AGENDA

COLORADO SUPREME COURT
ADVISORY COMMITTEE ON
RULES OF CIVIL PROCEDURE

Friday, September 26, 2014, 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 May 30, 2014 meeting minutes [Page 2-5].

III. Announcements from the Chair

a. 2014 meeting schedule
   i. October 30
   ii. November 21

b. Rule changes adopted by supreme court: C.R.C.P. 26, C.R.C.P. 121 §1-15, and C.R.C.P 411 [Page 6-87].

c. Public release of subcommittee reports.

IV. Business

a. Costs - C.R.C.P. 54(d) (Judge Webb, subcommittee chair).

b. Colorado Rules of Probate Procedure (Laid over to October 30, 2014 Meeting) [Page 88-108].

c. C.R.C.P. 120 (Letter to Justice Eid from Representatives McCann and Williams) [Page 109-113].

d. Colorado Rules of Juvenile Procedure (Judge Ashby, Colorado Court of Appeals, Committee Chair) [Page 114-142].

e. Form 35.1 (Mandatory disclosure filed with the court pursuant to C.R.C.P. 16.2(e), Teresa Tate Assistant Legal Counsel to SCAO) [Page 143-150].

f. C.R.C.P. 26(b)(4)(D) (David DeMuro, federal rules subcommittee chair) [Page 151-156].

g. CAPP Rules – (Dick Holme, subcommittee chair).

V. Adjourn

COLORADO SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Minutes of Meeting
Friday, May 30, 2014

A quorum being present, the Colorado Supreme Court's 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	
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 Chris Voisinet	X	
Judge John R. Webb	X	
J. Gregory Whitehair		X
Christopher Zenisek	X	
Non-voting Participants		
Justice Allison Eid, Liaison	X	
Carol Haller	X	
Teresa Tate	X	

I. Attachments & Handouts

A. Agenda packet
B. Revised Clawback language May 30, 2014 (Mueller Synthesis)

II. Announcements from the Chair

Minutes of the March 21, 2014 meeting were approved with no revisions.

C.R.C.P 42.1 was amended to address a filing issue. It did not need to go through the Committee, and was approved by the supreme court on April 29, 2014.

The supreme court did not adopt the Committee's proposed rule changes to C.R.C.P. 54(d) and C.R.C.P. 121 §1-22. The supreme court decided it was not appropriate to overrule one of its cases, *Cherry Creek School District, No. 5 v. Voelker*, 859 P.2d 805, (1993) by rule change, and the court was concerned with the separation of powers issues raised with the proposed change. There is supreme court support to address litigation costs, but how to proceed was opened up for discussion. With one no vote, the Committee voted to reconstitute the costs subcommittee, chaired by Judge Webb.

III. New Business

A. The Civil Access Pilot Project

The Institute for the Advancement of the American Legal System's Preliminary Findings on the Colorado Civil Access Pilot Project (CAPP) was released in April 2014. The Civil Rules Committee's CAPP subcommittee was formed in March 2014, and has had two meetings so far.

At the first meeting, the subcommittee discussed the direction of their work, and decided that they will not propose a separate set of rules based on CAPP, but will instead take specific parts of CAPP and recommend their application to all courts by adding them to the Colorado Rules of Civil Procedure. At the second meeting, the subcommittee divided up topics to be addressed by its members. There are strong, divergent views on several topics, and the subcommittee assigned members with different points of view to these topics to create workable solutions that will be acceptable to the bar.

The subcommittee's concern is timing; the CAPP rules are set to end December 2014. The subcommittee would like to simultaneously transition from the end of CAPP to revised rules rather than make the courts and bar go through two sets of changes (reversion to the old rules at the end of CAPP and a later change when the new rules are implemented). However, the time it will take to submit changes to the Committee, discuss, vote, post the changes for public comment, and hold a hearing if necessary, cannot be accommodated by the end of the year. Therefore, the subcommittee's proposal is to ask the supreme court for a six month extension of CAPP. If CAPP is extended until June 2015 this will give the Committee time to act, so a motion was made to ask the supreme court to extend CAPP until June 2015. The motion passed unanimously.

B C.R.C.P. 26, Claw Back

The subcommittee submitted a new proposal, aimed at reducing the burden on the receiving party. After some discussion of the proposed change, and the addition of "All notices under this rule shall be in writing." at the end, the proposal was passed 17 to 3.

C. Colorado Rules of Probate Procedure

The Colorado Bar Association's Trust and Estate Section worked for over two years to amend the Colorado Rules of Probate Procedure. In March 2014, the Trust and Estate Section submitted the proposed rule changes to the State Court Administrator's Office's Probate Advisory Committee, and the rules are now ready for consideration by the Civil Rules Committee. The Trust and Estate Section and the Probate Advisory Committee agree on all but three amendments: 1) whether or not the probate rules should be renumbered; 2) whether or not current C.R.P.P. 14, Attorney's Withdrawal, is necessary; and 3) the organization of the amendments to current C.R.P.P. 16, Court Approval of Settlement of Claims of Persons Under Disability. Judger Berger asked member Fred Skillern to look at the rules, checking for typos, word usage, word choice, etc., and to make a suggestion about the renumbering at the next meeting.

D. C.R.C.P. 411, Appeals

The proposed change fixed a minor error. The rule was amended to comply with current practice where the clerk, not the judge, certifies the record. The proposed change was passed unanimously.

E. C.R.C.P. 121, §1-15, Motions to reconsider

The overall objective of the proposed C.R.C.P. 121, Section 1-15(11) is to discourage motions for reconsideration because they are disfavored. The Committee decided to move the first sentence of the proposed "Addition to Comments" to the end of the proposed rule. It also decided to delete the last sentence of the proposed rule because courts have adequate sanctioning ability without it. The proposed rule change, as amended, passed unanimously.

F. C.R.C.P. 47, Juror Questions

The committee agreed that all juror questions and follow-up questions need to be in writing, to ensure that no juror questions will be presented orally in court. The revised proposed rule change passed unanimously.

IV. Future Meetings

September 26, 2014
October 30, 2014
November 21, 2014

The committee adjourned at 3:40 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

August 21, 2014

Honorable Allison Eid, Justice

Colorado Supreme Court

Re: Colorado Supreme Court Civil Rules Committee—Proposed Amendments to the Colorado Rules of Civil Procedure

Dear Justice Eid:

I write, on behalf of the Civil Rules Committee, to recommend the adoption of four amendments to the Colorado Rules of Civil Procedure. They are:

1. Addition to C.R.C.P. 26 (b)(5). Claw Back of privileged or trial preparation materials.
   The Committee recommends the adoption of a form of the "claw back" procedure that is contained in Rule 26 (b)(5)(B) of the Federal Rules of Civil Procedure. This provision permits a party to at least temporarily "claw back" documents that were already disclosed or provided when the party later discovers that the document was subject to a privilege, or protection as trial preparation material. The proposed rule does not address the substantive grounds of waiver of any applicable privilege. That determination still will be made in accordance with the ad hoc approach described in Floyd v. Coors Brewing Co., 952 P.2d 797

(Colo.App.1997.)[1] (The Colorado Supreme Court has not spoken on this issue.)

With the continuing increase in the disclosure and production of electronically stored information, most observers are of the view that such a claw back provision is essential because the costs of privilege review can quickly exceed the amount in controversy in many cases. With the volume of documents to be reviewed, it is inevitable, even with the exercise of reasonable care, that mistakes will be made in the identification of privileged or trial preparation material. The cost of reducing these mistakes to zero (if even possible) is prohibitive and usually not justified.

The proposal is not identical to the federal rule because the Committee believes there are ambiguities in the operation of the federal rule that should be clarified. But the substance of this proposed rule is the same as the federal rule, which by all accounts, has worked well.

As further support for this addition to the Rules, I enclose the Report and Supplemental Report of the Civil Rules Subcommittee (David DeMuro, chair) that studied this issue.

2. Amendment to C.R.C.P. 47. Jurors—Questions by Jurors. This amendment arose from a case decided by the Colorado Court of Appeals, *People v. Gallo*, 09 CA 1308 (Colo.App. 2014) (Not published pursuant to C.A.R. 35 (f), cert. petition filed 4/10/2014[2] In that case, the trial court permitted a juror to pose follow-up questions to a witness based upon a prior juror question that the judge asked the witness. In a concurring opinion, Judge Diana Terry addressed the hazards of

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[1] In federal court, the determination of whether an otherwise applicable procedure has been waived is determined under Rule 502 of the Federal Rules of Evidence. The Colorado Supreme Court Committee on the Rules of Evidence has, to date, determined not to recommend to the Court the adoption of a state counterpart to Fed.R.Evid. 502. In the absence of a state counterpart to Fed.R.Ev.d 502, the substantive determination of waivers of privilege will continue to be made with reference to Colorado case law, cited in the text.

[2] The court of appeals decision, including Judge Terry's concurring opinion, is also enclosed with this letter.

permitting in open court such a colloquy between a juror and a witness. The Committee agrees that this is a legitimate concern and the proposed amendments address this concern. The Committee recommends that C.R.C.P. 47 be amended at set forth in the attached proposed amendments.

3. Addition to C.R.C.P. 121, Section 1-15. Motions to Reconsider Interlocutory Orders . This proposed rule addresses, for the first time in the Colorado Rules of Civil Procedure, motions to reconsider interlocutory orders. (Motions to reconsider final orders or judgments have long been governed by C.R.C.P. 59; no changes to Rule 59 are proposed or intended.)

   It is common place for litigants to file motions to reconsider interlocutory orders. Indeed, some of the judge-members of the Committee observed that in certain areas of practice, particularly domestic relations, it is the unusual order that does not result in a motion to reconsider. The proposed rule makes clear that such motions are disfavored and may not be filed on a routine basis. The proposed rule also establishes, based upon case law in the federal system, standards (albeit general) to govern the filing and disposition of these ubiquitous motions. As further support for this proposal, I enclose the Subcommittee report (Judge John Webb, Chair).

4. Amendment to C.R.C.P. 411 (County Court Rules of Civil Procedure). This minor amendment is necessitated by an inconsistency between HB 13-1086, codified at section 13-6-311 (2)(b), C.R.S. 2013, and the Rule. The statute requires the clerk to certify the appellate record, while the rule requires the judge to certify the record. Apart from the fact that there is no reason to burden the judge with this task, the statute and the rule should be consistent. For the same reason, the same change

previously was made to Crim.P. [Rules change 2014 (13). This proposed amendment corrects the inconsistency.

In support of these recommendations, I enclose both redlined and clean copies of each of the proposals, in the format required by the Court. I will also email to you this letter and the enclosures so that you have them in electronic format, if that is more convenient to you and the Court.

Please contact me if you have any questions.

Respectfully,

Michael H. Berger, Chair

Civil Rules Committee

Cc: Jenny Moore, Esq.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) [NO CHANGE]

(b)(1) – (4) [NO CHANGE]

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

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

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) [NO CHANGE]

(b)(1) – **(4)** [NO CHANGE]

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

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

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May 6, 2014

Via E-mail: Michael.berger@judicial.state.co.us

Honorable Michael Berger
Colorado Court of Appeals
Chairman, Colorado Supreme Court Committee on
the Rules of Civil Procedure
2 East 14th Avenue
Denver, CO 80203

Re: ***Report of Subcommittee on Federal Rules Changes***

Dear Judge Berger:

At the meeting of the Civil Rules Committee on March 21, 2014, the subcommittee on review of federal rules presented our proposal to modify C.R.C.P. 26(b)(5) by adopting a slightly modified version of Fed.R.Civ.P. 26(b)(5)(B). This rule, sometimes called the "claw back rule," sets forth a procedure to be followed when a party discovers it has inadvertently produced privileged information during discovery (see discussion in my March 10, 2014, letter to you that was included in the agenda for the meeting of March 21, 2014).

At the March 21 meeting, members of the Committee raised several issues about our proposal, including the lack of a consequence on the party that inadvertently produced the privileged information, the burden on the other party and timing issues. Because of those issues, you referred the proposal back to the subcommittee for further consideration.

The subcommittee considered the comments and now presents a revised proposed C.R.C.P. 26(b)(5), a copy of which is attached (labeled the "4/10/14 version"). Also attached are copies of the current version of C.R.C.P. 26(b)(5) and Fed.R.Civ.P. 26(b)(5)(B). Our proposal now differs in a number of respects from the federal rule.

In our new proposal, we added language to the end of the second sentence to provide that the party who received the privileged information and notice of the tardy claim of privilege "shall give notice to the party making the claim within 14 days if it contests the claim." If the receiving party does not contest the claim of privilege, there is no reason to move toward bringing the issue before the Court and the privilege will be protected by the receiving party's other duties under the second sentence, such as

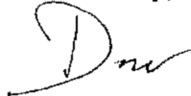
returning or destroying the specified information that it received. The burden of giving notice to the producing party that the claim of privilege is contested is meant to be a small one. Our proposal also does not require the receiving party to present the information to the Court, as is required under the federal version of the rule.

We next added a new third sentence to our proposal which provides as follows: "If the claim is contested, the party making the claim shall within 14 days after receiving such notice present the information to the Court under seal for a determination of the claim, or the claim is waived." This new sentence shifts the burden of presenting the information to the Court under seal to the party making the claim of privilege and expressly provides that if it fails to do so within 14 days, its claim of privilege is waived.

Finally, our old third sentence became the fourth and final sentence. We have not changed this sentence from our proposal to you of March 10, 2014. It continues to require the party that produced the information to preserve it until the claim is resolved. It also continues to provide specifically that the producing party "bears the burden of proving the basis of the claim and that the claim was not waived," which is not expressly stated in the federal rule.

We believe that the changes we have made in the April 10, 2014, version of our proposal address the principal concerns raised by the Committee at the last meeting. The subcommittee looks forward to discussing this matter at an upcoming meeting of the Civil Rules Committee.

Sincerely,



David R. DeMuro

DRD/lma

cc: The Honorable Jerry Jones ***(via E-mail)***
The Honorable Lisa Hamilton Fieldman ***(via E-mail)***
Professor Christopher Mueller ***(via E-mail)***
Richard Holme, Esq. ***(via E-mail)***
Enclosure(s): Various Documents

Proposed New C.R.C.P. 26(b)(5)(B):

(revised from Fed.R.Civ.P. 26(b)(5)(B))

(A) [Retain language currently in C.R.C.P. 26(b)(5)]

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

(4/10/14 Version)

Colorado

motion. For purposes of this paragraph, a statement previously made is:

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

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

(4) **Trial Preparation: Experts.**

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. Except to the extent otherwise stipulated by the parties or ordered by the court, no discovery, including depositions, concerning either the identity or the opinion of experts shall be conducted until after the disclosures required by subsection (a)(2) of this Rule.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided by C.R.C.P. 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

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

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

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

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

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

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

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

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

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

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

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

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

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of C.R.C.P. 37(a)(4) apply to the award of expenses incurred in relation to the motion.

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

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(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

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

(H) requiring that the parties simultaneousl[y] file specified documents or information i[n] sealed envelopes, to be opened as the cour[t] directs.

(2) *Ordering Discovery.* If a motion for a protec[tive] order is wholly or partly denied, the cour[t] may, on just terms, order that any party o[r] person provide or permit discovery.

(3) *Awarding Expenses.* Rule 37(a)(5) applies t[o] the award of expenses.

(d) Timing and Sequence of Discovery.

(1) *Timing.* A party may not seek discovery fro[m] any source before the parties have confer[red] as required by Rule 26(f), except in a procee[d]ing exempted from initial disclosure und[er] Rule 26(a)(1)(B), or when authorized by the[se] rules, by stipulation, or by court order.

(2) *Sequence.* Unless, on motion, the court orde[rs] otherwise for the parties' and witnesses' co[n]venience and in the interests of justice:

(A) methods of discovery may be used in a[ny] sequence; and

(B) discovery by one party does not requ[ire] any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) *In General.* A party who has made a disc[lo]sure under Rule 26(a)—or who has respond[ed] to an interrogatory, request for production, request for admission—must supplement correct its disclosure or response:

(A) in a timely manner if the party learns t[hat] in some material respect the disclosure response is incomplete or incorrect, an[d] the additional or corrective information not otherwise been made known to the [oth]er parties during the discovery process in writing; or

(B) as ordered by the court.

(2) *Expert Witness.* For an expert whose re[port] must be disclosed under Rule 26(a)(2)(B), party's duty to supplement extends bot[h]

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March 10, 2014

Via E-mail: Michael.berger@judicial.state.co.us

Honorable Michael Berger
Colorado Court of Appeals
Chairman, Colorado Supreme Court Committee on
The Rules of Civil Procedure
2 East 14th Avenue
Denver, CO 80203

Re: ***Report of Subcommittee on Federal Rules Changes***

Dear Judge Berger:

In a letter dated October 24, 2011, the subcommittee on review of federal rules changes requested that the Civil Rules Committee recommend that the Colorado Supreme Court adopt a slightly modified version of Fed.R.Civ.P. 26(b)(5)(B). This rule, sometimes called the "claw back rule," sets forth a procedure to be followed when a party discovers it has inadvertently produced privileged information during discovery.

The full committee deferred consideration of our 2011 proposal because of concern that this and other changes being considered at the time could interfere with the data collection efforts for the Pilot Project which began on January 1, 2012. Today, that concern seems to have decreased as the Pilot Project is well into its third year and we believe that this change would not have an adverse impact. Therefore, the subcommittee requests that this proposal be considered again.

<u>Fed.R.Civ.P. 26(b)(5)(B)</u>

We recommend that a slightly modified version of this Rule be adopted as C.R.C.P. 26(b)(5)(B) or 26(b)(6). Attached are copies of the federal version of Rule 26(b) with the applicable federal committee comment, Colorado Rule 26(b) and our Colorado proposal.

This rule addresses the situation where a party learns that it has already produced information in disclosures or discovery that is subject to a claim of privilege or the work product rule. In this event, the party seeking to assert tardily the privilege or work product rule may notify any party that received the information of the basis for its claim. The party receiving notice must promptly return, sequester or destroy the

information, not use it until the claim is resolved, retrieve the information from anyone to whom it was disclosed, and "may" promptly present the information to the court under seal for determination of the claim. In that circumstance, the court determines whether the information is protected by a privilege or the work product rule and, if so, whether the privilege or work product rule has been waived.

We think that this Rule is an appropriate way to handle the problem of inadvertent disclosure of privileged information which can occur occasionally, especially in cases involving large volumes of documents or a large amount of electronically-stored information.

Please note that the "claw back" issue is also addressed in Rule 502 of the Federal Rules of Evidence, but the Colorado Supreme Court Committee on the Rules of Evidence recommended that the Supreme Court not adopt Evidence Rule 502 and instead let the matter be addressed by the Civil Rules Committee in Rule 26. The Colorado Supreme Court accepted that recommendation of the Evidence Committee without comment. Also, there is something of a "claw back" rule in Rule 4.4(b) and (c) of the Colorado Rules of Professional Conduct.

Our Proposal

There are two changes from Federal Rule 26(b)(5)(B) in our Colorado proposal. The first is that the word "disclosures" be added to make it clear that this rule applies to information produced in either disclosures or discovery, even though some would define the word "discovery" to include disclosures. The second change is in placement of this subsection within Rule 26. In the Federal Rule 26, it is labeled as (B) under Rule 26(b)(5) after the rule requiring a privilege log. Our Colorado Rule 26(b) also contains the rule on privilege logs in subsection (5), but there is no (A). We could either re-label the material in subsection (5) as (A) and add the new material as (B), or we could add the new material as C.R.C.P. 26(b)(6).

The subcommittee looks forward to discussing this matter at an upcoming meeting at the Civil Rules Committee.

Sincerely,

David R. DeMuro

DRD/lma

cc: The Honorable Jerry Jones *(via E-mail)*
The Honorable Lisa Hamilton Fieldman *(via E-mail)*
Professor Christopher Mueller *(via E-mail)*
Richard Holme, Esq. *(via E-mail)*
Enclosure(s): Various Documents

Federal

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) *Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

(3) *Pretrial Disclosures.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.

(4) *Form of Disclosures.* Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) **Discovery Scope and Limits.**

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

(2) ***Limitations on Frequency and Extent.***

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(3) *Trial Preparation: Materials.*

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

(4) *Trial Preparation: Experts.*

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

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

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

(D) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other tha[n] the one selected by the party seeking dis[covery];

(D) forbidding inquiry into certain matters, o[r] limiting the scope of disclosure or discover[y] to certain matters;

(E) designating the persons who may be pres[ent] while the discovery is conducted;

(F) requiring that a deposition be sealed an[d] opened only on court order;

(G) requiring that a trade secret or other confi[dential] research, development, or commer[cial] information not be revealed or be re[vealed] only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) *Ordering Discovery.* If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) *Awarding Expenses.* Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) *Timing.* A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) *Sequence.* Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) *In General.* A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) *Expert Witness.* For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to

Federal Comment

within a reasonable time. Rule 26(f) was fit into this scheme when it was adopted in 1993. It was never intended, however, that the national requirements that certain activities be completed by a certain time should delay case management. In districts that move much faster than the national rules direct, and the rule is therefore amended to permit such a court to adopt a local rule that shortens the period specified for the completion of these tasks.

"Shall" is replaced by "must," "does," or an active verb under the program to conform amended rules to current style conventions when there is no ambiguity.

GAP Report

The Advisory Committee recommends adding a sentence to the published amendments to Rule 26(f) authorizing local rules shortening the time between the attorney conference and the court's action under Rule 16(b), and addition to the Committee Note of explanatory material about this change to the rule. This addition can be made without republication in response to public comments.

2006 Amendment

Subdivision (a). Rule 26(a)(1)(B) is amended to parallel Rule 34(a) by recognizing that a party must disclose electronically stored information as well as documents that it may use to support its claims or defenses. The term "electronically stored information" has the same broad meaning in Rule 26(a)(1) as in Rule 34(a). This amendment is consistent with the 1993 addition of Rule 26(a)(1)(B). The term "data compilations" is deleted as unnecessary because it is a subset of both documents and electronically stored information.

[Subdivision (a)(1)(E).] Civil forfeiture actions are added to the list of exemptions from Rule 26(a)(1) disclosure requirements. These actions are governed by new Supplemental Rule G. Disclosure is not likely to be useful.

Subdivision (b)(2). The amendment to Rule 26(b)(2) is designed to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information. Electronic storage systems often make it easier to locate and retrieve information. These advantages are properly taken into account in determining the reasonable scope of discovery in a particular case. But some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.

It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information. Information systems are designed to provide ready access to information used in regular ongoing activities. They also may be designed so as to provide ready access to information that is not regularly used. But a system may retain information on sources that are accessible only by incurring substantial burdens or costs. Subparagraph (B) is added to regulate discovery from such sources.

Under this rule, a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the (b)(2)(C) limitations that apply to all discovery. The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.

A party's identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence. Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case. It is often useful for the parties to discuss this issue early in discovery.

The volume of — and the ability to search — much electronically stored information means that in many cases the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties' discovery needs. In many circumstances the requesting party should obtain and evaluate the information from such sources before insisting that the responding party search and produce information contained on sources that are not reasonably accessible. If the requesting party continues to seek discovery of information from sources identified as not reasonably accessible, the parties should discuss the burdens and costs of accessing and retrieving the information, the needs that may establish good cause for requiring all or part of the requested discovery even if the information sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate.

If the parties cannot agree whether, or on what terms, sources identified as not reasonably accessible should be searched and discoverable information produced, the issue may be raised either by a motion to compel discovery or by a motion for a protective order. The parties must confer before bringing either motion. If the parties do not resolve the issue and the court must decide, the responding party must show that the identified sources of information are not reasonably accessible because of undue burden or cost. The requesting party may need discovery to test this assertion. Such discovery might take the form of requiring the responding party to conduct a sampling of information contained on the sources identified as not reasonably accessible; allowing some form of inspection of such sources; or taking depositions of witnesses knowledgeable about the responding party's information systems.

Once it is shown that a source of electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause, considering the limitations of Rule 26(b)(2)(C) that balance the costs and potential benefits of discovery. The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

The responding party has the burden as to one aspect of the inquiry — whether the identified sources are not reasonably accessible in light of the burdens and costs required to search for, retrieve, and produce whatever responsive information may be found. The requesting party has the burden of showing that its need for the discovery outweighs the burdens and costs of locating, retrieving, and producing the information. In some cases, the court will be able to determine whether the identified sources are not reasonably accessible and whether the requesting party has shown good cause for some or all of the discovery, consistent with the limitations of Rule 26(b)(2)(C), through a single proceeding or presentation. The good-cause determination, however, may be complicated because the court and parties may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation. In such cases, the parties may need some focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.

The good-cause inquiry and consideration of the Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.

The limitations of Rule 26(b)(2)(C) continue to apply to all discovery of electronically stored information, including that stored on reasonably accessible electronic sources.

Subdivision (b)(5). The Committee has repeatedly been advised that the risk of privilege waiver, and the work necessary to avoid it, add to the costs and delay of discovery. When the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed. Rule 26(b)(5)(A) provides a procedure for a party that has withheld information on the basis of privilege or protection as trial-preparation material to make the claim so that the requesting party can decide whether to contest the claim and the court can resolve the dispute. Rule 26(b)(5)(B) is added to provide a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery in the action and, if the claim is contested, permit any party that received the information to present the matter to the court for resolution.

Rule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by the production. The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information. Rule 26(b)(5)(B) provides a procedure for presenting and addressing these issues. Rule 26(b)(5)(B) works in tandem with Rule 26(f), which is amended to direct the parties to discuss privilege issues in preparing their discovery plan, and which, with amended Rule 16(b), allows the parties to ask the court to include in an order any agreements the parties reach regarding issues of privilege or trial-preparation material protection. Agreements reached under Rule 26(f)(4) and orders including such agreements entered under Rule 16(b)(6) may be considered when a court determines whether a waiver has occurred. Such agreements and orders ordinarily control if they adopt procedures different from those in Rule 26(b)(5)(B).

A party asserting a claim of privilege or protection after production must give notice to the receiving party. That notice should be in writing unless the circumstances preclude it. Such circumstances could include the assertion of the claim during a deposition. The notice should be as specific as possible in identifying the information and stating the basis for the claim. Because the receiving party must decide whether to challenge the claim and may sequester the information and submit it to the court for a ruling on whether the claimed privilege or protection applies and whether it has been waived, the notice should be sufficiently detailed so as to enable the receiving party and the court to understand the basis for the claim and to determine whether waiver has occurred. Courts will continue to examine whether a claim of privilege or protection was made at a reasonable time when delay is part of the waiver determination under the governing law.

After receiving notice, each party that received the information must promptly return, sequester, or destroy the information and any copies it has. The option of sequestering or destroying the information is included in part because the receiving party may have incorporated the information in protected trial-preparation materials. No receiving party may use or disclose the information pending resolution of the privilege claim. The receiving party may present to the court the questions whether the information is privileged or protected as trial-preparation material, and whether the privilege or protection has been waived. If it does so, it must provide the court with the grounds for the privilege or protection specified in the producing party's notice, and serve all parties. In presenting the question, the party may use the content of the information only to the extent permitted by the applicable law of privilege, protection for trial-preparation material, and professional responsibility.

If a party disclosed the information to nonparties before receiving notice of a claim of privilege or protection as trial-preparation material, it must take reasonable steps to retrieve the information and to return it, sequester it until the claim is resolved, or destroy it.

Whether the information is returned or not, the producing party must preserve the information pending the court's ruling on whether the claim of privilege or of protection is properly asserted and whether it was waived. As with claims made under Rule 26(b)(5)(A), there may be no ruling if the other parties do not contest the claim.

Subdivision (f). Rule 26(f) is amended to direct the parties to discuss discovery of electronically stored information during their discovery-planning conference. The rule focuses on "issues relating to disclosure or discovery of electronically stored information"; the discussion is not required in cases not involving electronic discovery, and the amendment imposes no additional requirements in those cases. When the parties do anticipate disclosure or discovery of electronically

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ized by the treaty except that, if the court determines that those methods are inadequate or inequitable, it may authorize other discovery methods not prohibited by the treaty.

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

(1) **In General.** Subject to the limitations and considerations contained in subsection (b)(2) of this Rule, parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

(2) **Limitations.** Except upon order for good cause shown, discovery shall be limited as follows:

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

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

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

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

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

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

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

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

(iii) Whether the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues in the litigation, and the importance of the proposed discovery in resolving the issues; and

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

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

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

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

motion. For purposes of this paragraph, a statement previously made is:

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

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

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. Except to the extent otherwise stipulated by the parties or ordered by the court, no discovery, including depositions, concerning either the identity or the opinion of experts shall be conducted until after the disclosures required by subsection (a)(2) of this Rule.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided by C.R.C.P. 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

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

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

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

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

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

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

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

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

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

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

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

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

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of C.R.C.P. 37(a)(4) apply to the award of expenses incurred in relation to the motion.

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

Proposed New 26(b)(6) or 26(b)(5)(B):

(taken from Fed.R.Civ.P. 26(b)(5)(B))

(6) If information produced in disclosures or discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

Rule 47. Jurors

(a) - (t) [NO CHANGE]

(u) Juror Questions. Jurors shall be allowed to submit written questions to the court for the court to ask of witnesses during trial, in compliance with procedure established by the trial court. The court shall, out of the hearing of the jury, review each question with counsel or unrepresented litigants and consider any objections they make. The trial court shall havethe discretion to prohibit, modify or limit a questions for good cause, even if an objection is not made, before posing it to the witnessin a particular trial based on a specific finding of good cause reflecting the particular circumstances of the case. The court shall have discretion to allow juror follow up questions in writing. The court shall not allow a juror to clarify a question by an oral statement or pose an oral question directly to a witness. The parties shall be permitted to ask additional questions of the witness within the scope of any juror questions posed by the court.

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09CA1308 People v Gallo 02-27-2014

COLORADO COURT OF APPEALS

Court of Appeals No. 09CA1308
Moffat County District Court No. 07CR104
Honorable Shelley A. Hill, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Michael Anthony Gallo,

Defendant-Appellant.

JUDGMENTS AFFIRMED IN PART, VACATED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE DAILEY
Miller, J., concurs
Terry, J., specially concurs

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced February 27, 2014

John W. Suthers, Attorney General, John D. Seidel, Senior Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Douglas K. Wilson, Colorado State Public Defender, Andrew C. Heher, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

Defendant, Michael Anthony Gallo, appeals the judgments of conviction entered on jury verdicts finding him guilty of sexual assault on a child by one in a position of trust (pattern of abuse) and aggravated incest (three counts). We affirm defendant's sexual assault conviction, vacate his three convictions for aggravated incest, and remand to the trial court with directions to enter judgments of acquittal on the aggravated incest counts.

I. Background

Defendant's convictions arose from several incidents in 2005 involving a four-year-old boy, W.H.

W.H.'s mother and defendant began living together in 2003, and, according to her, they were married in July 2005. In November 2005, as the mother was putting Vaseline on his lips, W.H. stated that his "daddy," referring to defendant, had put Vaseline in his butt. When asked what he meant, W.H. replied that (1) defendant would take W.H. into the bedroom and "make him lick [defendant's] pee-pee like a lollypop" and that it choked his throat and (2) defendant "put his pee-pee in [W.H.'s] butt."

The mother testified that approximately a week later, she reported W.H.'s allegations to a preschool counselor and spoke with

social services and the police. The matter was dropped, however, after W.H. denied to a social worker and a police officer that anything had happened and a Sexual Assault Nurse Examiner (SANE) observed no signs of sexual abuse during the course of a fifteen-minute "well-child exam" of W.H.

The matter was revived, however, when another SANE conducted a more detailed examination of W.H.'s anus in April 2007 and found some "irregular folds" around W.H.'s anus which were consistent with having been caused by the insertion of a blunt object, which would include a penis.

During an audiotaped interview with an investigator for the district attorney's office, defendant admitted that, on one occasion, he placed his penis in W.H.'s anus and that, on two other occasions, W.H. "lick[ed] and suck[ed]" his penis.

At the 2009 trial, the then eight-year-old W.H. testified that defendant committed the alleged acts. He acknowledged, on cross-examination, however, that he had previously recanted his allegations and made several inconsistent statements about them.

On his own behalf, defendant testified that (1) he never sexually assaulted W.H.; (2) he lied during the police interview

because he "wanted to get [his] children back" and thought that the investigator could help him to do that; and (3) he told police that if he had assaulted W.H., he did not remember doing it.[1]

In support of his assertion that he had falsely confessed to the police, defendant presented an expert who testified that the method used by the police to interview defendant — commonly known as the "Reid" technique — has been known to elicit false confessions.

Defendant also argued that W.H.'s mother made up — and influenced W.H. to make — the allegations against him, and only aggressively pursued them after he kicked her out of their home for having an affair with another man.

The jury found defendant guilty as charged and the trial court sentenced him on each of the four counts to concurrent terms of twelve years to life imprisonment in the custody of the Department of Corrections.

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[1] On this last point, he testified that sometime in 2005, he was so tired that he blacked out for a couple of days and he had no memory of what he did during that time.

II. Issues Surrounding Use of The "Reid" Technique

Defendant contends that the trial court committed three errors related to the investigator's use of the "Reid" technique to interview him: (1) the court did not suppress, as involuntary, his confession to the police; (2) the court allowed the investigator to give unendorsed expert testimony vouching for the truthfulness of defendant's statements during the interview; and (3) the court instructed the jury that neither side was contesting the legality of the technique itself. We conclude that any error does not warrant reversal.

Initially, we observe that the "Reid" technique is a method of interrogation which, according to both the investigator and the defendant's expert, is widely taught and used by law enforcement authorities throughout the United States. It "involves, among other things, isolating suspects from family and friends, confronting them with inculpatory evidence, rebuffing denials of innocence, and minimizing the subject's involvement in the offense." *United States v. Jacques*, 784 F. Supp. 2d 59, 64 (D. Mass. 2011); *accord United States v. Deuman*, 892 F. Supp. 2d 881, 889 (W.D. Mich. 2012) (using this technique, "'investigators are advised to isolate the

suspect in a small private room, which increases his or her anxiety and incentive to escape. A nine-step process then ensues in which an interrogator employs both negative and positive incentives. On one hand, the interrogator confronts the suspect with accusations of guilt, assertions that may be bolstered by evidence, real or manufactured, and refuses to accept alibis and denials. On the other hand, the interrogator offers sympathy and moral justification, introducing "themes" that minimize the crime and lead suspects to see confession as an expedient means of escape.'" (quoting Saul M. Kassin et al., *Police–Induced Confessions: Risk Factors and Recommendations,* 34 Law & Hum. Behav. 3, 7 (2010))).

Having this as background information, we now turn to the issues raised by defendant on appeal.

A. Voluntariness of Defendant's Confession

After defendant voluntarily appeared at the courthouse to discuss the allegations against him and was told that he was free to leave at any time, he was read his *Miranda* rights[2] and signed a

[2] Those rights are that the interrogated person "has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda v. Arizona*, 384

written waiver of those rights. He confessed after being interrogated by an investigator for about twenty minutes.

The court denied defendant's motion to suppress his statements, concluding that the statements were voluntary and that the investigator did not engage in any coercive behavior.

An involuntary statement is inadmissible for any purpose at trial. *People v. Harper*, 205 P.3d 452, 454 (Colo. App. 2008). "To be voluntary, a statement must be 'the product of an essentially free and unconstrained choice by its maker.'" *Effland v. People*, 240 P.3d 868, 877 (Colo. 2010) (quoting *People v. Raffaelli*, 647 P.2d 230, 234 (Colo. 1982)). The ultimate question is whether the individual's will to resist giving statements has been overborne by coercive governmental conduct. *See Effland*, 240 P.3d at 877; *People v. Gennings*, 808 P.2d 839, 843 (Colo. 1991). Whether a defendant's will has been overborne depends upon the totality of the circumstances under which the statements were made. *See Gennings*, 808 P.2d at 844.

U.S. 436, 444 (1966); *accord People v. Wood*, 135 P.3d 744, 749 (Colo. 2006).

On appeal, defendant does not argue that the use of the "Reid" technique in and of itself causes a suspect's confession to be involuntary. Nor could he successfully do so. *See, e.g., Shelby v. State*, 986 N.E.2d 345, 365-66 (Ind. Ct. App. 2013) (upholding voluntariness of confession, despite use of "Reid" interrogation technique); *State v. Cobb*, 43 P.3d 855, 863 (Kan. Ct. App. 2002) (rejecting the defendant's argument that application of the "Reid" technique rendered his confession involuntary); *State v. Ritt*, 599 N.W.2d 802 (Minn. 1999) (under totality of circumstances, neither "Reid" method of interrogation nor physical surroundings was coercive).

Instead, defendant argues that the deceptive tactics and intimidating circumstances of the interrogation in this case rendered his confession involuntary.

In his brief, defendant did not identify any particular lie or deceptive tactic used by the investigator. In addition, the use of deceptive tactics, standing alone, will not render a statement involuntary. *See Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (while misrepresentation by police is relevant, it is insufficient to make an otherwise voluntary confession inadmissible); *People v. Speer*, 216

P.3d 18, 22 (Colo. App. 2007), *rev'd on other grounds* 255 P.3d 1115 (Colo. 2011) (officers' false statements about the evidence did not have the effect of rendering the defendant's statements involuntary); *People v. Wickham*, 53 P.3d 691, 696 (Colo. App. 2001) "[E]ven where a causal connection exists between police misconduct and the defendant's confession, a violation of due process does not automatically ensue."); *People v. Zamora*, 940 P.2d 939, 942 (Colo. App. 1996) ("Most courts have recognized that ruses are a sometimes necessary element of police work and have held that deception standing alone does not invalidate consent; it is one factor to be considered in assessing the totality of the circumstances.").

Defendant did not identify in his brief any "intimidating circumstance" other than those "detailed by defense counsel below [in the trial court]." Because defendant provides no record citations, argument, or authority for his "intimidating circumstances" assertion — aside from an incorporation by reference of matters he presented to the trial court — he has not properly presented it for our review. *See Castillo v. Koppes-Conway*, 148 P.3d 289, 291 (Colo. App. 2006) (incorporation by reference of

trial court filings improperly attempts "to shift — from the litigants to the appellate court — the task of locating and synthesizing . . . relevant facts and arguments" and "'makes a mockery' of the rules that govern the lengths of briefs" (quoting *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr S.A.*, 377 F.3d 1164, 1167 n.4 (11th Cir. 2004))); *accord People v. Sexton*, 2012 COA 26, ¶ 35; *see also United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("A skeletal 'argument,' really nothing more than an assertion, does not preserve a claim [for appellate review]."); *People v. Hicks*, 262 P.3d 916, 920 (Colo. App. 2011) (declining to address an argument on which the defendant "has neither articulated a cogent argument for review nor provided supporting legal authority").

We conclude that reversal is not warranted on this ground.

B. Investigator's Testimony

During its case in chief, the prosecution presented testimony from the investigator who elicited defendant's confession. Although the investigator testified regarding his background and experience, he was not qualified as an expert by the trial court.

The investigator related that, in interviewing defendant, he used the "Reid" technique. When asked if that technique is

"generally accepted and practiced in law enforcement agencies across the country," the investigator responded affirmatively. When the prosecution then asked him why he used the "Reid" technique, the investigator stated that it has "been found to be reliable — " At this point, defendant objected, stating that the investigator was "essentially being asked to offer an expert opinion" without being qualified as an expert, and that "It is his credibility question." The prosecutor responded that he did not believe it was a "credibility" question, and that the investigator was qualified to answer the question based on his "training and experience, and as well as his . . . lay personal experience."

The court ruled that the investigator could testify to his personal experience with the "Reid" technique, but that he could not opine that the technique had been found to be reliable. In the court's view, any response stating that the technique has been found to be reliable "gets into the expert area."

The prosecutor then asked the investigator, "Containing your answer to only your personal experience, why did you use this technique?" Despite the court's earlier ruling , the investigator responded, "Because it's reliable and valid in obtaining truthful

information from subjects." Defendant renewed his objection, but the court overruled it.

Defendant argues that the investigator's testimony was improper in two respects. First, he argues that the investigator gave improper expert testimony without being qualified as an expert. Second, he argues that the investigator improperly vouched for the credibility of the statements defendant made during the interview.

Initially, we reject the prosecution's assertion that defendant did not properly preserve defendant's second argument about improper vouching because he failed to object on that ground in the trial court. In our view, defense counsel's statement that "It is his credibility question" was sufficient to alert the court to defendant's objection that the testimony improperly commented on the credibility of defendant's confession. *See Am. Family Mut. Ins. Co. v. DeWitt*, 216 P.3d 60, 66-68 (Colo. App. 2008) ("A party is not required to use 'magic words' in order to preserve an objection for appeal."), *aff'd*, 218 P.3d 318 (Colo. 2009); *People v. Silva*, 987 P.2d 909, 913 (Colo. App. 1999) (presenting sum and substance of argument to trial court preserves argument for appellate review).

Turning to the merits, we agree with defendant that the investigator's testimony constituted expert testimony vouching for the credibility of defendant's confession. We reach this conclusion because:

- the "Reid" technique, and its reliability or unreliability, are matters of specialized knowledge or training, outside the common knowledge or experience of laymen. *See* CRE 701, 702; *see also People v. Rincon*, 140 P.3d 976, 982 (Colo. App. 2005) (To determine if an opinion is based on "specialized knowledge," courts consider whether (1) ordinary citizens can be expected to have known of the information or have had the experiences that form the basis of the opinion and (2) the opinion resulted "'from a process of reasoning familiar in everyday life' [or] 'a process of reasoning which can be mastered only by specialists in the field.'"); and
- the investigator's opinion that the "Reid" technique is "reliable and valid in obtaining truthful information" necessarily implied to the jury that its usage here produced "truthful information" from defendant. *Cf. People v. Wittrein*, 221 P.3d 1076, 1081 (Colo. 2009) (error to admit generalized expert

opinion that an eight-year-old child is "unlikely" to hyper-report sexual abuse allegations); *People v. Snook*, 745 P.2d 647, 648-49 (Colo. 1987) (expert's description of "general attitudes" that children tend not to fabricate allegations of sexual abuse was tantamount to testifying that the child victim was telling the truth about her allegations); *State v. Kinney*, 762 A.2d 833, 843-44 (Vt. 2000) (error to admit expert testimony that for child victims of sexual abuse, "[f]alse reporting, the percentages are very low.").

That said, defendant is not entitled to a reversal on this ground.

Under Crim. P. 52(a), we disregard a harmless error. Because any error here would have been nonconstitutional in magnitude, reversal would be required only "where there is a reasonable probability that [the error] contributed to a defendant's conviction by substantially influencing the verdict or impairing the fairness of the trial." *People v. Casias*, 2012 COA 117, ¶ 61. Where there is no

such reasonable probability, however, we will disregard the error. *Id.*[3]

We perceive no such probability here. The investigator's conclusory comment on the reliability of the "Reid" technique was one sentence long. The evidentiary phase of trial lasted six days.

Further, in contrast to the investigator, defendant's expert testified for approximately five hours about false confessions and the ways in which the "Reid" technique and other methods of police interrogation are used to elicit them. Among other things, the defense expert testified that

- The results of one laboratory study demonstrated that "you get more and more false confessions the more of these Reid tactics that you add to the interrogation";
- "[T]he most important thing that will lead a person to give a false confession, other than just keeping them there . . . is to make them feel that they're hopelessly caught . . . [meaning] that there exists enough real evidence or

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[3] In this context, "a reasonable probability" does not mean that it is "more likely than not" that the error caused the defendant's conviction; rather, it means only a probability sufficient to undermine confidence in the outcome of the case. *Casias,* ¶ 63.

misleading evidence against them that they have no hope of being found innocent";

- Studies show that "those that are trained with the Reid method do worse than those that are not trained at all" at detecting when a subject is lying;
- Police interrogation tactics involve "absolutely brilliant psychology to get the person to comply and say what you want them to say. That's a different issue than being trained in social psychology about how to get the truth"; and,
- Part of the "Reid" technique is to "minimize any reminders of consequences" for the alleged conduct, and "one of the main reasons that people falsely confess is they think the whole thing will be over with, there won't be any consequences."

While, as defendant argues, a core issue before the jury was whether to believe defendant's confession, the significance of the investigator's one-sentence endorsement of the "Reid" technique pales in comparison to the lengthy and elaborate testimony given by the defense expert undermining the reliability of the technique. In

our view, there was no reasonable probability that the investigator's comment influenced the jury's verdict in any manner. *Cf. People v. Cardenas*, 25 P.3d 1258, 1263 (Colo. App. 2000) (any error in permitting hearsay statement regarding victim's reason for fearing the defendant was harmless because it was "brief and general in nature"); *People v. Ayala*, 919 P.2d 830, 833 (Colo. App. 1995) (police officer's testimony as to informant's reputation was harmless because it was brief and conclusory and the court's proper admission of the officer's opinion on the informant's character for truthfulness minimized the impact of the improper testimony).

C. Instructing the Jury

The court instructed the jury that "No party is asserting that the Reid Technique itself is illegal." It did so, though, after a fairly convoluted series of events in which

- A juror requested the court to ask the investigator whether the techniques he used to interrogate defendant were illegal;
- defendant objected to asking the investigator such a question;

- defendant objected the next day to the court's proposal to inform the jury that the court would not ask the question because it presented a question of law;
- defendant informed the court that no instruction would be necessary, as he did not intend to argue that the investigator did anything illegal;
- during cross-examination, however, defendant asked the investigator if he was aware that the "Reid" technique was "not allowed in some areas, including other countries because of its tendency . . . to elicit false confessions," to which the investigator responded that he was not familiar with other countries' laws on the technique;
- the court precluded the prosecution from eliciting redirect testimony from the investigator that the Reid technique was legal, reasoning that the defendant had not actually attacked the legality of the technique;
- nonetheless, the court ruled, over defendant's objection, that the jury was "entitled to have an answer" whether the technique was legal;

- the court concluded that it would be proper to instruct the jury that neither side was asserting that the technique *itself* was illegal, because it correctly stated defendant's position and still allowed defendant to argue that his interview responses were unreliable.

On appeal, defendant argues that the court's instruction was improper because it (1) was "at a minimum misleading, and at worst objectively false"; (2) placed the court's imprimatur on the credibility of the investigator and the reliability of defendant's confession; (3) undermined that part of his defense "that the statement extracted from him was false and in all respects unreliable"; and (4) invaded the sole province of the jury to determine and the credibility of witnesses and the weight to be given to any particular evidence. We are not persuaded.

Here, the court, as requested by defendant, did not ask the investigator the question posed by the juror.

But whether to provide an additional instruction in response to a question from the jury is a determination within the trial court's sound discretion. *See People v. Bass*, 155 P.3d 547, 552 (Colo. App. 2006) (written instruction). A court abuses its

discretion when its ruling is (1) based on an erroneous understanding or application of the law or (2) manifestly arbitrary, unreasonable, or unfair. *People v. Esparza-Treto*, 282 P.3d 471, 480 (Colo. App. 2011).

We perceive no abuse of discretion on the part of the court. The court essentially instructed the jury that the legality of the "Reid" technique *itself* was not an issue for it to consider, as the parties were not raising such an issue.

The court's instruction was not erroneous, misleading, or objectively false. In the trial court, defendant disavowed challenging the legality of the technique itself;[4] his challenge — to the extent he presented an argument about illegality — was to the particular manner in which the technique was used in this case.

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[4] Indeed, defendant has cited us no authority indicating that the "Reid" technique *itself* is illegal. If anything, the authorities are to the contrary. *See* Part II(A); *see also* Jodena Carbone, *Selective Testing of DNA and Its Impact on Post-Conviction Requests for Testing*, 10 Rutgers J.L. & Pub. Pol'y 339, 355 (2013) (noting that the tactics involved in the Reid Technique, "while questionable, are not illegal").

The court's instruction neither lessened the prosecution's burden of proof nor impermissibly undermined part of defendant's defense.

As the People argue, there is a difference between (1) "illegality," in the sense of rendering a statement involuntary, and (2) credibility or reliability, in the sense of whether a statement is worthy of belief. *See Crane v. Kentucky*, 476 U.S. 683, 689 (1986) ("[R]egardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility."); *People v. Lopez*, 946 P.2d 478, 482 (Colo. App. 1997) ("Here, as in *Crane*, even though the issue of voluntariness had been ruled upon, defendant . . . also had the constitutional right to a fair opportunity to persuade the jury that his statements to the police were not credible and should not be believed by them.").

Illegality, in the sense of rendering a statement involuntary, is for the court to decide; the credibility or reliability of any statement

found to be voluntary is for the jury to decide. *Deeds v. People*, 747 P.2d 1266, 1272 (Colo. 1987) ("[A] trial judge . . . cannot delegate responsibility for determining voluntariness to the jury. . . . If the judge concludes that the confession was voluntary, the confession is then submitted to the jury solely for consideration of the credibility of the testimony relating to the confession and the weight to be given to the testimony and the confession."); *see People v. Washington*, 179 P.3d 153, 167 (Colo. App. 2007) (characterizing *Deeds* as holding that "a jury is not permitted to second-guess a trial court's determination that a confession was voluntary, and hence admissible"); *see also People v. Flippo*, 159 P.3d 100, 105-06 (Colo. 2007) ("[G]enerally speaking, defendants may attack the credibility or reliability of a confession and allow the jury to determine any weight that should be given to such statements.").

In light of these authorities, we perceive no error in the court's essentially informing the jury that the issue of the "illegality" of the "Reid" technique was not a matter with which it needed to be concerned. The reliability of a confession is a matter distinct from its "legality." And because the instruction neither commented on its reliability nor impeded defendant's ability to argue its unreliability,

the instruction neither lessened the prosecution's burden of proof nor undermined defendant's right to present a defense.

III. Juror Questions

Defendant contends that the trial court violated Crim. P. 24 and deprived him of his right to trial by a fair and impartial jury by permitting jurors to engage in direct, adversarial questioning of witnesses. Although we conclude that the rule may have been violated, we also conclude that reversal is not warranted.

A. Facts

Pursuant to Crim. P. 24, the court allowed the jurors to submit written questions to be asked of witnesses. The court then reviewed the questions submitted by the jury before asking those questions of the witnesses. Defendant had no objections to the questions which the court, on behalf of the jury, asked the witnesses.

On three occasions, however, the court, over defendant's objection, also allowed individual jurors to orally clarify questions for two witnesses.[5]

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[5] Defendant mentions a fourth occasion when, with respect to a third witness, the court invited a juror to clarify a question.

On the first occasion, the court presented a juror question to defendant's expert on false confessions, in the following manner: "'[R]eferring to your testimony about the six portions of interview techniques, are we all in our society subjected to these techniques on a regular basis?' And the juror put in 'yes or no.'" The expert indicated that she was unsure what the juror meant, even after the court instructed her to disregard the reference to the six portions. Although the court initially asked the expert to give a yes or no answer or to state that she could not answer the question, it ultimately invited the juror who wrote the question to clarify it for the expert. After the juror stated that he was referring to a study the expert mentioned in her "video," the expert began to answer. The court interrupted her and asked that she reply with a yes or no answer, which she did.

On the second occasion, the court asked the expert another question written by the same juror, to wit, "Do you have any supporting studies or other information that would explain why a

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Because the witness responded, however, to the original question before any juror spoke, we do not consider — and, thus, we do not address — this as an issue of direct questioning of a witness by a juror.

suspect during an interview or during a confession would give false underlying information about the events being discussed? Why would the individual bring up something that is not in direct response to an interview question?"

When the expert asked if the question referred to questioning already in progress or a situation where the defendant started "talking out of the blue," the juror, without prompting from the court, clarified that his inquiry was about questioning already in progress. When the expert then asked if the inquiry was about an interrogator not bringing up details or just not bringing up the whole question of how something happened, the juror, again without any prompting from the court, clarified that he was asking about specific details not previously brought up. The expert then answered the question.

On the third occasion, the court read to the investigator who elicited defendant's confession a juror question asking, "Why all of your own comments on what happened?" When the investigator indicated that he did not understand the question, the court invited the inquiring juror to clarify it. The juror (who was not the juror who had orally clarified questions for the expert) orally restated the

question as, "Why did you make all your statements and comments to make him answer — answer into that?" The investigator responded by saying that part of the interview process involves laying a foundation about himself and "what has been gleaned [by police] to that point in the investigation." He does so by using a monologue at the beginning of the interview, which helps to elicit information from the subject.

B. Analysis

Defense counsel objected to allowing jurors to orally clarify their questions for witnesses because she thought the rule of criminal procedure on jury questions required that the jurors remain anonymous. She did not, then, "think it [wa]s proper to identify the source of the questions in terms of asking the jurors if that's what they meant."

This is not, however, the argument defendant presents on appeal. Although he again argues that the rule was violated, he does not do so on the basis of protecting the anonymity of the jurors. He does so based on the text of the rule. In addition, he argues that the effect of violating the rule was to deprive him of his constitutional right to a fair and impartial jury.

Because defense counsel did not object in the trial court on the grounds raised here on appeal, these grounds are not properly preserved for review,[6] and reversal is not warranted absent a showing of plain error. *See People v. Ujaama*, 2012 COA 36, ¶¶ 37-38.

To warrant relief under the plain error rule, an error must be both "obvious and substantial." *Hagos v. People*, 2012 CO 63, ¶ 14. By that, we mean that the error must be so clear-cut, so obvious, that a trial judge should be able to avoid it without benefit of objection, *People v. Pollard*, 2013 COA 31, ¶ 39, and that the error must be "seriously prejudicial," that is, it must so undermine the fundamental fairness of the trial as to cast serious doubt on the reliability of the conviction, *Ujaama*, ¶ 43; *see also Hagos*, ¶ 14.

For the following reasons, we perceive no "plain" error.

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[6] "'[T]o preserve a claim for review on appeal, the party claiming error must have supplied the right ground for the request. The basis of this requirement is obvious: the judge must largely rely upon the parties to research and raise issues, and giving the judge the wrong reason for a request is usually equivalent to giving the judge no reason at all.'" *Novak v. Craven*, 195 P.3d 1115, 1120 (Colo. App. 2008) (quoting *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8, 15 (1st Cir. 1999)); *accord People v. Cordova*, 293 P.3d 114, 120 (Colo. App. 2011).

Crim. P. 24(g), the rule governing juror questioning of witnesses, provides:

> Jurors shall be allowed to submit written questions to the court for the court to ask of witnesses during trial, in compliance with procedures established by the trial court. The trial court shall have the discretion to prohibit or limit questioning in a particular trial for reasons related to the severity of the charges, the presence of significant suppressed evidence or for other good cause.

The text of the rule does not directly address the procedure to be used when the questions asked by the court, on behalf of the jurors, are in need of clarification. In this regard, the rule neither expressly authorizes nor expressly prohibits a juror's direct oral clarification of a question to a witness.

No Colorado case addresses the issue, and there is no uniformity in caselaw from other jurisdictions prohibiting such a practice. Indeed, there is caselaw that appears to embrace it. *See People v. Stout*, 323 N.W.2d 532, 536 (Mich. Ct. App. 1982) (oral questioning of a witness is permissible where the juror's question is competent, does not indicate the juror was prejudiced against the defendant, and aids in the factfinding process); *Krause v. State*, 132 P.2d 179, 182 (Okla. Crim. App. 1942) ("We think it proper that a

juror may ask an occasional [oral] question where something has been said by a witness which is confusing to the juror for the purpose of clarifying the matter."); *see also United States v. Witt*, 215 F.2d 580, 584 (2d Cir. 1954) ("During the trial, some of the jurors, with the judge's consent, put questions to witnesses and received answers. We think that a matter within the judge's discretion, like witness-questioning by the judge himself."); *State v. Kendall*, 57 S.E. 340, 341 (N.C. 1907) ("There is no reason that occurs to us why this [direct questioning of a witness by jurors] should not be allowed in the sound legal discretion of the court, and where the question asked is not in violation of the general rules established for eliciting testimony in such cases.").

Under these circumstances, any error in not requiring clarifications of jury questions to be submitted in writing to, and relayed to the witnesses by, the court, would not be "so clear-cut, so obvious" as to constitute plain error. *Cf. Pollard*, ¶¶ 40-41 n.3 ("Ordinarily, for an error to be this 'obvious,' the action challenged on appeal must contravene (1) a clear statutory command; (2) a well-settled legal principle; or (3) Colorado case law." But "[t]he

uniform nature of case law from other jurisdictions is [also] relevant in assessing the 'obviousness' of an error." (citations omitted)).

Nor would any error here be "seriously prejudicial."

We recognize the dangers of permitting direct questioning of witnesses by jurors. *See United States v. Richardson*, 233 F.3d 1285, 1290-91 (11th Cir. 2000) (jurors should only be allowed to submit questions in writing because it "eliminates the possibility that a witness will answer an improper question and prevents jurors from hearing prejudicial comments that may be imbedded in improper questions"). But there is nothing prejudicial per se about allowing jurors to orally pose witness questions. *See United States v. Groene*, 998 F.2d 604, 606 (8th Cir. 1993).

There is nothing inherently partial, adversarial, or unfair about juror questioning of witnesses. *See Medina v. People,* 114 P.3d 845, 857 (Colo. 2005) (upholding juror questioning of witnesses, via written submissions to the court, under Crim. P. 24); *see also People v. Garrison*, 2012 COA 132, ¶ 8 ("The [*Medina*] court also concluded that the act of asking a question does not

necessarily transform an otherwise passive juror into an advocate."). [7]

Nor is there anything inherently partial, adversarial, or unfair about neutral participants in the trial process (such as jurors) orally questioning witnesses. Trial courts are also obliged to be neutral and impartial. *See Crumb v. People*, 230 P.3d 726, 731 (Colo. 2010) (judge should be "a neutral arbiter"); *People v. Hagos*, 250 P.3d 596, 611 (Colo. App. 2009) ("An accused has a constitutional right to an impartial judge at all stages of the proceedings against him."). Yet, under CRE 614(b), they have "the prerogative and, at times, the duty to question witnesses called by a party." *People v. Rodriguez*, 209 P.3d 1151, 1162 (Colo. App. 2008), *aff'd*, 238 P.3d 1283 (Colo. 2010).

Similarly, jurors may orally question witnesses without necessarily engaging in actual or apparent adversarial or partial

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[7] In his opening brief, defendant cites two opinions discouraging juror questioning, even in written form, because it allows the jury to assume the role of advocate. *See United States v. Bush*, 47 F.3d 511, 515 (2d Cir. 1995); *United States v. Johnson*, 892 F.2d 707, 713 (8th Cir. 1989) (Lay, C.J., concurring). Our reading of *Medina* reveals that the supreme court squarely disagrees with this reasoning for prohibiting juror questioning altogether. 114 P.3d at 857.

conduct. *See Witt*, 215 F.2d at 584; *cf. State v. Siferd*, 783 N.E.2d 591, 608 (Ohio Ct. App. 2002) ("'[A]n appellant must demonstrate resulting prejudice in order for a reviewing court to overturn a judgment based upon the trial court's decision to allow jurors to question the witnesses.'" (quoting *State v. Cobb*, 2000 WL 1049308 (Ohio Ct. App. No. 13–2000–07, July 24, 2000)), *aff'd*, 789 N.E.2d 237 (Ohio 2003)).

Whether direct juror clarification of questions to witnesses is prejudicial because it evinces bias, partiality, or the appearance of such, depends on the substance of the clarifications. *See Groene*, 998 F.2d at 606 (no prejudice resulted from jurors orally posing questions for witnesses where such questions addressed "relatively innocuous" issues, and elicited only clarifications of previous testimony, cumulative evidence, or evidence that supported defendant's theory of defense); *United States v. Gray*, 897 F.2d 1428, 1430 (8th Cir. 1990) (holding that a review of the substance of the challenged juror questions and witness answers revealed "nothing sufficiently prejudicial to overturn the result reached by the jury").

Here, defendant did not object in the trial court to the *substance* of any of the juror's clarifying statements, or to the answers given by the witnesses once the jurors had clarified their questions.

On appeal, defendant complains regarding the substance of only one question, which he refers to as a "softball question" to the investigator. On that occasion, the juror asked the investigator why he made his own statements and comments to defendant regarding what he thought happened to W.H. to get him to answer. While the investigator's answer explained why he used that technique, the juror's question appears to have been intended to clarify his understanding of the technique, if not to challenge the technique itself. Such clarifying questions are not prejudicial. *See Garrison*, ¶¶ 14, 19 (although jurors asked an "unusual number of questions," questions were not prejudicial where they "appear[ed] to represent attempts to understand, clarify, or expand upon defendant's testimony"); *cf. People v. Ray*, 640 P.2d 262, 264 (Colo. App. 1981) (a court's questioning of a witness is not improper where the purpose is to develop more fully the truth and to clarify testimony already given); *contra State v. Jeffries*, 644 S.W.2d 432,

434-35 (Tenn. Crim. App. 1982) (holding that lengthy oral questioning of defense witnesses, covering forty-two pages of the transcript and consisting of many prejudicial and argumentative questions, had turned the jurors into advocates and warranted reversal).

For these reasons, we conclude that any error committed here in allowing the jurors to directly address the witnesses did not undermine the fundamental fairness of the trial and cast serious doubt on the reliability of the conviction. Consequently, plain error, warranting reversal, did not occur.

IV. Court's "Chastisement" of Defense Counsel

We also disagree with defendant's contention that the court "chastised" defense counsel in front of the jury regarding the substance of counsel's objection to jurors orally clarifying their written questions for witnesses.

As described in Part III.B, defense counsel objected to the court's allowing jurors to identify themselves in the process of orally clarifying written questions for witnesses. Although the court initially asked if defense counsel could cite the applicable rule of

criminal procedure, it ultimately told her, "Don't worry about it, I just won't do it anymore. We don't have time to deal with it."

When, the next day, the issue arose again, the court revisited, in front of the jury, counsel's objection, stating,

> I noted your objection yesterday, I went back and looked at the juror questions rule, and there's nothing in there about what you alluded to, nothing. So, I'm going to ask if the juror who wrote this question would like to clarify it. I'll be happy to entertain that.

Defense counsel did not object at that time to the court's statement. The next morning, however, she said that, although she understood "it was late in the day, everybody was at the end of their rope," she nonetheless objected to the court "making comments that disparage either counsel or go to their veracity in the presence of the jury." The court responded by saying, "It certainly wasn't intended to be that way. I agree and disagree with counsel all the time."

To properly preserve an issue for appeal, a defendant must lodge a timely and specific objection on the trial court record. *See People v. Douglas*, 296 P.3d 234, 248 (Colo. App. 2012). Here, because defendant did not object contemporaneously to the court's

statement, he did not properly preserve the issue for review. Consequently, reversal is not warranted in the absence of plain error. *Cf. Taylor v. People*, 723 P.2d 131, 134 (Colo. 1986) (allegations of prosecutorial misconduct not preserved by *contemporaneous objection* are reviewed for plain error).

Here, we perceive no error, much less plain error.

"A trial court . . . has a duty to exercise restraint in its conduct and words so as to maintain an impartial forum. However, acts that merely cause disappointment, discomfort, or embarrassment to counsel in the presence of the jury, without more, are rarely prejudicial. Such comments and conduct are grounds for reversal only if they are so far removed from requisite impartiality as to deny a defendant the right to a fair trial." *People v. James*, 40 P.3d 36, 42-43 (Colo. App. 2001). "Numerous statements of a judge during trial demonstrating irritation and intolerance toward defense questioning, cumulatively, could render a trial unfair." *People v. Coria*, 937 P.2d 386, 391 (Colo. 1997); *see also People v. Gibson*, 203 P.3d 571, 578-79 (Colo. App. 2008).

We are concerned here with only one statement by the court. And, as we read that statement, we do not discern an intent on the

court's part to chastise counsel; rather, it appears to us that the court's intent was to inform defense counsel that it had changed its position from the previous day because its review of Crim. P. 24 revealed nothing about protecting the anonymity of inquiring jurors. In essence, the court merely stated the reason why it was reversing course and permitting jurors to orally clarify their questions. The court did not use harsh, accusatory, or otherwise inappropriate language.

In any event, the nature of the statement does not reveal that the trial court was irritated with and intolerant of defense counsel to the extent that the court displayed a negative bent of mind toward her, warranting reversal. *See Coria*, 937 P.2d at 391 (court's comment that defense counsel was only objecting to interrupt the flow of the prosecutor's closing argument was improper, but defendant failed to demonstrate any prejudice); *People v. Drake*, 748 P.2d 1237, 1249-50 (Colo. 1988) (trial court's rude comments and remarks evidencing irritation, including criticizing the defense attorney's performance, were insufficient to establish prejudice or interest against the defendant); *People v. Corbett*, 199 Colo. 490, 495-96, 611 P.2d 965, 969 (1980) (court's comments to counsel to

"quit it" and that it would sustain an objection "if you keep it up," and its inquiry as to whether defense counsel wanted it to remove the jury so he could object did not show any prejudice toward defendant or his counsel, either individually or collectively); *Rodriguez,* 209 P.3d at 1163 (noting that "a display of irritation or frustration on the part of the judge" does not warrant reversal where the court is dealing with an emotionally-charged atmosphere, highly contentious parties, and the pressure of a heavy docket).

V. Sufficiency of the Evidence

We are, however, persuaded by defendant's contention that the prosecution presented insufficient evidence to sustain his convictions for aggravated incest.

We review the record de novo to determine whether the evidence before the jury was sufficient both in quantity and quality to sustain defendant's conviction. *Dempsey v. People,* 117 P.3d 800, 807 (Colo. 2005).

"When examining the sufficiency of the evidence, we determine whether the evidence, viewed as a whole and in the light most favorable to the prosecution, is sufficient to support a conclusion by a reasonable person that the defendant is guilty of the crime

charged beyond a reasonable doubt." *People v. Grant*, 174 P.3d 798, 811 (Colo. App. 2007).

In analyzing the sufficiency of the evidence, we are guided by several basic principles: (1) if there is evidence upon which one may reasonably infer an element of the crime, the evidence is sufficient to sustain that element; (2) the prosecution, rather than the defendant, must be given the benefit of every reasonable inference that can be drawn from the evidence; and (3) where reasonable minds could differ, the evidence is sufficient to sustain a conviction. *Id.* at 812.

A modicum of relevant evidence will not rationally support a conviction beyond a reasonable doubt, and a verdict may not be based on guessing, speculation, or conjecture. *People v. Randell*, 2012 COA 108, ¶ 31.

As pertinent here, a person commits aggravated incest when he or she knowingly subjects his or her natural child, stepchild, or child by adoption to sexual penetration, sexual intrusion, or sexual contact when that child is under the age of twenty-one. § 18-6-302(a), C.R.S. 2013.

Defendant argues that the prosecution failed to prove beyond a reasonable doubt that W.H. was his stepchild at the time the acts were alleged to have occurred, that is, between June 1, 2005, and August 1, 2005.

The court defined "stepchild" for the jury as "a child by way of legal marriage to the child's biological parent." The mother testified that she and defendant were married in July 2005. She did not specify the particular date on which the couple were married. Defendant asserts that, because

- it is possible he may not have married the mother until July 31, 2005, and
- he may have committed the alleged acts against W.H. previous to that time,

the evidence was insufficient to support a conclusion beyond a reasonable doubt that W.H. was his stepson when the acts were committed.

In response, the prosecution asserts that the evidence was sufficient to support this conclusion, because the evidence supported a finding that defendant had been legally married from

before June 1, 2005, until after August 1, 2005, as a result of a common law marriage.

"A common law marriage does not require any kind of ceremony at all but only the agreement of the parties, followed by the mutual and open assumption of a marital relationship." *In re Marriage of Cargill*, 843 P.2d 1335, 1339 (Colo. 1993); *see People v. Lucero*, 747 P.2d 660, 663 (Colo. 1987) (a common law marriage requires "the mutual consent or agreement of the parties to be husband and wife, followed by a mutual and open assumption of a marital relationship").

Absent an express agreement to be married, courts consider two factors to be the most reliable in determining whether a mutual intent to be married has been established: (1) cohabitation and (2) a general reputation in the community that the parties hold themselves out as husband and wife. *Whitenhill v. Kaiser Permanente*, 940 P.2d 1129, 1132 (Colo. App. 1997); *see Lucero*, 747 P.2d at 664 n.5 ("sufficient evidence of cohabitation and reputation may give rise to a permissible inference of a common law marriage").

The People argue that the jury could have concluded that defendant and the mother were in a common law marriage "well before the charged time period," making W.H. defendant's stepchild, based on the following evidence:

- Defendant had been living together with the mother, her two children, and the couple's two children since 2003;
- Defendant often took care of the children when the mother was at work;
- Defendant was in a position of trust with respect to W.H.

The prosecution's evidence established that the couple began cohabitating in 2003. But it neither established nor provided grounds for reasonably inferring that either (1) the couple had an express agreement to be married or (2) they held themselves out in the community as husband and wife. *See Salzman v. Bachrach*, 996 P.2d 1263, 1269 n. 8 (Colo. 2000) ("Common-law marriage is more than mere cohabitation."); *Combs v. Tibbitts*, 148 P.3d 430, 434 (Colo. App. 2006) ("Mere cohabitation does not trigger any marital rights.").

Further, that defendant testified that he was "essentially" W.H.'s father, and that W.H. called him "daddy" and he called W.H.

"son," has no bearing on the status of defendant's relationship with *W.H.'s mother* prior to July 2005.

In our view, the jury could not have rationally found beyond a reasonable doubt from the evidence that defendant and W.H.'s mother were in a common law marriage prior to June 2005 or, for that matter, prior to July 31, 2005.

The prosecution has not argued that there was evidence presented from which the jury could have reasonably inferred that one or more of the alleged acts occurred after defendant married the mother in July 2005, and, thus, after the time W.H. became his stepson. Thus, we conclude that the evidence is insufficient to sustain defendant's convictions for aggravated incest.

The judgment of conviction for sexual assault on a child by one in a position of trust (pattern of abuse) is affirmed. The judgments of conviction on the three counts of aggravated incest are vacated and the case is remanded to the trial court for entry of judgments of acquittal on those counts.

JUDGE MILLER concurs.

JUDGE TERRY specially concurs.

JUDGE TERRY specially concurring.

I concur in the result reached and in the majority's reasoning. I write separately to express that the finding of no plain error in this case should not be interpreted as approval of the trial court's procedure of allowing jurors to pose follow-up questions orally in open court.

For the reasons expressed by the majority, I agree that there was no plain error in the trial court's employing that procedure here. Nevertheless, I believe that it was improper for the court to employ that procedure, and that the court should not continue to follow that procedure in the future.

Crim. P. 24(g) provides:

> (g) Juror Questions. *Jurors shall be allowed to submit written questions to the court for the court to ask of witnesses during trial,* in compliance with procedures established by the trial court. The trial court shall have the discretion to prohibit or limit questioning in a particular trial for reasons related to the severity of the charges, the presence of significant suppressed evidence or for other good cause.

(Emphasis added.) Although the rule does not specify a procedure to be followed where the written question posed by a juror is ambiguous or incomprehensible to the witness, the procedure used by the trial court here of allowing jurors to pose questions directly

of witnesses in open court presents problems that should be avoided. *See United States v. Richardson*, 233 F.3d 1285, 1290-91 (11th Cir. 2000) (jurors should only be allowed to submit questions in writing because such a procedure "eliminates the possibility that a witness will answer an improper question and prevents jurors from hearing prejudicial comments that may be imbedded in improper questions").

Rule 121. Local Rules - Statewide Practice Standards

Section 1-15

DETERMINATION OF MOTIONS

1. – 10. [NO CHANGE]

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).

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TO: SUPREME COURT CIVIL RULES COMMITTEE

FROM: SUBCOMMITTEE ON MOTIONS FOR RECONSIDERATION

DATE: MAY 19, 2014

RE: REPORT OF SUBCOMMITTEE ON MOTIONS FOR RECONSIDERATION

The subcommittee on motions for reconsideration (subcommittee)[1] submits the following report.

I. EXECUTIVE SUMMARY

The subcommittee believes that motions for reconsideration have come to be overused. Unfavorable consequences include waste of judicial resources, delay, and increased litigation costs. Although one member fears that a rule addressing motions for reconsideration may result in the filing of more such motions, all other members recommend the following rule:

C.R.C.P. 121, Section 1-15(11)

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

[1] The subcommittee consisted of F. Skillern and Judges Berger, Jones, Webb, and Zenisek.

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. In denying a motion to reconsider, the court may, without finding the motion to have been frivolous under paragraph 7 of this standard, require the moving party, the attorney who filed the motion, or both of them, to pay to the opposing party all reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

Addition to Comments

The court may deny the motion before receiving a responsive brief under paragraph 1(b) of this standard. 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).

II. BACKGROUND

The civil rule governing motions to amend a judgment or for new trial do not authorize a motion to reconsider.[2] Regardless, Colorado courts treat motions to reconsider either as a motion for post-trial relief under C.R.C.P. 59 or as relief from a judgment under C.R.C.P. 60(b). *See Zolman v. Pinnacol Assur.*, 261 P.3d 490,

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[2] Although the civil procedure rules allowing a district court to entertain a motion for reconsideration or a motion for relief from judgment do not extend to district court magistrates, *see, e.g.*, *In re M.B.-M.*, 252 P.3d 506, 510 (Colo. App. 2011) (collecting cases), C.R.M. 5(a) provides, "a magistrate has no authority to consider a petition for rehearing."

501-02 (Colo. App. 2011) ("A motion to reconsider a summary judgment order is properly characterized as a motion for new trial."); *Bailey v. Airgas-Intermountain, Inc.*, 250 P.3d 746, 752 (Colo. App. 2010) ("A motion to reconsider may be treated as a post-trial motion."); *Catlin v. Tormey Bewley Corp.*, 219 P.3d 407, 415 (Colo. App. 2009) ("Reconsideration motions, although discouraged, can be treated under C.R.C.P. 59 [rule governing motions for post-trial relief]."); *People v. Albaugh*, 949 P.2d 115, 117 (Colo. App. 1997) ("C.R.C.P. 60(b) permits a trial court to reconsider and, if necessary, to change a prior ruling when a significant new matter of fact or law arises that is extrinsic to it because it was not previously presented to the court."). The following cases are in accord[3]:

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[3] As has been explained:

> The relief available through a motion brought under C.R.C.P. 59 is broad. In one recent case, the court of appeals held that the trial court had abused its discretion in refusing to allow a plaintiff to amend his complaint to state a new claim, even though the request for leave to amend was first made in a motion to reconsider a prior grant of summary judgment brought under C.R.C.P. 59(a). *See Wisehart v. Zions Bancorporation*, 49 P.3d 1200, 1208 (Colo.App.2002). Stated broadly, "[a] motion under C.R.C.P. 59 allows for possible

- "Trial court did not abuse its discretion by declining to consider new theories asserted for first time in [a] motion" to reconsider summary judgment determination, which would be characterized as motion for new trial. *Bowlen v. Fed. Deposit Ins. Corp.*, 815 P.2d 1013, 1015 (Colo. App. 1991).

- "If trial court on reconsideration concludes that neither bias, prejudice, nor passion influenced jury verdict and that verdict was not manifestly excessive, jury verdict should be permitted to stand." *Burns v. McGraw-Hill Broadcasting Co., Inc.*, 659 P.2d 1351, 1356 (Colo. 1983).

- "Trial court properly exercised its discretion in granting wife's [second post trial] motion for reconsideration within time limitations of C.R.C.P. 59(j)," where the motion was directed to

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adjustment of the decision." *People v. Trupp*, 51 P.3d 985, 989 (Colo.2002). *See Bailey v. Airgas-Intermountain, Inc.*, 2010 WL 1913798 (Colo. App. 2010) (Where the court held the "assertion that plaintiffs cannot raise this issue on appeal because they did not present it in their motion for reconsideration is without merit. A motion to reconsider may be treated as a post-trial motion under C.R.C.P. 59"), citing *In re Petition of Taylor for Adoption of M.R.D.*, 134 P.3d 579, 582 (Colo. App. 2006) (where a motion is "not . . . a condition precedent to appeal" nor does it "limit the issues that may be raised on appeal."). *Cf. Fidelity National Title Company v. First American Title Insurance Company*, 2013 COA 80, 310 P.3d 272 (Colo. App. 2013) (holding that where a defense is raised for the first time in a C.R.C.P. 59(a)(4) post-trial motion, the defense is not preserved for appellate review).

Celeste Villegas & Debra Knapp, *Colorado Practice Series*, 12 Civil Procedure Forms & Commentary § 59.3 n.4 (2d ed.).

court's erroneous ruling that it did not have jurisdiction to rule on merits of wife's original post trial motion, *In re Marriage of Nixon*, 785 P.2d 151, 153 (Colo. App. 1989).

- "Regardless of whether the Sapps demonstrated good cause to grant the motion to reconsider, they did not argue in their motion to reconsider that they were harmed or prejudiced by the Office of Appeals' failure to consider the transcript." *Sapp v. El Paso Cnty. Dep't of Human Servs.*, 181 P.3d 1179, 1183 (Colo. App. 2008) (citing *Dave Peterson Elec., Inc. v. Beach Mountain Builders, Inc.,* 167 P.3d 175, 176 (Colo. App. 2007) (motion for reconsideration properly denied where party did not establish harm or prejudice)).

- "The force of C.R.C.P. 60(b) is to grant a trial court which has rendered judgment the ability to reconsider and, if appropriate, to change its ruling 'when [a] significant new matter of fact or law arises which is extrinsic to it because of not having been presented to the court.'" *State Farm Mut. Auto. Ins. Co. v. McMillan*, 925 P.2d 785, 789-90 (Colo. 1996) (quoting *E.B. Jones Constr. v. City & County of Denver,* 717 P.2d 1009, 1013 (Colo. App. 1986)).

Likewise, while no federal rule specifically addresses motions for reconsideration, they are often considered under either Fed. R. Civ. P. 59(e), Motion to Alter or Amend a Judgment, or Fed. R. Civ. P. 60(b). In *United States v. Emmons*, 107 F.3d 762, 764 (10th Cir. 1997), the court explained:

> The Federal Rules of Civil Procedure recognize no "motion for reconsideration." Instead, this court construes such a filing in one of two ways. If the motion is filed within ten days of the district court's entry of judgment, the motion is treated as a motion to alter or amend

> the judgment under Fed. R. Civ. P. 59(e). Alternatively, if the motion is filed more than ten days after the entry of judgment, it is considered a motion seeking relief from the judgment under Fed. R. Civ. P. 60(b). This distinction can be significant in determining the timeliness of a notice of appeal, for a Rule 59(e) motion tolls the 30-day period, while a Rule 60(b) motion does not.

See also Villanueva-Mendez v. Nieves Vazquez, 360 F. Supp. 2d 320 (D.P.R. 2005) ("The federal rules do not specifically provide for the filing of motions for reconsideration; notwithstanding, any motion seeking the reconsideration of a judgment or order is considered as a motion to alter or amend a judgment if it seeks to change the order or judgment issued."), *aff'd,* 440 F.3d 11 (1st Cir. 2006); Wright & Miller, 11 *Federal Practice & Procedure* § 2810.1 (3d ed.) ("Rule 59(e) does, however, include motions for reconsideration.").

Federal law addresses the grounds for granting motions to reconsider:

> Since specific grounds for a motion to amend or alter are not listed in the rule, the district court enjoys considerable discretion in granting or denying the motion. However, reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly. There are four basic grounds upon which a Rule 59(e) motion may be granted. First, the movant may demonstrate

> that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based. Of course, the corollary principle applies and the movant's failure to show any manifest error may result in the motion's denial. Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice. Serious misconduct of counsel may justify relief under this theory. Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law.

Wright & Miller, *supra* § 2810.1.

The following cases support this summary:

- "A district court has the discretion to grant a Rule 59(e) motion only in very narrow circumstances: '(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.' Moreover, Rule 59(e) motions may not be used to make arguments that could have been made before the judgment was entered." *Hill v. Braxton*, 277 F.3d 701, 708 (4th Cir. 2002) (quoting *Collison v. Int'l Chemical Workers Union*, 34 F.3d 233, 236 (4th Cir.1994)); *see also McDowell v. Calderon*, 197 F.3d 1253 (9th Cir. 1999).

- "A motion seeking reconsideration of a summary judgment is appropriately brought under Federal Rule of Civil Procedure 59(e). Such a motion, however, may not be used to relitigate old matters or to raise arguments or present evidence that could have been raised prior to entry of judgment. Motions under Rule 59(e) have been granted upon four basic grounds. First, the movant may demonstrate that reconsideration is necessary to correct manifest errors of law or fact upon which

the judgment was based. Second, the motion may be granted so that the moving party may present newly discovered previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice. Fourth, the motion may be justified by an intervening change in the controlling law." *Demasse v. ITT Corp.*, 915 F. Supp. 1040, 1048 (D. Ariz. 1995) (citations omitted), *aff'd in part, rev'd in part*, 185 F.3d 866 (9th Cir. 1999).

- "A district court has considerable discretion to grant or to deny a motion under Rule 59(e). A court's reconsideration of a prior order is an extraordinary remedy which should be used only sparingly. The court must strike the proper balance between the need for finality and the need to render a just decision on the basis of all the facts. Courts in this district hold that a moving party must satisfy at least one of the following criteria to prevail on a Rule 59(e) motion: (1) the motion is necessary to correct a manifest error of fact or law; (2) the movant presents newly discovered or previously unavailable evidence; (3) the motion is necessary in order to prevent manifest injustice; or (4) the motion is justified by an intervening change in the controlling law." *Flynn v. Terrebonne Parish Sch. Bd.*, 348 F. Supp. 2d 769, 771 (E.D. La. 2004) (citations and internal quotation marks omitted).

- "A party seeking reconsideration must show more than a disagreement with the Court's decision, and recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden. Such motions will only be granted where (1) an intervening change in the law has occurred, (2) new evidence not previously available has emerged, or (3) the need to correct a clear error of law or prevent a manifest injustice arises. Because reconsideration of a judgment after its entry is an extraordinary remedy, requests pursuant to these rules are to be granted sparingly, and only when dispositive factual matters or controlling decisions of law were brought to the court's attention, but not considered." *Gutierrez v. Ashcroft*, 289 F. Supp. 2d 555, 561 (D.N.J. 2003) (citations and internal

quotation marks omitted), *aff'd on other grounds sub nom.*, *Gutierrez v. Gonzales*, 125 Fed. App'x 406 (3d Cir. 2005).

- "The standard for granting a motion for reargument is strict in order to dissuade repetitive arguments on issues that have already been considered fully by the Court. Granting such a motion means that a court must find that it overlooked 'matters or controlling decisions' which, if it had considered such issues, 'would have mandated a different result." *Eisert v. Town of Hempstead*, 918 F. Supp. 601, 606 (E.D.N.Y. 1996) (citations and internal quotation marks omitted).

However, no Colorado case has used a clear four-factor test, as seen in federal courts.

III. DISCUSSION

To preserve symmetry with the federal rules, the subcommittee favors placement of a new rule in C.R.C.P. 121. Consistent with its objective of discouraging motions for reconsideration, the subcommittee's proposed rule describes such motions as "disfavored" and provides for an attorney fees award without a finding of frivolousness. The subcommittee considered softening the latter phrase with, "if in the interest of justice," but concluded that the cautionary message would then be too diluted.

The subcommittee also considered, but ultimately rejected as too restrictive on trial courts, including in the comment a definition of "a manifest error of fact or law." *See Flynn*, 348 F. Supp. 2d at

771. The subcommittee believes that allowing trial courts to deny such motions before receiving a responsive brief would both reduce delay and save the opposing party the expense of responding.

Respectfully submitted,

/s/

____

John R. Webb

Rule 411. Appeals

(a) [NO CHANGE]

(b) Preparation of Record on Appeal. Upon the deposit of the estimated record fee, the clerk of the court shall prepare and issue as soon as may be possible a record of the proceedings in the county court, including the summons, the complaint, proof of service, and the judgment. The record shall also include a transcription of such part of the actual evidence and other proceedings as the parties may designate or, in lieu of transcription, to which they may stipulate. If a stenographic record has been maintained or the parties agree to stipulate, the party appealing shall lodge with the clerk of the court the reporter's transcript of the designated evidence or proceedings, or a stipulation covering such items within 42 days after the filing of the notice of appeal. If the proceedings have been electronically recorded, the transcription of designated evidence and proceedings shall be prepared in the office of the clerk of the county court or under the supervision of the clerk, within 42 days after the filing of the notice of appeal. The clerk shall notify, in writing, the opposing parties of the completion of the record, and such parties shall have 14 days within which to file objections. If none are received, the record shall be certified forthwith by the clerk~~judge~~. If objections are made, the parties shall be called for hearing and the objections settled by the county judge as soon as possible, and the record then certified.

(c) through **(e) [NO CHANGE]**

Rule 411. Appeals

(a) [NO CHANGE]

(b) Preparation of Record on Appeal. Upon the deposit of the estimated record fee, the clerk of the court shall prepare and issue as soon as may be possible a record of the proceedings in the county court, including the summons, the complaint, proof of service, and the judgment. The record shall also include a transcription of such part of the actual evidence and other proceedings as the parties may designate or, in lieu of transcription, to which they may stipulate. If a stenographic record has been maintained or the parties agree to stipulate, the party appealing shall lodge with the clerk of the court the reporter's transcript of the designated evidence or proceedings, or a stipulation covering such items within 42 days after the filing of the notice of appeal. If the proceedings have been electronically recorded, the transcription of designated evidence and proceedings shall be prepared in the office of the clerk of the county court or under the supervision of the clerk, within 42 days after the filing of the notice of appeal. The clerk shall notify, in writing, the opposing parties of the completion of the record, and such parties shall have 14 days within which to file objections. If none are received, the record shall be certified forthwith by the clerk. If objections are made, the parties shall be called for hearing and the objections settled by the county judge as soon as possible, and the record then certified.

(c) through **(e)** **[NO CHANGE]**

Rule 1. [NO CHANGE]

Rule 2. Definitions

(a) As used in these rules, unless the context otherwise requires:

(1). "Documents" means any petition, or application, inventory, claim, accounting, notice or demand for notice, motion, and any other writing which is filed with the cCourt.

2. "Fiduciary" means any personal representative, guardian, conservator, trustee, and special administrator.

3(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.

4(3). "Colorado Probate Code" means the "Colorado Probate Code" sections §§15-10-101 et seq., C.R.S., as amended.

(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. Order of Business

For matters to be heard by the court, the order of business for the day shall be as follows:

1. Petitions and motions in probate matters, defaults, and other like ex parte matters, motions to show cause, and requests for other like rulings and orders.

2. Motions and other matters requiring supporting testimony, if they do not conflict with scheduled hearings or trials;

3. Hearings/trials requiring appearances of parties according to the calendar;

4. Non-appearance hearings according to the calendar;

5. The court shall establish a system for monitoring guardianships and conservatorships, including the filing and review of annual reports and plans and shall schedule such activities as resources permit.

~~Rule 4. Minute Orders~~

~~This Rule is intended to facilitate the work of the court and to provide the bar and the general public with prompt response to petitions and motions which require court orders. Any order, not required by the circumstances to contain recitals, findings of fact, or conclusions of law, may be evidenced by a concise memorandum or minute containing the caption of the proceeding, the date of the order, and a statement of the ultimate direction or conclusion of the court. Such order shall be signed by the judge forthwith and promptly delivered or mailed to the clerk of the court in the county in which the matter is pending. The judge may make the order and sign the memorandum or minute thereof at any place within the state and at any time.~~

Rule 5. Judicial Department Forms~~Preparations of Proceedings~~

~~In proceedings under the Code, t~~The Judicial Department Forms (JDF) ~~forms~~ approved by the Colorado Supreme Court should be used where applicable. Any ~~approved~~ form ~~produced by a word processor~~ should, insofar as possible, substantially follow the format and content of the approved form, not include language which otherwise would be stricken, ~~highlight in bold or capital letters or with an appropriate check mark~~emphasize all alternative clauses or choices which have been selected, ~~underline~~emphasize all filled-in blanks, and contain a statement ~~in a conspicuous place~~ that the pleading conforms in substance to the current version of the approved form, citing the ~~form's~~ JDF ~~form~~ number and effective date. ~~In all other proceedings, pleadings which are acceptable to the court may be used. Except as otherwise provided herein and in the Code, the form and presentation of pleadings, motions, and instructions shall be governed by the Colorado Rules of Civil Procedure. All other pleadings and papers to be filed in any matter shall be prepared and fastened as may be designated by rules adopted from time to time by the court.~~ Unless the context otherwise requires, terms used in JDFs shall be as defined as provided in Rule 2.

~~Rule 6. Forms of Claim~~

~~Any claim filed with the court shall be in the JDF form approved by the Supreme Court.~~

Rule 7. [NO CHANGE]

Rule 8. Process and Notice

The issuance, service, and proof of service of any process, notice, or order of court under the Colorado Probate C~~c~~ode shall be governed by the provisions of the Colorado Probate C~~c~~ode and these rules. When no provision of the Colorado Probate C~~c~~ode 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 8.1. [NO CHANGE]

Rule 8.2. [NO CHANGE]

Rule 8.3. Notice of Formal Proceedings Terminating Estates

The notice of hearing on a petition under §~~Section~~ 15-12-1001 or §~~Section~~ 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~~he~~ shall file ~~his~~ specific written objections at or before the hearing and shall furnish the personal representative with a copy thereof.

~~Rule 8.4. Information Concerning Appointment—Contents and Filing~~

~~The information concerning appointment required by Section 15-12-705, C.R.S., shall state:~~

~~1.The date of death of the decedent.~~

~~2. Whether the decedent died intestate or testate.~~

~~3. If the decedent died testate, the dates of the will and any codicils thereto, the date of admission to probate, and whether probate was formal or informal.~~

~~4. The name, address, and date of appointment of the personal representative.~~

~~5. Whether bond has been filed.~~

~~6. Whether the administration is supervised, and, if administration is unsupervised, that the court will consider ordering supervised administration if requested by an interested person.~~

~~7. That the information is being sent to persons who have or may have some interest in the estate being administered.~~

~~8. That papers relating to the estate, including the inventory of estate assets, are on file in the described court or, if not, may be obtained from the personal representative.~~

~~9. That interested persons are entitled to receive an accounting.~~

~~10.The surviving spouse, children under twenty-one years of age, and dependent children may be entitled to exempt property and a family allowance if a request for payment is made in the manner and within the time limits prescribed by Statutes (Section 15-11-401 et seq., C.R.S.).~~

~~11.The surviving spouse may have a right of election to take a portion of the augmented estate if a petition is filed within the time limits prescribed by Statute (Section 15-11-201 et seq., C.R.S.).~~

~~12. 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.~~

~~The personal representative shall promptly file with the court a copy of the information provided and a statement of when it was provided, to whom, and at what addresses.~~

~~Rule 8.5. Information Concerning Informal Probate – Contents and Filing~~

~~The information concerning informal probate required by Section 15-12-306, C.R.S., shall state the name and address of the moving party, the date of the death of the decedent, the date or dates of the will admitted to informal probate, the date of informal probate, that no personal representative has been appointed, and that interested persons wishing to object to the informal probate must act within the time and in the manner provided by the Colorado Probate Code.~~

~~The moving party shall promptly file with the court a copy of the information provided and a statement of when it was provided, to whom, and at what addresses, if mailed.~~

Rule 8.6. Trust Registration – Amendment, Release~~, Amendment~~ and Transfer

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.

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~~petition~~ and after notice to interested parties.

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~~court certified copies~~ 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.

~~A trustee shall file with the court of 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.~~

~~Rule 8.7. Demands for Notice~~

~~**(a) Mailing by the Clerk.** Upon receipt of a demand for notice with respect to a decedent's estate, the clerk shall mail a copy of the demand to the personal representative, if one has been appointed. The clerk shall not be required to mail a copy of the demand to the personal representative if a certificate of service is filed with the demand stating that a copy of the demand has been mailed or delivered to the personal representative.~~

~~**(b) Certificate of Service Requirement After Initial Filing.** After a demand for notice is filed with respect to a decedent's estate, all filings and orders to which the demand relates shall be accompanied by a certificate of service stating that a copy of the filing or order has been mailed or delivered to the person making the demand and to the personal representative. The clerk or registrar may thereafter take any authorized action, including accepting and acting upon an application for informal appointment of personal representative. Advance notice shall be required only for actions or hearings for which advance notice would otherwise be required.~~

Rule 8.8. Non-Appearance Hearings

(a) Unless otherwise required by statute, these rules or order of court, matters that are routine and are expected to be unopposed may be set for a Non-Appearance Hearing. Such Non-Appearance Hearings shall be conducted as follows:

(1) Attendance at the hearing is not required or expected.

(2) Any interested person wishing to object to the requested action set forth in the motion or petition attached to the notice must file a specific written objection with the ~~C~~court at or before the hearing, and shall furnish a copy of the objection to the person requesting the court order. ~~Form~~ JDF 722 in the Appendix to these Colorado Rules of Probate Procedure ~~Rules~~ may be used and shall be sufficient notice of objection.

(3) If no objection is filed, the ~~C~~court may rule ~~take action on the motion or petition~~ without further notice or hearing.

(4)

A. If any objection is filed, the objecting party shall, within 14 days after filing the objection, set the objection for an Appearance Hearing.

B. Upon receipt of a timely request to set a hearing from the objecting party, the court clerk shall note such request in the register of actions. The court, in its discretion, may allow the scheduling of a hearing or refer the matter for alternative dispute resolution prior to a hearing. Nothing in these rules shall prohibit a court from referring any matter, in its discretion, to alternative dispute resolution pursuant to 13-22-301, *et seq.*, C.R.S.

(5) 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.

(b) The notice of a Non-Appearance Hearing, together with copies of the motion or petition 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 in the Appendix to these Colorado Rules of Probate Procedure ~~Rules~~ may be used and shall be sufficient. The authorization of this Form shall not prevent use of another Form consistent with this rule.

~~Rule 9. Verification of Documents~~

~~Except as otherwise specifically provided in the Code, rule or as identified in the applicable JDF form each document filed with the court under the Code, including applications, petitions, and demands for notice, need not be verified.~~

Rule 10. 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 11. Correction of Clerical Errors

(a) ~~Minor c~~Clerical errors in documents filed with the court may be made the subject of a written request~~s~~ for correction only by filing 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.in which case the judge or registrar may make such correction on the documents specified. Significant errors in documents filed with the court shall be corrected by presentation of an amended or supplemental document, or as otherwise directed by the judge or registrar.

Rule 12. Fiduciaries—Change of Contact InformationAddress

Every fiduciary shall promptly notify the court of any change in the fiduciary's name,his address, e-mail address or telephone number by filing JDF 725.

Rule 13 Attorney's Entry of Appearance

An attorney desiring to enter his appearance in any proceeding, other than the attorney appearing on behalf of a party in the first instance, shall file a written entry of appearance or on oral request obtain an order recognizing his appearance. The attorney's name, address, registration number, and telephone number shall be in the written entry of appearance.

RULE 14. ATTORNEY'S WITHDRAWAL

(a) Before the court. An attorney desiring to withdraw from a matter before the court shall obtain an order authorizing his withdrawal after due notice to his client or the filing of the client's written consent. Notice of the order authorizing withdrawal shall be sent by the withdrawing attorney to all other counsel of record, persons demanding such notice by document of record, and such other persons as the court may direct.

(b) Before the registrar. An attorney desiring to withdraw from a matter before the registrar shall file his withdrawal after due notice to his client or the filing of the client's written consent. Notice of the withdrawal shall be sent by the withdrawing attorney to all other counsel of record and any person demanding such notice by document of record.

RULE 15. GUARDIANS AD LITEM

The court may appoint a guardian ad litem only in conformity with section 15-10-403(5), 15-14-115 or15-18-108(2)(a), C.R.S. For appointments pursuant to 15-10-403(5) and 15-14-115, C.R.S., the court must state on the record its reasons for the appointment. In cases of uncontested probate of wills, no guardian ad litem shall be appointed for a minor, incapacitated or protected person who takes as much or more under the will than by intestacy.

~~Rule 16. Guardians or Conservators — Settlement of Personal Injury Claims~~

~~Entire rule repealed effecvie November 16, 1995.~~

Rule 16. Court Approval of Settlement of Claims of Persons Under Disability

(a) This rule sets forth procedures by which a court considers requests for~~Where a guardian, conservator, or next friend seeks court~~ approval of the proposed settlement of ~~a ward's~~ claims on behalf ~~, such approval shall be sought by way~~ of a minor or an adult in need of protection pursuant to §15-14-401, et seq., C.R.S. ("respondent") ~~petition for approval of proposed settlement~~. ~~For purposes of this~~ In connection with a proceeding brought under this r~~R~~ule, the court shall:~~term "ward" includes a protected person, an incapacitated person, or a person under disability.~~

(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 ~~The~~ petition brought under this rule shall ~~request the approval of the proposed settlement as~~ be~~ing~~ in accordance with §15-14-108(3), C.R.S. ~~the ward's best interests and shall include the following information or an explanation of why the information is not applicable:~~

(c) An interested person seeking a court order approving the proposed settlement of a claim on behalf of a respondent shall petition for approval of any proposed settlement in accordance with the procedures set forth in this rule.

(d) The petition for approval of settlement shall include the following information:

(1) Facts.

A. The respondent's~~ward's~~ name and address;

B. The respondent's~~ward's~~ date of birth;

C. If the respondent is a minor, t~~T~~he name~~(s)~~ and contact information ~~address(es)~~ of ~~the ward's~~

~~parent(s)~~ each legal guardian. I~~i~~f the identity or contact information of any legal guardian ~~ward~~ is unknown, or if any parental rights have been terminated, the petition shall so state ~~a minor~~;

D. The name~~(s),~~ and contact information of the respondent's spouse, partner in a civil union, or if the respondent has none, an adult with whom ~~address(es) and description(s) of type of~~ the respondent has resided for more than six months within one year before the filing of the petition; ~~ward's custodian or court appointed fiduciary, if any; and~~

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~~E~~. The date and a brief description ~~of the nature~~ of the event or transaction giving rise to the claim.

(2) Claims and Liabilities~~y~~.

A. The contact information ~~name and address~~ of each party against whom the respondent ~~is or~~ may ~~be liable for the ward's~~ have a claim;

B. The basis for each of ~~for~~ the ~~ward's~~respondent's claims ~~of liability~~;

C. The defenses~~,~~ and/or counterclaims if any, to the respondent's~~ward's~~ claims; and

D. The name and contact information~~address~~ of each insurance company involved in the claim, the type of policy, the policy limits, and the identity of the ~~who was~~ insured~~under the policy, and its limits~~.

(3) Damages.

A. A description of the respondent's injuries~~The nature of the ward's claim~~;

B. The amount ~~nature~~ of time missed by the respondent from school or employment and a summary of lost income resulting from the respondent's injuries~~, if any, sustained by the ward~~;

C. A summary~~The amount~~ of ~~time, if~~ any damage to respondent's property~~, missed by the ward from school or employment~~;

D. A summary of any~~the~~ expenses~~, if any,~~ incurred for medical or other care provider services as a result of the respondent's~~ward's~~ injuries; and

E. The identification ~~A summary~~ of any person, organization, institution, or state or federal agency that paid ~~income from work lost by the ward, if~~ any~~,~~ of the respondent's expenses and ~~as~~ a summary ~~result~~ of expenses that have been or will be paid by each particular source. ~~the ward's injuries;~~

~~F. The nature of the damage, if any, to the ward's property;~~

~~G. A summary of the expenses, if any, incurred as a result of any property damage to the ward's property; and~~

~~H. The identification of the source of funds for payment of any of the ward's expenses and a summary of what expenses have been paid and will be paid by each particular source.~~

(4) Medical Status.

A. A description of respondent's current condition including but not limited to t~~T~~he nature and extent of any disability, disfigurement, or physical or psychological impairments ~~the ward's injuries~~ and any current treatments and/or therapies~~the ward's present condition~~; and

B. An explanation of respondent's prognosis and any anticipated treatments and/or therapies. ~~The nature, extent, and duration of the treatment required or anticipated as a result of the ward's injuries~~;

~~C. The prognosis of the ward's condition, including, when applicable, the nature and extent of any disability, disfigurement, or impairment; and~~

~~D. A written statement by the ward's physician or other health care provider shall be attached setting forth the information requested by A, B, and C above.~~

(5) Status of Claims.

A. For this claim and any other related claim ~~that is relevant to the event or transaction giving rise to the claim~~, the status of the claim and~~,~~ if any civil action~~(s)~~ has~~ve~~ been filed, the court, case number, and parties; and

B. For this claim and any other related claim, ~~that is relevant to the event or transaction giving rise to~~ identify the amount of the claim~~,~~ and contact information ~~the name and address~~ of any party having a subrogation right including ~~and~~ any ~~governmental~~ state or federal agency paying or planning to pay benefits to or for the ~~ward~~ 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 ~~address~~ contact information of any party/entity ~~the person(s)~~ making and receiving payment under the proposed settlement;

B. The proposed settlement amount, ~~of the settlement, terms of~~ 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 o~~I~~f any structured settlement, ~~in whole or in part, the type of arrangement (e.g., annuity or insurance policy), the name of the~~ annuity, ~~or~~ insurance policy~~company,~~ or trust instrument, including the terms, present value, discount rate, payment structure and the identity ~~rating~~ of the trustee ~~annuity~~ or entity administering such arrangements~~insurance company, and the present cash value and cost of the annuity or insurance~~;

D. ~~The amount of court costs, l~~Legal ~~expenses, and attorneys'~~ fees and costs being requested to be paid from ~~(attach a copy of attorney fee agreement and billings) incurred as a result of~~ the settlement proceeds~~transaction or event giving rise to the ward's claim~~; 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~~Attachments~~.

A. The petition shall list each ~~of the attachments to~~ exhibit filed with the petition.~~; and~~

B. ~~A copy of the proposed settlement agreement and proposed release~~ 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~~c~~) ~~**Notice.**~~ Notice of a~~the~~ hearing and a copy of the ~~on a~~ petition (except as otherwise ordered by the court in any specific case), ~~to settle a claim on behalf of persons under disability~~ shall be given in accordance with ~~C.R.S.~~ § 15-14-404~~5~~(1) and (2), C.R.S. ~~See also C.R.S. § 15-14-406~~ and C.R.P.P. 8.~~1.~~

(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 17. 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 ~~certified~~ copy of the court order obtained under ~~section~~§15-12-914, C.R.S.

RULE 18. Foreign Personal Representatives ~~and Conservatives and Conservators~~

~~(a) Estates of Decedents~~

(a~~1~~) 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 ~~Section~~§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)~~A.~~ The order appointing the domiciliary foreign personal representative, and

(2)~~B.~~ The letters or other documents evidencing or affecting the domiciliary foreign personal representative's authority to act.

(b~~2~~) 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 in form and content to~~ JDF 930.

Rule 18.1. Foreign Conservators

~~(b) Conservatorships~~

(a~~1~~) 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 ~~Section~~ §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)~~A.~~ The order appointing the foreign conservator,

(2)~~B.~~ The letters or other documents evidencing or affecting the foreign conservator's authority to act, and

(3)~~C.~~ Any bond of foreign conservator.

(b~~2~~) 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 in form and content to JDF 892.

Rule 19. [NO CHANGE]

Rule 20. ~~Security of~~ Files Under Seal

For good cause shown, the court may order all or any part of a file to be placed under seal ~~security, in which event the clerk of the court shall maintain it in an appropriate security file~~. Files kept under seal ~~security~~ may be examined only when approved and ~~by counsel of record unless otherwise~~ ordered by the court.

~~**Rule 21. Withdrawal of Documents and Exhibits**~~

~~Except as provided in Rule 22 of these rules for deposited wills, the documents and exhibits filed with the court shall not be withdrawn without order of the court. As a condition of withdrawal, the court may require a true copy of the withdrawn document to be retained in the court file.~~

Rule 22. Wills – Deposit for Safekeeping and Withdrawals

A will of a living person tendered to the court for safekeeping in accordance with ~~Section~~ §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 23. ~~Wills--Venue--~~Transfer of Lodged Wills~~to Other Jurisdiction~~

~~Upon a showing by petition that proper venue is in a county other than that of the court in which a will of a decedent is lodged, the court may order the will transferred to the proper district or probate court within this state, or to the proper court of probate without this state.~~ If a petition under §15-11-516, C.R.S. to transfer a will is filed and i~~I~~f 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 ~~action~~, but the petitioner shall pay ~~advance the cost~~ any other costs of ~~photocopying the will for the court file, and the cost of sending~~ transferring the original will ~~by certified mail, or its equivalent,~~ to the proper court.

~~Rule 24. Oral Agreements~~

~~No oral agreements of counsel of parties concerning the progress, management, or disposition of any matter pending in the court shall be enforced unless made in open court and approved by the court.~~

Rule 25. Jury Trial — Demand and Waiver

If a jury trial is permitted ~~authorized~~ by law, any jury demand therefor shall be filed with the court, and the appropriate fee paid, before the matter is first set for trial. Failure to make such a demand and/or pay fee shall constitute~~s~~ a waiver of trial by jury.

Rule 25.1. Informal Probate Separate — Writings

The existence of one or more separate written statements disposing of tangible personal property under the provisions of ~~Section~~ §15-11-513, C.R.S.~~,~~ shall not cause informal probate to be declined under the provisions of ~~Section~~ §15-12-304, C.R.S.

~~Rule 25.2. Proof of Will in Formal Testacy--Uncontested Case~~

~~If a petition in a formal testacy proceeding is unopposed and the conditions of Section 15-12-409, C.R.S., have been met, the court may order probate or intestacy on the basis of the pleadings. If the court requires additional proof of the matters necessary to support the order sought, it shall state on the record its reasons therefor.~~

Rule 26. ~~Fiduciaries—~~Appointment of Nonresident — Power of Attorney

~~The court or registrar may appoint as fiduciary~~ A~~a~~ny person, resident or nonresident of this state, who is qualified to act under the Colorado Probate C~~c~~ode 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 ~~his~~ 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 ~~estate, trust, or guardianship~~ 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~~, and such fiduciary shall promptly notify the court in writing of any change of such address. It shall be the duty of~~ the clerk ~~to~~ shall promptly forward ~~forthwith,~~ by ~~registered or certified mail,~~ any method that provides delivery confirmation, any notice or process served upon him or her ~~by reason thereof~~,to the fiduciary ~~named therein~~ at the address ~~mentioned in such power of attorney or subsequently furnished~~ last provided in writing to the clerk ~~in writing~~. The clerk shall ~~make and~~ file a certificate of service ~~that he has performed the acts required by this Rule and he shall include the dates of his compliance~~. Such s~~S~~ervice ~~on a nonresident fiduciary, under this Rule,~~ shall be deemed complete fourteen ~~ten~~ days after ~~the~~ mailing ~~thereof~~. The clerk may require the person issuing or serving such notice or process to furnish sufficient copies, ~~thereof to have available one copy for the fiduciary and one to be retained by the clerk;~~ and the person desiring service shall advance the costs and mailing expenses of the clerk.

Rule 27. [RESERVED] ~~Appointment of Special Administrator or Special or Temporary Conservator~~

~~Repealed effective November 16, 1995.~~

Rule 27.1. 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 ~~Section~~Title 15, Article 14, ~~15-14-401 et seq.,~~ C.R.S., 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 ~~physcal~~ 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 28. Inventory with Financial Plan – Conservatorships -- Date Due – Contents -- Oath or Affirmation

~~Unless the deadline for filing is extended in a written order for good cause shown, within 60 days after the Order Appointing Conservator is entered by the Court, each Conservator shall file with~~

~~the Court and serve on every interested person an Inventory with Financial Plan. Each Inventory with Financial Plan shall include a list and value of all assets in which the protected person has an interest and shall identify all projected income and expenses of the protected person. Inventories with Financial Plans prepared by Conservators shall include their oath or affirmation that it is complete and accurate so far as they are informed on the date of filing. In the event that the assets, their value, the income or the expenses change in any material way, an Amended~~ An i~~I~~nventory with Financial Plan shall~~must~~ be ~~promptly~~ filed with the c~~C~~ourt and served on all interested persons. Any Inventory with Financial Plan ~~and any~~ or Amended Inventory with Financial Plan (the "Plan") filed with the c~~C~~ourt shall be deemed to include a motion or p~~P~~etition for a~~A~~pproval 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~~thereof and may be acted on by the Court with or without the filing of a separate Petition requesting that the Court review and accept or approve the Inventory with Financial Plan~~.

Rule 29. Bond and Surety

~~(a) No bond shall be required of a fiduciary unless the statute or the court requires the filing of a secured bond. If a secured bond is required by statute, but the court waives surety or the registrar excuses bond, no bond shall be required.~~

~~(b)~~ A fiduciary shall file a~~A~~ny required bond ~~shall be filed,~~ or complete other arrangements for security ~~under the statute completed,~~ before letters are issued. Thereafter, the fiduciary shall increase the amount of bond or other security when the fiduciary receives ~~personal~~ property not previously covered by any bond or other security.

Rule 30. ~~Decedents' Estates --~~ 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 30.1. Conservatorship — Closing

~~Unless otherwise ordered by the Court, a Petition to Terminate Conservatorship and Schedule of Distribution (JDF 888) shall be accompanied by a final Conservator's Report (JDF 885).~~ Notice of the hearing on a petition for termination of conservatorship shall be given to t~~T~~he protected person ~~or minor,~~ if then living, and all other interested persons, as defined by law or by the c~~C~~ourt pursuant to § 15-10-201(27), C.R.S. if any~~, shall be given notice of the hearing on the petition, which~~ such hearing may be held pursuant to Rule 8.8.

Rule 31. Accountings and Reports

An fiduciary accounting or report prepared by a personal representative, conservator, trustee or other fiduciary shall contain sufficient information to put interested persons on notice as to all significant transactions affecting administration during the accounting period.

(a) All required accountings 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 significant transactions affecting administration during the accounting or report period. Accountings shall be typed or prepared by automated data processing. In any specific case, for good cause shown, Tthe cCourt may require the fiduciary to produce such vouchers or other supporting evidence of payment as the court may deem sufficient for any and all transactions.

(b) 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 31.1. Conservator's Report (Minors and Adults)

A Conservator's Report shall contain sufficient information to put the interested persons on notice as to all significant transactions affecting administration during the accounting/reporting period. Conservator's Reports that substantially conform to JDF 885 shall be considered acceptable as to both content and format for purposes of this Rule.

(a) A Conservator's Report filed shall show with reasonable detail the receipts and disbursements for the period covered in the report, shall list the assets remaining at the end of the period, and shall describe all other significant transactions affecting administration during the reporting period. In any specific case, for good cause shown, the court may require the fiduciary to produce such invoices, billing statements, or other supporting evidence as the Court requires.

(b) A Conservator shall keep records of the administration of the estate and make them available for examination on reasonable request of an interested person.

(c) If the Court appoints a suitable person pursuant to § 15-14-420(3), C.R.S. to investigate, review, and audit such accountings/reports, such costs may be the responsibility of the estate, or as ordered by the Court.

~~**(d)** Interested persons may file a pleading objecting to the appropriateness of disbursements, the compensation of fiduciaries, attorneys, and others and the distribution of estate assets.~~

~~Rule 31.2. Guardian's Report (Minors and Adults)~~

~~A Guardian's Report (JDF 834 or JDF 850) shall contain sufficient information to put the interested persons on notice as to all significant information regarding the welfare and care of the protected person during the reporting period.~~

~~Rule 32. Reports -- Multiple Minors or Beneficiaries~~

~~When the same person is conservator or guardian of two or more related minors he/she shall file a separate report for each minor or, with court approval, he/she may file a combined report which shows the interest of each minor in the receipts, disbursements, and other transactions reported therein and the amount of money or other property held for each. This Rule shall also apply to a trustee of a court-supervised trust for two or more beneficiaries unless the trust provides otherwise.~~

Rule 33. Objections to Accounting, Final Settlement, Distribution or Discharge -- Scope of Court Review in Absence of Objection

If any interested person desires to object to any accounting, ~~to~~ the final settlement or distribution of an estate, ~~or to~~ the discharge of a fiduciary, or ~~to~~ any other related matter, the interested person ~~he~~ shall file ~~his~~ specific written objections at or before the hearing thereon, and shall furnish all interested persons ~~the fiduciary~~ 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 8.8.

(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.

~~In formal proceedings to terminate decedents' estates, the court shall not inquire into the appropriateness of payments of claims against the estate or expenses of administration, provided notice has been given in accordance with Rule 8.3 and absent timely objection filed by an interested person. The court may review such matters as it determines necessary, on a case-by-case basis and for good cause shown.~~

~~Rule 33.1. Compensation of Personal Representatives and Attorneys~~

~~Personal representatives and attorneys representing an estate are entitled to reasonable compensation. In setting attorneys' fees, the time expended by personnel performing paralegal functions under the direction and supervision of the attorney may be considered as an item separate from and in addition to the time spent by the attorney. In setting other fees, the time expended by personnel performing paraprofessional functions may be considered as a separate item.~~

~~In the absence of unusual circumstances, the court may review such fees in decedents' estates only (1) upon petition or motion of an interested person or (2), in the case of formal proceedings terminating estates, if notice has not been given in accordance with Rule 8.3. If the court on its own motion in a decedent's estate orders a review of personal representatives' fees or attorneys' fees, such order shall state the unusual circumstances which make such a review advisable.~~

~~Rule 33.2. Informal Closings~~

~~In unsupervised administration proceedings, a personal representative may close an estate by verified statement. In any specific case, the court may prohibit such a closing only for good cause shown.~~

Rule 33.3. 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.

Note on Use: Note that Colorado Bar Association Real Estate Title Standard 11.1.7 requires a court order only in the narrow case of vesting title in a distributee free from the rights of all other persons interested in the estate to recover the property in case of any improper distribution. Such a court order is not required to vest merchantable title in a purchaser for value from or a lender to such a distributee nor is the order required to vest merchantable title in a purchaser for value from or a lender to a transferee from such distributee.

Rule 34. 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~~ and Rule 15 herein~~;

(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 23 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 ~~Section~~ §15-12-723, C.R.S.;

(15) To order an estate reopened for subsequent administration pursuant to ~~Section~~ §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 ~~fifteen~~ 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~~fifteen~~ -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~~fifteen~~ -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 35. Rules of Court

(a) Local rules. Courts may make rules for the conduct of probate proceedings ~~not in~~consistent with these rules. Copies of all such rules shall be submitted to the Colorado 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 36. [Reserved]~~Title and Citation~~

~~Repealed December 5, 1996, effective January 1, 1997.~~

Rule 37. 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 m~~M~~otion or *sua sponte*, the court may apply the Colorado 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 under~~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~~, Section~~ §1-12~~,~~ are applicable to proceedings under Title 15.

(d) Notwithstanding subsections (a) through (c) of this r~~R~~ule ~~37~~, 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 ~~Section~~§15-14-311, C.R.S.

Supreme Court of Colorado

2 EAST 14TH AVENUE
DENVER, CO 80203

ALLISON H. EID
JUSTICE

PHONE: (720) 625-5430
FAX: (720) 625-5435

Representative Beth McCann
Representative Angela Williams
Colorado House of Representatives
State Capitol
Denver, CO 80203

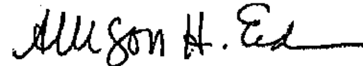
August 28, 2014

Dear Representative McCann and Williams,

Thank you so much for you August 18 letter regarding real parties in interest under CRCP 120. As the Supreme Court's liaison to the Civil Rules Committee, I am passing the letter along to the Committee Chair, Court of Appeals Judge Michael Berger. Judge Berger will be contacting you in the near future.

Thank you for bringing this issue to the Committee's attention.

Sincerely,



Allison H. Eid

Cc: Chief Justice Nancy Rice
Judge Michael Berger

COLORADO
HOUSE OF REPRESENTATIVES
STATE CAPITOL
DENVER
80203

August 18, 2014

Justice Allison Eid
Colorado Supreme Court
2 East 14th Ave.
Denver, Colorado 80206

Dear Justice Eid:

We are writing to you in your capacity as Chair of the Colorado Supreme Court Rules Committee. We met with Chief Justice Nancy Rice about the Colorado Rules of Civil Procedure (CRCP) Rule 120 procedure, and she suggested that we make a request that the Rules Committee consider amending CRCP 120 to make it clear that the issue of whether the party seeking to foreclose is the Real Party in Interest or that the terms of the loan have been modified may be raised and considered at a Rule 120 hearing.

Both of us represent many people who have faced foreclosures and have been very frustrated with the fact that many judges will not let them raise the issue of real party in interest despite the fact that case law is clear that this is an issue that should be allowed to be raised and determined at the Rule 120 hearing. Many judges conduct a very abbreviated hearing limited to the issue of default and whether the person qualifies under the Soldiers and Sailors Civil Relief Act of 1940.

In *Goodwin v. District Court*, 779 P.2d 837 (Colo.1989), Chief Justice Quinn considered this very issue. He framed the question presented in that case as: "whether a district court when ruling on a CRCP 120 motion for a court order authorizing the sale of encumbered real property in accordance with a power of sale contained in a deed of trust should consider whether the moving parties are the real parties in interest" *Id.* at 838. The district court had ruled in that case that

the real party in interest question could only be raised in a separate action. The Goodwins claimed that an assignment of a promissory note was invalid so the foreclosing party did not have a legitimate interest in the note or the Deed of Trust. The Court held that they should have been allowed to raise this defense at the CRCP 120 hearing. *Id* at 842. Under CRCP 17(a), every action must be prosecuted in the name of the Real Party in Interest. The Court in *Goodwin* concluded that implicit in Rule 120 is the requirement that a party seeking an order of sale in a foreclosure proceeding must have a valid interest in the property on which it is seeking to foreclose. Otherwise an order of sale might result in the sale of property in favor of a party who does not have any legitimate claim to the property. Once a debtor raises this issue, the burden shifts to the party seeking the order to prove he or she is the Real Party in Interest. The Court also noted that the availability of a collateral remedy should not deprive the debtor of the right to show parties seeking an order in a Rule 120 hearing were without authority. *Id.* at 843.

The Court concluded: "We thus conclude that the scope of inquiry in a Rule 120 proceeding encompasses an inquiry into whether the moving parties are the Real Parties in Interest by virtue of their right to enforce the power of sale contained in the instrument on which Rule 120 is based." *Id* at 843.

Justice Quinn noted that the original purpose of the Rule 120 proceeding was to protect military members from prejudice resulting from foreclosure while in the military, but he also noted that the scope of the rule had been expanded by case law to provide due process protections with respect to the taking and public sales of real property interests of a debtor under a deed of trust. *Id.* at 840. He cited the holding in *Princeville Corp. v. Brooks*, 533 P2d 916 (Colo. 1975) that Rule 120 is broad enough in scope to permit consideration of factors other than military service. The Court in *Princeville* recognized that a "growing awareness of due process consideration militated in favor of extending the rule to permit a district court to retain supervisory power over a foreclosure in order to align and protect the rights of all parties to the proceeding." *Id.* at 840

Prior to the *Goodwin* case, CRCP 120 was amended in 1976 to broaden its reach. In *Moreland v. Marwich Ltd.* 665 P.2d 613 (Colo. 1983), the Supreme Court reversed the Court of Appeals and noted that the purpose of Rule 120 was expanded from its original form in order to provide a debtor with "due process protections against summary foreclosure actions consistent with those protections against deprivations of property without a prior judicial hearing that have received recognition in a line of modern decisions of the United States Supreme Court." *Id* at 617. In that case, the District Court denied the Morelands

the opportunity in a Rule 120 hearing to offer evidence that the bank breached its oral agreement to convert a promissory note to an amortized loan thus modifying the original agreement. The Court noted that the constitutional requirements of due process extend to the taking of real property and ruled that the Morelands should have been allowed to challenge whether the moving parties had a valid interest in the note or deed of trust. *Id* at 617. As stated by the Court in *Moreland:*

> To ignore evidence that the written instruments have been modified and that the debtor is not in default under the current agreement between the parties would sacrifice the very protections against unwarranted summary foreclosures that CRCP 120 was expanded by construction and revisions to accord. *Id.* at 618.

Based on the ruling in the *Moreland* case, the issue of whether a loan agreement has been modified should be allowed to be raised in a Rule 120 hearing also. In *Goodwin,* the Court referenced *Moreland* and stated that its message is clear. "The due process protections contemplated by Rule 120 will be satisfied only when a court conducting a Rule 120 proceeding considers all relevant evidence in determining whether there is a reasonable probability of a default or other circumstances authorizing the exercise of the power of sale under the terms of the instrument described in the Rule 120 motion." *Goodwin* at 842.

> The Court's resolution of the Rule 120 motion, therefore, should necessarily encompass a consideration not only of the evidence offered by the creditor seeking the order of sale but also of any evidence offered by the debtor to controvert the moving party's evidence or to support a legitimate defense to the motion. A court's refusal to consider such properly offered evidence in resolving the issue of default adversely to the debtor is tantamount to the taking of property in a summary fashion without any hearing at all - a deprivation clearly violative of due process of law." *Id.* at 842.

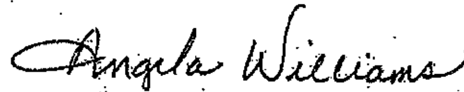
Despite this clear ruling by the Colorado Supreme Court, many Colorado judges are not allowing debtors to raise these issues in a Rule 120 proceeding and are not allowing evidence to be presented on critical and central issues to the proceeding. Many debtors appear *pro se* and are not aware of the *Goodwin* case and thus do not cite it to the court. Parties are denied due process in the critical determination of whether they will be allowed to remain in their homes. We have

heard from many borrowers who have found themselves denied due process in Rule 120 hearings.

Given this state of affairs, we urge the Rules Committee to amend Rule 120 to make clear that a court must consider, when properly raised by the debtor, whether the moving party is the Real Party in Interest and whether a debtor is actually in default under a modification of the loan. This will incorporate the case law and clarify for judges the proper conduct of a Rule 120 hearing.

We would be happy to meet with the Rules Committee and bring examples of this situation if that would be helpful. Please let us know the next steps to move this forward.

Yours truly,



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Rule 2.2. Summons — Content and Service

(a) Juvenile Delinquency Proceedings

1.~~(a)~~ The summons served in juvenile delinquency proceedings shall contain the notifications required by §19-2-514, C.R.S. A summons that substantially conforms to JDF _____ shall be deemed to comply with this rule. The summons and petition shall be served upon the juvenile in the manner provided in §19-2-514(8), C.R.S. ~~When the person to be served cannot be found after due diligence, service may be by a single publication pursuant to C.R.C.P. 4(g).~~

2.~~(b)~~ When the court has acquired jurisdiction over the parties as provided in the Children's Code or pursuant to the Colorado Rules of Juvenile ~~Civil~~ Procedure, subsequent pleadings and notice may be served ~~on such parties~~ by regular mail.

3. If a juvenile is issued a promise to appear pursuant to §19-2-507(5), C.R.S., the promise to appear shall contain the notifications contained in §19-2-507(5), C.R.S. A promise to appear that substantially conforms to JDF ____ shall be deemed to comply with this rule.

(b) Dependency and Neglect Proceedings

1. The summons served in dependency and neglect proceedings shall contain the notifications required by §19-3-503, C.R.S. The summons and petition shall be served upon respondents in the manner provided in §19-3-503(7) and (8), C.R.S.

2. When the person to be served cannot be found after due diligence, service may be by a single publication pursuant to C.R.C.P. 4(g).

3. When the court has acquired jurisdiction over the parties as provided in the Children's Code or pursuant to the Colorado Rules of Juvenile Procedure, subsequent pleadings and notice may be served by regular mail.

(c) Relinquishment Proceedings

1. The summons served in relinquishment proceedings shall contain the notifications required by §19-5-105(5), C.R.S.

2. The summons and petition shall be served upon the non-relinquishing parent as follows:

A. as ordered by the court; or

B. in the same manner as a summons in a civil action; or

C. by mailing it to the respondent('s/s') last known address, not less than 14 days prior to the time the respondent(s) is/are required to appear, by registered mail return receipt requested or

certified mail return receipt requested. Service by mail shall be complete upon return of the receipt signed by the respondent(s) or signed on behalf of the respondent(s) by one authorized by law.

3. When the person to be served cannot be found after due diligence, service may be by a single publication pursuant to C.R.C.P. 4(g).

4. When the court has acquired jurisdiction over the parties as provided in the Children's Code or pursuant to the Colorado Rules of Civil Procedure, subsequent pleadings and notice may be served by regular mail.

(d) Truancy Proceedings

1. The summons served in truancy proceedings shall comply with the provisions of C.R.C.P. 4(c). If the summons is combined with the notice required by §22-33-108(5)(c), C.R.S., it shall also comply with the provisions of that section. In any jurisdiction in which juvenile detention may be used as a sanction after a finding of a violation of a valid court order, the summons shall inform the juvenile served of his or her right to a hearing and to due process as guaranteed by the United States Constitution prior to the entry of a valid court order.

2. The summons and petition shall be served upon the respondent(s) as required pursuant to C.R.C.P. 4.

3. When the person to be served cannot be found after due diligence, service may be by a single publication pursuant to C.R.C.P. 4(g).

4. When the court has acquired jurisdiction over the parties as provided in the Children's Code or pursuant to the Colorado Rules of Civil Procedure, subsequent pleadings and notice may be served by regular mail.

(e) Uniform Parentage Act Proceedings

1. The petition and summons served in Uniform Parentage Act proceedings shall comply with all requirements of Title 19, Article 4 of the Colorado Revised Statues.

2. The petition and summons, filed by one party, shall be personally served upon all other parties in accordance with §19-4-105.5, 19-4-109(2), C.R.S., or the Colorado Rules of Civil Procedure.

3. When the person to be served cannot be found after due diligence, service may be by a single publication pursuant to C.R.C.P. 4(g). Affidavits in support of motions for service by publication shall include a detailed statement of the specific efforts made to locate an absent parent.

4. The summons issued upon commencement of a proceeding under Article 4 shall include the specified advisements and notice requirements of §19-4-105.5(5), C.R.S.

5. If the child support enforcement unit is initiating a proceeding under the Uniform Parentage Act, a delegate shall serve the petition and notice of financial responsibility in the manner identified in §26-13.5-104, C.R.S.

(f) Adoption Proceedings

1. In adoption proceedings where either parent's parental rights have not been terminated or relinquished, that parent must be personally served with a copy of the petition for adoption.

2. When the person to be served cannot be found after due diligence, service may be by a single publication pursuant to C.R.C.P. 4(g). Affidavits in support of motions for service by publication shall include a detailed statement of the specific efforts made to locate an absent parent.

3. If the motion for service through publication is granted, the court shall order service by one publication of the notice in a newspaper of general circulation in the county in which the hearing is to be held. The hearing shall not be held sooner than 35 days after service of the notice is complete.

4. If the subject child in the adoption proceeding is an enrolled member of a federally recognized American Indian Nation, the petition for adoption must be sent to the parent or Indian custodian of the Indian child and to the Indian child's tribe by registered mail, return receipt requested, pursuant to §19-1-126, C.R.S., and §19-5-208, C.R.S., and proof shall be filed with the Court. Postal receipts, or copies thereof, shall be attached to the petition for adoption when it is filed with the court or filed within10 days after the filing of the petition, as specified in §19-1-126(1)(c), C.R.S.

5. Service of petition and notice requirements do not apply to validation of a foreign adoption decree proceedings.

6. A petition for adult adoption shall be filed in accordance with §19-5-208, C.R.S. The petition and summons shall be served on the identified adult adoptee by the petitioner in accordance with §19-5-201, C.R.S.

(g) Support Proceedings under the Children's Code

1. Upon filing of the petition for support, the clerk of court, petitioner or Child Support Enforcement Unit shall issue a summons stating the hearing date and the substance of the petition. The petitioner may attach a copy of the petition in lieu of stating the substance of the petition in the summons.

2. Service of the summons shall be by personal service per C.R.C.P. 4(e). If the obligor is a nonresident of this state, the summons and petition may be served by sending the copies by certified mail with proof of actual receipt by the individual.

3. The hearing to establish support shall occur at least 10 days after service is completed, or any later date the court orders.

(h) Administrative Procedure for Establishing Child Support by the Child Support Enforcement Unit (CSEU)

1. The CSEU shall issue a Notice of Financial Responsibility to an obligor who owes child support.

2. The CSEU shall serve the Notice of Financial Responsibility on the obligor not less than 10 days prior to the date stated in the notice for the negotiation conference. Service can be accomplished in accordance with the Colorado Rules of Civil Procedure, by an employee appointed by the CSEU to serve process, or by certified mail, return receipt requested, signed by the obligor only. The receipt will be prima facie evidence of service.

3. If process is served through the administrative process, there will be no additional service necessary if the case is referred to court for further review.

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2. Service of the summons shall be by personal service per C.R.C.P. 4(e). If the obligor is a nonresident of this state, the summons and petition may be served by sending the copies by certified mail with proof of actual receipt by the individual.

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3. If process is served through the administrative process, there will be no additional service necessary if the case is referred to court for further review.

Rule 3. Advisement

(a) At the juvenile's first appearance after the detention hearing~~before the court~~, or at first appearance on a summons, the juvenile and parent, guardian, or other legal custodian shall be fully advised by the court, and the court shall make certain that they understand the following:

(1) The nature of the allegations contained in the petition;

(2) The juvenile's continuing right to counsel and if the juvenile, parent, guardian, or other legal custodian is indigent, that the juvenile may be assigned counsel, as provided by law;

(3) The juvenile need make no statement, and that any statement made may be used against the juvenile;

(4) The juvenile's ~~has the~~ right to a preliminary hearing, as ~~set forth in~~ provided by ~~Section~~§19-2-705, C.R.S.;

(5) The juvenile's right to a jury trial, as provided by ~~Section~~§19-2-107, C.R.S.;

(6) That any plea of guilty by the juvenile must be voluntary and not the result of undue influence or coercion on the part of anyone;

(7) The sentencing alternatives available to the court if the juvenile pleads guilty or is found guilty;

(8) The juvenile's right to bail as limited by ~~Sections~~§§19-2-508 and 19-2-509, C.R.S., and the amount of bail, if any, that has been set by the court; ~~and~~

(9) That the juvenile may be subject to transfer to the criminal division of the district court to be tried as an adult, as provided by ~~Section~~ §19-2-518, C.R.S.; and

(10) The availability, if any, of restorative justice practices, including victim-offender conferences as provided by §19-2-706(1)(a).

~~**(b)** If the juvenile pleads guilty to the allegations in the petition, the court shall not accept the plea without first determining that the juvenile is advised of all the matters set forth in (a) of this Rule and also determines that:~~

~~(1) The juvenile understands the nature of the delinquent act alleged, the elements of the offense to which the juvenile is pleading guilty, and the effect of the juvenile's plea;~~

~~(2) The plea of guilty is voluntary on the juvenile's part and is not the result of undue influence or coercion on the part of anyone;~~

~~(3) The juvenile understands and waives his or her right to trial, including the right to a jury trial, if authorized by statute, on all issues;~~

~~(4) The juvenile understands the possible sentencing alternatives available to the court;~~

~~(5) The juvenile understands that the court will not be bound by representations made to the juvenile by anyone concerning the sentence to be imposed; and~~

~~(6) There is a factual basis for the plea of guilty. If the plea is entered as a result of plea agreement, the court shall satisfy itself that the juvenile understands the basis for the plea agreement, and the juvenile may then waive the establishment of a factual basis for the particular charge to which the juvenile is pleading guilty.~~

~~(c) If the juvenile pleads not guilty to the allegations in the petition, the court shall set the matter for an adjudicatory trial.~~

Rule 3. Advisement

(a) At the juvenile's first appearance after the detention hearing, or at first appearance on a summons, the juvenile and parent, guardian, or other legal custodian shall be fully advised by the court, and the court shall make certain that they understand the following:

(1) The nature of the allegations contained in the petition;

(2) The juvenile's continuing right to counsel and if the juvenile, parent, guardian, or other legal custodian is indigent, that the juvenile may be assigned counsel, as provided by law;

(3) The juvenile need make no statement, and that any statement made may be used against the juvenile;

(4) The juvenile's right to a preliminary hearing, as provided by §19-2-705, C.R.S.;

(5) The juvenile's right to a jury trial, as provided by §19-2-107, C.R.S.;

(6) That any plea of guilty by the juvenile must be voluntary and not the result of undue influence or coercion on the part of anyone;

(7) The sentencing alternatives available to the court if the juvenile pleads guilty or is found guilty;

(8) The juvenile's right to bail as limited by §§19-2-508 and 19-2-509, C.R.S., and the amount of bail, if any, that has been set by the court;

(9) That the juvenile may be subject to transfer to the criminal division of the district court to be tried as an adult, as provided by §19-2-518, C.R.S.; and

(10) The availability, if any, of restorative justice practices, including victim-offender conferences as provided by §19-2-706(1)(a).

Rule 3.7. Detention

(a) Scope. For the purpose of this rule, "Detention" occurs when a juvenile is taken into custody by a law enforcement officer or a probation officer in connection with a proceeding arising under Article 2 of Title 19 of the Colorado Children's Code or the Interstate Compact for Juveniles.

(b~~a~~) Screening Team. The chief judge in each judicial district or the presiding judge of the Denver juvenile court shall designate one or more qualified ~~a~~ person~~(s)~~ or agencies to act as a screening team ~~as officer(s) of the court~~ with authority to determine whether a juvenile who has been taken into ~~temporary~~ custody should be released to a parent, guardian, or other legal custodian, or detained ~~admitted to a detention or shelter facility~~ pending ~~notification to the court and~~ a detention hearing. ~~**(b)** The court shall maintain control over the admission, length of stay, and release of all juveniles placed in shelter or detention, except for admission into detention pursuant to Section 19-2-508(3)(c), C.R.S.~~

(c) Notice. When a juvenile is detained, the screening team shall notify the court, the district attorney, and the local office of the state public defender. The screening team shall also inform the juvenile and the juvenile's parent, guardian, or other legal custodian of the right to a prompt hearing to determine whether the juvenile should be detained further. Notice to the juvenile and the juvenile's parent, guardian, or other legal custodian shall include the date, time, and location of the detention hearing, if known. If the date, time, and location of the detention hearing have not been determined, the screening team will instruct the juvenile's parent, guardian, or other legal custodian to contact the court on the next day which is not a Saturday, Sunday, or legal holiday, during regular business hours, to obtain that information. If a juvenile's parent, guardian, or other legal custodian cannot be located in the county, the screening team will provide notice to the person with whom the juvenile has been residing. Notice as required by this section (c) may be given verbally or in writing. Notice as required by this rule shall be given as soon as practicable and without unnecessary delay.

(d) Information Sharing. The law enforcement agency that took the juvenile into custody shall promptly provide to the court, the district attorney, and the local office of the state public defender the affidavit in support of probable cause for the arrest and the arrest report, if available. The screening team shall promptly provide to the court, the district attorney, the local office of the state public defender any screening material prepared pursuant to the juvenile's arrest. The information required to be disclosed by this rule shall be disseminated as soon as practicable before the detention hearing. If defense counsel does not continue to represent the juvenile after the detention hearing, defense counsel shall return any written materials to the court and destroy any materials received in electronic form immediately.

(e)Time. Upon receipt of the notification required by section (c) of this rule, the court shall schedule a detention hearing and notify the district attorney, the local office of the state public

defender, any defense attorney of record in the case, any guardian ad litem appointed by the court in the case, and the screening team of the date and time of the hearing. The court shall hold a detention hearing within forty-eight hours after the juvenile is taken into custody unless the juvenile was taken into custody for violating a valid court order on a status offense. The time in which the detention hearing must be held may be extended for a reasonable time by order of the court upon good cause shown. In computing any period of time prescribed by this section (e) Saturdays, Sundays, and legal holidays shall be excluded.

(f) Representation. A juvenile who is detained for committing a delinquent act shall be represented by counsel at a detention hearing as provided in C.R.J.P. 3.9. The court shall allow defense counsel sufficient time to consult with the juvenile before the detention hearing.

(g) Hearing. The purposes of a detention hearing are to determine if a juvenile should be detained further and to define conditions under which he or she may be released, if release is appropriate. Detention hearings shall be conducted in the manner prescribed by §19-2-508, C.R.S.

(h) Court Orders. At the conclusion of a detention hearing, the court shall enter orders prescribed by §19-2-508, C.R.S. The court may also issue temporary orders for legal custody of a juvenile as provided in §19-1-115, C.R.S. The court may further detain a juvenile only if it finds from information provided at the hearing that the juvenile is a danger to himself or herself or to the community.

(i) Court Oversight. The court shall maintain control over the admission, length of stay, and release of all juveniles placed in shelter or detention, subject to the limitations prescribed by §19-2-508(3)(c), C.R.S., and §19-2-509(1), C.R.S.

Rule 3.7. Detention

(a) Scope. For the purpose of this rule, "Detention" occurs when a juvenile is taken into custody by a law enforcement officer or a probation officer in connection with a proceeding arising under Article 2 of Title 19 of the Colorado Children's Code or the Interstate Compact for Juveniles.

(b) Screening Team. The chief judge in each judicial district or the presiding judge of the Denver juvenile court shall designate one or more qualified persons or agencies to act as a screening team with authority to determine whether a juvenile who has been taken into custody should be released to a parent, guardian, or other legal custodian, or detained pending a detention hearing.

(c) Notice. When a juvenile is detained, the screening team shall notify the court, the district attorney, and the local office of the state public defender. The screening team shall also inform the juvenile and the juvenile's parent, guardian, or other legal custodian of the right to a prompt hearing to determine whether the juvenile should be detained further. Notice to the juvenile and the juvenile's parent, guardian, or other legal custodian shall include the date, time, and location of the detention hearing, if known. If the date, time, and location of the detention hearing have not been determined, the screening team will instruct the juvenile's parent, guardian, or other legal custodian to contact the court on the next day which is not a Saturday, Sunday, or legal holiday, during regular business hours, to obtain that information. If a juvenile's parent, guardian, or other legal custodian cannot be located in the county, the screening team will provide notice to the person with whom the juvenile has been residing. Notice as required by this section (c) may be given verbally or in writing. Notice as required by this rule shall be given as soon as practicable and without unnecessary delay.

(d) Information Sharing. The law enforcement agency that took the juvenile into custody shall promptly provide to the court, the district attorney, and the local office of the state public defender the affidavit in support of probable cause for the arrest and the arrest report, if available. The screening team shall promptly provide to the court, the district attorney, the local office of the state public defender any screening material prepared pursuant to the juvenile's arrest. The information required to be disclosed by this rule shall be disseminated as soon as practicable before the detention hearing. If defense counsel does not continue to represent the juvenile after the detention hearing, defense counsel shall return any written materials to the court and destroy any materials received in electronic form immediately.

(e)Time. Upon receipt of the notification required by section (c) of this rule, the court shall schedule a detention hearing and notify the district attorney, the local office of the state public defender, any defense attorney of record in the case, any guardian ad litem appointed by the court in the case, and the screening team of the date and time of the hearing. The court shall hold a detention hearing within forty-eight hours after the juvenile is taken into custody unless the

juvenile was taken into custody for violating a valid court order on a status offense. The time in which the detention hearing must be held may be extended for a reasonable time by order of the court upon good cause shown. In computing any period of time prescribed by this section (e) Saturdays, Sundays, and legal holidays shall be excluded.

(f) Representation. A juvenile who is detained for committing a delinquent act shall be represented by counsel at a detention hearing as provided in C.R.J.P. 3.9. The court shall allow defense counsel sufficient time to consult with the juvenile before the detention hearing.

(g) Hearing. The purposes of a detention hearing are to determine if a juvenile should be detained further and to define conditions under which he or she may be released, if release is appropriate. Detention hearings shall be conducted in the manner prescribed by §19-2-508, C.R.S.

(h) Court Orders. At the conclusion of a detention hearing, the court shall enter orders prescribed by §19-2-508, C.R.S. The court may also issue temporary orders for legal custody of a juvenile as provided in §19-1-115, C.R.S. The court may further detain a juvenile only if it finds from information provided at the hearing that the juvenile is a danger to himself or herself or to the community.

(i) Court Oversight. The court shall maintain control over the admission, length of stay, and release of all juveniles placed in shelter or detention, subject to the limitations prescribed by §19-2-508(3)(c), C.R.S., and §19-2-509(1), C.R.S.

Rule 3.9 Counsel

(a) Appointment of Counsel.

(1) **Detention Hearing**. Any juvenile who is detained for committing a delinquent act shall be represented at the detention hearing by counsel. The court shall appoint the office of the State Public Defender or, in the case of a conflict, the office of Alternate Defense Counsel. Appointment of the Office of the State Public Defender or Alternate Defense Counsel shall continue to and counsel shall be available for the juvenile's first appearance.

(2) **First Appearance.** Unless the juvenile has made an early application for or retained his or her own counsel, or the juvenile has made a knowing, intelligent, and voluntary waiver, at the first appearance the court shall appoint the Office of the State Public Defender or, in the case of a conflict, Alternative Defense Counsel if:

A. The juvenile is indigent. Unless a preliminary determination of indigency has been made by the Office of the State Public Defender prior to the first appearance the court shall determine if the juvenile is indigent pursuant to section 21-1-103(3), C.R.S. and applicable Chief Justice Directives; or

B. The juvenile's parent, guardian or legal custodian, except the State or county Department of Human Services, refuses to retain counsel. The court shall advise any non-indigent parent, guardian or legal custodian that they will be ordered to reimburse the cost of the representation as provided by Chief Justice Directive; or

C. The court on its own motion determines that counsel is necessary to protect the interests of the juvenile; or

D. The juvenile is in custody of the State Department of Human Services or a County Department of Human Services.

(b) Waiver. Before accepting any waiver of counsel by the juvenile the court must place the following findings on the record, based on a dialog conducted with the juvenile:

(1) The juvenile is sufficiently mature to make a voluntary, knowing, and intelligent waiver;

(2) The juvenile understands the sentencing options that are available in the event of an adjudication or conviction of an offense which the juvenile is charged;

(3) The juvenile has not been coerced by another party, like his or her parent, guardian;

(4) The juvenile understands that the court will provide counsel if the juvenile's parent or guardian is unable or unwilling to retain counsel;

(5) The juvenile understands the possible consequences of an adjudication or conviction for the offense charged.

(c) Termination or Withdrawal of Counsel.

(1) The appointment of counsel shall continue until:

A. The Court's jurisdiction is terminated; or

B. The court finds that the juvenile or his or her parents, guardian, or legal custodian have sufficient means to retain counsel; or

C. The juvenile's parents, guardian, or legal custodian no longer refuse to retain counsel; or

D. The juvenile makes a knowing, voluntary and intelligent waiver of counsel.

(2) A lawyer may withdraw from a case only upon order of the court. In the discretion of the court, a hearing on a motion to withdraw may be waived with the consent of the prosecution and if a written substitution of counsel is filed which is signed by current counsel, future counsel and the juvenile. A request to withdraw shall be in writing or may be made orally in the discretion of the court and shall state the grounds for the request. A request to withdraw shall be made as soon as practicable upon the lawyer becoming aware of the grounds for withdrawal. Advance notice of a request to withdraw shall be given to the juvenile before any hearing, if practicable. Such notice to withdraw shall include:

A. That the attorney wishes to withdraw;

B. The grounds for withdrawal;

C. That the juvenile has the right to object to withdrawal;

D. That a hearing will be held and withdrawal will only be allowed if the court approves;

E. That the juvenile has the obligation to appear at all previously scheduled court dates;

F. That if the request to withdraw is granted, then the juvenile will have the obligation to hire other counsel, request the appointment of counsel by the court, waive counsel or elect to represent himself or herself.

(3) Upon setting of a hearing on a motion to withdraw, the lawyer shall make reasonable efforts to give the juvenile and his or her parent, guardian or legal custodian actual notice of the date, time and place of the hearing. No hearing shall be conducted without the presence of the juvenile unless the motion is made subsequent to the failure of the juvenile to appear in court, for reason(s) directly attributable to the juvenile, as scheduled. A hearing need not be held and notice need not be given to a juvenile when a motion to withdraw is filed after a juvenile has failed to appear for a scheduled court appearance and has not reappeared within six months.

Rule 3.9 Counsel

(a) Appointment of Counsel.

(1) **Detention Hearing**. Any juvenile who is detained for committing a delinquent act shall be represented at the detention hearing by counsel. The court shall appoint the office of the State Public Defender or, in the case of a conflict, the office of Alternate Defense Counsel. Appointment of the Office of the State Public Defender or Alternate Defense Counsel shall continue to and counsel shall be available for the juvenile's first appearance.

(2) **First Appearance**. Unless the juvenile has made an early application for or retained his or her own counsel, or the juvenile has made a knowing, intelligent, and voluntary waiver, at the first appearance the court shall appoint the Office of the State Public Defender or, in the case of a conflict, Alternative Defense Counsel if:

A. The juvenile is indigent. Unless a preliminary determination of indigency has been made by the Office of the State Public Defender prior to the first appearance the court shall determine if the juvenile is indigent pursuant to section 21-1-103(3), C.R.S. and applicable Chief Justice Directives; or

B. The juvenile's parent, guardian or legal custodian, except the State or county Department of Human Services, refuses to retain counsel. The court shall advise any non-indigent parent, guardian or legal custodian that they will be ordered to reimburse the cost of the representation as provided by Chief Justice Directive; or

C. The court on its own motion determines that counsel is necessary to protect the interests of the juvenile; or

D. The juvenile is in custody of the State Department of Human Services or a County Department of Human Services.

(b) Waiver. Before accepting any waiver of counsel by the juvenile the court must place the following findings on the record, based on a dialog conducted with the juvenile:

(1) The juvenile is sufficiently mature to make a voluntary, knowing, and intelligent waiver;

(2) The juvenile understands the sentencing options that are available in the event of an adjudication or conviction of an offense which the juvenile is charged;

(3) The juvenile has not been coerced by another party, like his or her parent, guardian;

(4) The juvenile understands that the court will provide counsel if the juvenile's parent or guardian is unable or unwilling to retain counsel;

(5) The juvenile understands the possible consequences of an adjudication or conviction for the offense charged.

(c) Termination or Withdrawal of Counsel.

(1) The appointment of counsel shall continue until:

A. The Court's jurisdiction is terminated; or

B. The court finds that the juvenile or his or her parents, guardian, or legal custodian have sufficient means to retain counsel; or

C. The juvenile's parents, guardian, or legal custodian no longer refuse to retain counsel; or

D. The juvenile makes a knowing, voluntary and intelligent waiver of counsel.

(2) A lawyer may withdraw from a case only upon order of the court. In the discretion of the court, a hearing on a motion to withdraw may be waived with the consent of the prosecution and if a written substitution of counsel is filed which is signed by current counsel, future counsel and the juvenile. A request to withdraw shall be in writing or may be made orally in the discretion of the court and shall state the grounds for the request. A request to withdraw shall be made as soon as practicable upon the lawyer becoming aware of the grounds for withdrawal. Advance notice of a request to withdraw shall be given to the juvenile before any hearing, if practicable. Such notice to withdraw shall include:

A. That the attorney wishes to withdraw;

B. The grounds for withdrawal;

C. That the juvenile has the right to object to withdrawal;

D. That a hearing will be held and withdrawal will only be allowed if the court approves;

E. That the juvenile has the obligation to appear at all previously scheduled court dates;

F. That if the request to withdraw is granted, then the juvenile will have the obligation to hire other counsel, request the appointment of counsel by the court, waive counsel or elect to represent himself or herself.

(3) Upon setting of a hearing on a motion to withdraw, the lawyer shall make reasonable efforts to give the juvenile and his or her parent, guardian or legal custodian actual notice of the date, time and place of the hearing. No hearing shall be conducted without the presence of the juvenile unless the motion is made subsequent to the failure of the juvenile to appear in court, for reason(s) directly attributable to the juvenile, as scheduled. A hearing need not be held and notice need not be given to a juvenile when a motion to withdraw is filed after a juvenile has failed to appear for a scheduled court appearance and has not reappeared within six months.

Juvenile Court, __________ County, Colorado [Court address]	☐ **COURT USE ONLY** ☐
THE PEOPLE OF THE STATE OF COLORADO IN THE INTEREST OF [CHILD'S NAME] , a Juvenile, and Concerning [name of parents, guardian, legal custodian], Respondent[s].	Case No: Div: Courtroom:
PROMISE TO APPEAR §19-2-507(5)	

I [child's name] promise to appear on [date], at [time] in [name and address of court] to be advised of my rights concerning [the charges or other reasons for which the juvenile was detained by law enforcement].

I acknowledge that, if I do not appear in court at the date and time stated above, a warrant may be issued for my arrest.

You are notified that a Petition has been filed in the Court in which it is represented to the Court that [child's name] is alleged to be a juvenile delinquent for the reasons set forth more fully in the Petition, a copy of which is attached and incorporated herein by reference.

The Court hereby informs the juvenile that pursuant to the provisions of C.R.S. 19-2-707, the juvenile is restrained, enjoined and prohibited from harassing, molesting, intimidating, retaliating against or tampering with any witness to or victim of the acts charged. A violation of this Mandatory Protection Order is punishable as contempt of Court.

Child's signature Date

By signing below, I acknowledge receipt of a copy of this promise to appear and will appear with [name of child] in court at the date and time stated above.

Parent or guardian's signature Date

Parent or guardian's signature Date

----------TO THE JUVENILE AND PARENT(S) OR OTHER RESPONDENT(S) ----------

You are to be present with the juvenile at all hearings in the case, as your right to care, custody, control, and guardianship of the juvenile will be determined.

You are notified that:

1. YOU HAVE THE RIGHT TO HAVE YOUR OWN LAWYER HELP YOU AT YOUR HEARING.

2. YOU MAY BE ELIGIBLE FOR A COURT-APPOINTED LAWYER AT NO CHARGE.

3. TO FIND OUT IF YOU ARE ELIGIBLE, YOU OR YOUR PARENT, GUARDIAN, OR LEGAL CUSTODIAN SHOULD CALL THE OFFICE OF THE STATE PUBLIC DEFENDER AT ______________, VISIT THE OFFICE OF THE STATE PUBLIC DEFENDER AT ______________, OR VISIT THE STATE PUBLIC DEFENDER'S WEBSITE AT ______________________.

4. YOU ARE MORE LIKELY TO HAVE A FREE LAWYER PRESENT AT YOUR HEARING IF YOU OR YOUR PARENT, GUARDIAN, OR LEGAL CUSTODIAN CALLS OR VISITS THE OFFICE OF THE STATE PUBLIC DEFENDER AT LEAST FIVE DAYS BEFORE YOUR HEARING.

------------------------------------ RETURN OF SERVICE ------------------------------------

I, __________________________, a peace officer in the State of Colorado, certify that I

served this promise to appear by ____________________ a copy of this promise to appear to

____

at the location of ____,

in the County of _____________, State of Colorado, on the _________ day of _______,

20___ @ ________.

Subscribed and sworn to before me this _______ day of __________________, 20_____.

_________________________ _________________________

Notary Public My Commission Expires

Juvenile Court, _________ County, Colorado [Court address]	☐ COURT USE ONLY ☐
THE PEOPLE OF THE STATE OF COLORADO IN THE INTEREST OF [CHILD'S NAME] , a Juvenile, and Concerning [name of parents, guardian, legal custodian], Respondent[s].	Case No: Div: Courtroom:
PROMISE TO APPEAR §19-2-507(5)	

I [child's name] promise to appear on [date], at [time] in [name and address of court] to be advised of my rights concerning [the charges or other reasons for which the juvenile was detained by law enforcement].

I acknowledge that, if I do not appear in court at the date and time stated above, a warrant may be issued for my arrest.

You are notified that a Petition has been filed in the Court in which it is represented to the Court that [child's name] is alleged to be a juvenile delinquent for the reasons set forth more fully in the Petition, a copy of which is attached and incorporated herein by reference.

The Court hereby informs the juvenile that pursuant to the provisions of C.R.S. 19-2-707, the juvenile is restrained, enjoined and prohibited from harassing, molesting, intimidating, retaliating against or tampering with any witness to or victim of the acts charged. A violation of this Mandatory Protection Order is punishable as contempt of Court.

__________________________ ____________________

Child's signature Date

By signing below, I acknowledge receipt of a copy of this promise to appear and will appear with [name of child] in court at the date and time stated above.

__________________________ ____________________

Parent or guardian's signature Date

__________________________ ____________________

Parent or guardian's signature Date

----------TO THE JUVENILE AND PARENT(S) OR OTHER RESPONDENT(S) ----------

You are to be present with the juvenile at all hearings in the case, as your right to care, custody, control, and guardianship of the juvenile will be determined.

You are notified that:

1. YOU HAVE THE RIGHT TO HAVE YOUR OWN LAWYER HELP YOU AT YOUR HEARING.

2. YOU MAY BE ELIGIBLE FOR A COURT-APPOINTED LAWYER AT NO CHARGE.

3. TO FIND OUT IF YOU ARE ELIGIBLE, YOU OR YOUR PARENT, GUARDIAN, OR LEGAL CUSTODIAN SHOULD CALL THE OFFICE OF THE STATE PUBLIC DEFENDER AT ____________, VISIT THE OFFICE OF THE STATE PUBLIC DEFENDER AT ____________, OR VISIT THE STATE PUBLIC DEFENDER'S WEBSITE AT ____________________.

4. YOU ARE MORE LIKELY TO HAVE A FREE LAWYER PRESENT AT YOUR HEARING IF YOU OR YOUR PARENT, GUARDIAN, OR LEGAL CUSTODIAN CALLS OR VISITS THE OFFICE OF THE STATE PUBLIC DEFENDER AT LEAST FIVE DAYS BEFORE YOUR HEARING.

------------------------------------ RETURN OF SERVICE ------------------------------------

I, __________________________, a peace officer in the State of Colorado, certify that I

served this promise to appear by __________________ a copy of this promise to appear to

____

at the location of ____,

in the County of ____________, State of Colorado, on the ________ day of _______,

20 ___ @ _______.

Subscribed and sworn to before me this _______ day of _________________, 20_____.

________________________ ________________________

Notary Public My Commission Expires

Juvenile Court, __________ County, Colorado [Court address]	☐ **COURT USE ONLY** ☐
THE PEOPLE OF THE STATE OF COLORADO IN THE INTEREST OF [CHILD'S NAME] , a Juvenile and concerning [name of parents, guardian, legal custodian], Respondents.	Case No: Div: Courtroom:

SUMMONS TO APPEAR

TO THE JUVENILE, PARENT OR OTHER RESPONDENT(S) NAMED ABOVE:

You are notified that a Petition has been filed in the Court in which it is represented to the Court that [child's name] is alleged to be a juvenile delinquent for the reasons set forth more fully in the Petition, a copy of which is attached and incorporated herein by reference.

The Court hereby informs the juvenile that pursuant to the provisions of C.R.S. 19-2-707, the juvenile is restrained, enjoined and prohibited from harassing, molesting, intimidating, retaliating against or tampering with any witness to or victim of the acts charged. A violation of this Mandatory Protection Order is punishable as contempt of Court.

You are further notified that the Court has set said Petition for first appearance and advisement of rights on [date], at [time] in [name and address of court]. You are hereby notified to appear before this Court with said Juvenile at that time. Failure to appear as scheduled may result in a warrant being issued by the Court for the arrest of the Juvenile or Respondent.

You are further notified that if either of the child's parents do not appear in court at the date and time listed above, you should be prepared to provide the court and counsel with whatever contact information you possess concerning the absent parent(s).

WITNESS my hand and seal of said Court this __________ day of __________.

____
Deputy Clerk
Clerk of the District Court

---------TO THE JUVENILE AND PARENT(S) OR OTHER RESPONDENT(S) ----------

You are to be present with the juvenile at all hearings of the case, as your right to care, custody, control and guardianship of the juvenile will be determined.

You are notified that:

1. YOU HAVE THE RIGHT TO HAVE YOUR OWN LAWYER HELP YOU AT YOUR HEARING.

2. YOU MAY BE ELIGIBLE FOR A FREE COURT APPOINTED LAWYER.

3. TO FIND OUT IF YOU ARE ELIGIBLE, YOU OR YOUR PARENT, GUARDIAN OR LEGAL CUSTODIAN SHOULD CALL THE OFFICE OF THE STATE PUBLIC DEFENDER AT ______________, VISIT THE OFFICE OF THE STATE PUBLIC DEFENDER AT ________________, OR VISIT THE STATE PUBLIC DEFENDER'S WEBSITE AT ______________.

4. YOU ARE MORE LIKELY TO HAVE A FREE COURT APPOINTED LAWYER PRESENT AT YOUR HEARING IF YOU OR YOUR PARENT, GUARDIAN OR LEGAL CUSTODIAN CALLS OR VISITS THE OFFICE OF THE STATE PUBLIC DEFENDER AT LEAST FIVE DAYS BEFORE YOUR HEARING.

------------------------------- RETURN OF SERVICE ---

I, ____________________________, a peace officer in the State of Colorado, certify that I

served this summons by ____________________ a copy of this summons to ___________

at the location of ____,

in the County of _____________, State of Colorado, on the _________ day of _______,

20___ @ ________.

Subscribed and sworn to before me this _______ day of _______________, 20___.

_______________ ________________________

Notary Public My Commission Expires

Juvenile Court, _________ County, Colorado [Court address]	☐ COURT USE ONLY ☐
THE PEOPLE OF THE STATE OF COLORADO IN THE INTEREST OF [CHILD'S NAME] , a Juvenile and concerning [name of parents, guardian, legal custodian], Respondents.	Case No: Div: Courtroom:
SUMMONS TO APPEAR	

TO THE JUVENILE, PARENT OR OTHER RESPONDENT(S) NAMED ABOVE:

You are notified that a Petition has been filed in the Court in which it is represented to the Court that [child's name] is alleged to be a juvenile delinquent for the reasons set forth more fully in the Petition, a copy of which is attached and incorporated herein by reference.

The Court hereby informs the juvenile that pursuant to the provisions of C.R.S. 19-2-707, the juvenile is restrained, enjoined and prohibited from harassing, molesting, intimidating, retaliating against or tampering with any witness to or victim of the acts charged. A violation of this Mandatory Protection Order is punishable as contempt of Court.

You are further notified that the Court has set said Petition for first appearance and advisement of rights on [date], at [time] in [name and address of court]. You are hereby notified to appear before this Court with said Juvenile at that time. Failure to appear as scheduled may result in a warrant being issued by the Court for the arrest of the Juvenile or Respondent.

You are further notified that if either of the child's parents do not appear in court at the date and time listed above, you should be prepared to provide the court and counsel with whatever contact information you possess concerning the absent parent(s).

WITNESS my hand and seal of said Court this _________ day of _________ .

____

Deputy Clerk
Clerk of the District Court

---------TO THE JUVENILE AND PARENT(S) OR OTHER RESPONDENT(S) ----------
You are to be present with the juvenile at all hearings of the case, as your right to care, custody, control and guardianship of the juvenile will be determined.

You are notified that:

1. YOU HAVE THE RIGHT TO HAVE YOUR OWN LAWYER HELP YOU AT YOUR HEARING.

2. YOU MAY BE ELIGIBLE FOR A FREE COURT APPOINTED LAWYER.

3. TO FIND OUT IF YOU ARE ELIGIBLE, YOU OR YOUR PARENT, GUARDIAN OR LEGAL CUSTODIAN SHOULD CALL THE OFFICE OF THE STATE PUBLIC DEFENDER AT ____________, VISIT THE OFFICE OF THE STATE PUBLIC DEFENDER AT _____________, OR VISIT THE STATE PUBLIC DEFENDER'S WEBSITE AT ____________.

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------------------------------- RETURN OF SERVICE ---

I, ____________________________, a peace officer in the State of Colorado, certify that I

served this summons by __________________ a copy of this summons to __________

at the location of ____,

in the County of ____________, State of Colorado, on the _________ day of _______,

20 ___ @ ________.

Subscribed and sworn to before me this _______ day of _______________, 20___.

________________ ________________________

Notary Public My Commission Expires

District Court

EIGHTH JUDICIAL DISTRICT
201 LA PORTE AVENUE SUITE 100
FORT COLLINS CO 80521-2761

Stephen J. Schapanski
Chief Judge
Courtroom 3A

(970) 494-3602
Fax: (970) 494-3699
stephen.schapanski@judicial.state.co.us

September 4, 2014

The Honorable Michael Berger

Colorado Court of Appeals

2 East 14th Avenue

Denver, Co 80203

RE: Proposed Amendments to C.R.C.P. 16.2 (Form 35.1)

Dear Judge Berger:

The Family Issues Standing Committee recommends amending C.R.C.P. 16.2, Form 35.1 Mandatory Disclosures, as set forth in the attached proposals.

The Family Issues Standing Committee under the direction of the Supreme Court was charged with reviewing C.R.C.P. 16.2 to ensure that the rule was working efficiently for Colorado litigants. A Sub-Committee was formed to review the rule. The Sub-Committee collected feedback and reviewed two studies on C.R.C.P. 16.2 and its application to post decree matters. The first study was written by a former Magistrate from the 17th J.D. Simon Mole, J.D. entitled, "C.R.C.P. Rule 16.2 Etc.: Is it Working? And what would that Look Like Anyway?" The second study, "Family Law in Focus: A Retrospective Study of Colorado's Early Experiments with Proactive Case Processing" commission by the Institute for the Advancement of the American Legal System and written by John Greacen and Pam Gagel, J.D. was reviewed. The results of the studies and feedback led the Sub-Committee to the conclusion that the wide variety of post-decree matters (modifications of child support, maintenance, parenting time, decision-making) makes standardized, "one-size-fits all" post-decree disclosure rules problematic.

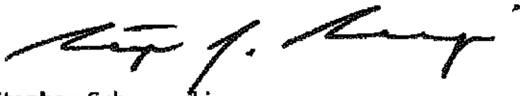
The Sub-Committee drafted changes to the mandatory disclosure form in response to the findings of the studies and general feedback given to the Committee by members in the legal community dealing with domestic relations. These changes aim to eliminate the need to exchange unnecessary financial disclosures for items that are not applicable or not at issue in post decree legal matters. The present form requires parties to exchange financial statements and documents for the last three years, even if

the decree entered within the last three years and that information has previously been exchanged. In addition, exchange of child-related expenses are required in the present form, even if the pending motion is for modification of parenting time and the parties are not in dispute about child support. Duplicative or unnecessary mandatory disclosures can add to the stress, cost and timeliness of a post decree motions. These new changes will streamline financial disclosures for parties thus saving time and money for the litigants and ensuring that the courts are not burdened by irrelevant information.

The proposed amendments to Form 35.1 were vetted through the legal community including Domestic Judges, Family Court Facilitators, Self-Represented Litigant Coordinators, The Colorado Bar Association (Family Law Section), American Academy of Matrimonial Lawyers, and a listserv of family law attorneys. The Sub-Committee solicited feedback by providing a copy of the proposed changes along with a short survey for participants to provide their feedback on the modifications. The Sub-Committee then incorporated several comments into the amended Form. The feedback was overwhelmingly positive towards the proposed amendments.

The Committee believes there is no need for a hearing, advance publication or invitation to public comment and that if the proposal is adopted, the amended Form 35.1 can become effective immediately. On behalf of the Family Issues Standing Committee, we kindly request that this item be added to the September 26th Civil Rules Committee agenda if possible and are available to answer any questions or assist in any way the Court may require.

Sincerely,



Stephen Schapanski

Chief Judge, 8th J.D., Chair of Family Issues Standing Committee

Enclosures:

- Copy of C.R.C.P. 16.2 (Form 35.1) in present form
- Strike-and-add copy of proposed amendments to C.R.C.P. 16.2 (Form 35.1)
- Clean copy of proposed amendments to C.R.C.P. 16.2 (Form 35.1)

Present Form

FORM 35.1 – Mandatory Disclosure
[Reference to 16.2(e)(2). These are not to be filed with the court, except as may be ordered pursuant to C.R.C.P. 16.2]

Mandatory Disclosures. (Complete and accurate copies may replace originals. Children refers to minor children of both parties.)

(a) Financial Affidavit. Each party shall provide a complete and signed Financial Affidavit in the Supreme Court approved form. See Appendix to Chapters 1 to 17A, Form 35.2, C.R.C.P.

(b) Income Tax Returns (Most Recent 3 Years). Provide the personal and business federal income tax returns for the three years before filing of the petition or post decree motion. The business returns shall be for any business for which a party has an interest entitling the party to a copy of such returns. Provide all schedules and attachments including W-2's, 1099's and K-1. If a return is not completed at the time of disclosure, provide the documents necessary to prepare the return including W-2's, 1099's and K-1's, copies of extension requests and estimated tax payments.

(c) Personal Financial Statements (Last 3 Years). Provide all personal financial statements, statements of assets or liabilities, and credit and loan applications prepared during the last three years.

(d) Business Financial Statements (Last 3 Years). For every business for which a party has access to financial statements, provide the last three fiscal years' financial statements, all year-to-date financial statements, and the same periodic financial statements for the prior year.

(e) Real Estate Documents. Provide the title documents and all documents stating value of all real property in which a party has a personal or business interest. This section shall not apply to post decree motions unless so ordered by the court.

(f) Personal Debt. Provide all documents creating debt, and the most recent debt statements showing the balance and payment terms.

(g) Investments. Provide most recent documents identifying each investment, and stating the current value.

(h) Employment benefits. Provide most recent documents identifying each employment benefit, and stating the current value.

(i) Retirement Plans. Provide most recent documents identifying each retirement plan, and stating the current value, and all Plan Summary Descriptions.

(j) Bank/Financial Institution Accounts. Provide most recent documents identifying each account at banks and other financial institutions, and stating the current value.

(k) Income Documentation. For each income source in the current and prior calendar year, including income from employment, investment, government programs, gifts, trust distributions, prizes, and income from every other source, provide pay stubs, a current income statement and the final

income statement for the prior year. Each self-employed party shall provide a sworn statement of gross income, business expenses necessary to produce income, and net income for the three months before filing of the petition or post decree motion.

(l) Employment and Education-Related Child Care Documentation. Provide documents that show average monthly employment-related child care expense including child care expense related to parents' education and job search.

(m) Insurance Documentation. Provide life, health and property insurance policies and current documents that show beneficiaries, coverage, cost including the portion payable to provide health insurance for children, and payment schedule.

(n) Extraordinary Children's Expense Documentation. Provide documents that show average monthly expense for all recurring extraordinary children's expenses.

Strike and Add Form

FORM 35.1 – Mandatory Disclosure
[Reference to 16.2(e)(2). These are not to be filed with the court, except as may be ordered pursuant to C.R.C.P. 16.2]

Mandatory Disclosures. (Complete and accurate copies may replace originals. Children refers to minor children of both parties.)

(a) ~~Financial Affidavit.~~ Sworn Financial Statement. Each party shall provide a complete and signed Financial Affidavit in the Supreme Court approved form. See Appendix to Chapters 1 to 17A, Form 35.2, C.R.C.P.

(b) Income Tax Returns (Most Recent 3 Years). Provide the personal and business federal income tax returns for the three years before filing of the petition or post decree motion. The business returns shall be for any business for which a party has an interest entitling the party to a copy of such returns. Provide all schedules and attachments including W-2's, 1099's and K-1. If a return is not completed at the time of disclosure, provide the documents necessary to prepare the return including W-2's, 1099's and K-1's, copies of extension requests and estimated tax payments. If a decree has entered within the last three years, only those returns filed since entry of the decree need to be provided.

(c) Personal Financial Statements (Last 3 Years). Provide all personal financial statements, statements of assets or liabilities, and credit and loan applications prepared during the last three years. If a decree has entered within the last three years, only those statements/applications prepared since entry of the decree need to be provided.

(d) Business Financial Statements (Last 3 Years). For every business for which a party has access to financial statements, provide the last three fiscal years' financial statements, all year-to-date financial statements, and the same periodic financial statements for the prior year. If a decree has entered within the last three years, only those statements/applications prepared since entry of the decree need to be provided.

(e) Real Estate Documents. Provide the title documents and all documents stating value of all real property in which a party has a personal or business interest. This section shall not apply to post decree motions unless so ordered by the court.

(f) Personal Debt. Provide all documents creating debt, and the most recent debt statements showing the balance and payment terms. This section shall not apply to post decree motions unless so ordered by the Court.

(g) Investments. Provide most recent documents identifying each investment, and stating the current value.

(h) Employment benefits. Provide most recent documents identifying each employment benefit, and stating the current value.

(i) Retirement Plans. Provide most recent documents identifying each retirement plan, and stating the current value, and all Plan Summary Descriptions. This section shall not apply to post decree motions unless so ordered by the Court.

(j) Bank/Financial Institution Accounts. Provide most recent documents identifying each account at banks and other financial institutions, and stating the current value.

(k) Income Documentation. For each income source in the current and prior calendar year, including income from employment, investment, government programs, gifts, trust distributions, prizes, and income from every other source, provide pay stubs, a current income statement and the final income statement for the prior year. Each self-employed party shall provide a sworn statement of gross income, business expenses necessary to produce income, and net income for the three months before filing of the petition or post decree motion.

(l) Employment and Education-Related Child Care Documentation. Provide documents that show average monthly employment-related child care expense including child care expense related to parents' education and job search. This section shall apply on if child support is an issue.

(m) Insurance Documentation. Provide life, health and property insurance policies and current documents that show beneficiaries, coverage, cost including the portion payable to provide health insurance for children, and payment schedule. This section shall not apply to post decree motions unless so ordered by the Court except in those cases in which child support is an issue in which case policy and cost information regarding the child(ren) shall be provided.

(n) Extraordinary Children's Expense Documentation. Provide documents that show average monthly expense for all recurring extraordinary children's expenses. This section shall apply only if child support is an issue.

(o) The above sections shall not apply to post decree motions if issues of decision-making and parenting time are the only issues unless so ordered by the Court.

Clean Copy

FORM 35.1 - Mandatory Disclosure

[Reference to 16.2(e)(2). These are not to be filed with the court, except as may be ordered pursuant to C.R.C.P. 16.2]

Mandatory Disclosures. (Complete and accurate copies may replace originals. Child(ren) refers to minor child(ren) of both parties.)

(a) Sworn Financial Statement. Each party shall provide a complete and signed Sworn Financial Statement in the Supreme Court approved form (Form 35.2).

(b) Income Tax Returns (Most Recent 3 Years). Provide the personal and business federal income tax returns for the three years before filing of the petition or post decree motion. The business returns shall be for any business for which a party has an interest entitling the party to a copy of such returns. Provide all schedules and attachments including W-2's, 1099's and K-1. If a return is not completed at the time of the disclosure, provide the documents necessary to prepare the return including W-2's, 1099's and K-1's, copies of extension requests and estimated tax payments. If a decree has entered within the last three years, only those returns filed since entry of the decree need be provided.

(c) Personal Financial Statements (Last 3 Years). Provide all personal financial statements, statements of assets or liabilities, and credit and loan applications prepared during the last three years. If a decree has entered within the last three years, only those statements/applications prepared since entry of the decree need be provided.

(d) Business Financial Statements (Last 3 Years). For every business for which a party has access to financial statements, provide the last three fiscal years' financial statements, all year-to-date financial statements, and the same periodic financial statements for the prior year. If a decree has entered within the last three years, only those statements prepared since entry of the decree need be provided.

(e) Real Estate Documents. Provide the title documents and all documents stating value of all real property in which a party has a personal or business interest. This section shall not apply to post decree motions unless so ordered by the Court.

(f) Personal Debt. Provide all documents creating debt, and the most recent debt statements showing the balance and payment terms. This section shall not apply to post decree motions unless so ordered by the Court.

(g) Investments. Provide most recent documents identifying each investment, and stating the current value.

(h) Employment benefits. Provide most recent documents identifying each employment benefit, and stating the current value.

(i) Retirement Plans. Provide most recent documents identifying each retirement plan, and stating the current value, and all Plan Summary Descriptions. This section shall not apply to post decree motions unless so ordered by the Court.

(j) Bank/Financial Institution Accounts. Provide most recent documents identifying each account at banks and other financial institutions, and stating the current value.

(k) Income Documentation. For each income source in the current and prior calendar year, including income from employment, investment, government programs, gifts, trust distributions, prizes, and income from every other source, provide pay stubs, a current income statement and the final income statement for the prior year. Each self-employed party shall provide a sworn financial statement of gross income, business expenses necessary to produce income, and net income for the three months before filing of the petition or post decree motion.

(l) Employment and Education-Related Child Care Documentation. Provide documents that show average monthly employment-related child care expense including child care expense related to parents' education and job search. This section shall apply only if child support is an issue.

(m) Insurance Documentation. Provide life, health and property insurance policies and current documents that show beneficiaries, coverage, cost including the portion payable to provide health insurance for child(ren), and payment schedule. The section shall not apply to post decree motions unless so ordered by the Court except in those cases in which child support is an issue in which case policy and cost information regarding the child(ren) shall be provided.

(n) Extraordinary Child(ren)'s Expense Documentation. Provide documents that show average monthly expense for all recurring extraordinary child(ren)'s expenses. This section shall apply only if child support is an issue.

(o) The above sections shall not apply to post decree motions if issues of decision-making and parenting time are the only issues unless so ordered by the Court.

TO: Judge Michael Berger, Chair, Civil Rules Advisory Committee

FROM: Dave DeMuro and the Subcommittee on federal rules changes

RE: Proposed new C.R.C.P. 26 (b)(4)(D) on draft expert reports

DATE: September 6, 2014

The subcommittee recommends the adoption of a new Rule 26(b)(4)(D) that treats drafts of expert reports and communications between the expert and the attorney as protected work product under Rule 26(b)(3), with certain exceptions. Attached are (i) the current version of C.R.C.P. 26(b)(4), (ii) the current version of Fed.R.Civ.P. 26(b)(4) which contains essentially the same rule in subsection (C) as our proposal, (iii) the 2010 federal committee comment discussing the federal version of this rule, and (iv) our proposal for the new Colorado Rule 26(b)(4)(D).

We believe that this rule removes a significant problem for lawyers in dealing candidly with experts, where lawyers often go to great lengths to avoid creating "drafts" of expert reports that would be discoverable. The rule is balanced by important exceptions which require disclosure of (a) facts that the attorney provided and that the expert considered, and (b) assumptions that the attorney provided and the expert relied on in forming opinions.

The committee was close to recommending adoption of this rule at the end of 2011, but it was decided that we should delay it while the Pilot Project was just starting as it might affect the data being gathered to assess the Project. Now that almost three years have passed, this concern has been removed and other rules are now being proposed and adopted. We think it is time to follow the federal rule in this area, and appropriate to do so.

We have recommended that this rule be adopted as subsection (D) rather than (C) as it is in the federal rule to avoid changing subsections (A) - (C) in our rule.

Colorado
26(b)(4)

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. Except to the extent otherwise stipulated by the parties or ordered by the court, no discovery, including depositions, concerning either the identity or the opinion of experts shall be conducted until after the disclosures required by subsection (a)(2) of this Rule.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided by C.R.C.P. 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

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

Federal
26(b)(4)

(4) *Trial Preparation: Experts.*

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

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

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

(D) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

2010 Amendments

Rule 26. Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than "data or other information," as in the current rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and—with three specific exceptions—communications between expert witnesses and counsel.

In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including—for many experts—an extensive report. Many courts read the disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports. The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts—one for purposes of consultation and another to testify at trial—because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.

Subdivision (a)(2)(B). Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all "facts or data considered by the witness in forming" the opinions to be offered, rather than the "data or other information" disclosure prescribed in 1993. This amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports. The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications.

The refocus of disclosure on "facts or data" is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel. At the same time, the intention is that "facts or data" be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data "considered" by the expert in forming the opinions to be expressed, not only those relied upon by the expert.

Subdivision (a)(2)(C). Rule 26(a)(2)(C) is added to mandate summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions. This disclosure is considerably less extensive than the report required by Rule 26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. An (a)(2)(B) report is required only from an expert described in (a)(2)(B).

A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705. Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under Rule 26(a)(2)(A) and provide the disclosure required under Rule 26(a)(2)(C). The (a)(2)(C) disclosure obligation does not include facts unrelated to the expert opinions the witness will present.

Subdivision (a)(2)(D). This provision (formerly Rule 26(a)(2)(C)) is amended slightly to specify that the time limits for disclosure of contradictory or rebuttal evidence apply with regard to disclosures under new Rule 26(a)(2)(C), just as they do with regard to reports under Rule 26(a)(2)(B).

Subdivision (b)(4). Rule 26(b)(4)(B) is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise. It also applies to drafts of any supplementation under Rule 26(e); *see* Rule 26(a)(2)(E).

Rule 26(b)(4)(C) is added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery. The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the

attorney for the party on whose behalf the witness will be testifying, including any "preliminary" expert opinions. Protected "communications" include those between the party's attorney and assistants of the expert witness. The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

The most frequent method for discovering the work of expert witnesses is by deposition, but Rules 26(b)(4)(B) and (C) apply to all forms of discovery.

Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions. For example, the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed. These discovery changes therefore do not affect the gatekeeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and related cases.

The protection for communications between the retained expert and "the party's attorney" should be applied in a realistic manner, and often would not be limited to communications with a single lawyer or a single law firm. For example, a party may be involved in a number of suits about a given product or service, and may retain a particular expert witness to testify on that party's behalf in several of the cases. In such a situation, the protection applies to communications between the expert witness and the attorneys representing the party in any of those cases. Similarly, communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action. Other situations may also justify a pragmatic application of the "party's attorney" concept.

Although attorney-expert communications are generally protected by Rule 26(b)(4)(C), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions. But the discovery authorized by the exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.

First, under Rule 26(b)(4)(C)(i) attorney-expert communications regarding compensation for the expert's study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). It is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work done by a person or organization associated with the expert. The objective is to permit full inquiry into such potential sources of bias.

Second, under Rule 26(b)(4)(C)(ii) discovery is permitted to identify facts or data the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed. The exception applies only to communications "identifying" the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.

Third, under Rule 26(b)(4)(C)(iii) discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. For example, the party's attorney may tell the expert to assume the truth of certain testimony or evidence, or the correctness of another expert's conclusions. This exception is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.

Under the amended rule, discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures, is permitted only in limited circumstances and by court order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii)—that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. A party's failure to provide required disclosure or discovery does not show the need and hardship required by Rule 26(b)(3)(A); remedies are provided by Rule 37.

In the rare case in which a party does make this showing, the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). But this protection does not extend to the expert's own development of the opinions to be presented; those are subject to probing in deposition or at trial.

Former Rules 26(b)(4)(B) and (C) have been renumbered (D) and (E), and a slight revision has been made in (E) to take account of the renumbering of former (B).

8/11/14
Proposed New C.R.C.P. 26(b)(4)(D):
(taken from Fed.R.Civ.P. 26(b)(4)(B) and (C)):

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

(i) relate to compensation for the expert's study or testimony;

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

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