AGENDA

COLORADO SUPREME COURT
COMMITTEE ON
RULES OF CIVIL PROCEDURE

Friday, April 24, 2015, 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 February 27, 2015 Meeting Minutes [Page 3 to 5]

III. Announcements from the Chair

A. Committee Comments amendments to the IAJ rules –Transmittal Letter and Proposal to Court [Page 6 to 22]

B. Revised Comments (not "Committee" Comments) transmitted to Court following Court's rejection of Item III A, above. [Page 23 to 38]

C. Public comments submitted to Court regarding proposed Rule changes [Page 39 to 153] —Discussion

IV. Current Business

A. Colorado Rules of Probate Procedure (Fred Skillern and Teresa Tate) [Page 154 to 175]

B. Rule 120 Subcommittee (Fred Skillern)

C. Rule 121 §1-15 Subcommittee (Authority of court to require oral motions; page limits) (David DeMuro) [Page 176 to 185]

D. Rule 84 Forms (Dick Holme)

E. Rule 53 – Masters —passed to June meeting

F. New Disclosure Form [Page 186 to 187]—subcommittee

G. Rule 122(c)(7) Case Specific Appointment of Appointed Judges Pursuant to C.R.S. § 13-3-111— [Page 188 to 189]

V. Adjourn

Michael H. Berger, Chair
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Conference Call Information:

Dial (720) 625-5050 and enter the access code, 11086806, followed by # key.

NEXT MEETING IS FRIDAY, JUNE 26, 2015 AT 1:30PM

Colorado Supreme Court Advisory Committee on the Rules of Civil Procedure
Minutes of February 27, 2015 Meeting

A quorum being present, the Colorado Supreme Court Advisory Committee on Rules of Civil Procedure was called to order by Judge Michael Berger at 1:30 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	
David R. DeMuro	X	
Judge Ann Frick		X
Peter Goldstein	X	
Lisa Hamilton-Fieldman		X
Richard P. Holme	X	
Judge Jerry N. Jones	X	
Charles Kall		X
Thomas K. Kane		X
Debra Knapp	X	
Cheryl Layne		X
Richard Laugesen	X	
Judge Cathy Lemon	X	
David C. Little	X	
Chief Judge Alan Loeb		X
Professor Christopher B. Mueller		X
Judge Ann Rotolo		X
Frederick B. Skillern		X
Lee N. Sternal	X	
Ben Vinci		X
Magistrate Marianne Tims	X	
Judge John R. Webb	X	
J. Gregory Whitehair		X
Christopher Zenisek	X	
Non-voting Participants		
Justice Allison Eid, Liaison	X	
Teresa Tate	X	

I. Attachments & Handouts

February 27, 2015 Agenda Packet

II. Announcements from the Chair

The January 30, 2015 Meeting Minutes were passed with no corrections.

The letter written by Judge Berger to the supreme court recommending a July 1, 2015 effective date for the Improving Access to Justice (IAJ) proposal was in the Agenda Packet at pages 7-9, and posted on the court's website. As a reminder, public comment to the proposed rule changes are due April 17, and a public hearing will be held on April 30 at 1:30 in the Supreme Court Courtroom.

III. Business

A. IAJ Proposal - Committee Comments

Judge Webb discussed the proposed committee comment amendments. The recommendation is, to delete the existing comments, add in a few new comments where necessary, and append the IAJ Report after Rule 1. The committee discussed whether or not the entire IAJ Report needed to be appended after Rule 1. Richard Holme made a motion to print relevant rule information from the IAJ Report after the appropriate rule, instead of appending the entire IAJ Report after Rule 1. Mr. Holme's motion was seconded and passed unanimously.

Mr. Holme had an additional amendment to the new committee comment in Rule 26. The new comment reads, "The 2015 amendments to C.R.C.P. 26, like the current proposed version of Rule 26 of the Federal Rules of Civil Procedure, emphasize the application of the concept of proportionality to disclosure and discovery" and Mr. Holme proposed adding "with robust disclosure followed by limited discovery." The motion passed by a vote of 7 to 6 (Judge Berger voted to break the 6-6 tie).

There was a question about Rules 30 and 54, where each had rule had a "Pre-2015 Committee Comment" title added to historic comments. A concern was raised about editing historic comments, and the committee agreed to take these comments under advisement. Judge Berger will write a supplemental letter regarding the committee comment amendments to Justice Eid.

B. Colorado Rules of Probate Procedure

Tabled until the April 24, 2015 Meeting.

C. Rule 120 Subcommittee

The subcommittee is still working on a final proposal, and subcommittee chair Fred Skillern will keep the committee updated.

D. Rule 121 §1-15 Subcommittee

Chair David DeMuro took the committee's February 27 comments into consideration, and began describing the amended proposal. As before, oral motions would be allowed for discovery and other nondispositive motions, and word and page limits were in paragraph 1. The Committee added language requiring the filing of a combined brief and motion, and in paragraph 4 whether or not to keep "prompt" in the first sentence was

discussed. Members wanted to add a double-spacing requirement, and they discussed how the use of 14 versus 12 point font would affect page limits. Through this discussion the committee decided an amendment to Rule 10 should be proposed. Mr. DeMuro said he would take all committee comments under consider and present a revised draft at the April 24 Meeting.

E. Rule 84, Forms

Mr. Holme began by stating that the federal rules that take effect in December abolish FRCP 84 and accompanying forms, because they are no longer relevant. In lieu of this, the committee should look at the standard forms in the CRS court rule books, and consider making changes. At the April 24 Meeting he will make a specific proposal.

F. Rule 53, Masters

Judge Berger received an email from attorney David Tenner, asking the committee to consider revision to Rule 53 similar to the 2003 amendments to FRCP 53. A subcommittee will be appointed to draft an amendment.

G. C.R.S. §2-4-401

In the federal rules restyling project, "shall" was replaced with "must". Colorado Revised Statute §2-4-401, defines "shall" and "must", and Judger Berger wanted to bring this to the committee's attention as rule changes are proposed.

IV. Future Meetings

April 24, 2015
June 26, 2015
September 25, 2015

The Committee adjourned at 3:30 p.m.

Respectfully submitted,

Jenny A. Moore

Court of Appeals

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

Michael H. Berger
Judge

March 24, 2015

Hon. Allison Eid

Justice, Colorado Supreme Court

Re: Colorado Supreme Court Civil Rules Committee—Improving Access to Justice (IAJ) Proposed Amendments to the Colorado Rules of Civil Procedure—Comments to the Rules

Dear Justice Eid:

I write to you in your capacity as the Liaison Justice to the Civil Rules Committee. This letter supplements my letters and the accompanying materials, dated January 5, 2015 and February 11, 2015.

At its meeting on February 27, 2015, the Committee considered the existing comments to the rules proposed to be amended by the IAJ proposals as well as new comments to the proposed amended rules.

Attached is a redline of the existing, affected Rules and Comments which show the recommendations of the Committee regarding the existing and new comments.

To summarize these changes, the Committee recommends that the relevant sections of the Committee Report dated December 14, 2014 be imported into new comments for the affected rules. Regarding the existing comments to the

affected rules, with very few exceptions, the Committee recommends the deletion of those comments. The federal rules notwithstanding, historical explanations of rules that have not been in effect for years are of very limited use for lawyers or judges to determine the meaning and intent of the rules now in effect.

On a going forward basis, any proposed comments will be placed under a heading that states the date (by year) of the comment, avoiding the situation which now exists in which it is impossible to determine when the comment was added (and thus to what version of the rule the comment had or has application.)

The only question not addressed by the Committee, is one that can only be addressed and resolved by the Court: what, if any, role does the Court want in reviewing and approving "Committee Comments". My personal view is that the Court should not be involved in this process. To the extent the Court is involved in approving Committee Comments, the comments are susceptible to an argument that they are more than committee comments and that, instead, they are official court comments to rules that the court has promulgated. Except in unusual circumstances, such as the Colorado Rules of Professional Conduct where the comments are part of a uniform code-the ABA Model Code of Professional Conduct-- I think that is unwise.

Respectfully,

Michael H. Berger

Committee Chair

Cc: Richard P. Holme, Esq.

Jenny Moore, Esq.

Proposed Amendments to Comments of the Rules affected by the Improving Access to Justice Proposal

March 24, 2015

Rule 1. Scope of the Rules

COMMITTEE COMMENT

2015

The 2015 Amendments are the next step in a wave of reform literally sweeping the nation. This reform movement aims to create a significant change in the existing culture of pretrial discovery with the goal of emphasizing and enforcing Rule 1's mandate that discovery be administered to make litigation just, speedy, and inexpensive. One of the primary movers of this reform effort is a realization that the cost and delays of the existing litigation process is denying meaningful access to the judicial system for many people.

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

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

COMMITTEE COMMENT

2015

These amendments were designed both to remove delays created by the filing of motions to dismiss under Rule 12(b)(5) and (6), and to avoid some of the problems that were uncovered in the Civil Access Pilot Project ("CAPP"). The prior provisions of Rule 12 and C.R.C.P. 16(b) provided a case was not "at issue" until all pleadings were complete and that discovery and pretrial preparation were not to commence until then, and answers did not have to be filed until after Rule 12 motions were decided – a process that frequently took significant time for busy trial judges to accomplish. Thus, under the prior rule, the entire case could be stalled for months by simply filing a Rule 12(b)(5) motion.

Therefore, the amendment declares cases "at issue," which commences the pretrial activities, once all the pleadings are filed, and provides that the filing of Rule 12(b)(5) and (6) motions do *not* relieve a party of the requirement to file a timely answer. Given that a number of such motions were filed precisely *because* they caused delay, it is expected that this rule change will also decrease the number of such motions the courts must consider. Because the much less common Rule 12(b)(1)–(4) motions challenge, in one manner or another, the jurisdiction of the court, the Committee believes that it is unfair to require parties over whom the court may not

have appropriate jurisdiction to file answers and engage in full-blown pretrial preparation and discovery until the jurisdictional motions are decided.

CAPP caused cases to become "at issue" at different times when multiple parties were served at different times (and then made their initial disclosures). This proved to be quite confusing for most parties (and judges). Thus, the amendment requires that the pleadings be complete for all parties in the case before the case is deemed to be "at issue" so that all parties commence pretrial proceedings at the same time and on the same schedule.

Rule 16. Case Management and Trial Management

COMMITTEE COMMENT

2015

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

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

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

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

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

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

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

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

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

~~History and Philosophy~~

Effective differential case management has been a long-term goal of the Bench, Bar, and Public. Adoption by the Colorado Supreme Court of C.R.C.P. 121 and its practice standards in 1983; revised C.R.C.P. 16 in 1988 to require earlier disclosure of matters necessary for trial; and the Colorado Standards for Case Management--Trial Courts in 1989 were a continuing and evolving effort to achieve an orderly, fair and less expensive means of dispute resolution. Those rules and standards were an improvement over prior practice where there was no prescribed means of case management, but problems still remained. There were problems of discovery abuse, late or inadequate disclosure, lack of professionalism, slow case disposition, outrageous expense and failure to achieve an early settlement of those cases that ultimately settled.

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

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

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

Operation

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

~~leadership to insure that only appropriate discovery is conducted and to carefully plan for and conduct an efficient and expeditious trial.~~

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

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

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

~~(a)~~

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

~~(b)~~

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

~~Lead counsel for each of the parties are required to confer about the nature and bases of their claims and defenses, discuss the matters to be disclosed and explore the possibilities of a prompt settlement or other resolution of the case. As part of the conferring process, lead counsel for each of the parties are required to cooperate in the development of the Case Management Order,~~

~~which is then submitted to the Court for approval. If there is disagreement about any aspect of the proposed Case Management Order, or if some aspect of the case requires special treatment, the parties are entitled to an expeditious Case Management Conference. If any party is appearing pro se an automatic mandatory Case Management Conference is triggered.~~

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

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

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

~~(c)~~

~~The Trial Management Order is jointly developed by the parties and filed with the Court as a proposal no later than thirty days prior to the date scheduled for the trial (or at such other time as the Court directs). The Trial Management Order contains matters for trial (see specific enumeration of elements to be contained in the Trial Management Order). It should be noted that the Trial Management Order references the Case Management Order and, particularly with witnesses, exhibits, and experts, contemplates prior identification and disclosure concerning them. Except with permission of the Court based on a showing that the witness, exhibit, or expert~~

~~could not have, with reasonable diligence, been anticipated, a witness, exhibit, or expert cannot be revealed for the first time in the Trial Management Order.~~

~~As with the Case Management Order, Trial Management Order provisions of the Rule are designed to be flexible so as to fit the particular case. If the parties cannot agree on any aspect of the proposed Trial Management Order, a Court Trial Management Conference is triggered. The Court Trial Management Conference is mandatory if any party is appearing in the trial pro se. As with the Case Management Order procedure, many cases will not require a Court Trial Management Conference, but such a conference is available upon request and encouraged if there is any problem with the case that is not resolved and managed by the Trial Management Order.~~

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

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

~~(d)~~

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

Rule. 26 General Provisions Governing Discovery; Duty of Disclosure

COMMITTEE COMMENT

2015

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

Scope of discovery.

Perhaps the most significant 2015 Amendments are in Rule 26(b)(1). This language is taken directly from the proposed Fed. R. Civ. P. 26(b)(1). (For a more complete statement of the changes and their rationales, one can read the extensive commentary proposed for the Federal

Rule.) First, the slightly reworded concept of proportionality is moved from its former hiding place in C.R.C.P. 26(b)(2)(F)(iii) into the very definition of what information is discoverable. Second, discovery is limited to matters relevant to the specific claims or defenses of any party and is no longer permitted simply because it is relevant to the "subject matter involved in the action." Third, it is made clear that while evidence need not be admissible to be discoverable, this does not permit broadening the basic scope of discovery. In short, the concept is to allow discovery of what a party/lawyer *needs* to prove its case, but not what a party/lawyer *wants* to know about the subject of a case.

Limitations on discovery.

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

Initial disclosures.

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

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

Expert disclosures.

Retained experts must sign written reports much as before except with more disclosure of their fees. The option of submitting a "summary" of expert opinions is eliminated. Their

testimony is limited to what is disclosed in detail in their report. Rule 26(a)(2)(B)(I).

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

Expert discovery.

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

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

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

~~**SCOPE**~~

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

~~**COLORADO DIFFERENCES**~~

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

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

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

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

FEDERAL COMMITTEE NOTES

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

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

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

It should also be noted that two types of experts are contemplated by Fed.R.Civ.P. and C.R.C.P. 26(a)(2). The experts contemplated in subsection (a)(2)(B)(II) are persons such as treating physicians, police officers, or others who may testify as expert witnesses and whose opinions are

~~formed as a part of their occupational duties (except when the person is an employee of the party calling the witness). This more limited disclosure has been incorporated into the State Rule because it was deemed inappropriate and unduly burdensome to require all of the information required by C.R.C.P. 26(a)(2)(B)(I) for C.R.C.P. 26(a)(2)(B)(II) type experts.~~

~~**2001 COLORADO CHANGES**~~

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

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

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

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

Rule 30. Depositions Upon Oral Examination

COMMITTEE COMMENT

1995

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

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

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

2015

Rule 30 is amended to reduce the time for ordinary depositions from seven to six hours, so that they can be more easily accomplished in a normal business day, and to provide for the shorter depositions of retained experts as set forth in C.R.C.P. 26(b)(4)(A).

Rule 31. Depositions Upon Written Questions

~~**COMMITTEE COMMENT**~~

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

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

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

COMMITTEE COMMENT

2015

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

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

~~A discovery schedule for the case is required by C.R.C.P. 16(b)(1)(IV). Under the requirements of that Rule, the parties must set forth in the Case Management Order the timing and number of~~

~~requests for production and the basis for the necessity of such discovery with attention to the presumptive limitation and standards set forth in C.R.C.P. 26(b)(2). There is also the requirement that counsel certify they have advised their clients of the estimated expenses and fees involved in the discovery. Discovery is thus tailored to the particular case. The parties in the first instance and ultimately the Court are responsible for setting reasonable limits and preventing abuse.~~

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

~~**COMMITTEE COMMENT**~~

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

COMMITTEE COMMENT

2015

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

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

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

Rule 54. Judgments; Costs

~~**COMMITTEE COMMENT**~~

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

COMMITTEE COMMENT

1989

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

2015

Rule 54(d) is amended to require cost awards to be "reasonable"; by directing courts to consider factors relating to proportionality in setting such awards; and by putting in place a presumption that expert cost awards should be limited to time testifying (but allowing departures in special cases).

The reasonableness requirement is consistent with §13-16-122, C.R.S., which lists matters included in cost awards, because it can hardly have been the intent of the legislature to authorize unreasonable awards. Also, consistent with the other 2015 Amendments, this rule is amended to require courts to consider specific factors relating to proportionality before deciding what costs should be awarded.

The Committee has been gravely concerned that cost awards, particularly for experts, have exploded out of control and are – by themselves – a very serious impediment that interferes with access to justice.

The amendment sets up what is in effect a presumption that expert cost awards are to be limited to "reasonable compensation" for time spent "testifying at trial" or in depositions "admitted in evidence in lieu of" testimony. A court may depart from this standard on the basis of "specific findings" that "the interests of justice" require something else. The amendment to Rule 54(d) allows courts to continue to consider "the degree of learning or skill required" in setting expert cost awards.

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

Large cost awards have the potential to reduce the access to justice for many litigants.

C.R.C.P. 121 Local Rules —Statewide Practice Standards

Section 1-22 Costs and Attorney Fees

COMMITTEE COMMENT

1992

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

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

2015

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

Court of Appeals

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

Michael H. Berger
Judge

April 6, 2015

Hon. Allison Eid

Justice, Colorado Supreme Court

Re: Supreme Court Civil Rules Committee—Increasing Access to Justice Rules Proposals—Comments

Dear Justice Eid:

Enclosed are the proposed Comments, revised as the Court directed. I will also send you these revised, proposed Comments in electronic form.

Sincerely,

Michael H. Berger

Chair, Civil Rules Committee

Proposed Amendments to Comments of the Rules affected by the Improving Access to Justice Proposal

April 17, 2015

Rule 1. Scope of the Rules

COMMENTS

2015

The 2015 Amendments are the next step in a wave of reform literally sweeping the nation. This reform movement aims to create a significant change in the existing culture of pretrial discovery with the goal of emphasizing and enforcing Rule 1's mandate that discovery be administered to make litigation just, speedy, and inexpensive. One of the primary movers of this reform effort is a realization that the cost and delays of the existing litigation process is denying meaningful access to the judicial system for many people.

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

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

COMMENTS

2015

These amendments were designed both to remove delays created by the filing of motions to dismiss under Rule 12(b)(5) and (6), and to avoid some of the problems that were uncovered in the Civil Access Pilot Project ("CAPP"). The prior provisions of Rule 12 and C.R.C.P. 16(b) provided a case was not "at issue" until all pleadings were complete and that discovery and pretrial preparation were not to commence until then, and answers did not have to be filed until after Rule 12 motions were decided – a process that frequently took significant time for busy trial judges to accomplish. Thus, under the prior rule, the entire case could be stalled for months by simply filing a Rule 12(b)(5) motion.

Therefore, the amendment declares cases "at issue," which commences the pretrial activities, once all the pleadings are filed, and provides that the filing of Rule 12(b)(5) and (6) motions do *not* relieve a party of the requirement to file a timely answer. Given that a number of such motions were filed precisely *because* they caused delay, it is expected that this rule change will also decrease the number of such motions the courts must consider. Because the much less common Rule 12(b)(1)–(4) motions challenge, in one manner or another, the jurisdiction of the court, the Committee believes that it is unfair to require parties over whom the court may not

have appropriate jurisdiction to file answers and engage in full-blown pretrial preparation and discovery until the jurisdictional motions are decided.

CAPP caused cases to become "at issue" at different times when multiple parties were served at different times (and then made their initial disclosures). This proved to be quite confusing for most parties (and judges). Thus, the amendment requires that the pleadings be complete for all parties in the case before the case is deemed to be "at issue" so that all parties commence pretrial proceedings at the same time and on the same schedule.

Rule 16. Case Management and Trial Management

~~COMMITTEE~~ COMMENTS

1995

History and Philosophy

Effective differential case management has been a long-term goal of the Bench, Bar, and Public. Adoption by the Colorado Supreme Court of C.R.C.P. 121 and its practice standards in 1983; revised C.R.C.P. 16 in 1988 to require earlier disclosure of matters necessary for trial; and the Colorado Standards for Case Management--Trial Courts in 1989 were a continuing and evolving effort to achieve an orderly, fair and less expensive means of dispute resolution. Those rules and standards were an improvement over prior practice where there was no prescribed means of case management, but problems still remained. There were problems of discovery abuse, late or inadequate disclosure, lack of professionalism, slow case disposition, outrageous expense and failure to achieve an early settlement of those cases that ultimately settled.

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

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

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

Operation

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

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

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

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

(a)

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

(b)

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

concerning settlement; and allows opportunity for inclusion of other provisions necessary to the case.

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

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

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

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

(c)

The Trial Management Order is jointly developed by the parties and filed with the Court as a proposal no later than thirty days prior to the date scheduled for the trial (or at such other time as the Court directs). The Trial Management Order contains matters for trial (see specific enumeration of elements to be contained in the Trial Management Order). It should be noted that the Trial Management Order references the Case Management Order and, particularly with

witnesses, exhibits, and experts, contemplates prior identification and disclosure concerning them. Except with permission of the Court based on a showing that the witness, exhibit, or expert could not have, with reasonable diligence, been anticipated, a witness, exhibit, or expert cannot be revealed for the first time in the Trial Management Order.

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

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

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

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

(d)

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

2015

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

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

Particularly in conjunction with the principle that discovery should be in proportion to the genuine needs of the case, it was deemed important for judges, in addition to litigants, to be involved early in the pretrial process in deciding how much discovery was appropriate. Both judges and lawyers have noted that some lawyers have a financial incentive not to limit

discovery. Perhaps more significant was the recognition that many lawyers engage in "over discovery" because of the fear (justifiable or not) that failing to engage in every conceivable means of discovery until a judge orders one to "stop!" could expose a trial lawyer to subsequent expensive malpractice litigation. These problems are greatly alleviated with the intervention of trial judges placing reasonable limitations on discovery and potentially excessive pretrial practices at the earliest meaningful stage of the case.

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

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

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

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

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

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

Rule. 26 General Provisions Governing Discovery; Duty of Disclosure

~~COMMITTEE~~ COMMENTS

1995

SCOPE

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

COLORADO DIFFERENCES

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

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

C.R.C.P. 26(b)(2) presumptive discovery limitations (C.R.C.P. 29); and (10) pretrial endorsements governed by Fed.R.Civ.P. 26(a)(3) are part of Colorado's trial management system established by C.R.C.P. 16(c) and C.R.C.P. 16(d).

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

FEDERAL COMMITTEE NOTES

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

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

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

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

2002

2001 COLORADO CHANGES

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

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

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

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

2015

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

Scope of discovery.

Perhaps the most significant 2015 Amendments are in Rule 26(b)(1). This language is taken directly from the proposed Fed. R. Civ. P. 26(b)(1). (For a more complete statement of the changes and their rationales, one can read the extensive commentary proposed for the Federal Rule.) First, the slightly reworded concept of proportionality is moved from its former hiding place in C.R.C.P. 26(b)(2)(F)(iii) into the very definition of what information is discoverable. Second, discovery is limited to matters relevant to the specific claims or defenses of any party and is no longer permitted simply because it is relevant to the "subject matter involved in the action." Third, it is made clear that while evidence need not be admissible to be discoverable, this does not permit broadening the basic scope of discovery. In short, the concept is to allow discovery of what a party/lawyer *needs* to prove its case, but not what a party/lawyer *wants* to know about the subject of a case.

Limitations on discovery.

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

Initial disclosures.

Amendments to Rule 26(a)(1) concerning initial disclosures are not as significant as those to Rule 26(b)(1). Nonetheless, it is intended that disclosures should be quite complete and that, therefore, further discovery should not be as necessary as it has been historically. In this regard,

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

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

Expert disclosures.

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

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

Expert discovery.

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

The 2015 amendment also requires that, if a deposition reveals additional opinions, previous expert disclosures must be supplemented before trial if the witness is to be allowed to express these new opinions at trial. Rule 26(e). This change addresses, and prohibits, the fairly frequent and abusive practice of lawyers simply saying that the expert report is supplemented by

the "deposition." However, even with the required supplementation, the trial court is not required to allow the new opinions in evidence. *Id.*

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

Rule 30. Depositions Upon Oral Examination

~~COMMITTEE~~ COMMENTS

1995

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

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

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

2015

Rule 30 is amended to reduce the time for ordinary depositions from seven to six hours, so that they can be more easily accomplished in a normal business day, and to provide for the shorter depositions of retained experts as set forth in C.R.C.P. 26(b)(4)(A).

Rule 31. Depositions Upon Written Questions

~~COMMITTEE~~ COMMENTS

1995

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

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

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

~~COMMITTEE~~ COMMENTS

1995

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

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

2015

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

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

~~COMMITTEE~~ COMMENTS

1990

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

~~COMMITTEE~~ COMMENTS

1995

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

2015

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

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

Rule 54. Judgments; Costs

~~COMMITTEE~~ COMMENTS

1989

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

2015

Rule 54(d) is amended to require cost awards to be "reasonable"; by directing courts to consider factors relating to proportionality in setting such awards; and by putting in place a presumption that expert cost awards should be limited to time testifying (but allowing departures in special cases).

The reasonableness requirement is consistent with §13-16-122, C.R.S., which lists matters included in cost awards, because it can hardly have been the intent of the legislature to authorize unreasonable awards. Also, consistent with the other 2015 Amendments, this rule is amended to require courts to consider specific factors relating to proportionality before deciding what costs should be awarded.

The Committee has been gravely concerned that cost awards, particularly for experts, have exploded out of control and are – by themselves – a very serious impediment that interferes with access to justice.

The amendment sets up what is in effect a presumption that expert cost awards are to be limited to "reasonable compensation" for time spent "testifying at trial" or in depositions "admitted in evidence in lieu of" testimony. A court may depart from this standard on the basis of "specific findings" that "the interests of justice" require something else. The amendment to Rule 54(d) allows courts to continue to consider "the degree of learning or skill required" in setting expert cost awards.

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

Large cost awards have the potential to reduce the access to justice for many litigants.

C.R.C.P. 121 Local Rules —Statewide Practice Standards

Section 1-22 Costs and Attorney Fees

~~COMMITTEE~~ COMMENTS

1992

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

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

2015

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

COLORADO LEGISLATIVE ACTION COMMITTEE
community ASSOCIATIONS INSTITUTE

April 17, 2015

Colorado Supreme Court
c/o Clerk of the Colorado Supreme Court
Christopher Ryan
2 East 14th Avenue
Denver, Colorado, 80203

Re: Proposed amendment to the Colorado Rules of Civil Procedure Rule 54

The Honorable Supreme Court of the State of Colorado:

The Community Associations Institute (CAI) is submitting the following public comments in opposition to the proposed amendment to Colorado Rule of Civil Procedure 54. CAI is a national organization dedicated to fostering vibrant, competent and harmonious community associations. Founded in 1973, CAI is the leading authority for providing education and resources to the volunteer homeowners who govern community associations and the professionals who support them. CAI's members include volunteer community leaders, professional managers, attorneys, contractors, developers, and others who provide products and services to community associations.

These are an estimated 15,000 to 20,000 community associations in Colorado, which are comprised of over 1.5 million individual unit and homeowners. CAI has two chapters in Colorado and sponsors a statewide legislative action committee to represent the interests of its Colorado members regarding legislative, regulatory, and judicial activities of relevance to the creation and operation of community associations.

CAI is concerned that the proposed amendment to Rule 54 will have a negative effect on community associations and the homeowners who live in them. The rule could significantly increase the costs to homeowners to bring claims related to construction defects, and for many associations, will make justice out of reach.

The Proposed Change to Rule 54 Will Harm Homeowners

The proposed change to Rule 54 includes a restriction on litigants' ability to recover the cost of having experts investigate claims prior to trial. Whereas the current rule requires the losing party to pay expert costs as a matter of course, the proposed amendment would require the prevailing parties to pay their own expert investigation costs, except in limited circumstances where the court finds that the interests of justice require otherwise.

In a dispute over construction defects, this could shift substantial costs of litigation away from the builders who caused construction defects and were found liable at trial. Instead,

the homeowners who are the victims of the builders' defective work would need to pay expert costs out of the damages awarded. Expert costs on construction defect cases can be significant, and this could severely limit the funds available for repairs. When homeowners are unable to make repairs, the value of their homes can decrease. In the most extreme situations, unrepaired defects can prevent homes from being sold, which can lead financially troubled homeowners into foreclosure. This proposed change could prevent many low-income homeowners from being able to have any meaningful day in court.

Developments in the law have not been friendly to Colorado homeowners over the past eight years. The proposed change to Rule 54 will make it even more difficult for Colorado homeowners to recover funds to make repairs when they are victims of construction defects. The change will also discourage settlement of disputes by reducing the risk that a losing party may owe expert costs. This will cause more cases to go to trial and further burden our already overworked district court judges.

For these reasons, the Community Associations Institute urges the Colorado Supreme Court to reject the proposed amendment to Rule 54 and retain the presumption that a losing party must pay all reasonable costs, including the costs of expert investigations in construction disputes.

Respectfully,

Colorado Legislative Action Committee
Community Associations Institute
c/o Dee Wolfe, Chair
dee.wolfe@outlook.com

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April 15, 2015

Christopher Ryan
Clerk of the Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

Re: Proposed Changes to the Colorado Rules of Civil Procedure
CBA Litigation Section Council's comments and suggestions

Dear Mr. Ryan:

I write to you as the Chairperson of the Colorado Bar Association Litigation Section Council to provide the Council's comments on behalf of the CBA Litigation Section regarding the proposed changes to the Colorado Rules of Civil Procedure. As the executive council for the Litigation Section, the Council solicited input from the members of the Section and has twice discussed the proposed rule changes in detail.

The Council's comments and suggestions were voted on by the Council and, except as indicated below, the recommendations, suggestions and comments were unanimously adopted. Council member Peter Goldstein, who is also a member of the Supreme Court's Civil Rules Committee, abstained from voting.

The following are the Council's recommendations, suggestions and comments:

1. **C.R.C.P. Rule 12(a)(1) - The Litigation Section opposes and recommends deletion of the sentence that reads: "Filing a motion under subsections (b)(5) and (b)(6) of this Rule does not affect the obligation also to file a timely answer."**

Comments:

a. If an answer is required to be filed while a 12(b)(5) and 12(b)(6) motion is pending and unresolved, this will result in the case proceeding through disclosures and likely discovery; meaning both sides will be incurring considerable expense before those dispositive motions are ruled upon. That

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fact, combined with the mandate of C.R.S. § 13-17-201 (awarding attorney fees to a defendant who obtains a Rule 12(b) dismissal of a tort claim) will deter potential plaintiffs and their counsel from filing actions seeking to establish new law or expand existing law.

2. **C.R.C.P. Rule 16(b)(1) - The Litigation Section opposes and recommends deletion of the sentence that reads: "Except for a motion pursuant to C.R.C.P. 12(b)(1) through (b)(4), the filing of a motion permitted by C.R.C.P. 12 shall not affect the obligation also to file a timely answer."**

Comments:

a. See comment to C.R.C.P. 12(a)(1) above.

3. **C.R.C.P. Rule 16(b)(8) - The Litigation Section recommends insertion of the phrase "unless otherwise provided by law" in front of the word "which."**

Comments:

a. This language will allow for statutorily defined deadlines (e.g., adding a claim for exemplary damages pursuant to C.R.S. §13-21-102, etc.).
b. The Council also notes that, with regard specifically to the language referring to the identification and designation of non-parties at fault pursuant to C.R.S. § 13-21-111.5, C.R.S. § 13-21-111.5(3)(b) requires that such designations must occur "within ninety days following commencement of the action" which may, in some circumstances, expire before the Case Management Conference occurs under the proposed revised Rules.

4. **C.R.C.P. Rule 26(a)(2) - The Litigation Section opposes all of the proposed changes to this rule.**

Comments:

a. The Council views the proposed changes as likely to have the opposite effect from what the Council understands as one of the primary goals of the proposed rule changes. The proposed changes to C.R.C.P. 26(a)(2) will increase motions practice and will significantly increase the costs of litigation.

b. The changes, if adopted, will have the effect of converting treating physicians, who are currently most frequently disclosed as non-retained experts, into specially retained experts who would under the proposed rule changes be required to write and sign a written report and also comply with the other

mandates of the proposed revised Rule. This would likely add a significant financial burden on the treating physician and plaintiff's counsel and may well ultimately prevent the fact finder from hearing helpful and truthful testimony. This would also likely create an incentive for the development of an expansion of the cottage industry of testifying physicians on issues that were previously dealt with by non-retained expert treating physicians.

c. To require a treating physician to submit a report after they've already submitted medical records is problematic. Additionally, treating physicians typically do not include opinions regarding causation, reasonableness and necessity of medical care expenses and cost of future care as part of their medical records which means that if the doctors are to testify about those topics, they will be required to write separate reports to be disclosed.

d. Requiring disclosure and submission of copies of all the exhibits a treating physician or other expert is expected to use during the expert's testimony at trial at the initial disclosure stage (as opposed to at the TMO stage) will force parties (including those who are the victims of injury or are otherwise not financially well to do) and their counsel to incur significant expense much earlier than they currently are required to do so which may well be a disincentive to plaintiffs and their counsel to commence actions to assert valid claims. This therefore becomes an access to justice issue.

5. **C.R.C.P. Rule 26(b)(1) - The Litigation Section [on a 10-4 vote] suggests that the following be substituted and replace the Rules Committee's proposed proportionality language:**

Subject to the limitations and considerations contained in subsection (b)(2) of this Rule, parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, and proportional to the needs of the case, considering the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving DISPUTED issues AS SHOWN BY ADMISSIONS OR DENIALS IN THE PARTIES' PLEADINGS AND IN THE DISCLOSURES, and whether THE DISCOVERY IS REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE. Information within the scope of discovery need not be admissible in evidence to be discoverable.

Comments:

a. The Council understands that central to all of the proposed changes is the assumption of complete and adequate disclosures by all parties. The

Council encourages the Court to consider that fact as a guiding principal in evaluating the proposed rule changes and, if necessary, in adding teeth to the enforcement provisions designed to require full disclosure. The adequacy of the initial disclosures should be a very important component of the proportionality analysis. Inadequate, incomplete and summary disclosures are frequently the cause of requests for discovery beyond the presumptive limit, especially depositions.

b. The suggested language to be added is in CAPS and the reasons for the added language are as follows:
   1. Assuming full disclosures and appropriate pleadings, the focus should be on disputed issues; and
   2. The disputed issues should be identifiable from the pleadings and the initial disclosures.

c. The suggested language to be deleted would be the following language:
   1. "the importance of the issues at stake in the action" - deletion is recommended because of the totally subjective component of this proposed standard;
   2. "the amount in controversy" - deletion is recommended because the amount in controversy may well be irrelevant to the importance to the resolution of the dispute and there may not be "an amount in controversy;" and
   3. "and whether the burden or expense of the proposed discovery outweighs its likely benefit" - again, deletion is recommended because of the subjective component of this proposed standard.
   4. **Dissent** - The four votes cast against the above suggestion were in support of the Council's suggested changes but favored not deleting the phrase: "and whether the burden or expense of the proposed discovery outweighs its likely benefit."

6. **C.R.C.P. Rule 26(e) - The Litigation Section suggests that the word "initial" be deleted from the second to the last sentence of this proposed revised Rule so that the sentence would read: "Nothing in this section requires the court to permit an expert to testify as to opinions other than those disclosed in detail in the expert report or statement."**

Comments:

a. Supplementation of an expert's report should be encouraged where appropriate. The Council believes that the insertion of the word "initial" in this sentence provides discretion to a trial judge when considering whether to allow supplemental opinions to be expressed but it provides no guidance as to the use or purpose of that discretion.

b. The word "initial" arguably provides the trial court with the discretion to prevent an expert witness from offering any supplemental opinions, regardless of whether the supplementation process was appropriately followed or justice otherwise requires allowing that testimony. A typical example of such supplementation would be an engineer, who was, at the time of the initial expert disclosures, still diagnosing a mechanical problem in order to prescribe necessary redesign or repairs (and therefore unable to offer opinions regarding permanency and future expense at the time) being asked to offer supplemental opinions regarding permanency and future expense after the mechanical failure had been fully investigated and analyzed. It appears that if the word "initial" is not deleted from the second to the last sentence then the expert could arguably be prevented from offering the additional, supplemental opinions.

c. Preclusion of otherwise appropriate expert opinion testimony is a much more drastic remedy than continuance of a trial date.

7. **C.R.C.P. Rule 37(c) - The Litigation Section suggests that the words "after holding a hearing if requested" be deleted from the last sentence so that the sentence would read: "The court 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."**

Comments:

a. The trial court should be able to decide whether to hold a hearing and should not be required to hold a hearing just because one has been requested.

The Council thanks the Court for the opportunity to provide feedback regarding the proposed revisions to the Rules of Civil Procedure. I am planning on attending the hearing on April 30th on behalf of the Council and the CBA Litigation Section.

TRAYLOR, BLACK & KANE, P.C.

Peter R. Black
Chairperson, CBA Litigation Section Council

PRB/

April 3, 2015

Colorado Supreme Court
c/o Clerk of the Colorado Supreme Court
Christopher Ryan
2 East 14th Avenue
Denver, Colorado, 80203

Re: Proposed amendments to the Colorado Rules of Civil Procedure Rules 1, 12, 16, 16.1, 26, 30, 31, 34, 37, 54 and 121 Sections 1-22

The Honorable Supreme Court of the State of Colorado:

We are providing the following public comments to the proposed rule changes that this Court is currently considering. While many of these rules represent a positive step forward in streamlining litigation, reducing costs, and increasing access to justice, several of the rules will have the opposite effect, increasing costs, discouraging early settlements, and reducing access to justice. Our law firm represents homeowners and homeowner associations who are the victims of construction defects. The proposed change to Rule 54 is the most troubling, and its potential negative effects on homeowners cannot be understated. We have addressed these rules in detail below, and thank the Court for its consideration of our comments.

Proposed Change to Rule 54

The proposed change to Rule 54(d) would have a devastating impact on homeowners in construction defect litigation. On these larger, complex cases it is not uncommon for the cost of the expert investigation to be 10% of the value of the case. In cases where the damages may be in the millions of dollars, the costs of the expert investigation is typically substantial. Expert investigation costs have increased over the past several years because of judges' rulings limiting extrapolation evidence, and provisions that builders insert into sales contracts and community declarations that prohibit homeowners from extrapolating damages from an investigation that is limited to a sampling of the building components. Latent defects such as dangerous and improperly installed firewalls cannot be seen without investigative testing of the building components. Because extrapolation evidence is difficult to introduce at trial, homeowners have to increase the scope of the testing to ensure that they will be able to meet their burden of proof.

For low-income consumers, this proposed rule would reduce their access to justice. Low-income consumers are typically unable to afford to pay the expert expenses to prosecute their cases, and attorneys will be less willing to take the cases, knowing that they would be unable to recover any advanced costs. This proposed rule would tip the scales against consumers, and in many cases

would make the litigation expenses and attorneys fees paid by the consumer exceed the amount the consumer would receive, even in highly successful, meritorious cases.

Moreover, the current state of Colorado law already makes it difficult enough for homeowners to be made whole. For example, homeowners are not entitled to statutory attorney fees or pre-judgment interest. *Goodyear Tire & Rubber Co. v. Holmes*, 193 P.3d 821, 823 (Colo. 2008). If homeowners are not able to collect their full expert litigation costs, their recovery will be eroded, and their ability to make repairs will be limited even further. In cases where the repairs would address a life safety issue, community associations may have to specially assess homeowners to complete the repairs. Such special assessments would affect the marketability and value of the units, and could have negative financial consequences to the homeowners, which could include foreclosure.

The proposed rule gives the judge discretion to award costs if the judge believes it is in the "interests of justice." This will make it extremely difficult to settle cases when the costs incurred are large. Defendants will not want to factor costs into settlement offers, and plaintiffs will not want to settle cases without having the costs paid. Each side will assume the "interests of justice" favor their position on costs. This rift will make settling cases even more difficult than it already is without prejudgment interest, and will increase the number of cases that will have to proceed to trial.

Because costs are typically covered as a supplemental payment under most Commercial General Liability insurance policies, this proposed rule would not only be taking away recovery for plaintiffs, it would also be taking away supplemental insurance coverage from builders—insurance coverage for which the builders have already paid.

Proposed Change to Rule 26(a)(2)(B)(I) and Rule 26(e)

The proposed change to this rule would eliminate the ability of a party to submit a "summary" of retained expert testimony, and would instead require a report containing "a complete statement of all opinions to be expressed and the basis and reasons therefor."

In practice, the current rule is already strict and the proposed change is going in the wrong direction. If an expert is required to submit "a complete statement of all opinions to be expressed and the basis and the reasons therefore," this leaves an expert with little option other than to read from their report verbatim while on the stand. Any deviation, however slight, will raise phony outrage coupled with motions to strike testimony as being beyond the scope of their expert report.

This proposed standard increases what is already great pressure for experts to prepare expert reports that are hundreds of pages long, at great expense to the parties. Experts who are less experienced in the litigation arena who may prepare shorter (and more reasonably priced) reports will be subject to having their relevant testimony excluded.

The standard for expert reports should require an expert to prepare a report that provides reasonable notice to the opposing party of the opinions they will express and the basis for those opinions. The appropriate standard for excluding expert testimony should remain the standard expressed by this Court in *Todd v. Bear Valley Vill. Apartments*, which is whether the failure to disclose will "prejudice the opposing party by denying that party an adequate opportunity to defend against the evidence." 980 P.2d 973, 979 (Colo. 1999) (*en banc).*

The proposed rule will be particularly unfair to plaintiffs. It is standard practice for many defense experts to not address the substance of the claims made by the plaintiff's experts, but instead to limit their opinions to the inadequacy of the plaintiff's expert's investigation and report. By limiting a plaintiff expert to the exact language in their report, the expert will be unable to properly rebut defense expert opinions attacking the basis of their opinions.

The proposed language "The witnesses' direct testimony shall be limited to matters disclosed in detail in the report," is also unnecessarily restrictive. If an expert is deposed, there is no reason that the expert should not be able to testify in direct examination as to matters disclosed in their deposition. Any opinions revealed in a deposition have been disclosed and subjected to questioning by opposing counsel, even more so than opinions disclosed merely in an expert report. This same limitation is repeated in proposed Rule 26(e), and should be removed. In fact, Rule 26(e) leaves the parties with uncertainty as to whether expert opinion provided in deposition will be admissible. Additionally, Rule 26(e) also leaves uncertainty as to whether opinions disclosed in a rebuttal or supplemental report will be admissible, as the rule guarantees admissibility of only opinions disclosed in the "initial report." Proposed Rule 26(e) will prevent parties from being able to reasonably anticipate what expert opinions will be admissible as trial. There is no good reason for this Court to deviate from the standard expressed in *Todd v. Bear Valley*, 980 P.2d at 979.

Proposed Change to Rule 26(b)(2)

The written discovery limitations provided by proposed Rule 26(b)(2) are lopsided in the case of complex, multi-party litigation. In complex cases, written interrogatories are typically of limited value. In complex, multi-party litigation the rules of civil procedure permit thirty written interrogatories per party. When there is a single plaintiff, but numerous defendants and third-party defendants, proposed Rule 26(b)(2) would allow defendants to coordinate the propounding of hundreds of interrogatories on the plaintiff while the plaintiff is be limited to propounding only thirty interrogatories. This rule should be amended to limit interrogatories to thirty interrogatories **per side** of the litigation, or preferably should be limited so that a party may only propound written interrogatories on a party to which the propounding party is either prosecuting or defending a claim.

The limitations on depositions are also lopsided in the case of complex, multi-party litigation. The proposed rules allow each party to take two non-party depositions. In the case of multi-party, complex litigation, this would limit the plaintiff to taking two non-party depositions, but would permit many more depositions to be taken by the multiple defendants and third-party defendants. This rule should be amended to limit non-party depositions to two depositions per side of the litigation.

While the change in the rule limiting expert depositions is laudable as an effort to control litigation costs, the proposed rule does not address expert billing practices that unnecessarily increase litigation costs. The proposed three-hour limit will do no good in limiting costs when an expert imposes a four-hour or even eight-hour minimum billing requirement. In order to have a positive effect, the rule should prohibit experts from imposing minimum bills. Additionally, the proposed rule should prohibit the common practice of experts who have two sets of billing rates—one rate for the attorney who hired them, and a higher rate for opposing counsel who wishes to take their deposition. Finally, the rule should prohibit or strictly limit an expert's ability to bill for travel time to and from the deposition, as this time cannot be controlled by deposing counsel.

Thank you for considering our comments.

Respectfully submitted,

BENSON, KERRANE, STORZ & NELSON, P.C.

Jeffrey P. Kerrane, Esq.

Heidi E. Storz, Esq.

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PUEBLO COUNTY BAR ASSOCIATION RESOLUTION
RE: PROPOSED CIVIL RULES MODIFICATIONS:

At the January 2015 Pueblo County Bar Association meeting it was decided that a committee be established to review and report its comments concerning the proposed changes to the Colorado Rules of Civil Procedure which changes are to the subject of a public hearing held before our State Supreme Court and for which the deadline for pre-public hearing comments is this April 17th.

The attorneys who comprise this committee are James Croshal, Mickey Smith, Lee Sternal and Tuck Young. It was their unanimous opinion that the Pueblo County Bar Association formally resolve to ask that the Supreme Court not adopt these proposed changes at this time and that said suggested changes, as well as additional changes not presently proposed, be the subject of additional public examination and consideration.

The basic concerns are that compliance with the proposed changes will result in and require too much effort and expense too soon after litigation is commenced at the same time they allow too little time to complete discovery and motion practice prior to trial. The overall concern is that the tightened time and compliance requirements are being declared in language which lacks mention of flexibility with the likely result being that only large firms with a broad base of associates, junior partners or paralegals and investigators will be able to afford to investigate, research and draft the motions, pleadings and other required documents within the mandated timelines.

If these rules are adopted without extensive revision the belief of this committee is that it will be economically all but impossible for many of our members to accept what is typically viewed as a "small" case. Our present perception is that adoption of these rule changes in their present form will increase the costs of litigation and create real additional "traps" in those cases which are accepted as well as result in rejection of many cases that are presently being accepted. Also, the additional effort and stress these proposed rules will clearly cause will hardly be anything but discouraging of "pro-bono" requests.

In summary, the proposed changes, especially to rules 16 and 26, only exacerbate long perceived problems of timely compliance with deadlines that are often burdensome and challenging for solo practitioners or small firms to meet. A detailed but still incomplete explanation of those reasons is attached. But for the present, we believe that in view of the fast approaching April 17th deadline to say anything, it should be the position of this bar association to oppose imposition of these proposed changes without far more study and discussion.

WHEREFORE, BE IT RESOLVED that the Bar Association of Pueblo, County, Colorado does oppose the adoption of the proposed changes to the Colorado Rules of Civil Procedure in their present presented form.

BE IT FURTHER RESOLVED however, that the Pueblo County Bar Association does support amendment to our present rules of Civil Procedure after further review and consideration.

Done by unanimous vote this ***14th*** day of ***April, 2015***.

STATEMENT IN SUPPORT OF RESOLUTION RE PROPOSED CIVIL RULE CHANGES:

At our January 2015 meeting the Pueblo County Bar Association appointed a committee of attorneys involved in the civil practice to review the proposed changes to the Colorado Rules of Civil Procedure scheduled for public hearing before our Supreme Court on April 30th. These committee members are regarded as experienced in the representation of plaintiffs as well as defendants in both tort and commercial litigation. A copy of this report was forwarded to all Pueblo County Bar association members for consideration at their April 14, meeting. The Pueblo County Bar Association, by formal resolution, did approve that this report be published to express its concern that this rules modification process is proceeding so quickly that issues of great importance are being overlooked.

Pueblo County attorneys who practice civil law are generally solo practitioners or members of small firms. This, however, is the common business model in most of southeastern Colorado. Typically their legal casework is scheduled many weeks in advance. Almost all non-attorney staff employees daily perform intermixed paralegal, secretarial, office management and receptionist work. None have in-house investigators. Most of their clients are individuals or small businesses, i.e., local banks, credit unions, car dealerships, etc. These clients are very concerned about the costs and expense of litigation.

Although, the average income for a family of four in the State of Colorado, according to the Census Bureau, is $83,000.00. The average income for a family of four in Pueblo and throughout southeastern Colorado is significantly below that level, approximately only half, in fact. Our members believe that access to the judicial system and the process of getting a case to judgment should be made simpler and less expensive rather than more difficult, costly and complicated. They uniformly believe that the proposed changes give an unfair procedural advantage to large law firms and wealthy litigants. Further, these proposed changes create a real financial barrier for Coloradoans who are middle class or poor to access our trial courts. We are concerned that many of the proposed rules being considered by the Supreme Court represent a "cookie cutter" approach to litigation that will directly increase the expense to our clients and create unnecessary additional "traps" for us as practitioners. Our association believes that these

changes fail to recognize the financial and time consumption realities of representing real clients with limited funds. Unfortunately, our frank view is that many of the trial judges who will implement and interpret these rules may view them as not permitting flexibility.

Of additional concern to our members is that adoption of these rules will result in a far greater interest in avoiding them but that the ability to do so is presently severely limited by the lack of increase of the jurisdictional limits of both our small claims and county courts. The county court jurisdictional limit of $15,000.00 set in 1991 has never been adjusted. Even if it were adjusted merely for inflation, the current county court jurisdiction should be in excess of $30,000.00. These proposed rule changes, with their inevitable increases in the time and costs to litigate pursuant to them, effectively will make it economically impossible to continue to exercise the district court option for those small cases that are still "too big" for the lower county court jurisdictional limits.

The jurisdictional limit of our small claims courts has not been adjusted for twenty years. Again, with proper modification for inflation, the jurisdictional limit of small claims court would be $15,000.00. The lack of even a court generated request for legislative increase of these jurisdictional lower court limitations, in conjunction with enactment of these proposed rule changes is simply not going to bode well for those litigants whose disputes are in the "small to medium" size categories. Such claims will be effectively placed all but out of reach for the present district court option.

It is our members' view that delays in getting cases to trial are largely based upon the three factors of the specific needs of the case, the reality that most cases defended involve either in-house corporate counsel for insurance companies or large firms from the Denver Metro area all of whom always seem to have attorney calendars with pre-existing commitments that make it impossible to get a reasonably early trial date and that statutory preference must be given to the resolution of other types of proceedings. Civil cases, unless involving an elderly party, occupy the bottom rung of the litigation ladder. So, in view of these realities, why is it perceived to be necessary to create the additional stresses and expenses which will so clearly be associated with these proposed rule changes?

With these general comments as our preface, we ask that you now consider our following comments and concerns regarding at least some of the specific proposed rule changes. We offer them in our belief that the overall purpose of our civil justice system, as declared in our very first rule of civil procedure, should be to ensure greater and less expensive access to courts which, above all else, are perceived to be fair.

We are concerned why the court is proposing to change the language of Rule 1. Our members do not accept that changes to our civil rules should be made simply to make our state rules more " consistent" with the federal rules. Our concern is what the courts will do with the additional proposed language for Rule 1. Without an explanation for it that is more compelling than what is said about it in the Colorado Lawyer, we oppose this proposed change. We believe our trial courts should not necessarily be modeled into mini federal courts.

We believe that C.R.C.P. 12 should be modified to mandate that affirmative defenses are subject to C.R.C.P. 11. This change, we believe, is necessary to avoid the allocation of costs and of Court time to defenses for which no supporting facts are known to exist at the time the answer is filed. "Proportional" time and cost estimates should not have to be considered for the litigation of affirmative defenses that have no known supporting grounds.

Our other Rule 12 concern is that it appears that a party has only twenty-one days after service upon it to file a C.R.C.P. 12(b)(1) (4) motion. This short timeline creates numerous problems. First, it assumes that a defendant will get his case promptly to an attorney. Secondly, it assumes that a solo practitioner whose calendar is already filled with deadlines to be met, client appointments and administrative matters will be able to get the client in within the twenty-one days, review the matter, do the research and file the motion. Most of our practitioners have calendars that are already filled up weeks in advance. Only large firms with a broad base of associates, junior partners or paralegals and investigators can afford to intake, investigate, research and draft motions with this timeline. To undertake any new case for which a rule 12 motion is appropriate we are going to have to drop whatever else we are doing to file the 12(b) motion within the twenty-one day limit. That means that our time will become more costly for our clients. We will be forced to accept fewer cases because of an artificially short deadline.

Rules 16 and 26 need to be considered together to understand our problems with them. The burdens of these deadlines of Rules 16 and 26 are only increased. These additional deadline burdens are going to result in additional costs which are either going to have to be passed on to the client directly or absorbed by the practitioner, ultimately to be passed on to clients, either through larger retainers, higher hourly rates, or increased fees in contingent fee cases. These additional burdens and traps make it extremely unlikely that any member of our association would agree to represent a pro bono party in a case in district court. We often conclude that when the rules impose these additional deadlines, timetables and burdens that the additional costs to the practitioner are not being considered by our rule makers. We believe that further increases to litigation costs will result in less access to our courts.

Another concern is the unevenness of the compliance burden in respect to most of the Rule 16 requirements. These burdens of moving forward with the CMO and the TMO, submission, even when both parties are represented by counsel, are placed solely upon the plaintiff. This unfairly increases the plaintiff's costs. It is also unfair when one party is pro se because it mandates that extra work, with its attendant expense, is to be borne solely by the represented party. Compliance with these Rule 16 burdens involves the making of multiple phone calls or e-mail communication to schedule meetings and confer just to timely present the proposed case management order. It also allows pro bono litigants to be treated in a preferred manner to those litigants who have attorneys. However, not all pro bono litigants are indigent. But, even if they have the resources to pay counsel, they will be treated in this preferred manner.

If there are two defendants and one is "pro-bono", the burden of the first defendant who files an answer is unfairly increased since that retained counsel must now pass to its client the extra costs associated with having to do the work that normally is done by counsel for a represented party. The Pueblo County Bar believes that the requirement to comply with Rule 16 must be equally applicable to all litigants. Only if all parties are equally burdened to comply with Rule 16. can the costs of litigation be more fairly shared. The basic perception of fairness, we believe, is what promotes cooperation and case movement.

However, the best efforts to engage that process are destined for stress creating frustration when it becomes all but impossible to meet the deadlines of the proposed changes to rules 16 and 26. They simply require that too much be accomplished too soon.

The deadline that the parties meet and confer forty-two days after the case is at issue, besides being artificial and having a "cookie cutter" nature, is problematic because of the disclosure requirements of Rule 26. Under Rule 26, the parties are required to submit their disclosures within twenty-eight days of the at issue date and a lack of knowledge is not an excuse for failure to submit a disclosure. However, the substance of the initial disclosures under the proposed Rule 26 is expanded from individuals with information of not only the disputed facts of the claims and defenses but also will have to include the specific details of all anticipated witness testimony. This greatly increased burden is simply unreasonable.

It also broadens the prospective number of witnesses and exhibits that need to be disclosed prior to the CMO. Additionally, these witness disclosures, under proposed Rule 26(1)(A), must at the same time they are "brief also be "specific". We do not know what that rule means but are much concerned over how it will be interpreted. Will this be new additional justification for exclusion of exhibit or testimony evidence? Will the obligation to comply with it be used as justification for pre CMO discovery? Even a conservative approach to this requirement creates a significant additional financial burden at the commencement of the case.

Are lawyers, only 42 days after the case is at issue, going to have to have taken their time or their paralegals' time or hire investigators to talk to each potential witness, then draft up a statement of their testimony so that they can say they were as detailed in their "specific" representations as was humanly possible? Even if the lawyer has a paralegal or hires an investigator he may ultimately feel obligated to do that investigation himself since it is his malpractice coverage that is on the line. Additionally, our members are concerned about how this rule interacts with the requirement for the disclosure of non-retained experts. If a bank has an in-house appraisal, is that appraisal going to have to be set out with specificity in the initial disclosure?

It is also unclear how this will interact with the current practice of many members who simply refer the opposing counsel to records or reports. Is the lawyer going to be required to take his time to regurgitate the important facts out of each record and/or the report, which activity, of course, is another cost that is going to be passed on to the clients, or can the attorney simply say "see accident report," or "see appraisal? The forty-two days in the meet and confer requirement has to be done within two weeks of disclosures being provided. Again, if you are a solo practitioner or in a small firm, you may have numerous matters, personal and business, not to mention the possibility of a trial, all already scheduled for that two-week period. This forty-two day "cookie cutter" approach to the CMO is far less flexible, for example, than are the current federal rules, which are designed to handle cases involving much larger sums than the average state district court case. But, the biggest concern of all is that modification of what is in the CMO can only be accomplished for "good cause". We have no reason to believe that the courts will be in agreement as to what elements will be viewed as necessary to meet that rigid sounding standard.

With regard to the specific requirements of Rule 16, our members had these comments: Rule 16(b)(5) says that the trial court may decide motions at the Case Management Conference. If the rule is going to impose deadlines within which the parties must meet, it should impose deadlines on the trial court to resolve these motions raised at the Case Management Conference. However, the fact that no such time requirement is imposed upon the trial court indicates, perhaps, that frequently decisions need to be pondered, considered and reviewed and may take more time than a "cookie cutter" approach would allow.

With regard to 16(b)(8), our members feel that the date for amending pleadings occurs far too quickly. Amendments to pleadings should be liberally allowed without regard to the rigidly declared deadline. Frequently parties do not know the full nature of their claims or defenses until discovery has occurred. An affirmative defense may not be known until a third party not involved in the lawsuit is deposed. A claim that a party's conduct was willful and wanton may not be determined or known until after depositions have been taken. In an insured's claim against their insurance company, whether the company acted in bad faith in handling a claim may not be known until the claim file is produced in often contested discovery. Any time limit to amend

pleadings should be subject to the same standard of reasonableness that is now contemplated to govern "proportionality" determinations.

The Rule 16(b)(16), requirement that the parties quickly schedule their trial date generally results in requests for more scheduled trial time than the case subsequently requires. If a trial court wants to have a more efficient trial calendar, allowing the litigants to be the ones who decide when to ask for the trial setting is likely to be a significant step in that direction. So, on the subject of the setting of trial, sooner is not necessarily better.

Despite the declared new emphasis upon early "hands on" involvement by the trial court, proposed Rule 16(b)(18) allows the judge to sign the case management order without a case management conference. But, discovery is still prohibited until the case management order is signed. There is simply no mention of flexibility in these rigidly created CMO deadlines. If the parties can so stipulate they should be free to commence agreed upon discovery without regard to whether they have a court issued CMO. And the lack of any rule declared deadline within which the court must resolve any disagreement over the terms of the CMO will likely mean further delay in the commencement of any deemed necessary discovery. That delay will only make the unreasonably short 115 days within which to amend the pleadings that much more unreasonable.

Our members believe the "good cause" test under Rule 16(e) should be prefaced with a requirement that amendment be liberally granted. Our concern with the good cause standard is that based upon the standards of judicial review, without a presumption under the rule that it be liberally applied, the parties are going to be at the whim of the trial court whose decision will be upheld on appeal based upon "its exercise of sound discretion." To meet the goal of our Rules of Civil Procedures that the intent is to give everyone their day in court with their case being fully considered, we should be looking at as few inflexible deadline requirements as possible. Unfortunately, these proposed rule changes, without any declaration as to flexibility, appear to us to stand in the way of that goal.

In regard to proposed Rule 26(a)(2)(b)(II), will we be required to rehash and put in writing everything contained in records of an expert which we previously could disclose simply

by incorporating those records into the disclosure? This will increase the cost of litigation and that cost will have to be passed on to the client.

Secondly, the requirement that the witness' testimony will be limited to matters disclosed in detail raises a concern of evidence preclusion if voluminous records of treating physicians or in-house experts have not been quoted in full from where they are considered to declare relevant information. To set that information out again in a pleading only increases the cost of litigation. Lawyers in our community charge $150.00 to $300.00 per hour. In Denver the hourly rate is as high as $600.00 per hour. That is what clients are going to have to absorb and when told so the certain result will be that some cases presently being accepted will be rejected as being costs prohibitive.

The proposed proportionality requirements of the Rule 26 revisions are concerning for two reasons. First, we believe it will be interpreted to mean a case is not worth the investment of the necessary resources unless it is worth "a lot of money". However $30,000.00 to many of our clients can be as economically significant as is $1,000,000.00 to someone else. Frankly, while we believe that the more appropriate remedy to deal with the proportionality issue would be to increase the jurisdictional limits of our lower courts, we question what percentage of our judges actually have the experience to properly and effectively execute this new responsibility, especially if it must occur when the answer is still permitted to raise affirmative defenses for which there is then no known factual support.

We are concerned about the fact that in determining proportionality the parties themselves, especially in the case of the insured defendant, are not the people who are making the costs expense decisions. Will the trial court be able to make it clear that just because a party is successful in their litigation result does not mean they are going to be able to recover costs deemed "non-proportional"?

The proposed new three hour time limit for the taking of an expert's deposition, while probably sufficient time for most of us, could present problems when the expert is experienced and engages in a passive-aggressive approach to manipulate the time allowed. We believe that a better way to control such expert deposition costs would be to declare that no more than three

hours of time will be subject to any charge for post judgment payment but that experts should otherwise have the same time limitation as lay witnesses.

Our members take special exception to the proposed limitations upon the disclosures of supplemental expert opinions. Frequently, it is during the deposition/discovery process that those supplemental opinions are learned. The court should not be given the authority to exclude such opinions just because they were not learned or disclosed prior to the deposition or other utilized discovery. Absent the showing of collusion between the expert and the retaining party the fact of a new or of a modified expert opinion should still be subject to addition by supplementation without the necessity of first establishing "good cause". To deny the finder of fact relevant evidence would be contrary to C.R.C.P. 1.

We support the goal of the proposed changes to C.R.C.P. 54(d) to greatly limit the amount of awardable post judgment costs.

In summary, our members believe that the proposed rule changes require further study and modification. The goals sought to be accomplished by these proposed changes, with the exception of those to rule 54(d) are less than clear. However, their "cookie cutter" treatment of deadlines is destined to increase the costs of litigation at the same time the new "traps" they will create for attorneys will discourage the acceptance of new cases, especially if they are of a "small" or "pro-bono" nature. At the same time that the Pueblo County Bar Association asks the Court to consider asking for legislative increase of the jurisdictional amounts for our lower courts, we wish to declare our opposition to the adoption of these proposed changes to our rules of civil procedure until they are the subject of further modification consistent with our expressed concerns.

Respectfully yours,

Pueblo County Bar Association Special Committee to Review Proposed Rule Changes

Aderant

April 8, 2015

VIA FEDERAL EXPRESS

Mr. Christopher Ryan
Clerk of the Colorado Supreme Court
2 East 14th Avenue
Denver, Colorado, 80203

Re: Proposed amendments out for comment to 4-17-15

Dear Mr. Ryan:

We reviewed the proposed amendments to the Colorado Rules of Civil Procedure ("CRCP"), out for comment until 4-17-15 and to be effective 7-1-15, and write to bring the Court's attention to a few ambiguities therein.

CRCP 12(a)(1), 12(a)(2) and 12(e)

First, as proposed, CRCP 12(a)(1) sets a 21-day deadline to file an answer to a summons and complaint, unless certain CRCP 12(b) motions are filed. CRCP 12(a)(2) then provides an exception to this deadline, changing the 21-day deadline to a 35-day deadline if "pursuant to special order, a copy of the complaint is not served with the summons, or if the summons is served outside of Colorado, or by publication."

On their own, CRCP 12(a)(1) and 12(a)(2) are clear. The ambiguity arises when these two deadlines are viewed together with proposed CRCP 12(e), which says:

> Within 21 days after the service of the pleading upon a party, the party may file a motion for a statement in separate counts or defenses, or for a more definite statement of any matter which is not averred with sufficient definiteness or particularity to enable the party properly to prepare a responsive pleading.

As written, if the summons was served without the complaint pursuant to special order, or if the complaint was served outside of Colorado or by publication, the defendant would be required to file a CRCP 12(e) motion within 21 days of service of the complaint, but would not be required to file an answer to the complaint until 35 after service. Is it the Court's intention to set a 21-day deadline for the CRCP 12(e) motion regardless of the method of service of the pleading?

CRCP 26(d) and 16(b)(18)

Second, proposed CRCP 26(d) says: "Except when authorized by these Rules, by order, or by agreement of the parties, a party may not seek discovery from any source before service of the Case Management Order pursuant to C.R.C.P. 16(b)(18)." Proposed CRCP 16(b)(18), however, does not mention "service" of the Case Management Order. Rather it says only, "The proposed order shall be signed by lead counsel for each party and by each party who is not represented by counsel and, after the court's review, shall be entered as an order of the court."

Did the Court perhaps mean to cross-reference CRCP 16(b)(11) instead, which says, "Discovery may commence as provided in C.R.C.P. 26(d) upon service of the Case Management Order"?

CRCP 121, §1-22.1

Finally, proposed CRCP 121, §1-22.1 says, "Any party which may be affected by the Bill of Costs may request a hearing within the time permitted to file a reply." It is unclear as to the "reply" to which §1-22.1 refers.

Because the previous sentence in §1-22.1 refers to Practice Standard §1-15, which is entitled "Determination of Motions," it seems likely the "reply" refers to a reply to a response to a motion. If so, we would respectfully request that the Court clarifiy this deadline so as to avoid any confusion. For example, §1-22.1 might be further changed to say, "Any party which may be affected by the Bill of Costs may request a hearing within the time permitted to file a reply to a response to a motion regarding a bill of costs under Practice Standard §1-15." [Emphasis added.]

Thank you for your time and consideration.

Sincerely,

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April 9, 2015

Christopher Ryan
Clerk of the Supreme Court
2 East 14th Avenue
Denver, CO 80203

Re: Comments to Proposed Changes to Rules of Civil Procedure

Dear Mr. Ryan:

The following are my comments on the proposed changes to the Rules of Civil Procedure.

Purpose of New Rules

My understanding is that one purpose of the new rule changes is to increase access to the Courts by making litigation more cost effective. The new rules attempt to accomplish this task by: (1) requiring the Court to assess certain proportionality factors early in the case and determine the amount of discovery allowed based on those factors; and (2) decreasing potential costs recoverable by a prevailing party at trial.

Proposed Rules Will Not Materially Decrease Litigation Costs

I do not believe the proposed rule changes will make litigation more cost effective. First, many District Court judges already perform a proportionality analysis pursuant to C.R.C.P. 26(b)(2)(F) and *DCP Midstream, LP v. Anadarko Petroleum Corp.*, 303 P.3d 1187 (Colo. 2013). My experience is that those judges who do perform such an analysis do not decrease the cost of litigation. Rather, the party seeking to withhold discovery simply has one more arrow in its quiver when it seeks to withhold information.

The new rules inject one more issue for a party to litigate before proceeding to trial. The new rules appear to encourage a mini-trial as to whether the subject case is "big" or "small." Based on this determination, the breadth of discovery available in the case is established. Resolution of this issue could set the tone for the entire case and may end up being hotly disputed and expensive.

I do not believe the new rules will cut down on discovery disputes. To the contrary, the new rules simply give a party a new excuse not to produce relevant documents – the burden or expense of production. If a party can convince a judge that a case does not warrant certain discovery, it can avoid producing relevant information. I am sure almost every civil litigator of any experience has had to fight to obtain discovery that ended up being crucial to proving a claim or defense at trial.

The new rules will punish the party with limited resources. By adding another expense at the beginning of the case, the party with limited resources is at a disadvantage. Despite the fact that the parties' resources are supposed to be a factor in the scope of discovery, it is easy to see how this factor could be neutralized if one of the parties hires what are perceived to be "high-priced" lawyers. These lawyers will implicitly argue: "Of course this case is big and important, otherwise our client would not have hired our firm." Unfortunately, judges are not immune to this type of thinking.

Even if the party with limited resources wins a fight related to proportionality at the beginning of the case – whether that party wanted to expand or limit the scope of discovery – the party with more resources can continue to litigate the issue by requesting the Court to reconsider.

Limitations on Cost

Proposed Rule 54(d) limits recoverable expert witness costs to those costs incurred testifying at trial. In most instances, trial testimony is only a small part of an expert's cost. If litigants with limited resources are unable to recover the cost of experts, this will only discourage them from pursuing a claim through trial.

I am not aware of any prospective client that has decided not to pursue a claim because he or she would have to pay costs if they lose. Most of my prospective clients believe they will win. The prospect of recovering costs is actually a small positive when a client performs a cost/benefit analysis. Decreasing the recoverable costs will only discourage parties from pursuing meritorious claims.

More powerful parties want to make the litigation process more expensive and uncertain. This is why they do not include attorney's fees provisions in their contracts or, when they do, they are one-sided. By forcing their adversaries to deal with a one-sided attorney's fee clause or no possibility of attorney's fee recovery, powerful parties make the litigation process more daunting to their shallow-pocket counterparts. The new rules limiting cost recovery just contribute to this problem.

Proposal for Achieving Goal

I would propose that if the legal system in Colorado is going to be modified to accomplish the goal of increasing access to the Courts by making litigation more cost-effective, the following should be done:

1. Increase the jurisdictional limit of Small Claims Court to $25,000, and increase the jurisdictional limit of the County Court to $50,000.

Small Claims and County Court cases already significantly limit the available discovery. I have heard judges express frustration with the increase in the number of *pro-se* litigants. By

increasing the limits on these lower dollar courts, more *pro-se* litigants will have access to a more stream-lined justice system.

2. Do not let parties opt out of Rule 16.1:

If a plaintiff is only claiming damages of $100,000 and wants to pursue their case under Rule 16.1, a defendant should not be able to opt out of this rule. The proportionality decision has already been decided – it is not subjective. Rule 16.1 still provides the ability to subpoena documents at trial. Rules that vest the judges with subjectivity will not decrease litigation costs – they will only give lawyers the opportunity to argue more issues. To decrease the cost of litigation, the rules must be black and white.

3. Award attorney's fees and costs to the prevailing party.

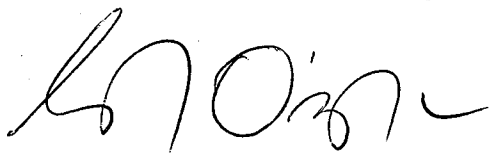
Attorney's fees are available to the prevailing party in cases where the parties have agreed to such an award and where state or federal statute provide for an award of attorney's fees. There is no reason attorney's fees should not always be awarded to the prevailing party in cases where more than $100,000 is at issue. If we truly want to provide access to the Court system to those who cannot afford it, require an award of attorney's fees to the prevailing party. Such an award will cut down on frivolous claims and defenses, and more claims will proceed to trial when there is a true dispute.

Conclusion

While the goal of the new rules is good, I do not believe it will improve access to the Courts by making litigation more cost effective. I urge the Civil Rules Committee to use their considerable influence to effect real change by increasing the jurisdictional limits of Small Claims and County Courts, preventing parties from opting out of Rule 16.1, and mandating that attorney's fees be awarded to the prevailing party. I believe these simple changes would more effectively accomplish the stated goal.

Sincerely yours,

ALPERN MYERS STUART LLC



Gregory M. O'Boyle

GMO/mjs

McKenzie Rhody & Hearn LLC
Attorneys At Law

March 24, 2015

Colorado Supreme Court
Attn: Christopher T. Ryan, Clerk
2 East 14th Avenue
Denver, CO 80203

Re: C.R.C.P. 54(d) Rule Change

Dear Mr. Ryan:

McKenzie, Rhody & Hearn, LLC is a local law firm that specializes in handling construction defect claims for owners of residential and commercial buildings. We have represented owners in Colorado for 17 years.

A major part of this area of the law requires the use of experts in the construction industry to investigate the design and construction of buildings to identify the causation of construction defects; and to establish repair recommendations. In fact, the use of experts in construction defect litigation is the central and most critical component to meeting the burden of proof required by law.

I have just received a copy of the proposed amendments to the Civil Rules of Procedure from the Standing Committee and have been made aware of a public hearing on these proposed amendments set for April 30, 2015. Please accept this letter as our firm's input on the proposed change to Rule 54(d).

Rule 54(d), in part, addresses the recovery of costs. Specifically, part of the proposed changes would limit the recovery of expert costs to time spent testifying at trial or in deposition admitted into evidence in lieu of testimony. We are strongly against such a change.

Colorado law requires the Plaintiff in construction defect cases to retain experts to investigate and prove-up both causation and repair recommendations. Some of these claims encompass hundreds of residential units, high-rise buildings, complicated soil issues and technical design problems. The cost of these required experts is significant and can add up to hundreds of thousands of dollars.

Additionally, the cost of these experts is partially driven by the defense bar's attempt to limit the use of extrapolation of the experts' findings. That limitation requires the Plaintiff to have its experts perform extensive investigation, including the use of intrusive testing of the buildings. That testing is very expensive.

As a result, Plaintiffs in coustruction defect cases are required to incur significant litigation costs. If these costs are not recoverable, then costs will substantially reduce any recovery so that the net recovery will prevent homeowners from being able to repair their properties.

It is absolutely critical that expert costs remain recoverable or many property owners will lose their constitutional right to seek damages for the negligent conduct of builders as the non-recoverable costs will prevent homeowners from seeking redress.

Thank you for your time in considering this problem.

Very truly yours,

Michael A. Hearn
McKenzie Rhody & Hearn, LLC

MAH/jb

Court of Appeals

STATE OF COLORADO
Ralph L. Carr Judicial Center
2 East 14th Avenue
DENVER, COLORADO 80203
(720) 625-5000

JOHN R. WEBB
Judge

April 1, 2015

Christopher Ryan
Clerk of the Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

Dear Mr. Ryan,

As the chair of the CBA Judicial Liaison Section, I write to inform you of the Section's position on proposed amendments the Colorado Rules of Civil Procedure Rules 1, 12, 16.1, 26, 30, 31, 34, 37, 54, and 121 Section 1-22.

Overall, the Section supports the proposed amendments, especially to the extent that they will foster earlier and greater judicial involvement in case management. However, some members expressed concerns in the following four areas.

Rule 12. Requiring answers and allowing cases to proceed, despite the pendency of certain motions to dismiss, may increase the amount of attorney fees recoverable against plaintiffs, such as under section 13-17-201, C.R.S. 2014, upon dismissal.

Rule 26. The proportionality criteria are imprecise and subjective. The result may be lack of predictability in discovery limitations, which in turn could foster disputes over proportionality.

Rule 26. The narrowing of discovery to admissible evidence, (from the current standard of material reasonably calculated to lead to the discovery of relevant evidence), may prove too limiting, and in any event disfavors parties who begin lawsuits with significantly less information than their adversaries.

Court of Appeals

STATE OF COLORADO
Ralph L. Carr Judicial Center
2 East 14th Avenue
DENVER, COLORADO 80203
(720) 625-5000

JOHN R. WEBB
Judge

Rule 54(d). Reducing recoverable expert witness costs to time spent testifying will make the vast majority of expert witness expenses unrecoverable. The result may be dissuading litigants who anticipate cost shifting from bringing cases that will require significant expert testimony.

The Section does not anticipate requesting to be heard on April 30.

Sincerely,

John R. Webb

cc: Peter A. Goldstein, CBA Civil Litigation Section
Honorable Michael H. Berger, Chair Standing Committee on the Rules of Civil Procedure

J. Keith Killian◆
Damon J. Davis
Christopher H. Richter●
Nicholas W. Mayle

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Daniel R. Robinson ▬
Erin Burke ▲
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James P. Guthro
Matt Parmenter ■
Joseph H. Azbell ▮

◆Also admitted in Navajo Nation ●Attorneys admitted in New Mexico
All Attorneys admitted in Colorado ▮Also admitted in Wyoming

▲Also admitted in California ▼Also admitted in North Dakota and Minnesota
▬Also admitted in Massachusetts ■Also admitted in Indiana and Illinois

www.killianlaw.com

April 16, 2015

Christopher Ryan
Clerk of the Supreme Court
2 E. 14th Avenue
Denver, CO 80203

RE: Proposed Changes to the Colorado Rules of Civil Procedure

Dear Mr. Ryan:

Thank you for the opportunity to comment on the 2015 proposed changes to the rules of civil procedure. As president of the Mesa County Bar Association, a member of the Mesa County Access to Justice Committee, and an attorney with a substantial civil practice, I take great interest in the proposed changes. I appreciate the Civil Rules Committee's extensive work on the revision and support many of the changes. However, in some instances I would encourage the committee to go even further, and in other instances I oppose the changes and would request that the committee reconsider them. I will address specific rule changes below.

C.R.C.P. 12

I fully support the amendments to C.R.C.P. 12. The amendments should speed the development of the case and avoid C.R.C.P. 12 motions being filed for purposes of delay. Our law firm has filed complaints with over 100 paragraphs of averments and received a motion for more definite statement in response. It seems likely the motion was filed for purposes of delay.

With regard to subpart f, I would encourage the committee to consider going further. The committee should consider clarifying the requirements of effectively pleading affirmative defenses, and the basis for a motion to dismiss a defense on the grounds that it fails to state a legal defense. Commentators have said that a C.R.C.P. 12(f) motion to strike for failure to state a legal defense is the plaintiff's equivalent of a C.R.C.P. 12(b)(5) motion. Sheila K. Hyatt, Stephen A. Hess, Colorado Civil Rules Annotated, Rules 1-52, West's Colorado Practice Series, 2005, p.147.

The almost universal practice in Colorado is for defendants to simply file a laundry list of affirmative defenses, regardless of their applicability to the particular case, and without stating a factual basis for the defense. This would appear contrary to the idea of having a motion to strike for failure to state a legal defense. And federal courts with a similar rule have held that filing a laundry list of defenses is improper; instead a defendant must include a short, plain statement of

the defense. *Heller Fin., Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1294-95 (7th Cir. 1989); *State Farm Mut. Auto. Ins. Co. v. Riley*, 199 F.R.D. 276, 279 (N.D. Ill. 2001).

The committee should consider explicitly adopting such a requirement. This would be in accord with the stated purpose of ensuring a just, speedy, and inexpensive determination of the actions. It would ensure each defense has a factual basis and avoid wasted time and energy on defenses that are baseless or which the defendant does not truly intend to put forth at trial. It would also focus the parties early on what the case was really about.

C.R.C.P. 16

With regard to C.R.C.P. 16(b)(3), the committee should consider adding video conferencing to the list of permissible means of conferral, along with in an in person meeting or telephone call. Although video conferencing is not yet common, the technology is available. Video conferencing may become popular in the future, and the committee might as well add it now rather than waiting until a later date.

With regard to C.R.C.P. 16(b)(4), I have no objection to parties providing a description of the case, but it is likely premature to discuss the issues to be tried. Claims or defenses may be added or removed. Some issues may be pled in the alternative, with only one alternative likely to proceed to trial. Some issues might best be decided by a motion for determination of law. At this point, it would be best to have the parties concentrate on a description of the case, rather than try and anticipate what will actually be tried.

With regard to C.R.C.P. 16(b)(7), it may be too early in the process to schedule a settlement conference. This will depend on the case. The parties should be given the option of scheduling settlement conferences later in the proceedings. I have no objection to the parties being required to state the prospects for settlement, but I question how effective it will be. I suspect parties will tend to use neutral language regardless of actual prospects; parties may wish to avoid appearing too eager to settle for fear it will weaken the party's settlement position.

I am opposed to C.R.C.P. 16(b)(10). It is often difficult to fully calculate damages at this early stage of the case. From a personal injury perspective, many plaintiffs are still undergoing treatment at the time they file suit. Thus, medical expense damages are often not fully known. Likewise, lost pay, whether from personal injury, discrimination, or breach of contract, is difficult to calculate without an expert witness. I would suspect that plaintiffs in other types of suits have similar difficulties. The initial disclosure of damages will frequently be an estimate, at best. I suspect the almost universal response to the proposed rule will be to state that damages cannot be fully disclosed until at least expert disclosures, and that discovery on damages will continue until the discovery cut-off. C.R.C.P. 16(b)(10) will not be particularly useful, and will simply put an additional administrative burden on plaintiffs.

I fully support C.R.C.P. 16(b)(12). The parties should be required to explain why they need more than one retained expert for each subject area. Hopefully this will help keep a battle of the experts from turning into the battle of who has the most experts. My only suggestion would be to consider giving the Court express authority to limit the experts to one per subject

area, or such other limit as the Court deems appropriate. This authority seems to be implied in the rule, but it would be preferable to give the Court express authority. It would also be better to have this issue decided early, so the parties can prepare, than at trial with the Court saying the testimony is cumulative.

With regard to C.R.C.P. 16(b)(4), the proposed order should leave this information blank, with the Court to fill it in in the final order. The parties are unlikely to know whether the Court will want oral or written discovery motions in a particular case. And the Court may want to decide the issue at the case management conference. I approve of oral discovery motions, I just think it can be difficult for the parties to anticipate what a particular judge wants in a particular case.

With regard to C.R.C.P. 16(c), I would encourage the committee to go a step further and provide that untimely C.R.E. 702 motions may be deemed waived. Even though the rule now requires that they be filed 70 days before trial, they are frequently filed with motions in limine. This provides the parties less time to address the motion and the Court less time to rule. And it makes trial preparation more difficult, because the Court's ruling must be anticipated. Although the authority to deny an untimely motion is implied, making it express would help ensure greater compliance.

C.R.C.P. 26

I fully support C.R.C.P. 26(a)(1)(A). Our firm frequently receives disclosures of witnesses that are little more than a list, with almost no description of what information the witnesses may possess. Having the additional information will help develop the case more quickly and less expensively.

With regard to C.R.C.P. 26(a)(1)(B), I am partially opposed to the changes. The rule requiring disclosure of documents with respect to disputed facts alleged with particularity in the pleadings should be left in place, or the rule should be changed to require disclosure of "materially relevant" documents. The problem with requiring production of all documents relevant to a claims or defense is the broad definition of relevant. The requirement would require production of all documents, no matter how tangentially related to the claims or defenses.

There are several issues with such a broad requirement. The requirement can be used as an excuse for a document dump. Parties could produce massive quantities of information with only marginal relevance to the claim, even on undisputed issues.

Another issue with the breadth of the requirement is that it will be easy to miss documents. This is especially problematic if there is an increased emphasis on sanctions. With a very broad standard, it is also easy to inadvertently miss items. This is especially true as people's lives become more documented and electronic data storage means more information is retained. For example, if you send an email to your cousin describing the contract you entered for your business, it might be relevant to a dispute over the meaning that contact years later, especially if the contact is ambiguous. But are you going to remember sending it? And when it

turns up in response to a request for all correspondence regarding the contract, is the opposing side going to ask for sanctions?

Instead of marginal issues, or items that individual litigants could easily miss, the emphasis should be on material items. Limiting disclosure to materially relevant information will provide some limitation on the breadth of documents and focus the parties on the key documents with regard to the case. If more documents are sought, they can be obtained through requests for production. Such requests have the benefit of focus, so parties know what specifically to look for and what specifically is sought. And knowing what to look for is half the battle in finding it.

If the committee leaves the standard as being relevant to claims and defenses, it should seriously consider my comment on refining the pleading standard for affirmative defenses. A laundry list of affirmative defenses compounds the plaintiff's disclosure obligation and difficulties at no expenses to the defendant. And it makes such disclosures difficult for the plaintiff, because the plaintiff has no understanding of the factual basis for the defense. With a standard relying on the specificity of the pleadings, the plaintiff has no obligation to make disclosures when no specificity is provided for affirmative defenses. If that standard is removed, it will be difficult for plaintiffs to know what to disclose with regard to affirmative defenses, because there is no information on the basis for the defense. If a party expects disclosures, they should at least provide information on what the claim or defense is about, so that the other side can determine what is relevant.

Finally, the committee should clarify whether C.R.C.P. 26(a)(1)(B) applies to damages as well as claims and defenses. I suggest that it should apply. Such a requirement may appear redundant in light of C.R.C.P. 26(a)(1)(C), but I disagree. The importance of including damages is to require the party opposing damages to also disclose documents bearing on damages. If a defendant has documents supporting the plaintiff's damages claim, the defendant should be compelled to provide them. Likewise, if the defendant has documents that tend to disprove the plaintiff's damages, the defendant should be compelled to provide them. This not only avoids surprise and helps both sides prepare for trial, but it will also promote settlement. Settlement will be eased if both sides fully understand each other's position on damages, and what evidence they have in support of their respective positions.

With regard to both C.R.C.P. 26(a)(1)(A) and (B), the committee may wish to specify whether disclosure is required for evidence intended for impeachment or rebuttal. Occasionally parties will argue they do not have to disclose documents or witnesses who would only be used for impeachment or rebuttal. This would appear to be contrary to the rules, but the argument gets made anyway, sometimes with success. The committee may wish to specifically address the issue.

With regard to C.R.C.P. 26(a)(1)(C), I would reiterate my comments about C.R.C.P. 26(a)(1)(B). The standard should be materially relevant. And the requirement to provide disclosures should be on both the party seeking damages, and the party opposing damages.

With regard to C.R.C.P. 26(a)(2)(B)(I), I support the clarification provided regarding expert disclosures. There was sometimes dispute regarding whether a party had to provide a list of data considered, or the actual data considered. I also support the clarification regarding referencing literature to be used in the witness' testimony.

I disagree with subpart g, in part. The requirement for an updated itemized bill should either be the discovery cut-off, or 14 days after the discovery cut-off. The requirement of an update as of the first day of trial is problematic for a couple reasons. The party endorsing the expert is trying to get ready for trial and should be focused on that effort. It can be hard enough to get your experts to show up when they are supposed to without also trying to get an updated bill. For the opposing party, the information comes too late. The opposing party has probably drafted questions already and will have to work in this last minute information and exhibit. On the other hand, the additional billing between the close of discovery and trial should not have a significant effect on credibility. The expert's opinions will already be developed, so any additional billing would just be for trial preparation. It would simplify things greatly to have the updated information disclosed at or near the discovery cut-off instead of the first day of trial.

With regard to C.R.C.P. 26(a)(2)(B)(II), the rule should expressly allow parties to incorporate non-retained experts' records into the summary of their testimony. As the federal courts have recognized, non-retained experts, "invariably have files from which any competent trial attorney can effectively cross-examine." *Washington v. Arapahoe Cnty. Dep't of Soc. Servs.*, 197 F.R.D. 439, 442 (D. Colo. 2000). It appears that the non-retained expert's files could already been incorporated by operation of C.R.C.P. 10(c). However, to avoid disputes, this should be made explicit in C.R.C.P. 26(a)(2)(B)(II). Incorporation makes sense, because there is little to be gained by either party in summarizing the non-retained expert's opinions if they are already written down somewhere.

I oppose C.R.C.P. 26(b)(4)(D). The proposed rule moves the trial away from a search for the truth and more toward gamesmanship. All of the information that may have influenced an expert, including drafts and communications from the attorney should discoverable. The rules should not encourage experts to act as hired guns retained to act as the parties' agents and to further their theories. Instead, the rules should encourage experts to act in a neutral, scientific fashion. To accomplish this, the expert's process should be an open book. If a trial is to be a search for the truth then the method by which an expert arrives at conclusions, including any attorney influence, should be subject to scrutiny.

I would encourage the committee to consider amending C.R.C.P. 26(b)(5)(A) to include claims of confidentiality. Unlike the federal courts, Colorado recognizes some items as confidential and presumptively not subject to disclosure or discovery. This includes items such as tax returns and personnel files. While these items are discoverable in some circumstances, often they are not. There is no explicit method for claiming confidentiality. It would be logical to claim it like a privilege. For this reason, the committee should consider adding it to C.R.C.P. 26(b)(5)(A).

C.R.C.P. 34

I fully support the amendments to C.R.C.P. 34(b). Objections should be specific and parties should have to specify whether information is being withheld. These are great amendments. I encourage the committee to go even further. The rules should also specify that objections must be made to specific requests. This would seem to be implicit in the rule, and the rule on interrogatories. Yet, almost uniformly, parties include general or reserved objections at the beginning of a response that purportedly apply to all requests. It appears that the only way to end this tactic is to specifically forbid it.

I also encourage the committee to adopt similar requirements for C.R.C.P. 33. Responding parties should be required to specify whether they are withholding information based on their objection. It is often difficult to tell. Likewise, objections should have to be made to each individual interrogatory. Finally, as with the amendment to requests for production, a properly stated objection should be adequate without the need to move for a protective order.

C.R.C.P. 37

I oppose the amendment to C.R.C.P. 37 entitling a party to be heard on sanctions only "if requested." The problem with this amendment is that sanctions may enter before a party has the opportunity to request to be heard. For example, a party moving to compel discovery responses might not seek sanctions until the reply. This deprives the responding party of both the opportunity to respond regarding sanctions, but also the opportunity to request the chance to be heard. The opposing party can request a sur-reply, but they are generally disfavored. Likewise, if the Court grants sanctions sua sponte, the sanctioned party might have no chance to be heard. The committee should leave in the requirement that a party be heard before sanctions are entered.

I also oppose adding "manifestly" before unjust. In my experience, the Courts are not shy about sanctioning parties in discovery disputes. But I am not convinced that this helps reduce or eliminate disputes. It think it may encourage parties to dig their heals in. This is because the risk goes both ways. Unless one party's position is clearly right, there is a temptation to make a counter-threat to seek fees in the hopes the other side will back down.

Additionally, the threat of fees may add to the litigiousness and contentiousness of a case. Once one party seeks sanctions, or even threatens to, it can sour relations between the attorneys. It encourages the other side to look for reasons to seek sanctions as well. And once an attorney or party is sanctioned, rather than being chastened, will instead feel the need to obtain a retributive award of attorney fees. I anything, I would suggest decreasing the role of attorney fees as sanctions because they simply add to the contentiousness of a case and can make disputes more personal. Alternate sanctions should be considered instead, such as limitations on evidence presentation, or informing the jury of a party's intransigence on discovery issues.

On the other hand, I support the change to C.R.C.P. 37(c). Often, the sanction of evidence exclusion is too harsh. And it may impede the truth seeking function of the trial. But some form of sanction is needed to discourage misconduct. Providing trial courts with greater flexibility in this regard is a positive change.

C.R.C.P. 54(d)

I support the changes to the first sentence of C.R.C.P. 54(d). It is appropriate to give trial courts more guidance on assessing the reasonableness of costs. Trial courts should have the flexibility to find that a case has been over-litigated and the costs incurred were unreasonable as a result.

I am opposed to the addition of the last sentence to C.R.C.P. 54(d). This change is contrary to Colorado statute defining awardable costs. The statute defining awardable costs uses the word "includes" meaning the list is nonexclusive and the items are examples of costs that may be awarded. *Cherry Creek Sch. Dist. v. Voelker*, 850 P.2d 805 (Colo. 1993). The statute was amended in 2001, without any change to the word "includes" or any attempt limit awardable expert costs. Thus, it can be safely inferred that the legislature is content with *Cherry Creek's* interpretation of section 13-16-122, C.R.S. *Tompkins v. De Leon*, 197 Colo. 569, 571 (1979).

Under section 13-16-122, C.R.S.: "The court is authorized...to consider not only the time spent in court but also the time spent by the expert in preparation for trial." *American Water Dev., Inc., v. Alamosa*, 874 P.2d 352, 389 (Colo. 1994). Notably, *American Water* was decided before the 2001 amendments to section 13-16-122, C.R.S. Its interpretation was therefore presumptively acceptable to the legislature.

Determining what costs should be awarded is primarily a legislative function. Costs were not available at common law. *Antero & Lost Park Res. Co. v. Lowe*, 70 Colo. 467, 469 (1921). Instead, they originated under the English statutes that were later incorporated into Colorado law. *Id.* at 469-470. The Colorado legislature also enacted statutes governing costs. *Id.* Although *Antero* states that costs may be regulated by statute or rule, it demonstrates that at their earliest, costs were governed and regulated by statute. *Id.* An early court stated that costs were a "creature of statute" and that "[i]t rests with legislative authority to grant or deny them, and to determine in which cases, and under what circumstances, they should be allowed." *Eastman v. Sherry*, 37 F. 844, 845 (E.D. Wis. 1889).

The paramount authority of the legislature over costs is confirmed by *Bennett v. Hickman*, 992 P.2d 670, 672-673 (Colo. 1999). *Bennett* held that the statutory offer of settlement statute, section 13-17-202, C.R.S., modified the provision of C.R.C.P. 54(d) that a prevailing party is entitled to costs. *Id.* A legislative enactment could not modify the court rule, unless the matter was substantive, meaning the legislative enactment controlled. Likewise, section 13-16-122, C.R.S. would control over any contrary provision of C.R.C.P. 54(d). Because the authority primarily rests with the legislature, the Court should avoid enacting rules that tread upon the legislature's definition of costs. *See People v. Herrera*, 183 Colo. 155, 161 (Colo. 1973).

The substantive nature of defining costs is shown by their history. Costs were initially allowed in England to alleviate the hardship of going into court to defend or enforce a right and having to bear the costs of such enforcement or defense. *See Downing v. Marshall*, 37 N.Y. 380, 381-382 (1867); *Day v. Woodworth*, 54 U.S. 363, 372 (1851). Thus, the statutes furthered a public policy of reducing hardship in litigation, and promoting fairness by ensuring those who

were in the right did not have to pay for the privilege of proving this in court. These are substantive public policy purposes that underlie the enactment of cost statutes. Further, many of the early statutes governed what costs could be awarded and how much could be awarded, including for attorney fees under the English Rule. *Downing*, 37 N.Y at 383-384.

In contrast, what costs are awarded as little impact on the functioning of the courts. Because the definition of what costs are awardable does not affect the functioning of the courts, it is not truly procedural in nature; instead, it is substantive. *See People v. McKenna*, 196 Colo. 367, 373 (Colo. 1978).

Additionally, the rule limiting awards of costs to experts will hinder professional negligence suits and other actions where expert testimony is required. In these types of suits, obtaining an expert report is a requirement. Depriving the prevailing party of the ability to recover the costs of obtaining the expert report will hinder such suits. Further, because experts are needed to sue attorneys for malpractice, the rule might be perceived as protectionist of attorneys.

There is also something unfair in tightening and expanding the requirements for expert reports, while at the same time denying parties the ability to recover the cost of obtaining such reports. In particular, the rule burdens low and moderate income litigants. Eliminating the ability to recover costs for expert reports does *not* eliminate the need or expense of such reports. Nor will it discourage those who can afford the experts; for them the risk of losing will be greater than the risk of not recovering the cost.

I also question the conclusion that high cost awards hinder access to justice. I would agree that the high cost of litigation limits access to justice, but that is often independent of the costs awarded. I submit that limiting the ability to recover costs will decrease access to justice. It will force those who could not afford to bear the costs, even if they win, out of litigation. And it will encourage those who can afford the loss to up the cost of litigation to force people out. Litigation might be determined based on who can afford an expert report.

Limiting expert costs to testimony will also hinder parties working with non-retained experts, which is a money saver in the long run. Often non-retained experts will charge for interviews or for providing information about a case. Doctor in particular will often refuse to speak to an attorney about a case unless they are paid for their time. Not awarding these costs can reduce trial preparation and perhaps reliance on non-retained experts.

Instead of reducing awardable costs, the committee should look for ways to reduce the total cost of litigation. Potentially limiting parties to one retained expert per field is an excellent start. The committee may also wish to consider limiting expert fees to the market rate for said expert outside of litigation. For example, if a doctor charges $400 per hour to see a patient, that should be the maximum awardable as a cost; and if the doctor wants $600 per hour for testimony, the excess will have to come from the retaining party.

If the committee had it within its power, I would suggest that it place a restricting on what experts can bill even to the retaining party. And I would give the Court authority to reduce

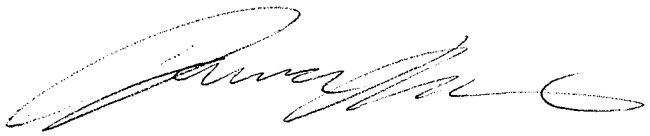
their bills, even to the retaining party. This is where the cost factor is, and it is one the parties often have little control over. However, I think restrictions on what experts can charge would have to come from the legislature.

CONCLUSION

Again, thank you for the opportunity to comment on the proposed rules. I appreciate the committee's work and believe that many of the proposed rules are a positive step. I hope the committee will take my comments into account and consider modifying or removing some of the proposed changes.

Yours truly,

KILLIAN, DAVIS, Richter & Mayle, PC



Damon Davis

/DJD

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April 16, 2015

Christopher T. Ryan
Clerk of the Supreme Court
2 East 14th Avenue
Denver, Colorado 80203

Re: Comments regarding proposed amendments to the Colorado Rules of Civil Procedure and request for verbal testimony

Dear Mr. Ryan:

Please accept these written comments from the Colorado Civil Justice League (CCJL) regarding the proposed amendments to the Rules of Civil Procedure. We also request time for verbal testimony at the upcoming public hearing.

CCJL's mission is to foster a fair and efficient system of civil justice. For over 20 years we have worked with state lawmakers to help preserve our excellent system of civil justice through reforms based on common sense and due process. We wish to thank the Colorado Supreme Court, the Civil Rules Committee, the Improving Access to Justice Sub-Committee (IAJ), as well as those involved with the Colorado Civil Access Project (CAPP), the Institute for the Advancement of the American Legal System (IAALS) and others for their ongoing efforts to help make our Colorado courts function in a speedy, inexpensive and just manner for all of us.

In many ways, CAPP and the newly proposed amendments should help provide speedier and less expensive access to justice, especially for the type of business and contract disputes focused on by CAPP where opposing parties have roughly equivalent access to relevant information throughout the process. However, some features in the rules and proposed amendments will likely continue to hinder and even prevent the attainment of our mutual goals in typical personal injury cases. Fortunately, these features can be easily adjusted to correct the root-cause of much of the frustrating, labor-intensive and expensive discovery disputes. Our suggestions focus on three features: (1) proportional access to information; (2) proportionality of discovery based upon itemization of damages; and (3) hybrid experts.

PROPORTIONAL ACCESS TO INFORMATION

Unlike typical CAPP cases, tort cases usually involve privileged mecical and other records. Personal injury claimants tend to enjoy exclusive, or at least disproportionate

knowledge regarding the very existence of records. They also control access to them. Recent rulings have empowered plaintiffs and their attorneys to unilaterally screen information to decide what to reveal, and what to conceal. In our adversarial system of justice, at times this relatively unchecked empowerment has the unfortunate consequence of encouraging and rewarding omission, forgetfulness, concealment, misrepresentation or worse, even when the aspirations of the Rules of Civil Procedure state otherwise.

As an unintended result of recent court rulings, the parties in litigation often find themselves in protracted discovery disputes. These cost a great deal of time, effort, money and court involvement simply to achieve rightful access to information which should have been freely provided at the outset of a case, but was not. Rather than foster a cost-effective and speedy process to arrive at a fair settlement or trial on a case, Colorado's rules and their unintended incentives often force defendants to battle for a fair opportunity to rightfully obtain basic relevant information that could help achieve a fair, just and appropriate resolution. The CAPP, IAJ and IAALS authors, as well as CCJL and individual businesses and citizens join in identifying the growth of litigation time and expense as a problem that can inhibit mutual access to justice. A few additional changes can help reduce or eliminate the problems.

In order to better pinpoint effective solutions, the core systemic causes of some of the most severe problems must be properly identified. In 2005, the Colorado Supreme Court issued two opinions which eventually resulted in the practical elimination of the time-tested method of quickly and efficiently obtaining executed medical authorizations through C.R.C.P. Rule 34. *See Weil v. Dillon*, 109 P.3d 127 (Colo. 2005) and *Alcon v. Spicer*, 113 P.3d 735 (Colo. 2005). After these decisions, plaintiffs began to refuse to provide executed authorizations that defendants requested in discovery. Instead, they began to screen and produce records through Rule 26 disclosures, albeit in an often incomplete and procrastinated manner. CCJL members indicate that medical authorizations were formerly provided on nearly 90% of tort cases, but are now voluntarily provided in as few as 10-15% of cases. And in 2012, the Colorado Supreme Court changed C.R.C.P. Rule 45(c)(2)(B) to require medical authorizations to accompany subpoenas issued to records custodians. Since the passage of HIPAA in 1996, and especially after the enhanced penalties signed into law through The American Recovery and Reinvestment Act of 2009, custodians began refusing HIPAA compliant medical authorizations without Rule 45 subpoenas. Now, with the 2012 changes to Rule 45, Colorado medical providers have been given the rule-based blessing to simply refuse subpoenas without authorizations. As a result, plaintiffs can chose to refuse to provide authorizations, thereby effectively eliminating a defendant's power of discovery under Rules 26 and 45. These powers previously provided a quick, inexpensive and just way to verify the accuracy, completeness and veracity of a plaintiff's disclosures, with very little effort by the plaintiff beyond a signature.

The direct consequence of these discovery restrictions was the creation of systemic incentives for some claimants to forget, omit and conceal records. Some even hide treatment information from their own personal injury counsel who otherwise would have abided by the rules. Some disclosures have become remarkably incomplete and non-compliant with the mandatory disclosure requirements. Without medical authorizations, the system lacks an effective, cost-efficient and speedy manner by which to cross-check and verify the completeness of disclosures. And if a violation is somehow uncovered, there is little or no penalty other than the imposition of a modest award of

costs or fees.[1] In short, plaintiffs are simply allowed to say, "Trust me!" as they select and self-screen their disclosures in pursuit of a financial goal. Without an effective means of verification, some will surely comply with the rules, and some will chose not to do so and will face little or no practical deterrence for their non-compliance.

As a result, discovery disputes have prospered. Defendants must use their remaining limited discovery tools to probe, detect and correct disclosure and discovery violations that impede access to justice. This situation prolongs and drives expensive discovery and motions efforts to obtain that which had been previously provided a few years earlier in an inexpensive, efficient and just manner. It is no coincidence Colorado has become one of the most expensive jurisdictions in the country for court access. The IAALS report indicates it costs $24,968.68 in attorney fees, plus costs, to defend the average civil case. The discovery process may appear burdensome to some claimants, particularly those who closely adhere to the letter and spirit of the rules. However, most experienced defense attorneys can relate any number of situations where claimants and/or their attorneys helped to create that burden for themselves, and others, by the production of incomplete, inadequate and even misleading disclosures which were only revealed as such by a thorough use of depositions, motions, and a meticulous scouring of the partially disclosed records for telltale signs of other relevant, undisclosed providers.

In contrast to the circumstances identified above, the State of Colorado has clearly identified official public policy that should help guide our actions. With the knowledge that most tort cases involve an insurance carrier as the primary source of settlement funds, many participants to litigation unfortunately believe there is no harm caused by settlements or awards artificially inflated by disclosure and discovery omissions, misrepresentations and "legal puffery". In fact, the Supreme Court has recognized human nature is easily distorted by knowledge of the existence of insurance as a financial resource in a dispute. Such knowledge carries an "unjustifiable risk" that it will "improperly" influence the decision-making process. *See Sunahara v. State Farm*, 280 P.3d 649, 654 (Colo. 2012). The courts should be vigilant to identify, prevent and police attempts to distort due process caused by those who improperly withhold the truth to unfairly inflate settlements and awards. The General Assembly is even more direct. It declares insurance fraud is very expensive, borne by the consuming public, places businesses at risk, reduces the ability of individuals to raise their standards of living, and decreases the economic vitality of this state. C.R.S. § 10-1-128. It further finds and declares "the state of Colorado must aggressively confront the problem of insurance fraud by facilitating the detection of and reducing the occurrence of fraud through stricter enforcement and deterrence and by encouraging greater cooperation among consumers, the insurance industry, and the state in coordinating efforts to combat insurance fraud." C.R.S. § 10-1-128(2)(a) (2012); *see also* C.R.S. §10-1-108 (insurance commission empowered to promulgate regulations).

The state's courts are needed to help achieve public policy by deterring concealment, misrepresentation and worse. The analysis and solutions offered by the CAPP

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[1] Unlike the criminal justice system, which is sometimes mentioned for its effectiveness despite its supposed lack of discovery, the civil process does not have search warrants, evidentiary hearings, squads of police officers, detectives and investigators, the possibility of criminal punishment and incarceration for impeding an investigation or failing to cooperate, or the innate respect and fear most people have for the power of the state and its enforcement officers and attorneys. And the criminal arena has significant sanctions upon prosecutors who fail to provide full disclosure of information.

experiment and the IAJ recommendations indicate that early and prompt involvement by the courts helps deter such tactics by those who may otherwise be less than fully compliant with the rules of disclosure. We agree that early court involvement will certainly help, but it is not enough. Additional steps should be taken. The courts and parties will continue to expend time and resources to enforce the disclosure of records that remain hidden or omitted if there is no verification method by which to detect improperly selective and erroneous omissions. Until such a method exists, the rules as written and amended will continue to require the robust use of remaining discovery rights to achieve fair access to justice. The use of these less-than-efficient tools consume a significant amount of time, effort and expense when there are speedy, inexpensive and just alternatives. CCJL offers suggestions that will benefit the system by reducing the burden on claimants and attorneys who choose to professionally abide by the rules, while also protecting non-waived privileges.

As the proposed amendments suggest, plaintiffs should continue to be required to disclose a list of medical providers and other individuals likely to have relevant discoverable information as required by C.R.C.P. Rule 26(a). And they should continue to present a highly detailed privilege log as required by *Weil* and *Alcon*. But the rules should also include a straight-forward check-and-balance to ensure full compliance with these requirements:

1. Any privilege associated with relevant information or records not included in the disclosures and not otherwise protected by the detailed privilege log should be presumed waived, unless good cause can be shown for the omission. This requirement should be explicit in Rule 26 and/or Rule 37 to encourage disclosure completeness.

2. Defendants should be given the authority to demand executed authorizations for the collection of records through C.R.C.P. Rule 34 and by subpoenas under C.R.C.P. Rule 45. Records custodians should be given protection against suit if they honor properly noticed and scheduled subpoenas. If the plaintiff has properly maintained a claim of privilege for those records, the authorization given to the defense can direct the records custodian to send the records to the plaintiff's counsel to give that attorney an opportunity to preserve the claimed privilege through a complying privilege log for any record or entry that is not produced. The defense would be notified when the records were sent. The plaintiff should also be required to promptly disclose all steps and communications taken to procure the records to ensure transparency and reasonable collection efforts. The plaintiff counsel should be required to send defendant the records within a reasonable time frame after receipt (i.e. 21 days). The definition of a "complying privilege log" should include the requirements provided by the Supreme Court in the *Weil* and *Alcon* decisions. Violations should include more than mild monetary sanctions. The rules should include a non-exhaustive list of possible sanctions to empower reticent trial judges to impose sanctions that actually deter violations, not the least of which could include jury instructions that authorize negative inferences such as those associated with spoliation of evidence.

3. C.R.C.P. Rule 45 should also be amended to reinstate the power to subpoena records without a medical authorization. The records custodians should be protected as above. With the current 14-day notice period, and the prompt attention of the courts, objections can easily be resolved in a timely manner.

4. If a party discovers a disclosure omission or an otherwise incomplete or improper disclosure, or if the situation reveals an inadequate attempt by a claimant to gather and disclose missing and relevant records, the rules should explicitly empower the courts to provide court-ordered subpoena power to the defendant to directly gather the records. The parties may have largely different motivations to gather much of these missing records, and the defense should be able to gather them with an emphasis of its choosing.

These tools would provide an indispensable cross-check that will encourage more complete disclosures and privilege logs, as well as proportionate access to relevant and proper information, while placing upon a claimant very little in terms of time, effort or expense. These are not novel recommendations. We can provide examples from other states that have crafted similar approaches. Rather, Colorado's current system is novel for the lack of statutory or rules-based approaches that provide these essential tools.

PROPORTIONALITY OF DISCOVERY BASED UPON ITEMIZATION OF DAMAGES

To ensure actual proportionality of discovery to claims and defenses, there must be clear and early itemization of damages and claims in the disclosures. Neither the court nor the defending party can determine proportionality of discovery unless they first know the extent of the allegations and demands. Such critically important information must be provided early, and not withheld until the discovery and disclosure deadlines have passed and trial has arrived, unless there is some compelling reason for the omission. Otherwise, under the doctrine of proportionality, unspecified and unlimited damages should warrant the need for proportionately unspecified and unlimited discovery.

It is currently uncertain how the proposed amended rules will handle a lack of disclosure of damage descriptions and computations. It is assumed the court will handle it somehow at the C.R.C.P. Rule 16 Case Management Conference. Given the new emphasis on proportionality, CCJL suggests clarity. C.R.C.P. Rule 26(a)(1)(C) should be amended to read as follows (proposed additions in italics):

> [A] party shall, without awaiting a discovery request, provide to the other parties . . . (C) A description of the categories of damages sought and a computation of *each* category of damages claimed by the disclosing party. *Uncertainty or difficulty regarding the ability to compute any damage category shall not constitute justification for failing to provide a financial computation. The disclosing party must provide a computation upon which the court and any opposing party may determine proportionality of discovery. Until such computation is provided, discovery upon that claim shall remain similarly unlimited.*

In this manner, the plaintiff can help control discovery by specifying the exposure faced by the defendant. Defining the level of exposure will help the courts and the defendants decide how much discovery is proportionately appropriate and fair.

HYBRID EXPERTS

Both the IAJ and IAALS reports suggest the use of experts should be curtailed. The current rules and the proposed amendments continue to make a clear distinction between "retained" experts under C.R.C.P. Rule 26(a)(2)(B)(I) who are "retained or specially employed to provide expert testimony, or whose duties as an employee of the

party regularly involve giving expert testimony" in contrast to those "who may be called to provide expert testimony" under C.R.C.P. Rule 16(a)(2)(B)(II) but are "not within the description contained in subsection (a)(2)(B)(I) . . ."

Trial courts and counsel for the respective parties are well aware some experts do not fit squarely in to one category or the other, like certain health-care providers who specialize or cater to the personal injury industry and regularly offer trial testimony. In reality, these experts are used in court as frequently as "retained" experts. Trial courts should have the discretion, on a case by case basis, to require such experts to be subjected to the more complete disclosure requirements of C.R.C.P. Rule 26(a)(2)(B)(I). CCJL recommends modification of that passage under the rules to read as follows (proposed additions in italics):

> [D]isclosure shall (I) 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, be accompanied by a written report. *In the court's discretion, it may also include other experts into this category if the court determines they regularly give expert testimony.*

E-DISCOVERY

As a final note, CCJL appreciates the appropriate recognition by the proposed amended rules that e-discovery is a growing issue that will soon need to be addressed more fully by the courts. CCJL welcomes this discussion and seeks to be involved in it.

CCJL also conveys its appreciation for the opportunity for written input regarding the proposed amendments to the rules. And we also look forward to the opportunity to provide verbal testimony as well. Thank you in advance for your consideration!

Sincerely,

Stuart S. Jorgensen, Esq.
On behalf of the Colorado Civil Justice League

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STEVEN J. DAWES

April 17, 2015

VIA U.S. MAIL and E-MAIL: christopher.ryan@judicial.state.co.us

Christopher Ryan
Clerk of the Supreme Court
Colorado Judicial Department
2 East 14th Avenue
Denver, CO 80203

RE: Proposed Rule Changes

Dear Mr. Ryan:

I represent the Colorado Intergovernmental Risk Sharing Agency (CIRSA). Please accept the following comments of CIRSA to the proposed amendments to the Colorado Rules of Civil Procedure.

CIRSA is a public entity risk sharing pool comprised of over 250 municipalities throughout Colorado. CIRSA is formed by an intergovernmental agreement that operates as CIRSA's bylaws. The CIRSA Policy provides liability coverage for multiple risks, including but not limited to bodily injury, property damage, personal injury, advertising injury, law enforcement activities, administration of employee benefits, uninsured/underinsured motorist, violations of the United States Constitution, violations of the Colorado Constitution, and violations of laws affording protection for civil rights, including employment practices and land use decisions. As such, when a CIRSA member municipality and its public employees are sued CIRSA will retain one or more attorneys to provide a defense for the member municipality and its employees, and CIRSA will indemnify them, subject to the terms of the CIRSA Policy.

Of the lawsuits against CIRSA members, a large number are subject to a Rule 12(b)(5) motion to dismiss for failure to state a claim including many lawsuits in which the plaintiff is representing himself or herself, i.e., *pro se*.

The Rules Committee's proposed amendments to Rule 12(a) are the following:

> (1) Unless ~~a~~A defendant ~~shall~~ files a motion under subsections (b)(1), (b)(2), (b)(3), or (b)(4) of this Rule, the defendant shall file an ~~his~~ answer ~~or other response~~ within 21 days after the service of the pleading asserting a claim~~summons and complaint~~ on ~~him~~ that defendant. Filing a motion under

subsections (b)(5) or (b)(6) of this Rule does not affect the obligation also to file a timely answer. The court shall give priority to any motion presented pursuant to subsections (b)(1), (b)(2), (b)(3), or (b)(4) of this Rule. If the court denies any such motion, the defendant shall file an answer within 14 days after service of the order.

CIRSA is concerned because these proposed amendments to Rule 12(a) will require the municipality and its employees to file an answer and engage in time consuming discovery even though they have filed a motion to dismiss for failure to state a claim under Rule 12(b)(5). This will cause CIRSA and its members (many of whom have significant deductibles) to incur substantial litigation expense while awaiting a ruling on the Rule 12(b)(5) motion. CIRSA's experience is that rulings on pending Rule 12(b) motions can take a considerable amount of time, often many months. Requiring the municipalities and their employees to incur the expense of litigating these case while awaiting a ruling on the Rule 12(b)(5) motion will cause unnecessary waste of time and money.

In addition, certain immunities are often raised under Rule 12(b)(5). The decision on whether the municipality or its employee is entitled to immunity from suit is critically important, and the purpose of filing the motion to dismiss is to protect public employees and municipalities from ill-considered and improperly filed lawsuits.

Accordingly, CIRSA's proposal is that the Rule should exclude all defendants from filing an answer and engaging in discovery when the defendants file a motion not only under Rule 12(b)(1) –(4), but also under 12(b)(5). CIRSA's proposed language to Rule 12(a) is as follows:

(1) Unless a~~A~~ defendant ~~shall~~ files a motion under subsections (b)(1), (b)(2), (b)(3), (b)(4). ~~or (b)(5)~~ of this Rule, the defendant shall file an ~~his~~ answer ~~or other response~~ within 21 days after the service of the pleading asserting a claim~~summons and complaint~~ on ~~him~~ that defendant. Filing a motion under subsections (b)(5) or (b)(6) of this Rule does not affect the obligation also to file a timely answer. The court shall give priority to any motion presented pursuant to subsections (b)(1), (b)(2), (b)(3), or (b)(4) of this Rule. If the court denies any such motion, the defendant shall file an answer within 14 days after service of the order.

A corresponding change would be necessary to Rule 16, as follows:

(1) At Issue Date. ~~For the purposes of this Rule, A~~a case shall be deemed at issue at such time as all parties have been served and all pleadings permitted by C.R.C.P. 7 have been filed or defaults or dismissals have been entered against all non-appearing parties, or at such other time as the court may direct. Except for a motion pursuant to C.R.C.P. 12(b)(1) through (b)(~~4~~5), the filing of a motion permitted by C.R.C.P. 12 shall not affect the obligation also to file a timely answer. The proposed order shall state the at issue date.

Thank you for receiving these comments for consideration by the Court.

Very truly yours

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Office of the Attorney General

April 17, 2015

Mr. Christopher Ryan
Clerk of the Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

RE: Comments on the Proposed Amendments to the Colorado Rules of Civil Procedure

Dear Justice Eid, Members of the Civil Rules Committee, and Mr. Ryan:

I write for myself and on behalf of the attorneys of the Office of the Attorney General regarding the proposed amendments to the Colorado Rules of Civil Procedure. I appreciate the considerable effort put forth by the Civil Rules Committee to address the challenges our civil justice system faces in an era of increasing caseloads and limited judicial resources. The majority of the proposed amendments have been received positively by the attorneys in my office, who engage in a wide variety of litigation in civil courts, representing both plaintiffs and defendants. The following are the comments and concerns of the Attorney General's Office:

1. *Proposed changes to Rules 16 and 26 relating to case management and the scope of discovery.*

The Attorney General's Office welcomes the proposed changes to Rule 16 providing for a more robust case management process, and in particular, the revised language of Rule 16(d) setting forth the expectation that the parties and trial court engage in a case management conference. The Attorney General's Office also is enthusiastic about the changes to Rule 26(b)(1) regarding the scope of discovery and the emphasis on proportionality. The Attorney General's Office believes these important reforms will increase efficiency, control costs, and, ultimately, improve access to justice.

Suggested Revision of C.R.C.P. 12(a)

(1) Unless a defendant files a motion under subsections (b)(1), (b)(2), (b)(3), or (b)(4) of this Rule, or a motion under subsection (b)(5) of this Rule raising a defense of qualified or absolute immunity, the defendant shall file an answer within 21 days after the service of the pleading asserting a claim on that defendant. Except as provided in the first sentence of this subsection, filing a motion under subsections (b)(5) or (b)(6) of this Rule does not affect the obligation also to file a timely answer. The court shall give priority to any motion presented pursuant to subsections (b)(1), (b)(2), (b)(3), or (b)(4) of this Rule, and to any motion presented pursuant to subsection (b)(5) of this rule raising a defense of qualified or absolute immunity. If the court denies any such motion, the defendant shall file an answer within 14 days after service of the order.

Suggested Revision of C.R.C.P. 16(b)(1)

(1) At Issue Date. A case shall be deemed at issue at such time as all parties have been served and all pleadings permitted by C.R.C.P. 7 have been filed or defaults or dismissals have been entered against all non-appearing parties, or at such other time as the court may direct. Except for a motion pursuant to C.R.C.P. 12(b)(1) through (b)(4), or a motion pursuant to C.R.C.P. 12(b)(5) raising a defense of qualified or absolute immunity, the filing of a motion permitted by C.R.C.P. 12 shall not affect the obligation also to file a timely answer. The proposed order shall state the at issue date.

2. *Proposed changes to Rules 12 and 16 relating to filing an answer and the at-issue date when a motion to dismiss is filed under Rule 12(b)(5).*

The proposed changes to Rules 12 and 16 would require parties to file an answer and place a case "at issue" for purposes of scheduling and discovery, even though a motion to dismiss has been filed under Rule 12(b)(5) for failure to state a claim. The Attorney General's Office has identified significant concerns regarding the effect of these proposed changes on defenses commonly raised in litigation against public officials. Accordingly, the Attorney General's Office has proposed additional revisions to Rules 12 and 16. *See* attached. The proposal would (1) exempt from the new requirements Rule 12(b)(5) motions in which a party raises "a defense of qualified or absolute immunity" and (2) add Rule 12(b)(5) motions in which a party raises "a defense of qualified or absolute immunity" to the list of motions that the trial court should prioritize. The Attorney General's proposal has been presented to and accepted by the Rules Committee.

Although public entities commonly file motions to dismiss under Rule 12(b)(1) asserting immunity under the Colorado Governmental Immunity Act (CGIA), many of the other immunities frequently asserted by public entities and officials are raised under Rule 12(b)(5). Most significantly, state actors (officials and employees not only of the State but also of counties, municipalities, school districts, and other public entities) often assert the defense of qualified immunity in response to claims asserting that a state actor violated a federal right. Such claims are routinely filed in state court. *See, e.g., Churchill v. Univ. of Colo.*, 285 P.3d 986, 999 (Colo. 2012). Because a state actor's entitlement to qualified immunity is assessed based on the face of the complaint and does not implicate the court's subject matter jurisdiction, such motions are filed under Rule 12(b)(5). *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 666 (2009) (noting that the case originated with a motion to dismiss asserting failure to state a claim); *Sebastian v. Weaver*, 2013 Colo. App. LEXIS 1450, at *2 (Colo. App. 2013), *cert. granted*, 2014 Colo. LEXIS 673 (Colo. 2014).

The United States Supreme Court routinely has held that state actors are presumed to be immune from liability as long as their actions did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Whether a defendant is entitled to qualified immunity should be resolved at the "earliest possible stage in litigation." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). This is because qualified immunity is both a defense to liability and an "entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Denial of qualified immunity to a state official is subject to interlocutory appeal when the qualified immunity determination is made as a matter of law—as is routinely the case. *City of Lakewood v. Brace*, 919 P.2d 231, 241 (Colo. 1996).

Motions to dismiss asserting other forms of immunity such as the absolute immunity of judicial officers and prosecutors similarly are brought under Rule 12(b)(5). *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 416 (1976). Denial of a motion to dismiss based on absolute immunity also would be subject to an interlocutory appeal. *See Chadha v. Charlotte Hungerford Hosp.*, 865 A.2d 1163, 1170 (Conn. 2005).

Because the various immunity defenses are intended to insulate public employees from the burdens of discovery and trial, as well as from liability, motions to dismiss raising these defenses should be exempt from the proposed requirements to answer the complaint and begin discovery. I appreciate the Committee's willingness to consider the concerns of public entities and urge the Supreme Court to consider the State's proposed revisions when the Court takes up the proposed amendments.

3. *Proposed changes to Rules 26(b)(4)(A) and 54(d).*

I offer two additional minor comments on the remaining proposed amendments, which I am sure will echo comments expressed by other members of the bar.

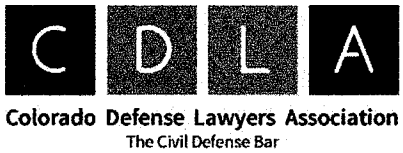
First, proposed Rule 26(b)(4)(A) presumptively would limit all expert depositions to three hours. The attorneys in my office have responded that this amount of time would be insufficient to accomplish an expert deposition in most cases, and particularly in instances in which a party intends to challenge an expert's testimony under Colorado Rule of Evidence 702. Accordingly, the Attorney General's Office recommends an increase in the presumptive time permitted for expert depositions.

Second, the Attorney General's Office does not favor the proposed change to Rule 54(d) limiting the recoverable costs for experts to the expert's time testifying at trial or for testimony at a deposition admitted in evidence in lieu of testifying at trial. The expert's trial testimony is often the least significant part of the overall expense of retaining an expert whose testimony is necessary to prevail on a claim. Limiting a party to recovery of time for trial testimony does not adequately compensate a party for the costs fairly incurred in the litigation.

I again thank the Court and the Rules Committee for their efforts in encouraging an open discussion about the needs of the civil justice system in our state and in working to bring to fruition important reforms to the system.

Sincerely,

CYNTHIA H. COFFMAN
Colorado Attorney General



April 17, 2015

Judge Michael Berger
Chair, Civil Rules Committee
c/o Clerk of the Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

Re: *Proposed Civil Rule Changes*

Dear Judge Berger:

I am writing today on behalf of the Colorado Defense Lawyers Association ("CDLA") with respect to the proposed changes to the Colorado Rules of Civil Procedure. CDLA has over 750 member attorneys who defend individuals, businesses, public entities, and insurance companies in civil actions across Colorado. We are committed to the improvement of the civil justice system, while serving our clients' interest in having the resources and the opportunities to defend themselves against a broad spectrum of claims. To that end, we welcome a discussion of potential changes to the civil rules and would like to offer our perspective on the changes proposed.

The two largest groups within CDLA are (1) those representing defendants in general tort liability stemming from personal injury and property damage claims; and (2) those representing developers, design professionals, general contractors, and subcontractors in construction defect actions. CDLA also has sizable contingencies defending medical malpractice, employment, worker's compensation, and first party insurance claim matters. The claims our members defend are quite varied, ranging from small personal injury claims where potential liability is a matter of who ran the red light or who had the right-of-way, to multi-million dollar construction defect claims involving experts in multiple engineering disciplines, to medical malpractice claims stemming from virtually every potential medical specialty.

In many of these matters, the plaintiffs, their counsel, and their experts will be at a significant advantage. The statutes of limitation give them time to develop their cases, retain experts, and compile their damages before giving notice of a claim and filing suit. Defending parties and their counsel have significantly less time to respond once suit is filed.

Colorado Defense Lawyers Association
The Civil Defense Bar

PROPOSED LIMITATIONS ON EXPERT DEPOSITIONS
C.R.C.P. 26(b)(4)(A)

My personal experience is mostly in the area of construction defects. In these cases, a property owner has six years from the date a building is completed to discover a problem, defined in the Construction Defect Action Reform Act, C.R.S. § 13-20-801, *et seq.* ("CDARA") as the physical manifestation of a defect. The owner has two years from the date of that discovery to investigate the issue and serve a Notice of Claim, which tolls the statute of limitations. Upon receipt of a Notice of Claim, a construction professional has only 30 days to conduct an inspection and either 30 or 45 days (depending on whether it is a residential or commercial project) to respond.

Once the matter is in litigation, the plaintiff property owner will disclose reports by experts in many different disciplines. It is not unusual for these reports to run hundreds of pages long, plus attachments. The experts' files can run thousands of pages long. These reports are issued 18 weeks before trial and the defending parties have only 4 weeks to analyze the reports, perform any needed inspections (as the reports will identify issues in much more detail than any pre-litigation notice), and prepare responsive reports. Even when additional time to respond is allowed, it is rarely more than 8 weeks from receipt of the voluminous expert reports.

While the example given is in from a construction defect case, the same concerns and considerations also apply to many other civil cases.

Under these circumstances, one of the few equalizers is the availability of expert depositions, during which experienced counsel can question the experts about their methodology, the sources they relied upon, and try to extract concessions from the experts. Limiting expert depositions to three hours would eliminate this valuable tool. The experts, themselves cannot (and generally do not) object to this, as they get paid for their time testifying at rates often well above their regular hourly rates.

CDLA understands and appreciates the limitations on proposed expert trial testimony that is beyond the scope of the experts' disclosed opinions. However, given the broad scope of opinions, the length of their reports, and the information contained with the often-myriad attachments to the reports, it is difficult for attorneys to monitor whether testimony being sought or offered is indeed outside the scope of an expert's disclosed opinions. One tool attorneys use during depositions is clarifying the extent to which an expert has offered an opinion on a particular subject.

In personal injury and medical malpractice cases, experts are often medical professionals and economic damages experts. Experienced lawyers can and typically do "self-regulate" by limiting the time spent with these experts, largely due to the large

fees they charge. While beyond the scope of the issues addressed here, CDLA would welcome a discussion within the Inter-Professional Committee to discuss the escalating testimony fees being sought by experts.

Expert depositions are of vital importance to the defense of any number of cases being defended by CDLA members. They help counsel understand the nature of claims and evaluate them for settlement purposes. They are important in developing facts necessary for C.R.E. 702 challenges or C.R.C.P. 56 motions. They aid in trial preparation efforts by determining the true scope and extent of the experts' opinions.

There is presumably a reason that construction cases were exempted from the CAPP rules. The preclusion of expert depositions was likely one of those reasons. Given that the IAJ Committee was persuaded to return to allowing expert depositions in cases that had been controlled by CAPP, there is no reason to limit the duration of depositions in cases that were not subject to CAPP. For these reasons, CDLA objects to the proposed limitations on the length of expert depositions.

DISTINCTION BETWEEN RETAINED AND NON-RETAINED EXPERTS
C.R.C.P. 26(a)(2)(B)(I) and (II)

CDLA welcomes the additional requirements for disclosure of non-retained experts in the proposed rules, but questions whether those requirements should extend to parties who may also be experts in a particular field. Also, the way the proposed rule is written could be read to limit the scope and extent of a party or fact witness' testimony when that person is also testifying as an expert, in that they could be limited to testify about fact issues which have not been specifically disclosed through C.R.C.P. 26(a)(2)(B)(II).

More important to CDLA, the line between whether an expert is specially retained or non-retained can often become blurred. Colorado law on this issue is limited, but most recently addressed in ***Gonzalez v Windlan***, -- P.3d ---, 2014 COA 176 (December 31, 2014). There, the Colorado Court of Appeals recognized non-retained experts are "occupational experts, such as treating physicians, police officers, or others who might testify as experts but whose opinions are formed as part of their normal occupational duties."

While this definition is helpful, supposedly non-retained experts can cross the line into matters generally reserved for retained experts. For example, a treating physician may offer an opinion not only about a patient's diagnosis or prognosis, but also causation of the patient's condition. This often comes up when a treating medical provider is among those well-known providers who testify on a regular basis and often treat their patients only after referrals from attorneys. Similarly, contractors who are

often asked by counsel to provide a cost to make repairs, may also offer an opinion as to why the repairs are required and whether a party violated the standard of care.

The fact that an expert has not been paid to offer an opinion within a litigated matter should not be the determining factor in whether that expert is considered retained or non-retained. Rather, Colorado should adopt a policy that finds the disclosure requirements under C.R.C.P. 26(a)(2)(B) do not turn on whether the disclosing party deems the expert retained or non-retained. "It is the substance of the expert's testimony, not the status of the expert, which will dictate whether a Rule 26(a)(2)(B) report will be required." An otherwise non-retained expert should be required to comply with C.R.C.P. 26(a)(2)(B)(I) when the expert intends to offers testimony regarding causation or the standard of care, including whether there was a breach of the standard of care. *See* ***Harvey v. United States***, 2005 WL 3164236, at *8 (D. Colo. Nov. 28, 2005) *report and recommendation adopted sub nom.* ***Estate of Harvey, ex rel. Grace v. United States***, 2006 WL 2505850 (D. Colo. Aug. 28, 2006). This can be incorporated into the rule or addressed through a Committee Comment.

DISCLOSURE OF EXPERT FILES
C.R.C.P. 26(b)(4)(D)

CDLA believes it is important that experts not be simply appendages of the parties by whom they were retained, but independent arbiters of technical or otherwise specialty issues who formed their own opinions, regardless of the party who retained them. In fact, the Bylaws and Rules of The State Board of Licensure for Architects, Professional Engineers and Professional Land Surveyors defines the "Practice of Engineering" to include:

> Inspection and examination of single or multiple family residential, commercial, industrial or institutional structures, regarding their structural, electrical, mechanical, thermal, insulation and roofing/waterproofing subsystems for proper integrity or capacity, constitutes the practice of engineering as defined in C.R.S. 12-25, Part 1. This would include the diagnosis and analysis of problems with structures and/or the design of remedial actions. Therefore, an individual who advertises or practices in this area shall be licensed as a professional engineer in the State of Colorado.

Section 3.6.1 of those rules is titled, "Exercise of Judgment" and reads, "Licensees shall not permit a client, employer, another person, or organization to direct, control, or otherwise affect the licensee's exercise of independent professional judgment in rendering professional services for the client."

This premise has also been adopted by many other professional organizations. For example, the American Medical Association opinion 9.07 states:

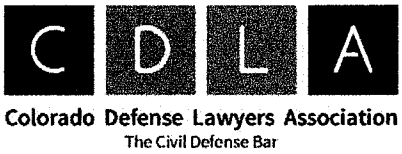
When physicians choose to provide expert testimony, they should have recent and substantive experience or knowledge in the area in which they testify, and be committed to evaluating cases objectively and to providing an independent opinion. Their testimony should reflect current scientific thought and standards of care that have gained acceptance among peers in the relevant field. If a medical witness knowingly provides testimony based on a theory not widely accepted in the profession, the witness should characterize the theory as such. Also, testimony pertinent to a standard of care must consider standards that prevailed at the time the event under review occurred.

All physicians must accurately represent their qualifications and must testify honestly. Physician testimony must not be influenced by financial compensation; for example, it is unethical for a physician to accept compensation that is contingent upon the outcome of litigation.

CDLA does not object to the protection of draft reports from discovery, as is the practice under the Federal rules. However, CDLA believes the protection of communications between experts and a party's attorney goes too far. The credibility of any witness is always relevant. Attorneys should be allowed to conduct discovery into the extent to which an attorney's theory of the case influenced the expert's opinion and whether that influence resulted in the expert's violation of the Bylaws. Communications between an expert and attorney are a primary source of this information and should not be protected from discovery.

SUPPLEMENTATION OF DISCLOSURES
C.R.C.P. 26(e)

CDLA has concerns with the inclusion of expert reports in the title of this proposed rule change. Civil cases are difficult enough to defend without claimants constantly moving the target through supplementation of expert reports after the initial expert reports and rebuttals are served. Allowing supplementation because expert reports are "incomplete" in some material respect only encourages claimants to continually supplement the scope of a defect case by identifying new issues as the parties get closer and closer to trial. This drives up the cost of litigation by making the defending parties have their experts investigate the newly added claims each time a new issue is identified. While this addition may make some sense for certain experts in the context of a personal injury plaintiff who is having ongoing treatment throughout a litigated matter, it is not appropriate in the construction context or other situations where conditions or historical facts upon which an expert's opinions are based are unlikely to be fluid.



Having said that, it does not appear from its comments that the Improving Access to Justice ("IAJ") Committee intended to allow the extensive supplementation by experts about which CDLA is concerned and which could potentially result based on the current wording of the proposed amendment, particularly, the reference to expert reports and statements in the title. Perhaps removing that reference and adding another subparagraph specifically addressing supplementation of experts' opinions would prevent this potential confusion.

CDLA agrees that a party seeking to expand upon an expert's proposed trial testimony based on opinions offered at deposition but not otherwise disclosed, ought to be required to identify that testimony. CDLA also agrees that a trial court ought not be required to permit such testimony at trial. CDLA would go a step further and require the party seeking to admit previously undisclosed testimony to show good cause as to why the new opinion could not have been included within the expert's opinions originally disclosed under C.R.C.P. 26(a)(2).

DURATION OF DEPOSITIONS
C.R.C.P. 30(d)(2)

CDLA does not support the proposed reduction of the presumptive limit on the duration of depositions from seven hours to six hours absent a showing that the current time limit is excessive and abused by attorneys. In multi-party cases, which construction defect, medical malpractice, and business litigation actions often are, the current seven hour limit is often not sufficient due to the fact that multiple attorneys need to ask questions. In my experience, most Colorado attorneys do not want to take excessively long depositions and do not abuse the current seven hour limit.

The current seven hour deposition time limit allows for a deposition to begin at 9:00 am and conclude at 5:00 pm with a one hour lunch. Even adding short breaks from time to time will have the deposition completed by 5:30 pm. This is well within what is generally considered the normal business day. CDLA does not believe the reasoning given in the IAJ Committee Comments justifies a change.

CDLA also does not understand how the proposed reduction of the non-expert deposition duration "provides for the shorter depositions of experts as set forth in C.R.C.P. 26(b)(4)(A)" as stated in the IAJ Committee Comments.

COST AND FEE AWARDS
C.R.C.P. 54(d) / C.R.C.P. 121 § 1-22

CDLA shares the Committee's concern about ensuring that cost awards be reasonable. CDLA would extend that to awards of attorney fees. One factor to

consider in any evaluation of reasonability of costs and fees, as stated in the IAJ Committee Comments, is proportionality. One way to define this is the amount of damages awarded relative to the amount claimed. For example, if a claimant were awarded only 10% of her claimed damages, CDLA proposes it is not reasonable or proportionate to transfer liability for 100% of her costs to the defending party.

While access to justice for claimants making appropriate claims is important, too many times, parties make unreasonable demands during mediation or at trial with little risk. They know that all they have to do is recover *something* to be considered a prevailing party and recover all of their costs and, when applicable, attorney fees.

The 2008 amendments to C.R.S. § 13-17-202 significantly reduced the risk that a claimant would not be able to recover almost all costs, even if the total recovery was limited. Typically, a claimant's costs are incurred very early in the litigation process or before a lawsuit is filed. A defendant will typically not be in a position to evaluate a claim and make an offer of settlement until much later in the case. As a result, under current law, even a defendant who "beats" an offer of settlement, but does not obtain a defense verdict, will have to pay the claimant's costs incurred before the offer was served, without consideration of proportionality.

To this end, CDLA proposes that the phrase, "the extent of recovery compared to the amount in controversy," be added after, "the amount in controversy," in proposed Rule 54(d).

The availability of attorney fees is controlled by contract or statute. However, no rule addresses the factors a trial court ought to consider in determining the amount of fees to award. CDLA proposes including language related to proportionality similar to that suggested with respect to costs in C.R.C.P. 54(d). For example, the language of Rule 54(d) could be modified to read:

> (d) Costs/Fees. Except when express provision therefor is made either in a statute of this state or in these rules, reasonable costs shall be allowed as of course to the prevailing party, as determined by the Court. When a contract or statute calls for an award of attorney fees to a prevailing party, the Court, upon a determination that there is a prevailing party, shall award attorney fees to that party. In awarding costs and/or attorney fees, the Court shall consider any relevant factors, which may include the needs and complexity of the case, the amount in controversy, the extent of recovery compared to the amount in controversy and the importance of incurring the costs in the litigation unless the court otherwise directs. Costs or attorney fees against the state of Colorado, its officers or agencies, shall be imposed only to the extent permitted by law. Unless the

trial court makes specific findings that the interests of justice require otherwise, costs for experts shall be limited to reasonable compensation fixed by the court for the value of time spent testifying at trial, and for testifying in depositions admitted in evidence in lieu of testifying at trial.

This language recognizes that, even when a party recovers damages, it may not necessarily be the "prevailing party" if the amount of damages recovered are very small considering proportionality considerations, possible counterclaims, and controlling Colorado case law.

Thank you for considering CDLA's views on these very important issues. We look forward to discussing them with you at the April 30, 2015 public hearing. If you have any questions prior to the hearing, I can be reached by telephone at (303) 572-4200 or by email at rich@mgjllaw.com.

Very truly yours,

Colorado Defense Lawyers Association

Gregg S. Rich
Secretary, 2014-15

GSR:sy

cc: CDLA Board, via email

COLORADO
PELA
ATTORNEYS FOR COLORADO EMPLOYEES

April 17, 2015

FILED IN THE
SUPREME COURT

APR 17 2015

OF THE STATE OF COLORADO
Christopher T. Ryan, Clerk

Christopher Ryan
Clerk of the Colorado Supreme Court
2 East 14th Avenue
Denver, Colorado, 80203

Re: January 2015 Proposed Amendments to the Colorado Rules of Civil Procedure: Comments of the Plaintiff Employment Lawyers Association (PELA)

Honorable Justices,

On behalf of the Colorado Plaintiff Employment Lawyers Association ("PELA") amd Towards Justice, we submit the following comments regarding the January 2015 proposed amendments to the Colorado Rules of Civil Procedure.

Founded in 1985, PELA is an organization of over 150 attorneys practicing plaintiff's-side employment and civil rights law throughout Colorado. We believe that the employment relationship goes to the core of individuals' economic well-being and frequently implicates individuals' fundamental civil rights to be protected from discrimination, retaliation for conduct protected by law, wage theft, and similar harms. Our organization seeks to protect those rights both within and outside the administrative and judicial forums where we practice. We share this Court's goal of maximizing access to justice for all Colorado citizens. As a result, our members routinely represent low-income individuals on a contingency fee or *pro bono* basis.

Towards Justice is a non-profit legal organization focused on addressing systemic problems impacting low wage workers using class and collective action litigation. Towards Justice also acts as a clearinghouse for individual wage theft complaints and as an educational resource for workers and community leaders. The organization's outreach to local Denver residents in need includes twice weekly intake hours at a location in Five Points.

We strongly believe that the proposed Amendments should not apply to employment cases because the proposed rules will significantly impair our clients' access to justice. We strongly urge you to consider the disproportionately negative impact of the proposed changes on plaintiffs in employment and other civil rights cases.

I. Background Information on Employment and Civil Rights Cases in Colorado State Courts.

A. Exclusion of Employment Cases from CAPP Pilot Project.

The genesis of the proposed rule changes was the Civil Action Pilot Project ("CAPP") conducted in several Colorado judicial districts from 2012 to 2014.[1] The stated goal of the CAPP rules was to "mak[e] the civil pretrial process more efficient *and mak[e] courts more accessible.*"[2] The Pilot Project was designed to assess whether particular rules changes helped or hurt these twin goals, and to gather data to help this Court determine whether these changes should be adopted more generally in the Colorado Rules of Civil Procedure.[3]

Notably, employment cases were explicitly *excluded* from the class of cases subject to the operation of the CAPP Rules.[4] It is our understanding that the Court understood that employment and other civil rights cases are unique for a number of reasons (discussed below), and that as a result, CAPP should not be applied in those cases. **Thus, the data collected and analyzed during the scope of the CAPP project did not include *any* employment cases or feedback from employment attorneys.**[5] In any event, the unique discovery needs of employment and civil rights cases (discussed below), would be severely hindered by the proposed rule changes.

B. Simultaneous Adoption of Enhanced State-Law Remedies for Discrimination.

During the period when the CAPP rules were in effect, a monumental change in Colorado's anti-discrimination laws took place. Coinciding with the close of the CAPP pilot project, the Colorado legislature has now authorized the recovery of damages in employment and other discrimination cases parallel to the damages available under federal law.[6] Mostly importantly, individuals who work for smaller employers (employers with less than fifteen (15) employees) would, for the first

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[1] "A History and Overview of the Colorado Civil Access Pilot Project Applicable to Business Actions in District Court," *available at* https://www.courts.state.co.us/userfiles/file/Court_Probation/Educational_Resources/CAPP%20Overview%20R8%2014%20(FINAL).pdf, at 2.
[2] *Id.* (emphasis added).
[3] *Id.* at 2-3.
[4] Chief Justice Directive 11-02 (July 11, 2014), at 10 (App'x A § II(e)) (excluding "[e]mployment actions arising out of existing or former employment relationships, unless the dispute concerns claims of breach of non-compete covenants or theft of trade secrets"), *available at* https://www.courts.state.co.us/Courts/Supreme_Court/Directives/11-02amended%207-11-14.pdf.
[5] This is with the exception of cases arising from employment non-compete agreements, which do not typically implicate the same access to justice concerns as other, more typical employment cases.
[6] Job Protection and Civil Rights Enforcement Act of 2013 (HB 13-1136), *codified at* C.R.S. § 24-34-405.

time, be able to recover for lost front pay, emotional distress and attorneys' fees, recovery not previously allowed under the statute.

The practical import of this legislation is that employees will now be far more likely to bring discrimination cases (a large subset of employment cases) in their local Colorado District Courts, which we expect will provide a more affordable and faster route to recovery—*truly improving access to justice*—for many of our clients.

However, this legislation became effective only very recently, applying to cases where the underlying act of discrimination occurred on or after January 1, 2015. Given that there is a requirement that claims must first be filed at the Colorado Civil Rights Division, we expect that these cases will not begin to be filed in state courts until mid – 2015 at the earliest.

II. Unique Disparities of Access to Information Faced by Employment and Civil Rights Plaintiffs.

Based on the collective expertise and experience of our members, PELA and Towards Justice have identified the following factors which, taken together, make our cases distinct from most other areas of law.

First, *the proposed limitations on discovery will have a disproportionately negative impact on the civil rights plaintiff because the vast majority of data in these cases is held exclusively by the employer.* Limiting a plaintiff's ability to gather the necessary circumstantial data directly impacts that plaintiff's ability to prove often subtle forms of discrimination. This would clearly undermine the legislative intent to modify the state laws to provide meaningful remedies to victims of discrimination.

In most discrimination/civil rights cases, the plaintiffs must rely on circumstantial evidence to prove discrimination, which requires gathering substantial information. For instance, to prove a discriminatory failure to promote case, a plaintiff needs evidence not only on her performance, but also information on comparators' performance, salaries, and promotions, as well as information about the decision-maker and whether there has been any history of complaints or discrimination by the employer. Especially in "pattern or practice" cases, discovery is often very extensive.

With regard to documents, company policies typically restrict employees from retaining documents past the end of their employment. Employees who retain documents in hopes of proving their claims risk counterclaims for theft or a defense under the "after-acquired evidence" doctrine. This doctrine allows an employer to

claim that an employee's damages are cut off by evidence of conduct for which the employer would have fired the employee had it been aware of it at the time.[7]

Nearly all witnesses in an employment case will be current or former employees of the defendant. Defense counsel routinely argue that it is unethical for plaintiff's counsel to contact such current or former employees because they are represented by counsel for the company. Additionally, when witnesses leave the company, the terminated plaintiff may have difficulty locating witnesses, and is often forced to rely on information from the employer regarding the witness's last known address. Complicated employment situations involve even more complicated evidence gathering, as different supervisors and coworkers may be involved in various aspects of the case's facts, which can only fully be pieced together as part of a comprehensive discovery effort.

Second, employment cases involve highly fact-specific questions of motivation and intent (*e.g.*, would the employer have viewed a particular error as a disciplinary offense if not for the age, race, or sex of the person making the error). An empirical study by University of Colorado Law School Professor Scott Moss, a PELA member, concluded that stricter discovery limits make it more difficult for plaintiffs in fact-intensive cases to prove their claims. *Professor Moss found that claims requiring proof of intent are a type of fact-intensive matter that would be hampered by further restrictions on discovery.*[8]

The Colorado Anti-Discrimination Act ("CADA") states that judges must interpret CADA "consistent with standards established through judicial interpretation of [the federal discrimination laws]."[9] As you may know, under longstanding federal precedents, employment cases are subject to an evidentiary burden-shifting framework that is unique in any area of law.[10] Under this framework, a plaintiff's case ordinarily may only progress past summary judgment if she is able to produce sufficient evidence that the reasons given by the employer for her termination are pretextual and that the real motive is discriminatory.

Because discovery is so crucial to surviving summary judgment in employment discrimination and other civil rights cases, any additional limitations on discovery (or rules which introduce uncertainty into the discovery process) chill the likelihood of eventual recovery, and thus the likelihood that attorneys can take the risk entailed in accepting a relatively low-dollar value case on behalf of a lower-income client.

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[7] *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 362-63 (1995) (explaining doctrine).
[8] Scott Moss, "Litigation Discovery Cannot be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age," 58 Duke L.J. 889, 910-15, 921-27 (2009).
[9] C.R.S. § 24-34-405(6) (2015).
[10] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

Third, because such cases nearly always involve an individual who is out of work—and often, an individual who was not highly compensated to begin with—these cases raise acute access-to-justice concerns and, in those cases where a plaintiff is able to secure counsel at all, are very commonly undertaken on a contingency fee basis. Because lost wages are the primary measure of damages, the prospect for monetary recovery is tightly circumscribed compared to virtually any other broad class of cases—and the less a worker earned while employed, the less her case is worth from a monetary perspective.[11]

However, employment cases involve a plaintiff acting as a private attorney general, enforcing the very important civil rights laws and working to vindicate not only her own rights, but those of all others in the workplace. In addition to damages, employment cases frequently involve important public policy-oriented requests for noneconomic injunctive and declaratory relief designed to bring employers into compliance with these laws.

With this background in mind, PELA has the following comments regarding specific portions of the proposed amended rules and their application to employment and civil rights cases.

III. Comments on the Application of Specific Proposed Changes to Employment and Other Civil Rights Cases.

A. Proportionality Factors.

1. Proportionality Factors Should Not Apply In Employment Discrimination and Other Civil Rights Cases.

A major change in the proposed amended rules is the creation of a new standard of "proportionality" in discovery, replacing the venerated "relevancy" standard that is well understood by practicing attorneys and judges. Proposed Rule 26(b)(1) strictly limits discovery to that which is "proportional," based on a list of factors including—very troublingly for our cases—"the amount in controversy" and "whether the burden or expense of the proposed discovery outweighs its likely benefit."

The United States Supreme Court has firmly rejected the idea that "proportionality" principles should be applied in civil rights cases. The Court's reasoning applies equally to the use of "proportionality" as a tool to limit discovery.

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[11] Besides economic damages, compensatory and punitive damages are often available, but in discrimination cases, these are subject to restrictive caps, ranging from $10,000 for the smallest employers to $300,000 in non-economic damages for the largest.

First, a "proportionality" limitation that looks to the amount of damages at issue to determine the scope of discovery overlooks the vital nonmonetary ends served by enforcement of civil rights laws:

> Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. . . . [T]he public as a whole has an interest in the vindication of the rights conferred . . . over and above the value of a civil rights remedy to a particular plaintiff. Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards. . . . In addition, the damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future.[12]

Plaintiffs should *never* be put in the position of arguing the "value" of the civil rights at issue. The proposed rules would do just that – and in so doing place the courts in the untenable position of valuing civil rights laws on a case-by-case basis.

Second, as discussed above, if counsel are not able to obtain the evidence needed to survive summary judgment, few attorneys will be willing to take the financial risk required to vindicate the important statutory rights of employees and civil rights plaintiffs:

> [V]ictims [of civil rights violations] ordinarily cannot afford to purchase legal services at the rates set by the private market. Moreover, the contingent fee arrangements that make legal services available to many victims of personal injuries would often not encourage lawyers to accept civil rights cases, which frequently involve substantial expenditures of time and effort but produce only small monetary recoveries. . . . *A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts.*[13]

2. Proportionality Factors Decrease Access to Justice.

These proposed rules do not advance efficiency in litigation. On the contrary, they introduce uncertainty that will inevitably lead to *more, not less*, pretrial motions practice from parties seeking to understand their discovery rights and obligations. Defendants can be expected to argue that particular discovery requests

[12] *Id.* at 574-75 (internal citations and quotations omitted).
[13] *Id.* at 576-78 (internal quotations and citations omitted, emphasis added).

are disproportionate to the monetary value of the case, requiring plaintiffs to file costly and time-consuming motions to compel arguing the importance of the vindicating the civil rights laws at issue. Under the proposed Rule, *all* discovery, including depositions and written discovery, may be reduced from the presumptive limits in the Rules if the court determines that "proportionality" so requires.

Moreover, the plaintiff's opportunity to address the application of proportionality to her case is extremely limited. Proposed Rule 16(b) (6) requires the parties to provide "brief statements" regarding the application of the proportionality principle in the proposed Case Management Order ("CMO"). Based on these "brief statements" alone, the court is then empowered by Proposed Rule 16(b)(11) to create additional limits on discovery in the final CMO, issued before any discovery has occurred. The CMO can only be altered thereafter for "good cause" under Proposed Rule 16(e).

The proportionality standard also risks harming the very individuals this Court has sought to protect through its efforts to improve access to justice: employees in low-paying jobs face the same burdens of proof as employees in high-paying jobs; yet, under the proposed rule of proportionality, the risk is that employees in lower-paying jobs will no longer be entitled to the same discovery as highly-compensated employees because the amount in controversy is necessarily lower.

Tellingly, the Honorable Judge William J. Martinez, who was previously an employment lawyer, has adopted a streamlined approach that does not question the inherent value of these civil rights cases.[14] This sensible approach has been implemented by a large number of other federal courts across the nation. Rather than determining on a case-by-case basis what discovery is proportional to the needs of the case, Judge Martinez has adopted a set of discovery protocols that simply require the immediate production of a specified list of documents from both sides in every employment case. The protocols were a nationwide effort, developed as a result of extensive work by a committee composed of plaintiff and defense attorneys, and was facilitated by the very same body involved in assessing the CAPP pilot project: the Institute for the Advancement of the American Legal System ("IAALS"). A copy of the protocols is attached.

The protocols approach reflects the federal judiciary's experiential knowledge of what is proportional in most employment cases, and in our collective experience, avoids a great deal of costly motions practice and the delay commensurate therewith. If the Court is inclined to apply the proposed rules to civil

[14] *See* Judge William J. Martinez, Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action (Nov. 2011), *available at* http://www.cod.uscourts.gov/Portals/0/Documents/Judges/WJM/WJM_Initial-Discovery-Protocols-in-Certain-Employment-Cases.pdf.

rights cases, PELA and Towards Justice urge the court to consider redefining the concept of "proportionality" in such cases to encompass a similar specific list of materials rather than an amorphous multifactor test.

B. Standard for Sanctions for Motions to Compel.

Proposed Rule 37(a)(4) limits a party's ability to avoid the imposition of sanctions for filing an unsuccessful motion to compel by asking the court to consider not whether a sanctions award would be unjust, but whether it would be *manifestly* unjust—a higher standard. Because interpretations of the unclear "proportionality" standard will encourage defendants' resistance to disclosure early in litigation, and frequently require plaintiff's counsel to file motions to compel, this provision will likely expose a plaintiff of limited means to sanctions awards. Given that an interpretation of the new amended statute will involve new issues not previously decided by the state courts, plaintiffs should not be threatened with sanctions because they are now navigating these new frontiers. For most of our clients, the increased threat of sanctions is a direct chill on their willingness to fight for their civil rights. Again, such provision inhibits our clients' access to justice.

C. Limitations on Experts.

Under Proposed Rule 16(b)(12), a party must provide special justification, governed by the concept of "proportionality," for why more than one expert is needed in a particular case. Moreover, Proposed Rule 26(b) 26(b)(4)(A) limits depositions of experts to three hours.

These limitations are potentially very harmful to certain groups of civil rights plaintiffs, such as disabled individuals who seek relief pursuant to CADA's requirement of reasonable accommodation. Proving that one has a qualifying disability and that the disability could have been reasonably accommodated by the employer is, in our experience, an expert-intensive endeavor, and one which should not be hampered even when the plaintiff's claim at issue has a relatively low monetary value. Similarly, pattern and practice and disparate impact cases often rely on complicated statistical evidence, in addition to experts to explain why an employer's hiring practice has a disproportionately negative impact on certain minorities. Such experts, as well as economic experts, are routinely required in these cases to sustain the plaintiff's burden of proof.

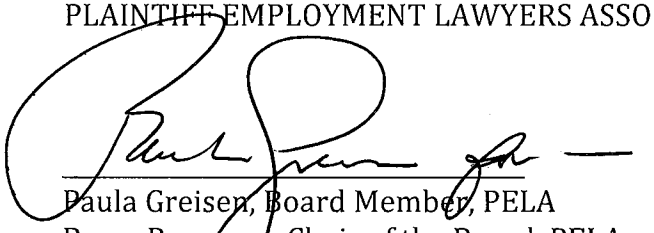
Moreover, because of the often extreme cost of using experts, there is little risk of employment and civil rights plaintiffs burdening the court and the defense with the use of unnecessary experts. Again, at least as applied to this class of cases, the proposed Rule appears to be a solution in search of a problem.

In summary, it is our belief that application of the proposed rules to employment and other civil rights cases would severely hinder access to the courts by victims of discrimination and abuse. We strongly urge that employment and other civil rights cases be exempted from these rules.

We thank you for the opportunity to comment.

Sincerely,

PLAINTIFF EMPLOYMENT LAWYERS ASSOCIATION



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TOWARDS JUSTICE

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PILOT PROJECT REGARDING
INITIAL DISCOVERY PROTOCOLS
FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION

November 2011

INTRODUCTION

The Initial Discovery Protocols for Employment Cases Alleging Adverse Action provide a new pretrial procedure for certain types of federal employment cases. As described in the Protocols, their intent is to "encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery." Individual judges throughout the United States District Courts will pilot test the Protocols and the Federal Judicial Center will evaluate their effects.

This project grew out of the 2010 Conference on Civil Litigation at Duke University, sponsored by the Judicial Conference Advisory Committee on Civil Rules for the purpose of re-examining civil procedures and collecting recommendations for their improvement. During the conference, a wide range of attendees expressed support for the idea of case-type-specific "pattern discovery" as a possible solution to the problems of unnecessary cost and delay in the litigation process. They also arrived at a consensus that employment cases, "regularly litigated and [presenting] recurring issues,"[1] would be a good area for experimentation with the concept.

Following the conference, Judge Lee Rosenthal convened a nationwide committee of attorneys, highly experienced in employment matters, to develop a pilot project in this area. Judge John Koeltl volunteered to lead this committee. By design, the committee had a balance of plaintiff and defense attorneys. Joseph Garrison[2] (New Haven, Connecticut) chaired a plaintiff subcommittee, and Chris Kitchel[3] (Portland, Oregon) chaired a defense subcommittee. The committee invited the Institute for the Advancement of the American Legal System at the University of Denver (IAALS) to facilitate the process.

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[1] Civil Rules Advisory Committee, *Report to the Standing Committee*, 10 (May 17, 2010).

[2] Mr. Garrison was a panelist at the Duke Conference. He also wrote and submitted a conference paper, entitled *A Proposal to Implement a Cost-Effective and Efficient Procedural Tool Into Federal Litigation Practice*, which advocated for the adoption of model or pattern discovery tools for "categories of cases which routinely appear in the federal courts" and suggested the appointment of a task force to bring the idea to fruition.

[3] Ms. Kitchel serves on the American College of Trial Lawyers Task Force on Discovery and Civil Justice, which produced the *Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System*, 268 F.R.D. 407 (2009). As a result of her role on the ACTL Task Force, Ms. Kitchel had already begun discussing possibilities for improving employment litigation with Judge Rosenthal when she attended the Duke Conference.

The group worked diligently over the course of one year. Committee members met at IAALS for valuable in-person discussions in March and July of 2011. Judge Koeltl was in attendance as well, to oversee the process and assist in achieving workable consensus. In addition, committee members exchanged hundreds of emails, held frequent telephone conferences, and prepared numerous drafts. The committee's final product is the result of rigorous debate and compromise on both sides, undertaken in the spirit of making constructive and even-handed improvements to the pretrial process.

The Protocols create a new category of information exchange, replacing initial disclosures with initial discovery specific to employment cases alleging adverse action. This discovery is provided automatically by both sides within 30 days of the defendant's responsive pleading or motion. While the parties' subsequent right to discovery under the F.R.C.P. is not affected, the amount and type of information initially exchanged ought to focus the disputed issues, streamline the discovery process, and minimize opportunities for gamesmanship. The Protocols are accompanied by a standing order for their implementation by individual judges in the pilot project, as well as a model protective order that the attorneys and the judge can use a basis for discussion.

The Federal Judicial Center will establish a framework for effectively measuring the results of this pilot project.[4] If the new process ultimately benefits litigants, it is a model that can be used to develop protocols for other types of cases. **Please note:** Judges adopting the protocols for use in cases before them should inform FJC senior researcher Emery Lee, elee@fjc.gov, so that their cases may be included in the evaluation.

[4] Civil Rules Advisory Committee, *Draft Minutes of April 2011 Meeting*, 43 (June 8, 2011).

INITIAL DISCOVERY PROTOCOLS
FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION

PART 1: INTRODUCTION AND DEFINITIONS.

(1) Statement of purpose.

a. The Initial Discovery Protocols for Employment Cases Alleging Adverse Action is a proposal designed to be implemented as a pilot project by individual judges throughout the United States District Courts. The project and the product are endorsed by the Civil Rules Advisory Committee.

b. In participating courts, the Initial Discovery Protocols will be implemented by standing order and will apply to all employment cases that challenge one or more actions alleged to be adverse, except:
   i. Class actions;
   ii. Cases in which the allegations involve only the following:
      1. Discrimination in hiring;
      2. Harassment/hostile work environment;
      3. Violations of wage and hour laws under the Fair Labor Standards Act (FLSA);
      4. Failure to provide reasonable accommodations under the Americans with Disabilities Act (ADA);
      5. Violations of the Family Medical Leave Act (FMLA);
      6. Violations of the Employee Retirement Income Security Act (ERISA).

   If any party believes that there is good cause why a particular case should be exempted, in whole or in part, from this pilot program, that party may raise such reason with the Court.

c. The Initial Discovery Protocols are not intended to preclude or to modify the rights of any party for discovery as provided by the Federal Rules of Civil Procedure (F.R.C.P.) and other applicable local rules, but they are intended to supersede the parties' obligations to make initial disclosures pursuant to F.R.C.P. 26(a)(1). The purpose of the pilot project is to encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery.

d. The Initial Discovery Protocols were prepared by a group of highly experienced attorneys from across the country who regularly represent plaintiffs and/or defendants in employment matters. The information and documents identified are those most likely to be requested automatically by experienced counsel in any similar case. They are unlike initial disclosures pursuant to F.R.C.P. 26(a)(1) because they focus on the type of information most likely to be useful in narrowing the issues for employment discrimination cases.

(2) Definitions. The following definitions apply to cases proceeding under the Initial Discovery Protocols.

a. ***Concerning.*** The term "concerning" means referring to, describing, evidencing, or constituting.

b. ***Document.*** The terms "document" and "documents" are defined to be synonymous in meaning and equal in scope to the terms "documents" and "electronically stored information" as used in F.R.C.P. 34(a).

c. ***Identify (Documents).*** When referring to documents, to "identify" means to give, to the extent known: (i) the type of document; (ii) the general subject matter of the document; (iii) the date of the document; (iv) the author(s), according to the document; and (v) the person(s) to whom, according to the document, the document (or a copy) was to have been sent; or, alternatively, to produce the document.

d. ***Identify (Persons).*** When referring to natural persons, to "identify" means to give the person's: (i) full name; (ii) present or last known address and telephone number; (iii) present or last known place of employment; (iv) present or last known job title; and (v) relationship, if any, to the plaintiff or defendant. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

(3) Instructions.

a. For this Initial Discovery, the relevant time period begins three years before the date of the adverse action, unless otherwise specified.

b. This Initial Discovery is not subject to objections except upon the grounds set

forth in F.R.C.P. 26(b)(2)(B).

c. If a partial or incomplete answer or production is provided, the responding party shall state the reason that the answer or production is partial or incomplete.

d. This Initial Discovery is subject to F.R.C.P. 26(e) regarding supplementation and F.R.C.P. 26(g) regarding certification of responses.

e. This Initial Discovery is subject to F.R.C.P. 34(b)(2)(E) regarding form of production.

PART 2: PRODUCTION BY PLAINTIFF.

(1) Timing.

a. The plaintiff's Initial Discovery shall be provided within 30 days after the defendant has submitted a responsive pleading or motion, unless the court rules otherwise.

(2) Documents that Plaintiff must produce to Defendant.

a. All communications concerning the factual allegations or claims at issue in this lawsuit between the plaintiff and the defendant.

b. Claims, lawsuits, administrative charges, and complaints by the plaintiff that rely upon any of the same factual allegations or claims as those at issue in this lawsuit.

c. Documents concerning the formation and termination, if any, of the employment relationship at issue in this lawsuit, irrespective of the relevant time period.

d. Documents concerning the terms and conditions of the employment relationship at issue in this lawsuit.

e. Diary, journal, and calendar entries maintained by the plaintiff concerning the factual allegations or claims at issue in this lawsuit.

f. The plaintiff's current resume(s).

g. Documents in the possession of the plaintiff concerning claims for unemployment benefits, unless production is prohibited by applicable law.

h. Documents concerning: (i) communications with potential employers; (ii) job search efforts; and (iii) offer(s) of employment, job description(s), and income

and benefits of subsequent employment. The defendant shall not contact or subpoena a prospective or current employer to discover information about the plaintiff's claims without first providing the plaintiff 30 days notice and an opportunity to file a motion for a protective order or a motion to quash such subpoena. If such a motion is filed, contact will not be initiated or the subpoena will not be served until the motion is ruled upon.

i. Documents concerning the termination of any subsequent employment.

j. Any other document(s) upon which the plaintiff relies to support the plaintiff's claims.

(3) Information that Plaintiff must produce to Defendant.

a. Identify persons the plaintiff believes to have knowledge of the facts concerning the claims or defenses at issue in this lawsuit, and a brief description of that knowledge.

b. Describe the categories of damages the plaintiff claims.

c. State whether the plaintiff has applied for disability benefits and/or social security disability benefits after the adverse action, whether any application has been granted, and the nature of the award, if any. Identify any document concerning any such application.

PART 3: PRODUCTION BY DEFENDANT.

(1) Timing.

a. The defendant's Initial Discovery shall be provided within 30 days after the defendant has submitted a responsive pleading or motion, unless the court rules otherwise.

(2) Documents that Defendant must produce to Plaintiff.

a. All communications concerning the factual allegations or claims at issue in this lawsuit among or between:
   i. The plaintiff and the defendant;
   ii. The plaintiff's manager(s), and/or supervisor(s), and/or the defendant's human resources representative(s).

b. Responses to claims, lawsuits, administrative charges, and complaints by the plaintiff that rely upon any of the same factual allegations or claims as those at issue in this lawsuit.

c. Documents concerning the formation and termination, if any, of the employment relationship at issue in this lawsuit, irrespective of the relevant time period.

d. The plaintiff's personnel file, in any form, maintained by the defendant, including files concerning the plaintiff maintained by the plaintiff's supervisor(s), manager(s), or the defendant's human resources representative(s), irrespective of the relevant time period.

e. The plaintiff's performance evaluations and formal discipline.

f. Documents relied upon to make the employment decision(s) at issue in this lawsuit.

g. Workplace policies or guidelines relevant to the adverse action in effect at the time of the adverse action. Depending upon the case, those may include policies or guidelines that address:
   i. Discipline;
   ii. Termination of employment;
   iii. Promotion;
   iv. Discrimination;
   v. Performance reviews or evaluations;
   vi. Misconduct;
   vii. Retaliation; and
   viii. Nature of the employment relationship.

h. The table of contents and index of any employee handbook, code of conduct, or policies and procedures manual in effect at the time of the adverse action.

i. Job description(s) for the position(s) that the plaintiff held.

j. Documents showing the plaintiff's compensation and benefits. Those normally include retirement plan benefits, fringe benefits, employee benefit summary plan descriptions, and summaries of compensation.

k. Agreements between the plaintiff and the defendant to waive jury trial rights or to arbitrate disputes.

l. Documents concerning investigation(s) of any complaint(s) about the plaintiff or made by the plaintiff, if relevant to the plaintiff's factual allegations or claims at issue in this lawsuit and not otherwise privileged.

m. Documents in the possession of the defendant and/or the defendant's agent(s) concerning claims for unemployment benefits unless production is prohibited by applicable law.

n. Any other document(s) upon which the defendant relies to support the defenses, affirmative defenses, and counterclaims, including any other document(s) describing the reasons for the adverse action.

(3) Information that Defendant must produce to Plaintiff.

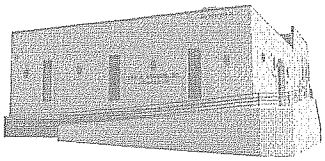
a. Identify the plaintiff's supervisor(s) and/or manager(s).

b. Identify person(s) presently known to the defendant who were involved in making the decision to take the adverse action.

c. Identify persons the defendant believes to have knowledge of the facts concerning the claims or defenses at issue in this lawsuit, and a brief description of that knowledge.

d. State whether the plaintiff has applied for disability benefits and/or social security disability benefits after the adverse action. State whether the defendant has provided information to any third party concerning the application(s). Identify any documents concerning any such application or any such information provided to a third party.

LEE N. STERNAL, P.C.
ATTORNEY AT LAW



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April 17, 2015

Chief Justice Rice and Associate Justices
Colorado Supreme Court
c/o Christopher Ryan
2 East 14th Avenue
Denver, Colorado 80203

Re: Proposed Civil Rule Changes

Dear Justices:

We have 167 members in our Pueblo County bar association. How many of us have daily ongoing issues that concern compliance with our civil rules, especially with 16 and 26, I cannot say. However, several of us who do have that degree of concerned interest did take it upon ourselves to be designated as the "task force" authorized to study and comment upon what has been submitted to you by your Civil Rules Advisory Committee as suggested rule changes.

This past Tuesday, April 14th, the principal topic of discussion at our county bar meeting were those proposed modifications. To prepare for that discussion each of our members had been electronically transmitted both the resolution proposed by our "task force" and its ten page explanatory statement, with only slightly different language from what is now enclosed for your consideration. Not a single voice was raised in opposition to this resolution. Also, no opposing e-mails were received.

It is fair to say, therefore, that at the same time there is zero support for the adoption of these proposed changes as they presently have been submitted, there is one hundred percent support for your interest in seeing that important rule changes be made. We believe, however, that the scope of what needs to be changed should also include significant modifications to many of the time declared deadlines.

We recognize that what we have done and now submit to you with request that it be given your consideration may well generate the objection that we have used this communication opportunity to considerably expand the intended scope of your request for comments. Nevertheless, we believe that the strength of our interest in urging that other changes be made together with the sincerity of our concerns as to what will result for so many of us if you adopt these changes as they have been proposed absolutely require that we make this effort to get your attention. So, we look forward to being told that we have.

Very truly yours and in behalf of the Pueblo County Bar Association,

Lee N. Sternal

PUEBLO COUNTY BAR ASSOCIATION RESOLUTION
RE: PROPOSED CIVIL RULES MODIFICATIONS:

At the January 2015 Pueblo County Bar Association meeting it was decided that a committee be established to review and report its comments concerning the proposed changes to the Colorado Rules of Civil Procedure which changes are to the subject of a public hearing held before our State Supreme Court and for which the deadline for pre-public hearing comments is this April 17th.

The attorneys who comprise this committee are James Croshal, Mickey Smith, Lee Sternal and Tuck Young. It was their unanimous opinion that the Pueblo County Bar Association formally resolve to ask that the Supreme Court not adopt these proposed changes at this time and that said suggested changes, as well as additional changes not presently proposed, be the subject of additional public examination and consideration.

The basic concerns are that compliance with the proposed changes will result in and require too much effort and expense too soon after litigation is commenced at the same time they allow too little time to complete discovery and motion practice prior to trial. The overall concern is that the tightened time and compliance requirements are being declared in language which lacks mention of flexibility with the likely result being that only large firms with a broad base of associates, junior partners or paralegals and investigators will be able to afford to investigate, research and draft the motions, pleadings and other required documents within the mandated timelines.

If these rules are adopted without extensive revision the belief of this committee is that it will be economically all but impossible for many of our members to accept what is typically viewed as a "small" case. Our present perception is that adoption of these rule changes in their present form will increase the costs of litigation and create real additional "traps" in those cases which are accepted as well as result in rejection of many cases that are presently being accepted. Also, the additional effort and stress these proposed rules will clearly cause will hardly be anything but discouraging of "pro-bono" requests.

In summary, the proposed changes, especially to rules 16 and 26, only exacerbate long perceived problems of timely compliance with deadlines that are often burdensome and challenging for solo practitioners or small firms to meet. A detailed but still incomplete explanation of those reasons is attached. But for the present, we believe that in view of the fast approaching April 17th deadline to say anything, it should be the position of this bar association to oppose imposition of these proposed changes without far more study and discussion.

WHEREFORE, BE IT RESOLVED that the Bar Association of Pueblo, County, Colorado does oppose the adoption of the proposed changes to the Colorado Rules of Civil Procedure in their present presented form.

BE IT FURTHER RESOLVED however, that the Pueblo County Bar Association does support amendment to our present rules of Civil Procedure after further review and consideration.

Done by unanimous vote this ***14th*** day of ***April, 2015***.

STATEMENT IN SUPPORT OF RESOLUTION RE PROPOSED CIVIL RULE CHANGES:

At our January 2015 meeting the Pueblo County Bar Association appointed a committee of attorneys involved in the civil practice to review the proposed changes to the Colorado Rules of Civil Procedure scheduled for public hearing before our Supreme Court on April 30th. These committee members are regarded as experienced in the representation of plaintiffs as well as defendants in both tort and commercial litigation. A copy of this report was forwarded to all Pueblo County Bar association members for consideration at their April 14, meeting. The Pueblo County Bar Association, by formal resolution, did approve that this report be published to express its concern that this rules modification process is proceeding so quickly that issues of great importance are being overlooked.

Pueblo County attorneys who practice civil law are generally solo practitioners or members of small firms. This, however, is the common business model in most of southeastern Colorado. Typically their legal casework is scheduled many weeks in advance. Almost all non-attorney staff employees daily perform intermixed paralegal, secretarial, office management and receptionist work. None have in-house investigators. Most of their clients are individuals or small businesses, i.e., local banks, credit unions, car dealerships, etc. These clients are very concerned about the costs and expense of litigation.

Although, the average income for a family of four in the State of Colorado, according to the Census Bureau, is $83,000.00. The average income for a family of four in Pueblo and throughout southeastern Colorado is significantly below that level, approximately only half, in fact. Our members believe that access to the judicial system and the process of getting a case to judgment should be made simpler and less expensive rather than more difficult, costly and complicated. They uniformly believe that the proposed changes give an unfair procedural advantage to large law firms and wealthy litigants. Further, these proposed changes create a real financial barrier for Coloradoans who are middle class or poor to access our trial courts. We are concerned that many of the proposed rules being considered by the Supreme Court represent a "cookie cutter" approach to litigation that will directly increase the expense to our clients and create unnecessary additional "traps" for us as practitioners. Our association believes that these

changes fail to recognize the financial and time consumption realities of representing real clients with limited funds. Unfortunately, our frank view is that many of the trial judges who will implement and interpret these rules may view them as not permitting flexibility.

Of additional concern to our members is that adoption of these rules will result in a far greater interest in avoiding them but that the ability to do so is presently severely limited by the lack of increase of the jurisdictional limits of both our small claims and county courts. The county court jurisdictional limit of $15,000.00 set in 1991 has never been adjusted. Even if it were adjusted merely for inflation, the current county court jurisdiction should be in excess of $30,000.00. These proposed rule changes, with their inevitable increases in the time and costs to litigate pursuant to them, effectively will make it economically impossible to continue to exercise the district court option for those small cases that are still "too big" for the lower county court jurisdictional limits.

The jurisdictional limit of our small claims courts has not been adjusted for twenty years. Again, with proper modification for inflation, the jurisdictional limit of small claims court would be $15,000.00. The lack of even a court generated request for legislative increase of these jurisdictional lower court limitations, in conjunction with enactment of these proposed rule changes is simply not going to bode well for those litigants whose disputes are in the "small to medium" size categories. Such claims will be effectively placed all but out of reach for the present district court option.

It is our members' view that delays in getting cases to trial are largely based upon the three factors of the specific needs of the case, the reality that most cases defended involve either in-house corporate counsel for insurance companies or large firms from the Denver Metro area all of whom always seem to have attorney calendars with pre-existing commitments that make it impossible to get a reasonably early trial date and that statutory preference must be given to the resolution of other types of proceedings. Civil cases, unless involving an elderly party, occupy the bottom rung of the litigation ladder. So, in view of these realities, why is it perceived to be necessary to create the additional stresses and expenses which will so clearly be associated with these proposed rule changes?

With these general comments as our preface, we ask that you now consider our following comments and concerns regarding at least some of the specific proposed rule changes. We offer them in our belief that the overall purpose of our civil justice system, as declared in our very first rule of civil procedure, should be to ensure greater and less expensive access to courts which, above all else, are perceived to be fair.

We are concerned why the court is proposing to change the language of Rule 1. Our members do not accept that changes to our civil rules should be made simply to make our state rules more " consistent" with the federal rules. Our concern is what the courts will do with the additional proposed language for Rule 1. Without an explanation for it that is more compelling than what is said about it in the Colorado Lawyer, we oppose this proposed change. We believe our trial courts should not necessarily be modeled into mini federal courts.

We believe that C.R.C.P. 12 should be modified to mandate that affirmative defenses are subject to C.R.C.P. 11. This change, we believe, is necessary to avoid the allocation of costs and of Court time to defenses for which no supporting facts are known to exist at the time the answer is filed. "Proportional" time and cost estimates should not have to be considered for the litigation of affirmative defenses that have no known supporting grounds.

Our other Rule 12 concern is that it appears that a party has only twenty-one days after service upon it to file a C.R.C.P. 12(b)(1) (4) motion. This short timeline creates numerous problems. First, it assumes that a defendant will get his case promptly to an attorney. Secondly, it assumes that a solo practitioner whose calendar is already filled with deadlines to be met, client appointments and administrative matters will be able to get the client in within the twenty-one days, review the matter, do the research and file the motion. Most of our practitioners have calendars that are already filled up weeks in advance. Only large firms with a broad base of associates, junior partners or paralegals and investigators can afford to intake, investigate, research and draft motions with this timeline. To undertake any new case for which a rule 12 motion is appropriate we are going to have to drop whatever else we are doing to file the 12(b) motion within the twenty-one day limit. That means that our time will become more costly for our clients. We will be forced to accept fewer cases because of an artificially short deadline.

Rules 16 and 26 need to be considered together to understand our problems with them. The burdens of these deadlines of Rules 16 and 26 are only increased. These additional deadline burdens are going to result in additional costs which are either going to have to be passed on to the client directly or absorbed by the practitioner, ultimately to be passed on to clients, either through larger retainers, higher hourly rates, or increased fees in contingent fee cases. These additional burdens and traps make it extremely unlikely that any member of our association would agree to represent a pro bono party in a case in district court. We often conclude that when the rules impose these additional deadlines, timetables and burdens that the additional costs to the practitioner are not being considered by our rule makers. We believe that further increases to litigation costs will result in less access to our courts.

Another concern is the unevenness of the compliance burden in respect to most of the Rule 16 requirements. These burdens of moving forward with the CMO and the TMO, submission, even when both parties are represented by counsel, are placed solely upon the plaintiff. This unfairly increases the plaintiff's costs. It is also unfair when one party is pro se because it mandates that extra work, with its attendant expense, is to be borne solely by the represented party. Compliance with these Rule 16 burdens involves the making of multiple phone calls or e-mail communication to schedule meetings and confer just to timely present the proposed case management order. It also allows pro bono litigants to be treated in a preferred manner to those litigants who have attorneys. However, not all pro bono litigants are indigent. But, even if they have the resources to pay counsel, they will be treated in this preferred manner.

If there are two defendants and one is "pro-bono", the burden of the first defendant who files an answer is unfairly increased since that retained counsel must now pass to its client the extra costs associated with having to do the work that normally is done by counsel for a represented party. The Pueblo County Bar believes that the requirement to comply with Rule 16 must be equally applicable to all litigants. Only if all parties are equally burdened to comply with Rule 16 can the costs of litigation be more fairly shared. The basic perception of fairness, we believe, is what promotes cooperation and case movement.

However, the best efforts to engage that process are destined for stress creating frustration when it becomes all but impossible to meet the deadlines of the proposed changes to rules 16 and 26. They simply require that too much be accomplished too soon.

The deadline that the parties meet and confer forty-two days after the case is at issue, besides being artificial and having a "cookie cutter" nature, is problematic because of the disclosure requirements of Rule 26. Under Rule 26, the parties are required to submit their disclosures within twenty-eight days of the at issue date and a lack of knowledge is not an excuse for failure to submit a disclosure. However, the substance of the initial disclosures under the proposed Rule 26 is expanded from individuals with information of not only the disputed facts of the claims and defenses but also will have to include the specific details of all anticipated witness testimony. This greatly increased burden is simply unreasonable.

It also broadens the prospective number of witnesses and exhibits that need to be disclosed prior to the CMO. Additionally, these witness disclosures, under proposed Rule 26(1)(A), must at the same time they are "brief also be "specific". We do not know what that rule means but are much concerned over how it will be interpreted. Will this be new additional justification for exclusion of exhibit or testimony evidence? Will the obligation to comply with it be used as justification for pre CMO discovery? Even a conservative approach to this requirement creates a significant additional financial burden at the commencement of the case.

Are lawyers, only 42 days after the case is at issue, going to have to have taken their time or their paralegals' time or hire investigators to talk to each potential witness, then draft up a statement of their testimony so that they can say they were as detailed in their "specific" representations as was humanly possible? Even if the lawyer has a paralegal or hires an investigator he may ultimately feel obligated to do that investigation himself since it is his malpractice coverage that is on the line. Additionally, our members are concerned about how this rule interacts with the requirement for the disclosure of non-retained experts. If a bank has an in-house appraisal, is that appraisal going to have to be set out with specificity in the initial disclosure?

It is also unclear how this will interact with the current practice of many members who simply refer the opposing counsel to records or reports. Is the lawyer going to be required to take his time to regurgitate the important facts out of each record and/or the report, which activity, of course, is another cost that is going to be passed on to the clients, or can the attorney simply say "see accident report," or "see appraisal"? The forty-two days in the meet and confer requirement has to be done within two weeks of disclosures being provided. Again, if you are a solo practitioner or in a small firm, you may have numerous matters, personal and business, not to mention the possibility of a trial, all already scheduled for that two-week period. This forty-two day "cookie cutter" approach to the CMO is far less flexible, for example, than are the current federal rules, which are designed to handle cases involving much larger sums than the average state district court case. But, the biggest concern of all is that modification of what is in the CMO can only be accomplished for "good cause". We have no reason to believe that the courts will be in agreement as to what elements will be viewed as necessary to meet that rigid sounding standard.

With regard to the specific requirements of Rule 16, our members had these comments: Rule 16(b)(5) says that the trial court may decide motions at the Case Management Conference. If the rule is going to impose deadlines within which the parties must meet, it should impose deadlines on the trial court to resolve these motions raised at the Case Management Conference. However, the fact that no such time requirement is imposed upon the trial court indicates, perhaps, that frequently decisions need to be pondered, considered and reviewed and may take more time than a "cookie cutter" approach would allow.

With regard to 16(b)(8), our members feel that the date for amending pleadings occurs far too quickly. Amendments to pleadings should be liberally allowed without regard to the rigidly declared deadline. Frequently parties do not know the full nature of their claims or defenses until discovery has occurred. An affirmative defense may not be known until a third party not involved in the lawsuit is deposed. A claim that a party's conduct was willful and wanton may not be determined or known until after depositions have been taken. In an insured's claim against their insurance company, whether the company acted in bad faith in handling a claim may not be known until the claim file is produced in often contested discovery. Any time limit to amend

pleadings should be subject to the same standard of reasonableness that is now contemplated to govern "proportionality" determinations.

The Rule 16(b)(16), requirement that the parties quickly schedule their trial date generally results in requests for more scheduled trial time than the case subsequently requires. If a trial court wants to have a more efficient trial calendar, allowing the litigants to be the ones who decide when to ask for the trial setting is likely to be a significant step in that direction. So, on the subject of the setting of trial, sooner is not necessarily better.

Despite the declared new emphasis upon early "hands on" involvement by the trial court, proposed Rule 16(b)(18) allows the judge to sign the case management order without a case management conference. But, discovery is still prohibited until the case management order is signed. There is simply no mention of flexibility in these rigidly created CMO deadlines. If the parties can so stipulate they should be free to commence agreed upon discovery without regard to whether they have a court issued CMO. And the lack of any rule declared deadline within which the court must resolve any disagreement over the terms of the CMO will likely mean further delay in the commencement of any deemed necessary discovery. That delay will only make the unreasonably short 115 days within which to amend the pleadings that much more unreasonable.

Our members believe the "good cause" test under Rule 16(e) should be prefaced with a requirement that amendment be liberally granted. Our concern with the good cause standard is that based upon the standards of judicial review, without a presumption under the rule that it be liberally applied, the parties are going to be at the whim of the trial court whose decision will be upheld on appeal based upon "its exercise of sound discretion." To meet the goal of our Rules of Civil Procedures that the intent is to give everyone their day in court with their case being fully considered, we should be looking at as few inflexible deadline requirements as possible. Unfortunately, these proposed rule changes, without any declaration as to flexibility, appear to us to stand in the way of that goal.

In regard to proposed Rule 26(a)(2)(b)(II), will we be required to rehash and put in writing everything contained in records of an expert which we previously could disclose simply

by incorporating those records into the disclosure? This will increase the cost of litigation and that cost will have to be passed on to the client.

The requirement that the witness' testimony will be limited to matters disclosed in detail raises a concern of evidence preclusion if voluminous records of treating physicians or in-house experts have not been quoted in full from where they are considered to declare relevant information. To set that information out again in a pleading only increases the cost of litigation. Lawyers in our community charge $150.00 to $300.00 per hour. In Denver the hourly rate is as high as $600.00 per hour. That is what clients are going to have to absorb and when told so the certain result will be that some cases presently being accepted will be rejected as being costs prohibitive.

The proposed proportionality requirements of the Rule 26 revisions are concerning for two reasons. First, we believe it will be interpreted to mean a case is not worth the investment of the necessary resources unless it is worth "a lot of money". However $30,000.00 to many of our clients can be as economically significant as is $1,000,000.00 to someone else. Frankly, while we believe that the more appropriate remedy to deal with the proportionality issue would be to increase the jurisdictional limits of our lower courts, we question what percentage of our judges actually have the experience to properly and effectively execute this new responsibility, especially if it must occur when the answer is still permitted to raise affirmative defenses for which there is then no known factual support.

We are concerned about the fact that in determining proportionality the parties themselves, especially in the case of the insured defendant, are not the people who are making the costs expense decisions. Will the trial court be able to make it clear that just because a party is successful in their litigation result does not mean they are going to be able to recover costs deemed "non-proportional"?

The proposed new three hour time limit for the taking of an expert's deposition, while probably sufficient time for most of us, could present problems when the expert is experienced and engages in a passive-aggressive approach to manipulate the time allowed. We believe that a better way to control such expert deposition costs would be to declare that no more than three

hours of time will be subject to any charge for post judgment payment but that experts should otherwise have the same time limitation as lay witnesses.

Our members take special exception to the proposed limitations upon the disclosures of supplemental expert opinions. Frequently, it is during the deposition/discovery process that those supplemental opinions are learned. The court should not be given the authority to exclude such opinions just because they were not learned or disclosed prior to the deposition or other utilized discovery. Absent the showing of collusion between the expert and the retaining party the fact of a new or of a modified expert opinion should still be subject to addition by supplementation without the necessity of first establishing "good cause". To deny the finder of fact relevant evidence would be contrary to C.R.C.P. 1.

We support the goal of the proposed changes to C.R.C.P. 54(d) to greatly limit the amount of awardable post judgment costs.

In summary, our task force members believe that the proposed rule changes require further study and modification. The goals sought to be accomplished by these proposed changes, with the exception of those to rule 54(d) are less than clear. However, their "cookie cutter" treatment of deadlines is destined to increase the costs of litigation at the same time the new "traps" they will create for attorneys will discourage the acceptance of new cases, especially if they are of a "small" or "pro-bono" nature. We believe that the Pueblo County Bar Association should ask the Court to consider asking for legislative increase of the jurisdictional amounts for our lower courts and to declare its opposition to the adoption of these proposed changes to our rules of civil procedure until they are the subject of further modification consistent with our expressed concerns.

Respectfully yours,

Pueblo County Bar Association Special Committee to Review Proposed Rule Changes

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April 17, 2015

Via E-Mail: Christopher.Ryan@judicial.state.co.us

Colorado Supreme Court Rules Committee
c/o Christopher Ryan
Clerk, Colorado Supreme Court
2 East 14th Avenue
Denver, Colorado 80202

Re: Proposed Rules Changes

Dear Mr. Ryan and Supreme Court Rules Committee:

I am writing to provide comments on the proposed civil rule changes that will be heard on Thursday, April 30, 2015. The comments below are my personal opinions and do not represent the views of Sherman & Howard L.L.C. or other attorneys within the firm.

In general, I appreciate and support the amendment of the rules as proposed. There are a few proposed rules change that I oppose or tha I believe require clarification, however. By proposed Rule, they are as follows:

Proposed Rule 12(e). The requirement that a party answer a complaint before a ruling on a motion for more definite statement eviscerates the protection of Rule 12(e) in many circumstances. A Rule 12(e) motion must allege that the initial pleading is not "averred with sufficient definiteness or particularity" to be answered. Yet the Rule as proposed requires that an answer be filed anyway. I do not believe an attorney can both file an answer and file a motion under Rule 12(e) consistent with her obligations under Rule 11. That is, an attorney who files a Rule 12(e) motion necessarily undercuts the viability of her own answer by attesting [in accordance with Rule 11] that her own answer could not properly have been prepared.

I have no objection to a requirement that a party any claim to which an objection is not made under Rule 12(e).

Proposed Rule 12(f). Similarly, requiring an answer before a decision on a motion to strike may undercut the protection afforded by the rule when the motion is based on redundant, immaterial, or impertinent allegations. It does no good to ask the Court to strike such allegations, while at the same time being forced to undertake the very burden (answering the complaint) that the motion is designed to avoid.

Propose Rule 16(b)(4). I do not object to the proposed limitation, but in multi-party cases the word "side" has no clear definition. If a Plaintiff files against two Defendants, one of whom files a Counterclaim, Cross-Claim, and a Third-Party Claim, what are the "sides"? How many "sides" is the Defendant/Counterclaimant/Third-Party Plaintiff/Cross-Claimant on? Again, I think a limitation is fine so long as it is clear.

Proposed Rule 16(b)(7). I think the requirement that "[t]he proposed order shall confirm that settlement discussions were held" is a typo, or it imposes an unusually early obligation to actually engage in settlement discussions. If it really means that the parties must discuss settlement mechanisms, etc., (as opposed to discussing settlement), the language can be rewritten. If it means (as it is written) that the parties must actually discuss settlement, I am not sure imposition of such early settlement discussions immediately on the heels of disclosures is reasonable. Moreover, a requirement that the parties "describe the prospects for settlement" is probably harmless in some cases, but my guess is it will often lead to gamesmanship as parties may not want to tip their hands. Finally, requiring disclosure of settlement prospects may invade an attorney's work product.

Proposed Rule 26(a)(2)(B)(I). The standard for exclusion of expert testimony for want of adequate disclosure should be clarified. This section says "the witness's direct testimony shall be limited to matters disclosed in detail in the report." On the other hand, the rule requiring supplementation [26(e)] says "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." Are matters different from opinions? Do fact assumptions qualify as "matters"? A question highlighting this uncertainty is "under the proposed rule, may and expert testify as to factual bases for his/her opinions where that basis is not disclosed in his/her report Moreover, can an expert expand the scope of his testimony by disclosing additional facts/information in deposition, (the comments suggest that opinions in a deposition can expand the scope of permissible testimony) which certainly gives the other side notice?

I agree with a rule change compelling disclosure and precluding use of non-disclosed information, but the rule should be clear and consistent about its reach.

Proposed 26(b)(4)(A). I am not sure whose interests the three-hour rule is designed to protect. I cannot imagine it is the experts', because expert witnesses are often far less burdened

than ordinary fact witnesses. They get paid for their time, and testifying is often part of their profession. Moreover, expert witnesses are often provide an excellent opportunity for counsel to focus on assessment of underlying disputes much more efficiently than in fact depositions, because the parties' respective assessment of what is relevant and important is often evidenced by what gets channeled through experts and what the experts themselves look at. Indeed, the expert's understanding of important facts is important enough that the proposed rules prohibiting inquiry into draft opinions specifically excludes (from the secrecy, that is) communications concerning many fact issues. See 26(b)(4)(D)(ii)&(iii). I would not provide a shorter presumptive limit on expert depositions than on other depositions.

Proposed Rule 26(c) appears to overrule Todd v. Bear Valley Apartments to the extent that *Todd* allowed admission of non-disclosed evidence where the non-disclosure was "substantially justified or harmless." However, Todd created this exception in the absence of a specific rule setting out the "substantially justified" language, and thus it is not clear whether this rule change is merely intended to refine the "harmless" exception to exclusion alone, or instead is intended to excise the "substantially justified" exception to exclusion. I would suggest that the Rule clarify whether the proposal is intended to revoke the judicial exception the bar on use of untimely disclosed information where the non-disclosure is “substantially justified.”

Thank you for your consideration.

Sincerely,

Stephen

Stephen A. Hess

SAH/pc

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April 17, 2015

Via Hand-Delivery

Chief Justice Nancy Rice and Associate Justices
c/o Christopher Ryan, Clerk of the Court
Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

Dear Chief Justice Rice and Associate Justices:

The Colorado Trial Lawyers Association (CTLA) is an organization of more than 1,100 trial attorneys throughout the State of Colorado. Our mission emphasizes protecting the rights of ordinary people and their access to our civil justice system. We appreciate this opportunity to comment on the proposed changes to the Colorado Rules of Civil Procedure.

INTRODUCTION

CTLA formed a task force chaired by our president-elect, Ross Pulkrabek, to study the proposed changes to the Colorado Rules of Civil Procedure. We solicited input from our members, and many responded. Our members primarily represent plaintiffs in personal injury cases; however, a substantial number of our members also represent clients in business litigation matters, as well as construction defect, medical negligence, products liability, and many other types of tort cases.

What follows are CTLA's comments and concerns about specific proposed rule changes, as well as our recommendations on how the proposed changes can be revised to accommodate the goals of reducing litigation costs and increasing efficiency while, above all, promoting access to justice for ordinary people.

Our view is that any change to the rules that *increases* expense and *reduces* efficiency will act as a barrier to justice. The more expensive and time-consuming the litigation process relative to the amount of the claim, the more difficulty most people will have finding an attorney willing to champion their cause.

Although there is much that we like about the proposed rule changes, our members have significant concerns that *some* of the proposed changes will have opposite of the intended effect, and will close the courthouse doors to many ordinary citizens. We will address first those concerns that are of the highest priority to us.

CTLA'S HIGH PRIORITY CONCERNS

The following three sets of proposed rule changes are of most concern to CTLA:

A. Proposed Change to C.R.C.P. 26(b)(1) Regarding "Proportional" Discovery

CTLA *opposes* the changes to Rule 26(b)(1) to impose "proportional" limitations on discovery. Based partly on our experience with CAPP cases, we believe that the subjective and vague criteria of proportionality tend to promote discovery disputes and *increase* the expense of litigation.

1. CTLA's concerns about the proportionality of discovery process

Several criteria that trial judges are directed to consider when assessing whether discovery is "proportional" to the needs of the case are subjective and vague. Some criteria in the proposed rules are objective or can be made objective. "[T]he parties' relative access to relevant information" and "the parties' resources" are objective and appropriate factors for a court to consider. "[T]he importance of the discovery in resolving the issues" can be made more objective *if* trial courts are directed to use the parties' pleadings to determine which material issues are disputed and require discovery.

Importance of the issues. On the other hand, "the importance of the issues at stake in the action" is a subjective, vague, and unhelpful factor. The typical civil case is usually subjectively very important to the parties, but usually is not objectively more or less important than any other civil case. Because there is no objective standard for what types of cases should be considered important, trial court judges can't help but draw upon personal experience or biases when deciding the importance of a particular case, such as an automobile case versus a medical malpractice case versus a business dispute.

Amount in controversy. "[T]he amount in controversy" is similarly vague and subjective. Moreover, it's unnecessary. Trial attorneys tend to be pragmatic

people,[1] so plaintiff and defense counsel generally do not seek the same level in discovery in a $50,000 personal injury case as they might in a $5 million trade secrets case. The economics of the case almost always controls the level of discovery sought by both sides. Moreover, if a party is being unreasonable, the court already has the power to enter a protective order pursuant to Rule 26(c).

On the other hand, in most cases the amount of damages is hotly contested within a range. More often than not, parties need to conduct discovery and consult with damages experts before they can ascertain the amount reasonably "in controversy" for the particular case. It is inefficient and unfair to the parties for trial court judges to make preliminary decisions about the value of claims or counterclaims based on allegations in the pleadings or arguments by counsel, then use that preliminary decision to narrow or expand the scope of discovery. Such an approach is tantamount to asking trial court judges to subjectively prejudge the outcome of the case, then limit discovery in a manner most likely to lead to that outcome.

Burden or expense. Finally, the trial court and party seeking discovery are at a great disadvantage when assessing "whether the burden or expense of the proposed discovery outweighs its likely benefit." This factor invites judges to rely almost entirely on representations by the party resisting discovery, then make a subjective determination whether the due process rights of the party seeking discovery should yield to the resisting party's interest in avoiding discovery.

The tried-and-true "reasonably calculated to lead to the discovery of admissible evidence" standard is objective and gives both the parties and trial court judges a well-established framework for conducting meaningful discovery. In addition, trial court judges also have the power under C.R.C.P. 26(c) to protect parties against discovery that is unduly burdensome and expensive.

2. CTLA's recommended solution

CTLA urges the court to reject the proposed changes to Rule 26(b)(1). However, CTLA respectfully submits that, to the extent this Court believes that a "proportionality" standard for discovery is needed in civil cases, the following revisions to the proposed rule changes would help made the standard clearer and more objective:[2]

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[1] If contingent fee attorneys are not pragmatic, they're not likely to remain in practice long.

[2] CTLA's suggested revisions to the proposed changes to the civil rules are in red ALL CAPITAL LETTERS.

> (1) **In General.** Subject to the limitations and considerations contained in subsection (b)(2) of this Rule, parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, and proportional to the needs of the case, considering ~~the importance of the issues at stake in the action, the amount in controversy,~~ the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving ~~the~~ DISPUTED issues AS SHOWN BY ADMISSIONS OR DENIALS IN THE PARTIES' PLEADINGS, and whether the ~~burden or expense of the proposed discovery outweighs its likely benefit~~ THE DISCOVERY IS REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE. Information within the scope of discovery need not be admissible in evidence to be discoverable.

B. Proposed Changes to C.R.C.P. 26(a)(2)(B)(I) Regarding Retained Experts

CTLA *opposes* the proposed changes to Rule 26(a)(2)(B)(I). We think that the additional time and expense imposed by the proposed changes is likely not worth the benefit. Our position is informed in part by our experience under the CAPP rules. However, if the Court is inclined to revise the rule, what follows is our analysis of the specific problems with specific provisions, and our recommended solutions.

1. CTLA's general concerns regarding requirement of written expert reports.

CTLA has serious concerns about the proposed changes to Rule 26(a)(2)(B)(I), that require parties to provide a "written report signed by the witness." Our concern is informed by our experience with similar requirements of the CAPP rules and in U.S. District Court. While not explicit, the proposed rule implies that the expert witness must prepare the written report rather than, as now permitted, allowing the attorney to prepare a designation through a written summary of the expert testimony. Our concern is that the implied requirement of a written report will significantly increase the cost of litigation and will be impractical with respect to many expert witnesses.

a. Adequate written reports are impractical or difficult to obtain from some expert witnesses.

Under the current version of Rule 26(a)(2)(B)(I), lawyers may disclose testimony by a retained expert in a written report *or summary* that need not be signed by the

expert. Experts are expensive and busy, and requiring an expert to prepare and sign a written report substantially increases the cost of hiring an expert witness in many cases. While we believe it preferable for an expert to draft his or her own report, it is simply not practical in many cases, particularly if the expert is a physician or has a very demanding schedule.

Moreover, the proposed rule requires the report to contain a "complete statement of all opinions to be expressed and the basis and reasons therefor." These additional requirements make the process difficult in that many novice expert witnesses do not appreciate all that must be included in the report, even if the retaining attorney repeatedly explains the process. This is a particular problem with experts who are inexperienced witnesses or who are medical professionals. As a practical matter, to ensure that everything that must be included in the report is in fact in the report, the attorney must be heavily involved in editing the report and coaxing the expert witness to make the necessary changes (some of which may be necessary to prove the elements of a claim).

b. CTLA's recommended solution

We understand that rule changes are not going to solve the practical problems with expert witnesses outlined above. However, we also believe that the rules should not make the process more difficult or expensive than it already is. Continuing the current process of allowing attorneys to prepare written summaries of the expert witnesses report, and allowing the expert witnesses to review and approve such summaries, while not ideal, will at least not make the process worse.

As such, CTLA recommends that the phrase "or summary" remain in Rule 26(a)(B)(II). Alternatively, adding the phrase, "DETAILED SUMMARY PREPARED BY THE ATTORNEY AND REVIEWED AND SIGNED BY THE EXPERT WITNESS" would be acceptable.

2. Problem of blurring lines between retained and non-retained expert witnesses

CTLA also is concerned another disturbing trend in the trial courts that increases the cost of litigation. Specifically, the lines are increasingly blurred between retained experts and non-retained experts.

a. The trial courts' reinterpretation of C.R.C.P. 26(a)(2)

The official Committee Comment to C.R.C.P. 26 state as follows:

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

While CTLA believes the Comment to be clear, in practice trial court judges are increasingly relying on the foregoing Comment to rule that a non-retained expert becomes a retained expert if the expert offers <u>any</u> opinion not "formed as part of their occupational duties."

For example, a treating physician sometimes has no medical reason to consider the cause of a patient's injuries. While the physician may know and understand the cause, and may take into account the cause as part of her treatment plan, the physician may make no reference to the cause in the medical record. The more emergent the situation, the less likely the "cause" will be fully documented, even if the physicians and nurses fully understand the cause.

Causation is almost always an issue in litigation. The treating physician usually is the person best qualified to testify about the cause of a patient's injuries. However, in our recent experience, trial judges increasingly rule that unless the opinions of the treating physician about causation, or other medical issues such as prognosis, are contained in the four corners of the treatment records, the treating physician is a "retained expert" whose opinions must meet the requirements of Rule 26(a)(2)(B)(I).

Anticipating the possibility of such a ruling, many plaintiff attorneys attempt to meet the requirements of current Rule 26(a)(2)(B)(I) by obtaining the treating physician's resume, list of publications, and testimonial history. This often is a struggle because the treating physician is an involuntary expert witness in the litigation, and many physicians do not maintain testimonial history. Moreover, treating physicians are extremely busy, many do not want to be involved in the litigation process, and many *will not* take the time to prepare a written report. Those physicians who agree to prepare a written report often demand significant fees for doing so, *e.g.*, $1,000 per hour or more.

If the trend of blurring the lines between retained and non-retained experts continues, the proposed changes to Rule 26(a)(2)(B)(I) would require attorneys to procure a written report signed by the treating physician, which will be impossible in many cases and extremely expensive in the balance of cases. Alternatively, the attorney is required to retain and pay a specifically retained expert witness a great and, often, unnecessary expense. This unfortunate trend drives up the cost of litigation and acts as a barrier to justice for people with smaller claims.

Thus, in CTLA's view, the proposed rule change to Rule 26(a)(2)(B)(I) requiring a written and signed expert report will act as an unintended barrier to justice by making it more expensive and more difficult for personal injury plaintiffs to bring claims, particularly the smaller claims. As the current comments acknowledge, it is inappropriate and burdensome to impose the requirements of Rule 26(a)(2)(B)(I) on non-retained experts such as treating physicians and police officers. Imposing such requirements through rule changes will further impair the ability of ordinary citizens to access our court system.

b. CTLA's recommended solution

If this Court adopts the proposed requirement that a retained expert provide a written and signed report, it also should clarify the comments to C.R.C.P. 26 by stating that non-retained experts are people whose opinions are formed or *reasonably derived from or based on* their occupational duties. The court should also explicitly state in the Committee Comment to the rule that treating physicians or police officers are not to be considered retained expert witnesses even if the treating physician's opinions about causation or prognosis go beyond the four corners of the medical records or a police officer's opinions go beyond the four corners of the police report.

3. Problems caused by an unreasonably restrictive reading of the expert disclosure requirements of Rule 26(a)(2)(B)

a. Our experience with CAPP Rule 10(b)

CTLA members with substantial experience in CAPP cases have observed that, in some circumstances, attorneys have taken an unreasonably restrictive interpretation of the current CAPP Rule 10(b) requirement that "[t]he substance of each expert's direct testimony shall be fully addressed in the expert's report. Experts shall be limited to testifying on direct examination about matters disclosed in reasonable detail in their written reports."

In short, some counsel have argued that if an opinion or, more likely, the basis for an opinion isn't precisely stated in the written report with great exactitude, then the expert witness may not testify as to the opinion or the basis opinion, or explain the opinion, even if one can reasonably derive the opinion, basis or explanation from the written report.

In our experience with CAPP cases, anticipating and heading off such objections forces both sides to spend an extraordinary amount of time and money wordsmithing expert witness reports instead of getting to the heart of the matter. Our fear (and our unfortunate experience in CAPP cases) is that sometimes our opponent will subject an expert's report to a pettifogging critique and interject obstructive objections at trial.

b. CTLA's recommended solution

CTLA believes that the parties can comply with the spirit and intent of the proposed changes to Rule 26(a)(2)(B)(I), and eliminate much inefficient debate and expert witness expense by amending the last sentence of the proposed change to the Rule as follows:

> The witness's direct testimony shall be limited to matters disclosed in detail in the report AS THE REPORT IS PROPERLY SUPPLEMENTED IN ACCORDANCE WITH C.R.C.P. 26(e), AND AS TO SUCH MATTERS THAT ARE REASONABLY DERIVED FROM A GOOD FAITH READING OF THE REPORT.

4. Concerns about the proposed change to C.R.C.P. 26(e) and supplementing expert reports

On a related issue, CTLA *supports* most of the proposed changes to Rule 26(e), however, we see a significant and unhelpful contradiction within the rule.

a. CTLA's concerns about courts refusing to allow supplemented expert testimony

Cases change over time. As the parties conduct discovery, evidence that a party's attorneys thought important early in the case may diminish in importance, and other evidence thought not to be important becomes critical. Moreover, the parties' theories, claims and defenses can evolve or become clarified through discovery. An expert witness's opinions may change or be expanded as the evidence develops.

The proposed changes to Rule 26 should accommodate the natural and expected evolution of a lawsuit. Therefore, CTLA *supports* expanding Rule 26(e) to require the parties to supplement their expert reports and statements "in a timely manner."

Moreover, CTLA *supports* as reasonable the requirement that if an expert witness expands upon or explains the basis for an opinion in a deposition, the party offering the expert witness must designate such testimony through a supplemental report or statement if the party wishes to offer such testimony at trial.

These reasonable changes are, however, negated by the decidedly unhelpful sentence that "[n]othing 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." CTLA *opposes* modifying the rule to include the sentence. This statement is not only unreasonable in the context of how real cases develop, but is at odds with (and defeats the purpose of) the requirement that the parties supplement their expert reports.

b. CTLA's recommended solution

CTLA recommends that the second to last sentence of C.R.C.P. 26(e) be substituted with the following sentence: "THE COURT SHALL PERMIT AN EXPERT WITNESS TO TESTIFY TO OPINIONS PROPERLY SUPPLEMENTED IN ACCORDANCE WITH THIS RULE, SUBJECT TO THE RULES OF EVIDENCE."

C. Proposed change to C.R.C.P. 54(d) Regarding Awards of Litigation Costs

CTLA urges this Court to reject the proposed change to Rule 54(d) as drafted. The propose change was the subject of vigorous discussion among our members. In the end, our view is that the proposed change threatens access to justice in cases where the costs reasonably required to take the case to trial are substantial in comparison to the provable damages. However, taking a tort case to trial and losing should not mean financial ruin through a costs award against either a plaintiff or a defendant.

While we believe that Rule 54(d) should remain largely unchanged so that the prevailing party may recover costs allowed by C.R.S. § 13-16-122 and this Court's decision in *Cherry Creek Sch. Dist. #5 v. Voelker,* 859 P.2d 805, 813 (Colo. 1993), we also believe the Court should require trial courts to consider the relative economic

position of the litigants when assessing costs, including considering insurance coverage. Again, this is an access to justice issue.

1. CTLA's concerns about the proposed changes to Rule 54(d)

In many cases, the plaintiff is required to present medical or other expert testimony in order to meet the burden of proof. Similarly, defendants regularly retain experts to refute the testimony of the plaintiff's expert or to support an affirmative defense or counterclaim. Expert testimony is unavoidably expensive. We are also concerned that the requirement of detailed written expert reports will drive up costs.

Under the existing statutory framework, an award of costs to the prevailing party is mandatory. C.R.S. § 13-16-104. The list of allowable costs is lengthy and specifically includes "charges for expert witnesses approved pursuant to section 13-33-102(4)," C.R.S. § 13-16-122(g), and "costs of taking depositions for the perpetuation of testimony, including . . . expert witness fees." This Court has held that the list of awardable costs in C.R.S. § 13-16-122 is illustrative but not exhaustive. *See Cherry Creek Sch. Dist. #5,* 859 P.2d at 813. Trial courts are directed to award expert fees "with reference to the value of the time employed and the degree of learning or skill required." C.R.S. § 13-33-102(4).

The proposed changes to C.R.C.P. 54(d) depart from the statutory language and this Court's opinions. The proposed changes provide in part as follows: "Unless the trial court makes specific findings that the interests of justice require otherwise, costs for experts shall be limited to reasonable compensation fixed by the court for the value of time spent testifying at trial, and for testifying in depositions admitted in evidence in lieu of testifying at trial." This proposed change appears to create a presumption that a trial court may award expert fees only for the time that an expert actually spends testifying (which usually is small relative to the time the expert actually spends on the case). In addition, the proposed changes would direct trial courts to consider "any relevant factors which may include the needs and complexity of the case, the amount in controversy, and the importance of incurring the costs in the litigation" when awarding costs. This would appear to invite trial courts to second-guess the legislature's judgment about which costs should or should not be recoverable by the prevailing party.

Setting aside the question whether this Court may adopt a cost rule that is inconsistent with Colorado statute and its opinion in *Cherry Creek,* CTLA believes that the proposed change to C.R.C.P. 54(d) will limit access to justice by making many cases economically prohibitive without addressing the problem of potential

financial ruin for litigants of modest means. This concern applies both to small and large cases.

a. Example of problems caused by the proposed change to Rule 54(d) for small cases

To illustrate the problem that the proposed amendment presents for smaller cases, many CTLA members represent plaintiffs in automobile cases where damages are comparatively small. If the defendant's insurer refuses to settle, a plaintiff's attorney handling a $20,000 case reasonably may conclude that it will cost as much as $20,000 to hire the accident reconstruction experts and medical experts needed to take the case to trial, recognizing that the defendant's insurance company is prepared to do the same.

Under the current version of Rule 54(d), the plaintiff's attorney has a reasonable basis to expect that she will recover costs if the plaintiff prevails at trial. Under the proposed changes to Rule 54(d), however, the plaintiff's attorney must assume that the majority of those costs will not be recoverable, and consequently the case will not be economically viable. This circumstance would make it difficult for a plaintiff with a meritorious but small personal injury case to retain counsel or obtain compensation. Moreover, the insurers will have less incentive to settle early, even in clear liability cases, if the insurers know that the plaintiff's attorney is unlikely to take the risk of spending thousands of dollars in litigation costs on a small damages case when there is little hope of recovering such costs after a trial.

In short, in our view, there is a great risk that the proposed change to Rule 54(d) will limit access to the courts for people with small cases.

b. Example of problems caused by the proposed changes to Rule 54(d) for large cases

As an illustration of the problems that the proposed amendment may cause for large cases, in construction defect litigation it is common for plaintiffs' counsel to advance as much as $5,000 per unit for expert investigation. On an average sized HOA of 100 units, costs of expert investigation could be as much as $500,000. Our members report a case settled last year where such costs exceeded $2,000,000 for expert witness investigation. Accordingly, the plaintiffs' ability to recover litigation costs is an extraordinarily important part of the economic analysis of construction defect cases.

Although the proposed changes to Rule 54(d) allow the trial court judge to award non-testimonial expert witness fees if he or she "makes specific findings that the interests of justice require otherwise," the inherent unpredictability of that standard will make it difficult for plaintiffs and their attorneys to evaluate whether to invest the costs needed to bring a case at the outset, and it will inhibit parties' ability to settle cases involving substantial expert witness costs because defendant developers or their insurers believe that they may be able to avoid a substantial award of costs even if they lose at trial.

If the proposed changes to Rule 54(d) are adopted, plaintiffs' lawyers will be unwilling or unable to advance costs required to bring many such construction cases. Many homeowners and HOAs lack the financial ability to finance their own litigation. Even those homeowners or HOAs who have the financial means will be deterred from doing so due to uncertainty whether they will recover costs even if they prevail on their claims. On the other hand, parties with the financial means to fund litigation without the expectation of recovering the costs, such as large corporations or insured defendants, will have a distinct advantage in litigation.

In our view the proposed changes to C.R.C.P. 54(d) will act as another barrier to the courts for ordinary people.

c. <u>Problems of well-funded defendants or their insurers threatening financial ruin to litigants pursuing tort claims</u>.

Our members routinely see the threat of a substantial award of costs used to bully claimants into dropping well-founded claims, particularly in medical negligence cases. Our members are aware of people with strong tort claims who have elected not to pursue their rights in court because of the fear that if they were to lose at trial, they will be financially ruined. In most personal injury, products liability or medical negligence tort claims, the defendants have insurance. On the other hand, the plaintiffs are often unable to pay their own costs, much less the costs of the defendants.

The threat of a substantial cost award poses the threat of losing homes, bankruptcy or other financial ruin for those litigants without insurance – almost always plaintiffs. It is an access to justice issue. Moreover, the limitations on recovery imposed by the Health Care Availability Act, C.R.S. 13-64-101, *et. seq.*, and other statutory limitations on tort damages create extraordinary risk without a concomitant financial upside in some circumstances. The practical effect of these circumstances acts as a bar to the courthouse for many ordinary people.

Accordingly we believe that trial courts should consider the relative economic position of the parties when determining an award of costs.

2. CTLA's recommendation as to proposed changes to Rule 54(d)

CTLA *opposes* the proposed change to Rule 54(d) as written. CTLA believes that the Rule should be modified as follows:

> **(d) Costs.** Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the state of Colorado, its officers or agencies, shall be imposed only to the extent permitted by law. WHEN DETERMINING AN AWARD OF COSTS, THE COURT SHALL CONSIDER THE RELATIVE ECONOMIC POSITION OF THE PARTIES, INCLUDING ANY AVAILABLE INSURANCE COVERAGE.

CTLA'S OTHER CONCERNS ABOUT THE PROPOSED AMENDMENTS

The following proposed rule changes are also of concern to CTLA:

D. Proposed Change to C.R.C.P. 16(b)(12) Regarding Anticipated Expert Testimony

CTLA sees two problems with the proposed change to Rule 16(b)(12), but believes the problems are easily fixed.

1. CTLA's concerns about early identification of subject areas of expert testimony

Problem 1. Attorneys will usually know early in a case the subject areas about which they anticipate offering expert testimony. However, those subject areas sometimes changes as discovery proceeds and the case unfolds. Our experience with the similar CAPP rule is that there is sometimes a problem if, while in the midst of discovery, it becomes clear that expert testimony is required that was not anticipated earlier.

Problem 2. In our experience, multiple defendants will often designate multiple expert witnesses on the same subject area, citing minor differences in position among the defendants, determine who performs best at a deposition, and

then collectively call only that expert witness at trial. Such practices significantly drive up the cost of litigation and disadvantage the plaintiff.

2. CTLA's recommended solution

a. Additional Anticipated Subject Areas

Any changes to Rule 16(b)(12) should permit the parties to add a subject area for expert witness testimony *if* such can be done on a timely basis without prejudice to the opponent or delaying the trial.

b. Designating More Than One Expert Witness in a Subject Area

We believe that having multiple expert witnesses per topic on a side, even if there are slight differences in aligned parties' positions, should be allowed *only* in rare circumstances. We think that requiring a party or side to show "good cause" for endorsing multiple expert witnesses on a subject area, rather than a mere "justification," will eliminate some abuses. We think that the official Comment to the rule should explicitly state that the exception should be rare.

However, if good cause is shown, and one side is permitted to designate more than one Rule 26(a)(B)(I) expert witness on a subject matter, the opposing side should be allowed an equal number of expert witnesses in the same subject area if they wish.

To address both of our concerns outlined above, we recommend that if this Court adopts Rule 16(b)(12), the rule be revised as follows:

> (12) **Subjects for Expert Testimony.** The proposed order shall identify the subject areas about which the parties anticipate offering expert testimony; whether that testimony would be from an expert defined in C.R.C.P. 26(a)(2)(B)(I) or in 26(a)(2)(B)(II). IF PRIOR TO THE DEADLINE FOR DESIGNATING EXPERT WITNESSES A PARTY WISHES TO IDENTIFY ADDITIONAL SUBJECT AREAS ABOUT WHICH THE PARTY WISHES TO OFFER EXPERT TESTIMONY, THE PARTY WISHING TO DESIGNATE SUCH ADDITIONAL SUBJECT AREAS MAY REQUEST LEAVE OF THE COURT TO ADD SUCH ADDITIONAL SUBJECT AREAS, WHICH LEAVE SHALL BE LIBERALLY GRANTED, AND EACH SIDE SHALL BE PERMITTED TO DESIGNATE A SINGLE EXPERT WITNESS FOR SUCH ADDITIONAL SUBJECT AREA.~~.; and, if~~ IF THE PARTIES ANTICIPATE more than one expert as defined in C.R.C.P. 26(a)(2)(B)(I) per subject per side ~~is~~

~~anticipated~~, the proposed order shall explain the ~~justification~~ GOOD CAUSE BASIS for such ADDITIONAL expert or experts consistent with the proportionality factors in C.R.C.P. 26(b)(1) and considering any differences among the positions of multiple parties on the same said as to experts. SHOULD THE COURT, UPON GOOD CAUSE SHOWN, ALLOW MORE THAN ONE EXPERT PER SUBJECT AREA, EACH SIDE SHALL BE ENTITLED TO THE SAME NUMBER OF EXPERTS ON THE SUBJECT AREA.

E. Proposed Change to C.R.C.P. 26(b)(4) Regarding Expert Depositions

CTLA has a minor but easily fixed concern about Rule 26(b)(4). Based upon our experience with the CAPP rules, we generally like the limits on expert witness depositions. Our anecdotal experience is that if the expert has provided a detailed report or summary, cross-examinations are as effective without a deposition as with a deposition. However, if the rules are to permit short depositions of retained expert witnesses, the rules should also permit depositions of non-retained experts. In our recent experience, some healthcare organizations will not permit their treating physicians to meet with attorneys without a subpoena, including attorneys for the patient. Thus, the rules should clarify that non-retained expert witnesses are to be treated as fact witnesses. Alternatively, the rules should provide a mechanism for subpoenaing and deposing non-retained expert witnesses if necessary.

We suggest that Rule 26(b)(4) be revised as to state that "[a] party may depose any person who has been identified as an expert disclosed pursuant to subsection 26(a)(2)(B) of this Rule whose opinions may be presented at trial. . . ."

CONCLUSION

CTLA is grateful to the Supreme Court's Civil Rules Committee and the others involved for the significant thought and work that went into these proposed changes to Colorado's rules of civil procedure.

Respectfully Submitted,

Colorado Trial Lawyers Association

Michael T. Mimm, President

CTLA Civil Rules Task Force:

Ross W. Pulkrabek, President-Elect and Chair
James Croshal, Past-President
Jason Jordan, Member, Board of Directors
Sommer Luther, Treasurer
Michael Nimmo, Member, Board of Directors
Jim Puga, Member, Board of Directors
Michael J. Rosenberg, Vice-President
Saul Sarney, Executive Committee
Darin Schanker, Past-President
Lee Sternal, Member, Supreme Court Civil Rules Committee

APPENDIX

Summary of the Colorado Trial Lawyers Association's Positions on Proposed Amendments to the Rules of Civil Procedure

A. CTLA's position on proposed change to C.R.C.P. 26(b)(1) re "proportional" discovery:

1. CTLA opposes the proposed changes to Rule 26(b)(1).
2. If Court amends the rule to implement proportional discovery, CTLA recommends eliminating subjective terms, tie discovery to the pleadings, and retain the "reasonably calculated to lead to the discovery of admissible evidence" standards now used in discovery.

B. CTLA's position on proposed change to C.R.C.P. 26(a)(2)(B)(I) re retained experts:

1. CTLA opposes the proposed changes to Rule 26(a)(2)(B)(I).
2. If the Court amends the rule, CTLA recommends that the rule 1) permit written summaries of expert witnesses prepared by the attorneys, 2) permit non-retained expert witnesses to testify as to those opinions formed or *reasonably derived from or based on* their occupational duties, 3) permit retained expert witnesses to testify as to those matters that are reasonably derived from a good faith reading of the report, and 4) require courts to allow expert testify as to matters properly supplemented pursuant to Rule 26(e) (subject to the rules of evidence).

C. CTLA's position on the proposed changes to Rule 54(d):

1. CTLA opposes the proposed changes to Rule 54(d) as written.
2. CTLA recommends the rule be changed to provide that when determining an award of costs, the trial court shall be required to consider the relative economic position of the parties, including any insurance coverage.

D. CTLA's position on proposed changes to C.R.C.P. 16(b)(12) re anticipated expert testimony:

1. Allow parties to reasonable opportunity to add subject areas for expert witness testimony after the Case Management Order.
2. Allow each side to have more than one expert witness on a particular topic *only* in rare circumstances after a finding of good cause shown.
3. If the court allows one side more than one expert witness on a topic, allow the other side an equal number of experts on the topic (if wished).

E. CTLA's position on proposed change to C.R.C.P. 26(b)(4) re expert depositions:

1. CTLA supports the changes, but recommends that the rule allow short depositions of non-retained expert witnesses or clarify that non-retained experts are to be treated as fact witnesses.

moore, jenny

From: berger, michael
Sent: Friday, April 17, 2015 4:39 PM
To: Richard P. Holme , Esq.; moore, jenny
Subject: Fwd: Comments on Proposed Rule Changes to the Colorado Rules of Civil Procedure

Sent from my iPhone

Begin forwarded message:

From: "ryan, christopher" <christopher.ryan@judicial.state.co.us>
Date: April 17, 2015 at 4:37:08 PM MDT
To: "berger, michael" <michael.berger@judicial.state.co.us>
Subject: FW: Comments on Proposed Rule Changes to the Colorado Rules of Civil Procedure

#12 today

From: Timothy M. Garvey [mailto:tmg@robertslevin.com]
Sent: Friday, April 17, 2015 4:35 PM
To: ryan, christopher
Subject: Comments on Proposed Rule Changes to the Colorado Rules of Civil Procedure

This Message was Encrypted.

Mr. Ryan,

I write to provide you with my comments regarding the proposed rule changes to the Colorado Rules of Civil Procedure that are currently under consideration and expected to effective July 1, 2015.

Let me begin with an overall comment: In the Revised First Report of the Improving Access to Justice Subcommittee, dated October 17, 2014, it was noted there is a reform movement involving access to justice that is sweeping the nation, aimed at creating a significant change in the existing culture of pretrial discovery with the goal of emphasizing and enforcing Rule 1's mandate that discovery be administered to make litigation just, speedy and inexpensive. The Report further noted that one of the primary movers of this reform effort is a realization that the cost and delays of the existing litigation process is denying meaningful access to the judicial system to obtain justice for many people.

As an attorney who represents those wronged by the acts and omissions of others, I see firsthand how these costs and delays affect my clients and even some prospective clients who choose not to move forward with a case. Nearly weekly, I have to turn down cases that are meritorious, simply because they are not economically feasible. Not worth it in the cost/benefit analysis. In such instances, the wrongdoer suffers no consequences for its acts, while the individual harmed is left with essentially no remedy. What replaces the remedy is a sense of distrust and ill will toward our justice system.

Over the past few years, Colorado and courts throughout the nation have identified Access to Justice as a priority. To the extent the proposed rule changes are an attempt to further promote

the ideals embodied in the concept of Access to Justice, its attempts are laudable. Unfortunately, the execution is not. Below, I provide a few reasons why.

Rule 16 and 26(b): The proposed proportionality factors effectively require a plaintiff to provide a prima facie case regarding all of his claims. However, the true facts are often unknown to a plaintiff at the outset of a case and what may seem proportional at the outset may prove severely limiting in the long run and permit a tortfeasor to evade liability. Moreover, proportionality is a hopelessly vague concept that has no place in the discovery process and hinders the search for truth. Certainly, we are all familiar with cases where attorneys found the needle in the haystack that made the case. Imposing a proportionality element at the outset will ensure that such a needle is never found, because the defense will not even be required to produce the haystack in which it knows the needle is to be found.

Further, requiring early discussions of settlement (under Rule 16) will only benefit tortfeasors, who are often in an advantageous position at the outset of a case, as the plaintiff lacks all the information known to the tortfeasor and cannot properly assess or value the case at this early stage.

Rule 26: The changes to expert disclosures will only harm plaintiffs and make it more difficult for them to prove their case. Requiring an expert to provide references to all literature that may used during the witness's testimony and providing all exhibits that may be used will be very difficult at this early stage of litigation. The requirement that the "witness's direct testimony shall be limited to matters disclosed in detail in the report" presents a very vague standard that will be too difficult to consistently enforce. Moreover, requiring an expert to disclose all opinions "in detail" will require all parties to incur extra costs to ensure that the expert's report is sufficiently detailed. This additional upfront cost will harm only plaintiffs—as defendants, often insurance companies, usually have far more economic ability to absorb such upfront costs.

Regarding the changes to treating experts, these changes will also harm plaintiffs for many of the same reasons discussed above. Additionally, requiring treating doctors to provide qualifications (to what extent is unclear) and copies of all exhibits that may be used will be resisted by many treating physicians who have neither contracted nor sought to become experts. Most treating experts would certainly prefer that their time be spent doing what they choose to do, i.e., treat people, not be made to do a bunch of extra work because their patients have filed a lawsuit. Already, we as plaintiffs' lawyers receive hostility from many treating experts. Imposing these additional requirements will only exacerbate that divide.

Limiting expert depositions to three hours will only encourage obstinate experts to become more obstinate. Same applies to limiting depositions to six hours.

There is no reason to prevent the discovery of draft expert reports. Juries can learn much from seeing changes made to reports at the direction of lawyers. This goes both ways.

Rule 34: If there is to be an automatic stay of discovery, then there should be imposed a concomitant obligation that the court resolve such disputes expediently.

Rule 54: Allowing a party to recover only the costs incurred by the expert when testifying at trial will harm plaintiffs. Immensely. Often, the amount of time spent testifying is minimal compared with the total time invested by the expert. Experts are not cheap, but they are required in many cases for a variety of reasons. Without experts, plaintiffs' cases are routinely dismissed. Permitting prevailing plaintiffs to recover only a fraction of the costs related to experts will preclude many from seeking justice and permit tortfeasors to act wrongly and get away with it. Of all the proposed rule changes, this is the one that most clearly closes the courthouse door to an unknowable number of potential plaintiffs who will never receive their day in court.

And those are just a few of the harms that will be caused by the proposed rule changes. As such, in an effort to ensure that access to justice remains the goal of the Colorado Rules of Civil Procedure, I ask that you please reconsider enacting many of the proposed rule changes.

I should note, that not all the rules are bad. And I do not mean to come off as someone who is entirely against the changes. That said, I do believe the changes discussed above will negatively impact plaintiffs, denying them access to justice, and permitting tortfeasors and other wrong doers to escape liability.

Thank you,

Tim Garvey

Timothy M. Garvey

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Think GREEN before printing this email!

moore, jenny

From: tate, teresa
Sent: Thursday, April 16, 2015 3:03 PM
To: Fred Skillern; berger, michael; moore, jenny
Cc: leith, elizabeth; lind, connie
Subject: Colorado Rules of Probate Procedure
Attachments: NEW CRPP.DOC

All:

I have been asked to forward the final renumbered version of the Colorado Rules of Probate Procedure approved by the PAC and T&E section of the CBA. Please find them attached. I believe that the CRPP are ready for final consideration and vote at the next Civil Rules Committee Meeting.

When I reviewed the Rules, I noticed theses very minor issues:

Rule 23 has a subsection (a), but no subsection (b). The Civil Rules Committee may want to consider renumbering.

Rule 50 the period at the end of the sentence should be moved inside of the quotation marks to read "Lodged Will File."

Rule 56 and 63 both have time requirements that read "not more than sixty days prior to filing." Sixty days does not conform to the new rule of 7 days, however, I don't think this is really an issue since it is a "not more than sixty days prior to" requirement. I just wanted to call it to your attention in the event this comes up later so you all will have thought of it and made an affirmative decision to leave it as is.

Best regards,
Teresa

Teresa Taylor Tate
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Colorado Judicial Branch
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COLORADO RULES OF PROBATE PROCEDURE

GENERAL:

PLEADINGS:

NOTICE:

FIDUCIARIES:

Rule 34 – RESERVED
Rule 35 – RESERVED
Rule 36 – RESERVED
Rule 37 – RESERVED
Rule 38 – RESERVED
Rule 39 – RESERVED

CONTESTED PROCEEDINGS:

Rule 40 – Discovery
Rule 41 – Jury Trial – Demand and Waiver (25)
Rule 42 – Objections to Accounting, Final Settlement, Distribution or Discharge (33)
Rule 43 – RESERVED
Rule 44 – RESERVED
Rule 45 – RESERVED
Rule 46 – RESERVED
Rule 47 – RESERVED
Rule 48 – RESERVED
Rule 49 – RESERVED

DECEDENT'S ESTATES:

Rule 50 – Wills – Deposit for Safekeeping and Withdrawals (22)
Rule 51 – Transfer of Lodged Wills (23)
Rule 52 – Informal Probate – Separate Writings (25.1)
Rule 53 – Heirs and Devisees – Unknown, Missing or Nonexistent – Notice to Attorney General (17)
Rule 54 – Supervised Administration – Scope of Supervision – Inventory and Accounting (30)
Rule 55 – Court Order Supporting Deed of Distribution (33.3)
Rule 56 – Foreign Personal Representatives (18)
Rule 57 – RESERVED
Rule 58 – RESERVED
Rule 59 – RESERVED

PROTECTIVE PROCEEDINGS:

Rule 60 – Physicians' Letters or Professional Evaluation (27.1)
Rule 61 – Inventory with Financial Plan – Conservatorships (28)
Rule 62 – Court Approval of Settlement of Claims of Persons Under Disability (16)
Rule 63 – Foreign Conservators (18)
Rule 64 – RESERVED
Rule 65 – RESERVED
Rule 66 – RESERVED
Rule 67 – RESERVED
Rule 68 – RESERVED
Rule 69 – RESERVED

TRUSTS:

Rule 70 – Trust Registration – Amendment, Release and Transfer (8.6)
Rule 71 – RESERVED
Rule 72 – RESERVED
Rule 73 – RESERVED
Rule 74 – RESERVED
Rule 75 – RESERVED
Rule 76 – RESERVED
Rule 77 – RESERVED
Rule 78 – RESERVED
Rule 79 – RESERVED

GENERAL:

Rule 1. Scope of Rules - How Known and Cited

(a) Procedure Governed. These rules shall govern the procedure in the probate court for the city and county of Denver and district courts when sitting in probate. In case of conflict between these rules and the Colorado Rules of Civil Procedure set forth in Chapter 1, or between these rules and any local rules of probate procedure, these rules shall control.

(b) How Known and Cited. These rules shall be known and cited as the Colorado Rules of Probate Procedure, or C.R.P.P.

Rule 2. Definitions.

(a) As used in these rules, unless the context otherwise requires:

(1) "Document or Documents" means any petition, or application, inventory, claim, accounting, notice or demand for notice, motion, and any other writing which is filed with the Court.

(2) "Accounting" means any written statement that substantially conforms to JDF 942 for decedents' estates, JDF 885 for conservatorships and to the 1984 version of the Uniform Fiduciary Accounting Standards as recommended by the Committee on National Fiduciary Accounting Standards.

(3) "Colorado Probate Code" means Articles 10 to 17 of Title 15 of the Colorado Revised Statutes.

(b) Except as otherwise provided in this rule, terms used in these rules shall be as defined in the applicable sections of Title 15, C.R.S., as amended.

Rule 3. Registry of Court -- Payments and Withdrawals.

Payment into and withdrawals from the registry of the court shall be made only upon order of court.

Rule 4. Security of Court Records.

For good cause shown, the court may order all or any part of a court record to be placed under security as outlined below:

The court may seal a court record. A sealed court record is only accessible to judges and court staff. Parties, attorneys, other people affiliated with the case, and the public shall not obtain a sealed court record without a court order.

The court may suppress a court record. A suppressed court record is any court record within a suppressed case or a court record that has been assigned a security level of suppressed by the court. Except as otherwise provided in Chief Justice Directive 05-01, only judges, court staff, and parties to the case (and, if represented, their attorneys) may access a suppressed court record without a court order.

A suppressed register of actions is accessible without a court order only to judges, court staff, parties to the case, (and, if represented, their attorneys) and persons or agencies who have been granted view access to the electronic record.

A protected court record is only accessible to the public after redaction in accordance with applicable law and Chief Justice Directive 05-01.

Rule 5. Delegation of Powers to Clerk and Deputy Clerk.

(a) In addition to duties and powers exercised as registrar in informal proceedings, the court by written order may delegate to the clerk or deputy clerk any one or more of the following duties, powers and authorities to be exercised under the supervision of the court:

(1) To appoint fiduciaries and to issue letters, if there is no written objection to the appointment or issuance on file;

(2) To set a date for hearing on any matter and to vacate any such setting;

(3) To issue dedimus to take testimony of a witness to a will;

(4) To approve the bond of a fiduciary;

(5) To appoint a guardian ad litem, subject to the provisions of law;

(6) To certify copies of documents filed in the court;

(7) To order a deposited will lodged in the records and to notify the named personal representative;

(8) To enter an order for service by mailing or by publication where such order is authorized by law or by the Colorado Rules of Civil Procedure;

(9) To correct any clerical error in documents filed in the court;

(10) To appoint a special administrator in connection with the claim of a fiduciary;

(11) To order a will transferred to another jurisdiction pursuant to Rule 51 herein;

(12) To admit wills to formal probate and to determine heirship, if there is no objection to such admission or determination by any interested person;

(13) To enter estate closing orders in formal proceedings, if there is no objection to entry of such order by any interested person;

(14) To issue a citation to appear to be examined regarding assets alleged to be concealed, etc., pursuant to §15-12-723, C.R.S.;

(15) To order an estate reopened for subsequent administration pursuant to §15-12-1008, C.R.S.;

(16) To enter similar orders upon the stipulation of all interested persons.

(b) All orders made and proceedings had by the clerk or deputy clerk under this rule shall be made of permanent record as provided for acts of the court done by the judge.

(c) Any person in interest affected by an order entered or action taken under the authority of this rule may have the matter heard by the judge by filing a motion for such hearing within fourteen days after the entering of the order or the taking of the action. Upon the filing of such a motion, the order or action in question shall be vacated and the motion placed on the calendar of the court for as early a hearing as possible, and the matter shall then be heard by the judge. The judge may, within the same fourteen day period referred to above, vacate the order or action on the court's own motion. If a motion for hearing by the judge is not filed within the fourteen day period, or the order or action is not vacated by the judge on the court's own motion within such period, the order or action of the clerk or deputy clerk shall be final as of its date subject to normal rights of appeal. The acts, records, orders, and judgments of the clerk or deputy clerk not vacated pursuant to the foregoing provision shall have the same force, validity, and effect as if made by the judge.

Rule 6. Rules of Court.

(a) Local rules. Courts may make rules for the conduct of probate proceedings consistent with these rules. Copies of all such rules shall be submitted to the Supreme Court for its approval before adoption, and, upon their promulgation, a copy shall be furnished to the office of the state court administrator to the end that all rules made as provided herein may be published promptly and that copies may be available to the public.

(b) Procedure not otherwise specified. If no procedure is specifically prescribed by rule or statute, the court may proceed in any lawful manner not inconsistent with these rules of probate procedure and the Colorado Probate Code and shall look to the Colorado Rules of Civil Procedure and to the applicable law if no rule of probate procedure exists.

Rule 7. RESERVED
Rule 8. RESERVED
Rule 9. RESERVED

PLEADINGS:

Rule 10. Judicial Department Forms.

The Judicial Department Forms (JDF) approved by the Supreme Court should be used where applicable. Any form filed in a probate proceeding should, insofar as possible, substantially follow the format and content of the approved form, not include language which otherwise would be stricken, emphasize all alternative clauses or choices which have been selected, emphasize all filled-in blanks, and contain a statement that the pleading conforms in substance to the current version of the approved form, citing the JDF number and effective date. Unless the context otherwise requires, terms used in JDFs shall be as defined as provided in Rule 2.

Rule 11. Identification of Party and Attorney.

All documents presented or filed shall bear the name, address, e-mail address and telephone number of the appearing party, and of the attorney, if any.

Rule 12. Correction of Clerical Errors

(a) Clerical errors in documents filed with the court may be made the subject of a written request for correction only by filing JDF 740 or a document that is in substantial conformance with the JDF 740, together with corrected documents as necessary. "Clerical errors" include, but are not limited to, the following:

(1) Errors in captions (i.e. aka names, etc.);

(2) Misspellings;

(3) Errors in dates, other than dates for settings, hearings, and limitations periods;

(4) Transposition errors.

(b) If the court is not satisfied that a written request for correction is a "clerical error," the request may be denied. A clerical error does not include the addition of an argument, allegation, or fact that has legal significance.

Rule 13. Petitions Must Indicate Persons Under Legal Disability.

If any person who has any interest in the subject matter of a petition is under the age of eighteen years, or otherwise under legal disability, or incapable of adequately representing his or her own interests, each petition, the hearing of which requires the issuance of notice, shall state such fact and the name, age, and residence of such minor or other person when known and the name of the guardian, conservator, or personal representative, if any has been appointed.

Rule 14. RESERVED
Rule 15. RESERVED
Rule 16. RESERVED
Rule 17. RESERVED
Rule 18. RESERVED
Rule 19. RESERVED

NOTICE:

Rule 20. Process and Notice.

The issuance, service, and proof of service of any process, notice, or order of court under the Colorado Probate Code shall be governed by the provisions of the Colorado Probate Code and these rules. When no provision of the Colorado Probate Code or these rules is applicable, the Colorado Rules of Civil Procedure shall govern. Except when otherwise ordered by the court in any specific case or when service is by publication, if notice of a hearing on any petition or other pleading is required, the petition or other pleading, unless previously served, shall be served with the notice. When served by publication, the notice shall briefly state the nature of the relief requested. The petition or other pleading need not be attached to or filed with the proof of service, waiver of notice, or waiver of service.

Rule 21. Constitutional Adequacy of Notice.

When statutory notice is deemed by the court to be constitutionally inadequate, the court shall provide by local rule or on a case-by-case basis for such notice as will meet constitutional requirements.

Rule 22. Waiver of Notice.

Unless otherwise approved by the court, a waiver of notice shall identify the nature of the hearings or other matters, notice of which is waived.

Rule 23. Non-Appearance Hearings.

(a) Unless otherwise required by statute, these Rules or order of court, any matter may be set for a non-appearance hearing. The procedure governing non-appearance hearings is as follows:

(1) Attendance at the non-appearance hearing is not required or expected.

(2) Any interested person wishing to object to the requested action set forth in the court filing attached to the notice must file a specific written objection with the Court at or before the hearing, and shall furnish a copy of the objection to the person requesting the court order. Form JDF 722, or a form that substantially conforms to JDF 722, may be used and shall be sufficient.

(3) If no objection is filed, the Court may take action on the matter without further notice or hearing.

(4) If any objection is filed, the objecting party shall, within 14 days after filing the objection, set the objection for an appearance hearing. Failure to timely set the

objection for an appearance hearing as required by section (4) of this rule shall result in the dismissal of the objection with prejudice without further hearing.

(5) If an objection is filed, the Court may, in its discretion:

(i) Rule upon the written filings and briefs submitted;

(ii) Require oral argument;

(iii) Require an evidentiary hearing;

(iv) Order the movant, objector and any other interested person who has entered an appearance to participate in alternative dispute resolution; or

(v) Enter any other orders the Court deems appropriate.

(6) The Notice of a Non-Appearance Hearing, together with copies of the court filing and proposed order must be served on all interested persons no less than 14 days prior to the setting of the hearing and shall include a clear statement of the rules governing such hearings. Form JDF 712 or JDF 963, or a form that substantially conforms to such JDF forms, may be used and shall be sufficient.

Rule 24. Notice of Formal Proceedings Terminating Estates.

The notice of hearing on a petition under §15-12-1001 or §15-12-1002, C.R.S., shall include statements: (1) that interested persons have the responsibility to protect their own rights and interests within the time and in the manner provided by the Colorado Probate Code, including the appropriateness of claims paid, the compensation of personal representatives, attorneys, and others, and the distribution of estate assets, since the court will not review or adjudicate these or other matters unless specifically requested to do so by an interested person; and (2) that if any interested person desires to object to any matter such person shall file specific written objections at or before the hearing and shall furnish the personal representative with a copy pursuant to C.R.C.P. 5.

Rule 25. Conservatorship – Closing

Notice of the hearing on a petition for termination of conservatorship shall be given to the protected person, if then living, and all other interested persons, as defined by law or by the Court pursuant to §15-10-201(27), C.R.S., if any. Such hearing may be held pursuant to Rule 23.

Rule 26. RESERVED
Rule 27. RESERVED
Rule 28. RESERVED
Rule 29. RESERVED

FIDUCIARIES:

Rule 30. Change of Contact Information.

Every fiduciary shall promptly notify the court of any change in the fiduciary's name, address, e-mail address or telephone number by filing JDF 725 or a form that substantially conforms to JDF 725.

Rule 31. Accountings and Reports.

An accounting or report prepared by a personal representative, conservator, trustee or other fiduciary shall show with reasonable detail the receipts and disbursements for the period covered by the accounting or report, shall list the assets remaining at the end of the period, and shall describe all other transactions affecting administration during the accounting or report period. The court may require the fiduciary to produce supporting evidence for any and all transactions.

Accountings and reports that substantially conform to JDF 942 for decedents' estates, JDF 885 for conservatorships and to the 1984 version of the Uniform Fiduciary Accounting Standards as recommended by the Committee on National Fiduciary Accounting Standards shall be considered acceptable as to both content and format for purposes of this rule.

Rule 32. Appointment of Nonresident – Power of Attorney.

Any person, resident or nonresident of this state, who is qualified to act under the Colorado Probate Code may be appointed as a fiduciary. When appointment is made of a nonresident, the person appointed shall file an irrevocable power of attorney designating the clerk of the court and the clerk's successors in office, as the person upon whom all notices and process issued by a court or tribunal in the state of Colorado may be served, with like effect as personal service on such fiduciary, in relation to any suit, matter, cause, hearing, or thing, affecting or pertaining to the proceeding in regard to which the fiduciary was appointed. The power of attorney required by the provisions of this Rule shall set forth the address of the nonresident fiduciary. The clerk shall promptly forward, by any method that provides delivery confirmation, any notice or process served upon him or her, to the fiduciary at the address last provided in writing to the clerk. The clerk shall file a certificate of service. Such service shall be deemed complete fourteen days after mailing. The clerk may require the person issuing or serving such notice or process to furnish sufficient copies, and the person desiring service shall advance the costs and mailing expenses of the clerk.

Rule 33. Bond and Surety.

A fiduciary shall file any required bond, or complete other arrangements for security before letters are issued. Thereafter, the fiduciary shall increase the amount of bond or other security when the fiduciary receives property not previously covered by any bond or other security.

Rule 34. RESERVED
Rule 35. RESERVED
Rule 36. RESERVED
Rule 37. RESERVED
Rule 38. RESERVED
Rule 39. RESERVED

CONTESTED PROCEEDINGS:

Rule 40. Discovery.

(a) This Rule establishes the provisions and structure for discovery in all proceedings seeking relief under Title 15, C.R.S. Nothing in this Rule shall alter the court's authority and ability to direct proportional limitations on discovery or to impose a case management structure or enter other discovery orders. Upon appropriate motion or *sua sponte*, the court may apply the Rules of Civil Procedure in whole or in part, may fashion discovery rules applicable to specific proceedings and may apply different discovery rules to different parts of the proceeding.

(b) Unless otherwise ordered by the court, the parties may engage in the discovery provided by C.R.C.P. 27 through 37. Any discovery conducted in Title 15 proceedings prior to the issuance of a case management or other discovery order shall be subject to C.R.C.P. 26(a)(2)(A), 26(a)(2)(B), 26(a)(4) and (5), and 26(b) through (g). However, due to the unique, expedited and often exigent circumstances in which probate proceedings take place, C.R.C.P. 16, 16.1, 16.2, and 26(a)(1) do not apply to probate proceedings unless ordered by the court or stipulated to by the parties.

(c) C.R.C.P. 45 and 121 §1-12 are applicable to proceedings under Title 15.

(d) Notwithstanding subsections (a) through (c) of this Rule 40, subpoenas and discovery directed to a respondent in proceedings under Part 3 of Article 14 of Title 15, shall not be permitted without leave of court, or until a petition for appointment of a guardian has been granted under §15-14-311, C.R.S.

Rule 41. Jury Trial -- Demand and Waiver.

If a jury trial is permitted by law, any jury demand therefor shall be filed with the court, and the requisite fee paid, before the matter is first set for trial. Failure of a party to file and serve a demand for jury trial and pay the requisite fee shall constitute a waiver of trial by jury as provided in C.R.C.P. 38(c).

Rule 42. Objections to Accounting, Final Settlement, Distribution or Discharge.

If any interested person desires to object to any accounting, the final settlement or distribution of an estate, the discharge of a fiduciary, or any other related matter, the interested person shall file specific written objections at or before the hearing thereon, and shall furnish all interested persons with a copy of the objections.

(a) If the matter is uncontested and set for a non-appearance hearing, any interested person wishing to object must file specific written objections with the court at or before the hearing, and shall provide copies of the specific written objections to all interested persons. An objector must set an appearance hearing in accordance with Rule 23.

(b) If the matter is set for an appearance hearing, the objector must file specific written objections ten (10) or more days before the scheduled hearing. If the objector fails to provide copies of the specific written objections within the required time frame, the Petitioner is entitled to a continuance of the hearing.

Rule 43. RESERVED
Rule 44. RESERVED
Rule 45. RESERVED
Rule 46. RESERVED
Rule 47. RESERVED
Rule 48. RESERVED
Rule 49. RESERVED

DECEDENT'S ESTATES:

Rule 50. Wills -- Deposit for Safekeeping and Withdrawals.

A will of a living person tendered to the court for safekeeping in accordance with §15-11-515, C.R.S. shall be placed in a "Deposited Will File" and a certificate of deposit issued. In the testator's lifetime, the deposited will may be withdrawn only in strict accordance with the statute. After the testator's death, a deposited will shall be transferred to the "Lodged Will File".

Rule 51. Transfer of Lodged Wills.

If a petition under §15-11-516, C.R.S. to transfer a will is filed and if the requested transfer is to a court within this state, no notice need be given; if the requested transfer is to a court without this state, notice shall be given to the person nominated as personal representative and such other persons as the court may direct. No filing fee shall be charged for this petition, but the petitioner shall pay any other costs of transferring the original will to the proper court.

Rule 52. Informal Probate -- Separate Writings.

The existence of one or more separate written statements disposing of tangible personal property under the provisions of §15-11-513, C.R.S. shall not cause informal probate to be declined under the provisions of §15-12-304, C.R.S.

Rule 53. Heirs and Devisees – Unknown, Missing or Nonexistent – Notice to Attorney General.

In a decedent's estate, whenever it appears that there is an unknown heir or devisee, or that the address of any heir or devisee is unknown, or that there is no person qualified to receive a devise or distributive share from the estate, the personal representative shall promptly notify the attorney general. Thereafter, the attorney general shall be given the same information and notice required to be given to persons qualified to receive a devise or distributive share. When making any payment to the state treasurer of any devise or distributive share, the personal representative shall include a copy of the court order obtained under §15-12-914, C.R.S.

Rule 54. Supervised Administration – Scope of Supervision – Inventory and Accounting.

In directing the activities of a supervised personal representative of a decedent's estate, the court shall order only as much supervision as in its judgment is necessary, after considering the reasons for the request for supervised administration, or circumstances thereafter arising. If supervised administration is ordered, the personal representative shall file with the court an inventory, annual interim accountings, and a final accounting, unless otherwise ordered by the court.

Rule 55. Court Order Supporting Deed of Distribution.

When a court order is requested to vest title in a distributee free from the rights of other persons interested in the estate, such order shall not be granted ex parte, but shall require either the stipulation of all interested persons or notice and hearing.

Committee Comment:

*Note that Colorado Bar Association Real Estate Title Standard 11.1.7 discusses certain requirements for the vesting of marketable title in a distributee. A court order is necessary to vest marketable title in a distributee, free from the rights of all persons interested in the estate to recover the property in case of an improper distribution. This rule requires a notice and hearing procedure as a condition of issuance of such order. A certified copy of the court's order should be recorded with the deed of distribution. Under the title standard, an order is not required to vest marketable title in a purchaser for value from or a lender to such distributee. See §*38-35-109, *C.R.S.*

Rule 56. Foreign Personal Representatives

(a) After the death of a nonresident decedent, copies of the documents evidencing appointment of a domiciliary foreign personal representative may be filed as provided in §15-13-204, C.R.S. Such documents must have been certified, exemplified or authenticated by the appointing foreign court not more than sixty days prior to filing with a Colorado court, and shall include copies of all of the following that may have been issued by the foreign court:

(1) The order appointing the domiciliary foreign personal representative, and

(2) The letters or other documents evidencing or affecting the domiciliary foreign personal representative's authority to act.

(b) Upon filing such documents and a sworn statement by the domiciliary foreign personal representative stating that no administration, or application or petition for administration, is pending in Colorado, the court shall issue its Certificate of Ancillary Filing, substantially conforming to JDF 930.

Rule 57. RESERVED
Rule 58. RESERVED
Rule 59. RESERVED

PROTECTIVE PROCEEDINGS:

Rule 60. Physicians' Letters or Professional Evaluation.

Any physician's letter or professional evaluation utilized as the evidentiary basis to support a petition for the appointment of a guardian, conservator or other protective order under Article 14 of the Colorado Probate Code, unless otherwise directed by the court, should contain: (1) a description of the nature, type, and extent of the respondent's specific cognitive and functional limitations, if any; (2) an evaluation of the respondent's mental and physical condition and, if appropriate, educational potential, adaptive behavior, and social skills; (3) a prognosis for improvement and recommendation as to the appropriate treatment or habilitation plan; and (4) the date of any assessment or examination upon which the report is based.

Rule 61. ~~Inventory with Financial Plan~~ Financial Plan with Inventory and Motion for Approval -- Conservatorships.

~~An~~ Conservator's Financial Plan with Inventory and Motion for Approval ~~with Financial Plan~~ shall be filed with the court and served on all interested persons. ~~Any Inventory with Financial Plan or Amended Inventory with Financial Plan (the "Plan") filed with the court shall be deemed to include a motion or petition for approval of the Plan.~~ The request for approval of the Plan may be set on the nonappearance docket, the appearance docket, or not set for hearing and treated as a motion under C.R.C.P. 121.

Rule 62. Court Approval of Settlement of Claims of Persons Under Disability.

(a) This rule sets forth procedures by which a court considers requests for approval of the proposed settlement of claims on behalf of a minor or an adult in need of protection pursuant to §15-14-401, et seq., C.R.S. ("respondent"). In connection with a proceeding brought under this rule, the court shall:

(1) Consider the reasonableness of the proposed settlement and enter appropriate orders as the court finds will serve the best interests of the respondent;
(2) Ensure that the petitioner and respondent and/or his/her legal guardian/fiduciary understands the finality of the proposed settlement;
(3) Adjudicate the allowance or disallowance, in whole or in part, of any outstanding liens and claims against settlement funds, including attorney fees; and
(4) Make protective arrangements for the conservation and use of the net settlement funds, in the best interests of the respondent, taking into account the nature and scope of the proposed settlement, the anticipated duration and nature of the respondent's disability, the cost of any future medical treatment and care required to treat respondent's disability, and any other relevant factors, all pursuant to §15-14-101, et seq., C.R.S.

(b) Venue for a petition brought under this rule shall be in accordance with §15-14-108(3), C.R.S.

(c) A petition for approval of a proposed settlement of a claim on behalf of a respondent may be filed by respondent's conservator or guardian, or if there is no conservator or guardian, by an interested person, and shall be presented in accordance with the procedures set forth in this rule.

(d) A petition for approval of settlement shall include the following information:

(1) Facts.

A. The respondent's name and address;
B. The respondent's date of birth;
C. If the respondent is a minor, the name and contact information of each legal guardian. If the identity or contact information of any legal guardian is unknown, or if any parental rights have been terminated, the petition shall so state;
D. The name and contact information of the respondent's spouse, partner in a civil union, or if the respondent has none, an adult with whom the respondent has resided for more than six months within one year before the filing of the petition;
E. The name and contact information of any guardian, conservator, custodian, trustee, agent under a power of attorney, or any other court appointed fiduciary for the respondent. A description of the purpose of any court appointed fiduciary shall be included; and
F. The date and a brief description of the event or transaction giving rise to the claim.

(2) Claims and Liabilities.

A. The contact information of each party against whom the respondent may have a claim;
B. The basis for each of the respondent's claims;
C. The defenses and/or counterclaims if any, to the respondent's claims; and
D. The name and contact information of each insurance company involved in the claim, the type of policy, the policy limits, and the identity of the insured.

(3) Damages.

A. A description of the respondent's injuries;
B. The amount of time missed by the respondent from school or employment and a summary of lost income resulting from the respondent's injuries;
C. A summary of any damage to respondent's property;
D. A summary of any expenses incurred for medical or other care provider services as a result of the respondent's injuries; and
E. The identification of any person, organization, institution, or state or federal agency that paid any of the respondent's expenses and a summary of expenses that have been or will be paid by each particular source.

(4) Medical Status.

A. A description of respondent's current condition including but not limited to the nature and extent of any disability, disfigurement, or physical or psychological impairments and any current treatments and/or therapies; and
B. An explanation of respondent's prognosis and any anticipated treatments and/or therapies.

(5) Status of Claims.

A. For this claim and any other related claim, the status of the claim and if any civil action has been filed, the court, case number, and parties; and
B. For this claim and any other related claim, identify the amount of the claim and contact information of any party having a subrogation right including any state or federal agency paying or planning to pay benefits to or for the respondent. A list of all subrogation claims and/or liens against the settlement proceeds shall be included as well as a summary of efforts to negotiate them.

(6) Proposed Settlement and Proposed Disposition of Settlement Proceeds.

A. The name and contact information of any party/entity making and receiving payment under the proposed settlement;
B. The proposed settlement amount, payment terms, and proposed disposition, including any restrictions on the accessibility of the funds and whether any proceeds will be deposited into a restricted account;
C. The details of any structured settlement, annuity, insurance policy or trust instrument, including the terms, present value, discount rate, payment structure and the identity of the trustee or entity administering such arrangements;
D. Legal fees and costs being requested to be paid from the settlement proceeds; and
E. Whether there is a need for continuing court supervision, the appointment of a fiduciary or the continuation of an existing fiduciary appointment. The court may appoint a conservator, trustee, or other fiduciary to manage the settlement proceeds or make other protective arrangements in the best interests of the respondent.

(7) Exhibits.

A. The petition shall list each exhibit filed with the petition.
B. The following exhibits shall be attached to the petition:
   (i) A written statement by the respondent's physician or other health care provider. The statement shall set forth the information required by subparagraph 4, A and B of this rule and comply with C.R.P.P. 27.1 unless otherwise ordered by the court;
   (ii) Relevant legal fee agreements, statement of costs and billing records and/or billing summary; and
   (iii) Any proposed settlement agreements and proposed releases.
C. The court may continue, vacate, or place conditions on approval of the proposed settlement in response to petitioner's failure to include such exhibits.

(e) Notice of a hearing and a copy of the petition (except as otherwise ordered by the court in any specific case), shall be given in accordance with §15-14-404(1) and (2), C.R.S. and C.R.P.P. 8.

(f) An appearance hearing is required for petitions brought under this rule.

(g) The petitioner, respondent, and any proposed fiduciary shall attend the hearing, unless excused by the court prior to the hearing for good cause.

(h) The court may appoint a guardian ad litem, attorney, or other professional to investigate, report to the court, or represent the respondent.

Rule 63. Foreign Conservators

(a) After the appointment of a conservator for a person who is not a resident of this state, copies of documents evidencing the appointment of such foreign conservator may be filed as provided in §15-14-433, C.R.S. Such documents must have been certified, exemplified or authenticated by the appointing foreign court not more than sixty days prior to filing with a Colorado court, and shall include copies of all of the following:

(1) The order appointing the foreign conservator,

(2) The letters or other documents evidencing or affecting the foreign conservator's authority to act, and

(3) Any bond of foreign conservator.

(b) Upon filing such documents and a sworn statement by the foreign conservator stating that a conservator has not been appointed in this state and that no petition in a protective proceeding is pending in this state concerning the person for whom the foreign conservator was appointed, the court shall issue its Certificate of Ancillary Filing, substantially conforming to JDF 892.

Rule 64. RESERVED
Rule 65. RESERVED
Rule 66. RESERVED
Rule 67. RESERVED
Rule 68. RESERVED
Rule 69. RESERVED

TRUSTS:

Rule 70. Trust Registration – Amendment, Release and Transfer.

(a) A trustee shall file with the court of current registration an amended trust registration statement to advise the court of any change in the trusteeship, of any change in the principal place of administration, or of termination of the trust.

(b) If the principal place of administration of a trust has been removed from this state, the court may release a trust from registration in this state upon request and after notice to interested parties.

(c) If the principal place of administration of a trust has changed within this state, the trustee may transfer the registration from one court to another within this state by filing in the court to which the registration is transferred an amended trust registration statement with attached thereto a copy of the original trust registration statement and of any amended trust registration statement prior to the current amendment, and by filing in the court from which the registration is being transferred a copy of the amended trust registration statement. The amended statement shall indicate that the trust was registered previously in another court of this state and that the registration is being transferred.

Rule 71. RESERVED
Rule 72. RESERVED
Rule 73. RESERVED
Rule 74. RESERVED
Rule 75. RESERVED
Rule 76. RESERVED
Rule 77. RESERVED
Rule 78. RESERVED
Rule 79. RESERVED

moore, jenny

From: David DeMuro <DDemuro@vaughandemuro.com>
Sent: Thursday, April 16, 2015 12:28 PM
To: berger, michael
Cc: moore, jenny
Subject: Rule 121, sec. 1-15 et al.
Attachments: Rule 121 proposals - 04 16 15.pdf

Judge Berger: This subcommittee is back again with proposed revisions to CRCP 121, sec. 1-15, and two related rules, CRCP 10(c) and 121, sec. 1-12, which are attached.

On 121, sec. 1-15, we have been discussing page and word limitations for motions and briefs in paragraph 1(a). Since our last meeting, you provided additional information about how to calculate how many words match up with how many pages. What we learned was that 12 point arial is 270 words per page, while 12 point new times Roman is 244. There was some discussion of following the Colorado Appellate Rules on this but they require 14 point and I have not heard a big push to go to 14 point in the district court (if we did the words per page are only 217 and 192). The result of this info was to cut the number of words suggested in our prior proposals by trying to get between the 244 – 270 words per page numbers above. Therefore, the 10-page brief is now also limited to 2,500 words, the 15-page brief to 4,000 words and the 25-page brief to 6,500. I kept the same number of pages as before, but the briefs will be shorter because of the reduction in word limits. Under this proposal, the writer must come within both limits, although I prefer the appellate approach of satisfying the word limit only.

There are a number of other small changes to paragraph 1(a) that the full committee suggested last time, and I tried to include those. We also discussed paragraph 4 on deciding motions last time but the only things I took away were to keep the concept of encouraging "prompt" decisions, revise the language to simplify, and keep the last sentence about requiring parties to advise the court clerk of motions that require immediate attention.

The committee also wanted to address the spacing requirements in CRCP 10 (c) so that motions and briefs would be double spaced. In examining that rule later, however, I think the categories set out there are not consistent, so I arbitrarily suggested in this proposal to move to double spacing on everything except things that were two pages or less (such as notices, entries of appearances, motions for extensions of time to file a brief, etc.). No one suggested this, but I thought we needed something on the table.

Finally, I have again attached 121, sec, 1-12, which is part of this, but which we have not yet been able to address.

Please let me know if you have questions about this.

Dave

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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 ~~deems an oral motion to be appropriate~~, 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. ~~except for a motion pursuant to C.R.C.P. 56. Motions or briefs in excess of 10 pages in length, exclusive of tables and appendices, are discouraged. Except for electronic filings made pursuant to Section 1-26 of this Rule, the original and one copy of all motions and briefs shall be filed with the court, and a copy served as required by law.~~ UNLESS THE COURT ORDERS OTHERWISE, MOTIONS AND RESPONSIVE BRIEFS NOT UNDER C.R.C.P. 12(b)(1) or (2), 12(c) 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, CERTIFICATE OF SERVICE AND ATTACHMENTS. UNLESS THE COURT ORDERS OTHERWISE, MOTIONS AND RESPONSIVE BRIEFS UNDER C.R.C.P. 12(b)(1) or (2), 12(c) 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, CERTIFICATE OF SERVICE AND ATTACHMENTS.

(b) 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 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.

2. Affidavits. If facts not appearing of record may be considered in disposition of the motion, the parties may file affidavits with the motion or within the time specified for filing the party's brief in this Section 1-15, Rules 6, 56 or 59, C.R.C.P., or as otherwise ordered by the court. Copies of such affidavits and any documentary evidence used in connection with the motion shall be served on all other parties.

3. Effect of Failure to File Legal Authority. If the moving party fails to incorporate legal authority into ~~the motion or fails to file a brief with~~ a C.R.C.P. 56 motion, the court may deem the motion abandoned and may enter an order denying the motion. Failure of a responding party to file a responsive brief may be considered a confession of the motion.

4. Motions to Be Determined on Briefs, When Oral Argument Is Allowed; Motions Requiring Immediate Attention. [NEW ALTERNATIVE:] MOTIONS SHALL BE DETERMINED PROMPTLY IF POSSIBLE. THE COURT HAS DISCRETION TO ORDER BRIEFING OR SET A HEARING ON THE MOTION. **[PRIOR PROPOSAL:]** If possible, WRITTEN motions shall be determined promptly

upon the written motion and briefs submitted. However, the court may order oral argument or an evidentiary hearing, or if the request for oral argument or an evidentiary hearing is requested in a motion, or any brief, oral argument may be allowed by the court at its discretion. IF POSSIBLE, THE COURT SHALL DETERMINE ORAL MOTIONS AT THE CONCLUSION OF ARGUMENT, BUT MAY TAKE THE MOTION UNDER ADVISEMENT OR REQUIRE BRIEFING BEFORE RULING. **[RETAIN THIS SENTENCE:]** Any motion requiring immediate disposition shall be called to the attention of the courtroom clerk by the party filing such motion.

5. Notification of Court's Ruling; Setting of Argument or Hearing When Ordered. Whenever the court enters an order denying or granting a motion without a hearing, all parties shall be forthwith notified by the court of such order. If the court desires or authorizes oral argument or an evidentiary hearing, all parties shall be so notified by the court. After notification, it shall be the responsibility of the moving party to have the motion set for oral argument or hearing. A UNLESS THE COURT ORDERS OTHERWISE, A notice to set oral argument or hearing shall be filed in accordance with Practice Standard § 1-6 within 7 days of notification that oral argument or hearing is required or authorized.

6. Effect of Failure to Appear at Oral Argument or Hearing. If any of the parties fails to appear at an oral argument or hearing, without prior showing of good cause for non-appearance, the court may proceed to hear and rule on the motion.

7. Sanctions. If a frivolous motion is filed or if frivolous opposition to a motion is interposed, the court may assess reasonable attorney's fees against the party or attorney filing such motion or interposing such opposition.

8. Duty to Confer. Unless a statute or rule governing the motion provides that it may be filed without notice, moving counsel shall confer with opposing counsel before filing a motion. The motion shall, at the beginning, contain a certification that the movant in good faith has conferred with opposing counsel about the motion. If the relief sought by the motion has been agreed to by the parties or will not be opposed, the court shall be so advised in the motion. If no conference has occurred, the reason why shall be stated.

9. Unopposed Motions. All unopposed motions shall be so designated in the title of the motion.

10. Proposed Order. Except for orders containing signatures of the parties or attorneys as required by statute or rule, each motion shall be accompanied by a proposed order submitted in editable format. The proposed order complies with this provision if it states that the requested relief be granted or denied.

11. Motions to Reconsider. Motions to reconsider interlocutory orders of the court, meaning motions to reconsider other than those governed by C.R.C.P. 59 or 60, are disfavored. A party moving to reconsider must show more than a disagreement with the court's decision. Such a motion must allege a manifest error of fact or law that clearly mandates a different result or other circumstance resulting in manifest injustice. The motion shall be filed within 14 days from the date of the order, unless the party seeking reconsideration shows good cause for not filing within that time. Good cause for not filing within 14 days from the date of the order includes newly available material evidence and an intervening change in the governing legal standard. The court may deny the motion before receiving a responsive brief under paragraph 1(b) of this standard.

COMMITTEE COMMENT

This Practice Standard was necessary because of lack of uniformity among the districts concerning how motions were to be made, set and determined. The Practice Standard recognizes that oral argument and hearings are not necessary in all cases, and encourages disposition of motions upon written submissions. The standard also sets forth the uniform requirements concerning filing of legal authority, filing of matters not already of record necessary to determination of motions, and the manner of setting an oral argument if argument is permitted. The practice standard is broad enough to include all motions, including venue motions. Some motions will not require extended legal analysis or affidavits. Obviously, if the basis for a motion is simple and routine, the citation of authorities can be correspondingly simple. Motions or briefs in excess of 10 pages are discouraged. This standard specifies contemporaneous recitation of legal authority either in the motion itself for all motions except those under C.R.C.P. Rule 56. Moving counsel should confer with opposing counsel before filing a motion to attempt to work out the difference prompting the motion. Every motion must, at the beginning, contain a certification that the movant, in good faith, has conferred with opposing counsel about the motion. If there has been no conference, the reason why must be stated. To assist the court, if the relief sought by the motion has been agreed to or will not be opposed, the court is to be so advised in the motion.

Paragraph 4 of the standard contains an important feature. Any matter requiring immediate action should be called to the attention of the courtroom clerk by the party filing a motion for forthwith disposition. Calling the urgency of a matter to the attention of the court is a responsibility of the parties. The court should permit a forthwith determination. Paragraph 11 of the standard neither limits a trial court's discretion to modify an interlocutory order, on motion or sua sponte, nor affects C.R.M. 5(a).

West's Colorado Revised Statutes Annotated
West's Colorado Court Rules Annotated
Colorado Rules of Civil Procedure
Chapter 2. Pleadings and Motions

C.R.C.P. Rule 10

RULE 10. FORM AND QUALITY OF PLEADINGS, MOTIONS AND OTHER DOCUMENTS

Currentness

(a) Caption; Names of Parties. Every pleading, motion, E-filed document under C.R.C.P. 121 (1-26), or any other document filed with the court (hereinafter "document") in both civil and criminal cases shall contain a caption setting forth the name of the court, the title of the action, the case number, if known to the person signing it, the name of the document in accordance with Rule 7(a), and the other applicable information in the format specified by paragraph (d) and the captions illustrated by paragraph (e) or (f) of this rule. In the complaint initiating a lawsuit, the title of the action shall include the names of all the parties to the action. In all other documents, it is sufficient to set forth the name of the first-named party on each side of the lawsuit with an appropriate indication that there are also other parties (such as "et al."). A party whose name is not known shall be designated by any name and the words "whose true name is unknown". In an action in rem, unknown parties shall be designated as "all unknown persons who claim any interest in the subject matter of this action".

(b) Paragraphs; Separate Statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances. A paragraph may be referred to by its paragraph number in all succeeding documents. Each claim founded upon a separate transaction or occurrence, and each defense other than denials, shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) Incorporation by Reference; Exhibits. A statement in a document may be incorporated by reference in a different part of the same document or in another document. An exhibit to a document is a part thereof for all purposes.

(d) General Rule Regarding Paper Size, Format, and Spacing. All documents filed after the effective date of this rule, including those filed through the E-Filing System under C.R.C.P. 121(1-26), shall meet the following criteria:

(1) **Paper:** Where a document is filed on paper, it shall be on plain, white, 8 ½ by 11 inch paper (recycled paper preferred).

(2) **Format:** All documents shall be legible. They shall be printed on one side of the page only (except for E-Filed documents).

(I) **Margins:** All documents shall use margins of 1 1/2 inches at the top of each page, and 1 inch at the left, right, and bottom of each page. Except for the caption, a left-justified margin shall be used for all material.

(II) **Font:** No less than twelve (12) point font shall be used for all documents.

(III) **Case Caption Information**: All documents shall contain the following information arranged in the following order, as illustrated by paragraphs (e) and (f) of this rule, except that documents issued by the court under the signature of the clerk or judge should omit the attorney section as illustrated in paragraphs (e)(2) and (f)(2). Individual boxes should separate this case caption information; however, vertical lines are not mandatory.

On the left side:

Court name and mailing address.

Name of parties.

Name, address, and telephone number of the attorney or pro se party filing the document. Fax number and e-mail address are optional.

Attorney registration number.

Document title.

On the right side:

An area for "Court Use Only" that is at least 2 1/2 inches in width and 1 3/4 inches in length (located opposite the court and party information).

Case number, division number, and courtroom number (located opposite the attorney information above).

(3) **Spacing:** ~~The following spacing guidelines should be followed~~. ALL PLEADINGS, MOTIONS, BRIEFS AND OTHER DOCUMENTS FILED AND SERVED UNDER THESE RULES WHICH ARE MORE THAN TWO PAGES IN LENGTH SHALL BE DOUBLE SPACED.

~~**(I) Single spacing for all:**~~

~~Affidavits~~

~~Complaints, Answers, and Petitions~~

~~Criminal Informations and Complaints~~

~~Interrogatories and Requests for Admissions~~

~~Motions~~

~~Notices~~

~~Pleading forms (all case types)~~

~~Probation reports~~

~~All other documents not listed in subsection (II) below~~

~~(II) Double spacing for all:~~

~~Briefs and Legal Memoranda~~

~~Depositions~~

~~Documents that are complex or technical in nature~~

~~Jury Instructions~~

~~Petitions for Rehearing~~

~~Petitions for Writ of Certiorari~~

~~Petitions pursuant to C.A.R. 21~~

~~Transcripts~~

Section 1-12

MATTERS RELATED TO DISCOVERY

1. Unless otherwise ordered by the court, reasonable notice for the taking of depositions pursuant to C.R.C.P. 30(b)(1) shall not be less than 7 days. Before serving a notice to take a deposition, counsel seeking the deposition shall make a good faith effort to schedule it by agreement at a time reasonably convenient and economically efficient to the proposed deponent and counsel for all parties. Prior to scheduling or noticing any deposition, all counsel shall confer in a good faith effort to agree on a reasonable means of limiting the time and expense of that deposition. Pending resolution of any motion pursuant to C.R.C.P. 26(c), the filing of the motion shall stay the discovery at which the motion is directed. IF THE COURT REQUIRES THAT ANY DISCOVERY MOTION UNDER RULE 26(C) BE MADE ORALLY, THEN MOVANT'S NOTICE OF THE MOTION TO ALL PARTIES SHALL ALSO STAY THE DISCOVERY TO WHICH THE MOTION IS DIRECTED.

2. Motions under Rules 26(c) and 37(a), C.R.C.P., shall set forth the interrogatory, request, question or response constituting the subject matter of the motion.

3. Interrogatories and requests under Rules 33, 34, and 36, C.R.C.P., and the responses thereto shall be served upon other counsel or parties, but shall not be filed with the court. If relief is sought under Rule 26(c), C.R.C.P., or Rule 37(a), C.R.C.P., copies of the portions of the interrogatories, requests, answers or responses in dispute shall be filed with the court contemporaneously with the motion. If interrogatories, requests, answers or responses are to be used at trial, the portions to be used shall be made available and placed, but not filed, with the trial judge at the outset of the trial insofar as their use reasonably can be anticipated. IF THE COURT REQUIRES THAT ANY DISCOVERY MOTION UNDER RULES 26(C) OR 37 (A) BE MADE ORALLY, THEN, UNLESS THE COURT ORDERS OTHERWISE, MOVANT SHALL PRIOR TO THE HEARING PROVIDE EACH PARTY WITH A COPY OF THE PORTIONS OF THE WRITTEN DISCOVERY AT ISSUE AND SHALL PROVIDE THE SAME TO THE COURT AT THE HEARING.

4. The originals of all stenographically reported depositions shall be delivered to the party taking the deposition after submission to the deponent as required by Rule 30(e), C.R.C.P. The original of the deposition shall be retained by the party to whom it is delivered to be available for appropriate use by any party in a hearing or trial of the case. If a deposition is to be used at trial, it shall be made available for inspection and placed, but not filed with the trial judge at the outset of the trial insofar as its use reasonably can be anticipated.

5. Unless otherwise ordered, the court will not entertain any motion under Rule 37(a), C.R.C.P., unless counsel for the moving party has conferred or made reasonable effort to confer with opposing counsel concerning the matter in dispute before the filing of the motion. Counsel for the moving party shall file a certificate of compliance with this rule at the time the motion under Rule 37(a), C.R.C.P., is filed. IF THE COURT REQUIRES THAT ANY DISCOVERY MOTION BE MADE ORALLY,THEN MOVANT MUST MAKE A REASONABLE EFFORT TO CONFER WITH OPPOSING COUNSEL BEFORE REQUESTING A HEARING FROM THE COURT.

COMMITTEE COMMENT

Provisions of the practice standard are patterned in part after the local rule now in effect in the United States District Court for the District of Colorado. This practice standard specifies the minimum time for the serving of a notice to take deposition. Before serving a notice, however, counsel are required to make a good faith effort to schedule the deposition by agreement at a time reasonably convenient and economically efficient to the deponent and all counsel. Counsel are also required to confer in a good faith effort to agree on a reasonable means of limiting the time and expense of any deposition. The provisions of this Practice Standard are also designed to lessen paper mass/filing space

problems and resolve various general problems related to discovery. THIS RULE WAS AMENDED TO ADDRESS SITUATIONS ARISING IN COURTS THAT REQUIRE ORAL DISCOVERY MOTIONS.

J. Keith Killian◆
Damon J. Davis
Christopher H. Richter●
Nicholas W. Mayle

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All Attorneys admitted in Colorado ▮Also admitted in Wyoming

▲Also admitted in California ▼Also admitted in North Dakota and Minnesota
▬Also admitted in Massachusetts ■Also admitted in Indiana and Illinois

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March 24, 2015

Colorado Civil Rules Commmittee
Colorado Rules of Evidence Committee
c/o Jenny Moore
jenny.moore@judicial.state.co.us

RE: Form to ease use of C.R.E. 803(6), 902(11), and 902(12), including disclosure of intent to use said rules

Dear Committee Members:

I am writing to encourage you to consider collaborating to draft a form for use with C.R.E. 803(6), 902(11), and 902(12), including disclosure of the intent to use these rules for the admission of documents. These rules allow a party to admit business records under the hearsay exception if the records are accompanied by an affidavit of a records custodian certifying the records fall within the hearsay exception. The rules also require disclosure of the intent to admit the records through an affidavit. A form easing the use of these rules would benefit both the bar and pro se parties, who often have difficulty admitting records.

My thought is a form would consist of three parts. First, there would be instructions on completion and use of the form. Second, would be an affidavit with blanks for the company name, description of the documents, and the like, which if completed and notarized would comply with C.R.E. 902(11) and (12). Third, would be a form disclosure that would indicate the intent to submit the records by affidavit, to which the affidavits would be attached. The disclosure could be a standalone document, part of the trial management order, or both. The form would apply in both district and county court. My thought is that the form would not be the exclusive means of complying with C.R.E. 902(11) and (12), but simply a way of complying.

Such a form would be of benefit to the bar. In my experience, some attorneys are still unaware of C.R.E. 902(11) and (12), and even if aware are resistant to the rules' use. A form would help publicize the rule to the bar and streamline its use. A form would be especially useful to pro se parties. Many pro se parties face difficulty in getting records admitted. Having a form will ease the process for them. It will also allow them to receive help from the self-represented litigant coordinators.

I am writing to both committees because this does not seem to be strictly an evidentiary issue. The rule has a disclosure component, which implicates the civil rules. Additionally, an records custodian affidavit is the type of document that is often obtained during the disclosure and discovery period. Lastly, for pro se parties, they often do not think about evidence

presentation until trial, if they think about it at all. Having a form within the civil rules, will hopefully prompt pro se parties to obtain the affidavit and disclose it in advance.

Thank you for taking the time to consider my letter. I am sure you have many other issues on your respective agendas. I hope you will consider the potential of the suggested form for use in Colorado.

Yours truly,

KILLIAN, DAVIS, Richter & Mayle, PC

Damon Davis

/DJD

cc: Hon. Michael Berger, Chair Civil Rules Committee: michael.berger@judicial.state.co.us
Hon. Gale Miller, Chair Rules of Evidence Committee: gale.miller@judicial.sate.co.us

moore, jenny

From: berger, michael
Sent: Monday, April 20, 2015 6:47 AM
To: moore, jenny
Subject: FW: Please forward this to the civil rules committee

Jenny, please put this on the June agenda.

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

From: eid, allison
Sent: Sunday, April 19, 2015 3:32 PM
To: berger, michael
Subject: FW: Please forward this to the civil rules committee

From: moss, edward
Sent: Thursday, April 16, 2015 12:22 PM
To: eid, allison
Subject: Please forward this to the civil rules committee

Justice Eid,
Please forward this to the Civil Rules Committee. Thanks!
- Ed Moss

Regarding, Colorado Rules, Chapter 17B, Appointed Judges, Rule 122(c)(7).

Rule 122(c)(7) requires the motion for appointment of a judge to include the proposed judge's oath, as follows: "I, _____ do solemnly swear or affirm by the ever living God. . . ."

Those of us who believe in a supreme being may easily swear an oath "by the ever living God." Atheists and others of similar persuasion use an affirmation. It's pretty difficult for someone who uses an affirmation to do so "by the ever living God."

Of course, in Colorado, it may be entirely appropriate to require an atheist to swear "by the ever living God." The Colorado supreme court repealed CRCP 43(b), which was likely similar to the federal rule (although I'm not sure and haven't taken the time to research it). The Federal Rule of Civil Procedure 43(b) allows someone to take an affirmation instead of an oath.

Not sure why our supreme court justices would want to repeal such a provision (if they did), especially since we are supposed to follow Code of Judicial Conduct Rule 2.3 (religious bias or prejudice) - - but that's way above my pay grade.

Anyway, when the civil rules committee has a slow month, maybe someone could look into this. ☺

Best,
Ed

Edward C. Moss
District Court Judge
Adams - Broomfield Counties
1100 Judicial Center Drive
Brighton, Colorado 80601-8872