
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 the initial pleading of a complaint, counterclaim, cross-claim or third party complaint in every district court civil (CV) case. 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 and believe that my claims in this case against one of the other parties have a fair expectation of being in excess of $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.

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.