PART FOUR – DEPENDENCY AND NEGLECT

Section _____- Disclosures and Discovery in Dependency and Neglect Cases.

Rule 1. Applicability.

These rules govern disclosures, ~~and~~ discovery, and sanctions related ~~to disclosures and discovery,~~ thereto in Dependency and Neglect cases.

Commented [md1]: The consensus of the subcommittee is that CRCP 11 still applies.

Commented [CN2R1]: I don't think we need CRCP 11 now that we have our own signing rule.

Rule 2. Intent.

(a) Purpose. Dependency and Neglect cases are unique civil cases requiring an intricate balance of the important and interrelated rights and interests of, at a minimum, parents, legal guardians and/or legal custodians; children and the guardians ad litem who represent their best interest; and the government. The purposes of the Colorado Children's Code, codified at 19-1-102, C.R.S., include securing for children subject to its provisions such care and guidance, preferably in such children's own home, as will best serve such children's interests and serve the interests of society; and preserving and strengthening family ties whenever possible, including improving the home environment. 19-1-102, C.R.S. also explains that children may be removed from the custody of their parents only when children's welfare and safety or the protection of the public would otherwise be endangered; and, in either instance, for courts to proceed with all possible speed to a legal determination that will serve the best interests of children. In general, the Colorado Children's Code emphasizes rehabilitating parents and/or home environments so children may be returned home; and, where such return is not possible under the law, to ensure the safe, stable, and secure placement of children in a permanent home. To that end, the Children's Code requires certain expedited settings and deadlines which have been deemed to serve the best interests of the Colorado children.

These and other such purposes and policies of the Colorado Children's Code render the normal discovery processes found in civil cases - sometimes involving frequent disputes and inherent delays - simply unacceptable in Dependency and Neglect cases. MORE?

Rule ~~2~~3. Definitions.

As used in this section:

(a) "Disclosure" means the informal process by which parties share information to include relevant and material documents and the identity of persons who may have relevant and material information. Courts may, in accordance with law, permit non-parties to receive and/or provide disclosures.

(b) "Discovery" means the process by which parties seek case or party information through formal processes including, but not limited to subpoenas, subpoenas to produce, depositions, interrogatories, requests for production of documents and tangible things, and requests for admission. ~~The c~~Courts may, in accordance with law, permit non-parties to receive and/or provide ~~engage in~~ discovery.

(c) "Parties" means the Petitioner, Guardians *ad litem* for the children, Respondents, Intervenors, and any other person or entity designated as a party by the court in accordance with law.

~~**Rule 3. Scope of Discovery**~~

~~Parties or those authorized by the court in accordance with law may obtain discovery regarding any matter not privileged, that is relevant to a claim or defense and proportional to the needs of the case, considering the unique timelines and goals of the Children's Code, which is proportional to the needs of the case considering the importance of the issues at stake for which discovery is sought, the parties' relative access to relevant information, the parties' resources and whether the burden, expense or delay associated with the proposed discovery outweighs its likely benefit.~~

Rule ~~3~~4. Duty to Sign~~ing of~~ Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to these rules ~~subsections (a)(1) or (a)(2) of this~~ rule shall be signed by at least one attorney of record in the attorney's individual name. An unrepresented party or others authorized by the court to participate in disclosures and/or discovery in accordance with law who are unrepresented shall sign the disclosure and state the party's address. That ~~e signature of the attorney or party~~ constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, or response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name. An unrepresented party or others authorized by the court to participate in disclosures and/or discovery in accordance with law who are unrepresented shall sign the request, response, or objection and state the party's address. That~~e~~ signature ~~of the attorney or party~~ constitutes a certification that to the best of the signer's knowledge,

Commented [CN3]: At the recommendation of Judge Furman and JJ Wallace, our subcommittee deleted the definitions of confidentiality and privilege, as they are more appropriately matters of case law and statute, than rules.

Commented [CN4]:

Commented [md5]: The subcommittee feels that the definition of parties is important to add, as the word "parties" is used throughout these rules.

Commented [CN6R5]: A member of the big committee recommended that we reference "individuals permitted to engage in discovery" instead of "parties."

Commented [CN7]: SB 17-177 deleted the language indicating that special respondents are added as parties.

Commented [CN8]: Moved because it did not make sense to provide:
1. one rule regarding the scope of *discovery*,
2. rules regarding *disclosures and discovery*,
3. rules regarding *disclosures*, then
4. rules regarding *discovery*.
Instead, I grouped them together by topic.

Commented [CN9]: This rule is new to our draft.

This rule will be very difficult for county attorneys to comply with if disclosures are made automatic.

information and belief, formed after a reasonable inquiry, the request, response or objection is:

(A) Consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) Not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) Not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification, a certification is made in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who made the certification, the party on whose behalf the disclosure, request, response or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including reasonable attorney fees.

Commented [CN10]: This issue is on cert.

Rule 5. Duty to Supplement Disclosures and Discovery.

Parties and/or others authorized by the court to participate in disclosures and discovery in accordance with law ~~court~~who has or have produced disclosures or discovery shall supplement any disclosures or discovery when the party or other(s) authorized by a court to participate in disclosures and/or discovery in accordance with law learns the information disclosed or discovered is incomplete or incorrect in some material respect and if the additional or corrective information has not otherwise been made known to the other parties from other disclosures or discovery. This includes information relating to anticipated rebuttal but does not include information to be used solely for impeachment of a witness. The duty to supplement or correct extends to the production of expert reports disclosed pursuant to these rules.

Commented [CN11]: Please note. I edited Judge Miller's draft of this rule, but the edits got lost in the edit either.

Commented [CN12]: Per Judge Miller: "we have taken portions of CRCP 26 (b) (5) (e) to create this provision. We have revised the language so it is not as wordy as the existing rule which in the opinion of the committee, is poorly written and verbose."

Rule 64. Delivery of Disclosures and Discovery.

Commented [md13]: Subcommittee decided to substitute the word "service" with "delivery" to avoid the many connotations that come with the word service and service of process.

(a) Delivery Upon Whom. Delivery of disclosures and discovery under these rules shall, for parties represented by counsel, consist of delivery upon the counsel of record for that party, unless the court orders delivery directly upon the party. If a party is not represented by counsel, then delivery shall be directly upon that party. Disclosures and discovery shall not be filed with the court.

(b) Manner and Completion of Delivery. ~~Unless otherwise ordered by the court, authorized by local rule, or agreed to the parties pursuant to C.R.J.P. 3(e),~~ dDelivery of disclosures and discovery shall be completed by one of the following:

(1) Mailing ~~a copy~~ to ~~counsel or~~ the person's last known address ~~of an unrepresented party.~~ Such dDelivery ~~by mail~~ is complete upon mailing.

(2) Depositing in the courthouse mailbox of an attorney, ~~counsel's drop box if~~. Such delivery is complete upon drop off.

(3) ~~Delivery by h~~Handing to the person. Such delivery is complete upon the transfer.

(4) Leaving ~~it~~ at the person's office with a person in charge or if there is no such person, by leaving it in a conspicuous place in the ~~workplace~~office. Such delivery is complete upon leaving.

(5) Leaving it at the person's dwelling house or usual place of abode with someone 18 years of age or older residing there. Such delivery is complete upon leaving.

(6) Delivery by any other means, including ~~judicial department~~ E-Service, or other electronic means such as ~~a~~ facsimile ~~phone number~~ or ~~an~~ email ~~address~~ when agreed to by the parties or the person served has submitted previous filings with the court reflecting a facsimile or email address. Delivery by E-Service, facsimile or email is complete upon transmission.

(7) Delivery by any other means authorized by the court or local rule. Such delivery is complete as provided by the court or local rule.

~~(a) consent in writing to delivery by other **Alternative Delivery by Consent.** Parties may also electronic means, such as email or facsimile. Delivery via these means is complete upon transmission.~~

Rule 7~~5~~. Disclosures.

(a) **Before a Contested Initial Hearing Pursuant to Section 19-3-403, C.R.S.** All parties shall disclose as soon as practicable, but no later than prior to the commencement of a contested initial hearing pursuant to section 19-3-403, C.R.S., all exhibits it intends to introduce in its case in chief at the contested initial hearing.

(b) **After the Initial Hearing.**

(1) **By Petitioner**. Upon a written request ~~no later than 35 days~~ before a contested trial or a contested hearing ~~or such other time the court determines reasonable and appropriate,~~ the Petitioner shall disclose to the requesting party the following items relevant and material to the case that are in its custody and control. Disclosure ~~of the following items shall~~ shall be made no later than 21 ~~14~~ days ~~before the contested trial or contested hearing~~, after the request is made or such other time the court determines reasonable and appropriate.

(A) Law enforcement reports;

(B) Photographs;

(C) Interview recordings, notes, and/or transcripts;

(D) Intake assessment summary reports, notes, record of contact sheets, and correspondence; ~~and~~

(E) Medical, dental, mental health, substance abuse, and educational documents or information for which a waiver of privilege or confidentiality has been provided; and~~.~~

(F) Family Safety and Risk Assessments.

(2) **By Respondents.** Upon a written request, ~~no later than 35 days~~ before a contested trial or a contested hearing ~~or such other time the court determines~~

Commented [CN14]: In or at? If the office is locked, could the item be left on the porch/under the mat… *at* the office, but not *in* the office?

Commented [CN15]: Members of the big committee had concerns about disclosures going to interventors, SPRs, and numerous merely alleged fathers. They recommended some sort of out related to such individuals.

Commented [CN16]: A member of the big committee suggested, "Disclosures shall occur pursuant to 19-1-303 and -307, case management orders, etc." My understanding is that the adjudication subcommittee frequently referenced the CRS.

Commented [md17]: The subcommittee acknowledges that this standard is low, but agreed to this standard as a compromise.

Commented [CN18]: There has vigorous debate about whether these disclosures should be automatic. Trent suggested, "No later than 35 days after the filing of a petition in dependency and neglect, the petitioner shall disclose to respondent parents or, if represented to their counsel, the following items:"

Commented [CN19]: Trent suggested:
(A) Records and comprehensive case files in connection with prior juvenile cases involving the respondent parents and the Department, if any;
(B) With respect to any prior juvenile cases involving the respondent parents and the department in another jurisdiction, all records and case files in the possession or control of the [] County Attorney's office and/or the Department;
(C) With respect to any concurrent and/or prior criminal proceedings involving the respondent parents, all records, files, law enforcement reports, and documents in the possession or control of the [] County Attorney's office and/or the Department;
(D) All photographs relevant to the case in the possession or control of the [] County Attorney's office and/or the Department;
(E) Intake and risk assessments, screenings, social studies, safety plans, communications, and other documents re. Department contact with the family;
(F) Documents and communications regarding all services discussed with and/or provided to the respondent parents by the Department;
(G) All medical, psychological, psychosexual, and other assessments or evaluations of the respondent parents in the possession or control of the [] County Attorney's office and/or the Department. If there are objections based on confidentiality or privilege, the [] County Attorney's office shall provide a privilege log that specifically identifies the items withheld;
(H) Transcripts of all recorded interviews of the respondent parents and/or their children in the possession or control of the [] County Attorney's office and/or the Department;
(I) Any and all urinary analyses, umbilical cord tests, and other substance screens in the possession or control of the [] County Attorney's office and/or the Department; … [1]

~~reasonable and appropriate~~, Respondents shall disclose to the requesting parties the following items relevant and material to the case that are in their custody and control. The disclosure shall be made no later than 21~~14~~ days before the contested trial or contested hearing or such other time the court determines reasonable and appropriate:

(A) A copy of the child's birth certificate, social security card, Medicaid/insurance card; and

(B) Proof of enrollment in a federally recognized Indian tribe; and

(C) If the Respondent, Child, or GAL holds and waives the child's privilege, then medical, dental, mental health, substance abuse, and educational records of the child or children alleged to be dependent and neglected.

(3) **By Others Permitted by the Court to Participate in Disclosures.** Individuals permitted by the court to participate in disclosures shall make disclosures as ordered by the court.

(4) ~~**Production of Evidence.**~~ **(c) Before a Contested Trial or Hearing.** The following shall be disclosed no later than 7 days before a contested trial or contested hearing or such other time the court determines reasonable and appropriate:

(1) Names, addresses, and telephone numbers of all witnesses intended to be presented at the contested trial or contested hearing, and any written or recorded statements of such witnesses;

(2) Written reports, if any, of expert witnesses. If no written report is available, a summary of any expert witness testimony that will be introduced at the contested trial or contested hearing.

(3) A list of all other evidence (including privileged evidence) intended to be presented at the contested trial or contested hearing. Copies of information that will be offered as evidence at the contested trial or hearing shall be provided if not previously disclosed.

Do we need more detail re: expert witnesses? Expert witnesses have already been the topic of one unpublished court of appeals case. CRCP 26 states the following re: expert witnesses:
(I) Retained Experts. With respect to a witness who is retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve giving expert testimony, the disclosure shall be made by a written report **signed** by the witness. The report shall include:
(a) a complete statement of all opinions to be expressed and the basis and reasons therefor;
(b) a list of the data or other information considered by the witness in forming the opinions;
(c) references to literature that may be used during the witness's testimony;
(d) copies of any exhibits to be used as a summary of or support for the opinions;
(e) the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;
(f) the fee agreement or schedule for the study, preparation and testimony;
(g) an itemization of the fees incurred and the time spent on the case, which shall be supplemented 14 days prior to the first day of trial; and
(h) a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Commented [md20]: The new definition of special respondents does not grant them party status. However, there may come a case where a court needs to permit a special respondent (or others) to engage in disclosures.

Commented [CN21]: A member of the big committee suggested 14.

Commented [CN22]: A member of the big committee recommended the addition of CVs.

The witness's direct testimony shall be limited to matters disclosed in detail in the report.
(II) Other Experts. With respect to a party or witness who may be called to provide expert testimony but is not retained or specially employed within the description contained in subsection (a)(2)(B)(I) above, the disclosure shall be made by a written report or statement that shall include:
(a) a complete description of all opinions to be expressed and the basis and reasons therefor;
(b) a list of the qualifications of the witness; and
(c) copies of any exhibits to be used as a summary of or support for the opinions. If the report has been prepared by the witness, it shall be **signed** by the witness.

If the witness does not prepare a written report, the party's lawyer or the party, if self-represented, may prepare a statement and shall sign it. The witness's direct testimony expressing an expert opinion shall be limited to matters disclosed in detail in the report or statement.
(C) Unless otherwise provided in the Case Management Order, the timing of the disclosures shall be as follows:
(I) The disclosure by a claiming party under a complaint, counterclaim, cross-claim, or third-party claim shall be made at least 126 days (18 weeks) before the trial date.
(II) The disclosure by a defending party shall be made within 28 days after service of the claiming party's disclosure, provided, however, that if the claiming party serves its disclosure earlier than required under subparagraph 26(a)(2)(C)(I), the defending party is not required to serve its disclosures until 98 days (14 weeks) before the trial date.
(III) If the evidence is intended to contradict or rebut evidence on the same subject matter identified by another party under subparagraph (a)(2)(C)(II) of this rule, such disclosure shall be made no later than 77 days (11 weeks) before the trial date.
(3) [There is no Colorado rule--see instead C.R.C.P. 16(c).]

(d) At Other Times. During times outside the times mentioned in this rule, disclosures shall occur as ordered by the court.

Rule 8. Scope of Discovery.

Parties and others authorized by the court in accordance with law to participate in disclosures and discovery may obtain disclosures and discovery regarding any matter not privileged; relevant to a claim or defense; and proportional to the needs of the case. Consideration shall be paid to the purposes and policies of the Colorado Children's Code; the importance of the issues at stake for which the information is sought; the parties' relative access to the requested information; the parties' resources; and whether the burden, expense or delay associated with the proposed disclosure or discovery outweighs its likely benefit.

Rule ~~69~~. ~~Scope of~~ Discovery Methods.

Unless ordered otherwise by the court or as defined in a~~the~~ Case Management Order, the parties may use the discovery methods identified in these rules. To the extent not addressed in these rules, a court may allow other and further discovery upon a determination of good cause.

Rule 10~~7~~. Depositions Upon Oral Examination.

(a) When Depositions May Be Taken. (1) A party may take the testimony of any ~~person, including a~~ party, and two other persons by deposition upon oral examination without leave of court except as provided in paragraph (2) of this section. The attendance of witnesses may be compelled by subpoena as provided in C.R.J.P. _____.

(2) Leave of court must be obtained if:

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

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

(C) The person to be examined is confined in prison; or

(D) The person to be examined is a child.

(b) Notice of Examination: General Requirements; Method of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.

(1) Consistent with C.R.J.P. _____, a party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded, which, unless the court otherwise orders, may be by sound, sound-and-visual, or stenographic means. Unless the court otherwise orders, the party taking the deposition shall bear the cost of the recording.

(3) Any party may provide for a transcription to be made from the recording of a deposition taken by non-stenographic means. With reasonable prior notice to the deponent and other parties, any party may designate another method of recording the testimony of the deponent in addition to the method specified by the person taking the deposition. Unless the court otherwise orders, each party designating an additional method of recording the testimony of a deponent shall bear the cost thereof.

(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated pursuant to the laws of this state or the state in which the deposition is held and shall begin with a statement on the record by the officer that includes (a) the officer's name and business address; (b) the date, time, and place of the deposition; (c) the name of the deponent; (d) the administration of the oath or affirmation to the deponent; and (e) an identification of all persons present. If the deposition is recorded other than stenographically, items (a) through (c) shall be repeated at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted by the use of camera or sound-recording techniques. At the conclusion of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel

Commented [CN23]: A member of the big committee recommended adding a deadline for depositions to be taken, i.e., depositions shall be completed ____ day before a contested trial or hearing.

concerning the custody of the transcript or recording, the exhibits, or other pertinent matters.

(5) The notice to a party deponent may be accompanied by a request made in compliance with C.R.J.P. _____ for the production of documents and tangible things at the taking of the deposition. The procedure of C.R.J.P. _____ shall apply to the request.

(6) A party may in his notice name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and C.R.J.P. _____, a deposition taken by telephone or other remote electronic means is taken at the place where the deponent is to answer questions propounded to the deponent. The stipulation or order shall include the manner of recording the proceeding.

(c) Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Colorado rules of Evidence except CRE 103. The witness shall be put under oath or affirmation and the officer before whom the deposition is to be taken shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other method authorized by subsection (b)(2) of this rule.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or in any other respect to the proceedings shall be noted by the officer upon the record of the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Schedule and Duration; Motion to Terminate or Limit Examination.

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

(2) **Time Limits.**

(A) Unless otherwise authorized by the court or stipulated by the parties, a deposition of a person other than a retained expert whose opinions may be offered at trial is limited to two ~~one half day of three~~ hours. Upon the motion of any party, the court may limit the time permitted for the conduct of a deposition to less than two ~~3~~ hours, or may allow additional time if needed for a fair examination of the deponent, or if the deponent or another person impedes or delays the examination, or if other circumstances warrant. If the court finds such an impediment, delay, or other conduct that frustrates the fair examination of the deponent, it may impose upon the person responsible therefor an appropriate sanction, including the reasonable costs and attorney fees incurred by any parties as a result thereof.

(B) Depositions of a retained expert to include caseworkers and other experts retained by or contracted with the Department of Human Services whose opinions may be offered in the case shall be limited to three ~~four~~ hours.

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

Commented [CN24]: A member of the big committee asked what we anticipate here.

(e) Review by Witness; Changes; Signing. If requested by the deponent or a party before completion of the deposition, the deponent shall be notified by the officer that the transcript or recording is available. Within 14 ~~21~~ days of receipt of such notification the deponent shall review the transcript or recording and, if the deponent makes changes in the form or substance of the deposition, shall sign a statement reciting such changes and the deponent's reasons for making them and send such statement to the officer. The officer shall indicate in the certificate prescribed by subsection (f)(1) of this rule whether any review was requested and, if so, shall append any changes made by the deponent.

(f) Certification and Filing by Officer; Exhibits; Copies; Notice of Filing.

(1) The officer shall certify that the witness was duly sworn and that the deposition is a true record of the testimony given by the witness. This certificate shall be set forth in writing and accompany the record of the deposition. Unless otherwise ordered by the court, the officer shall securely seal the deposition in an envelope or package endorsed with the title of the action and marked "deposition of (here insert name of witness)" and shall promptly transmit it to the attorney who arranged for the transcript or recording. The receiving attorney shall store the

deposition under conditions that will protect it against loss, destruction, tampering, or deterioration.

Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition and may be inspected and copied by any party, except that: if the person producing the materials desires to retain the originals, the person may

(A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or

(B) offer the originals to be marked for identification, after giving each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Unless otherwise ordered by the court or agreed by the parties, the officer shall retain stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent.

(g) Failure to Attend or to Serve Subpoena; Expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney~~'s~~ fees.

Rule 11~~8~~. Depositions Upon Written Questions.

(a) Serving Questions; Notice.

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

(2) A party must obtain leave of court, and the court must grant leave to the extent consistent with C.R.J.P___ if:

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

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

Commented [md25]: The issue of whether county attorneys can be required to pay attorneys' fees is on certiorari to the Colorado State Supreme court.

Commented [CN26R25]: A member of the big committee asked what, if any, alternatives we would suggest.

(C) the person to be examined is confined in prison; and
(D) the person to be deposed is a child.

(3) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating:
(A) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs; and
(B) the name or descriptive title and address of the officer before whom the deposition is to be taken.
A deposition upon written questions may be taken of a public or private corporation, or a partnership, or association, or governmental agency in accordance with the provision of C.R.J.P. 6(b)(6).

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

(b) Officer to Take Responses and Prepare Record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by C.R.J.P. 6, to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

(c) Notice of Filing. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

Rule 912. Use of Depositions in Court Proceedings.

(a) Use of Depositions. At the trial, hearing, or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness;

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association, or a governmental agency, which is a party, or a person designated under C.R.J.P. 6(b)(6) or 7(a) to testify on behalf thereof may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:
(A) That the witness is dead; or
(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the

absence of the witness was procured by the party offering the deposition; or

(C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

A deposition taken without leave of court pursuant to ~~C.R.J.P. 6(a)(2)(C)~~ shall not be used against a party who demonstrates that, when served with the notice, the party was unable through the exercise of diligence to obtain counsel to represent the party at the taking of the deposition.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed, vacated, or closed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(5) In lieu of reading text from a deposition, parties are encouraged to use stipulated written summaries of deposition testimony at any hearing or trial, and to present the testimony at any hearing or trial in a logical order.

(b) Objections to Admissibility. Subject to the provisions of these rules, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) Effect of Taking or Using Depositions. A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition under subsection (a)(2) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(d) Effect of Errors and Irregularities in Depositions.

(1) **As to Notice.** All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) **As to Disqualification of Officer.** Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made

Commented [CN27]: A member of the big committee asked if this is a potential problem for RPC and/or intervenors.

Commented [md28]: The committee decided to use these terms because there are many different terms used to refer to case closure.

before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) **As to Taking of Deposition.**

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under C.R.J.P. ___ are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 7 days after service of the last questions authorized.

(4) **As to Completion and Return of Deposition.** Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under C.R.J.P. ____~~6~~ and ____~~7~~ are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been ascertained.

Rule 1~~3~~3~~0~~. Interrogatories.

(a) **Availability.** Any party may serve upon any other party written interrogatories, not exceeding 20 ~~30~~, including all discrete subparts, to be answered by the party served or, if the party served is the Petitioner, by any officer or agent, who shall furnish such information as is available to the party. Leave of court must be obtained to serve more interrogatories than 20 ~~30~~. ~~Interrogatories shall be served no later than 35 days before the contested trial or contested hearing or such other time the court determines reasonable and appropriate.~~

(b) **Answers and Objections.**

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

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

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 21 days after the service of the interrogatories. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties.

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

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

Rule 143~~1~~. Production of Documents and Things.

(a) **Scope.** Subject to the limitations contained in the court orders, a party may serve on any other party:

(1) No more than 20 ~~30~~ requests to produce and permit the party making the request, or someone acting on the party's behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the responding party through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of C.R.J.P. ___ and which are in the possession, custody, or control of the party upon whom the request is served; or

(2) A request to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of C.R.J.P. ___.

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

(c) **Response.** The party upon whom the request is served shall serve a written response within 21 days after the service of the request. A shorter or longer time may be directed by the court or agreed to in writing by the parties pursuant to C.R.J.P. ____. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, or state with specificity the grounds for objecting to the request. The responding party may state that it will produce copies of information instead of permitting inspection. The production must then be completed no later than the time for inspection stated in the request or another reasonable time stated in the response. An objection must state whether any responsive materials are being withheld on the basis of that objection. If objection is made to part of an item or category, the part shall be specified. A timely objection to a request for production stays the obligation to produce

which is the subject of the objection until the court resolves the objection. No separate motion for protective order pursuant to C.R.J.P. ___ is required. The party submitting the request may move for an order pursuant to C.R.J.P. ___ with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

Rule 152. Requests for Admission.

(a) **Scope.** ~~Subject to the limitations contained in court orders, a~~ A party may serve upon any other party up to 20 written requests for the admission, ~~for purposes of the pending action only,~~ of the truth of any matters within the scope of C.R.J.P. _____ set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Leave of court must be obtained to serve more than ~~20~~ 20 ~~30~~ requests for admission or the number set forth in the Case Management Order. Each matter of which an admission is requested shall be separately set forth.

~~(b) **Service.** Without leave of court or written stipulation, requests for admission shall be served at least 35 days before a contested trial or contested hearing.~~

(b) **Response.** The matter is admitted unless, within 21 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing pursuant to C.R.J.P. _____ the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. ~~An answering party may not assert issue for trial may not object to the request on that ground alone; the party may, subject to C.R.J.P. _____, deny the matter or set forth reasons why the party cannot admit or deny it.~~

Commented [md29]: The committee deleted this sentence because it could not understand its purpose.

~~(b)~~(c) **Reply.** The party who requested admissions may move to determine the sufficiency of the answer or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is

admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of C.R.J.P. _____ apply to the award of expenses incurred in relation to the motion.

(e) **Effect of Admission.** Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. ~~Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.~~

Commented [md30]: The issue of whether county attorneys can be required to pay attorneys' fees is on certiorari to the Colorado State Supreme court.

Commented [md31]: The subcommittee was uncertain whether this sentence was appropriate for D&Ns.

Commented [CN32R31]: A member of the big committee asked how this relates to 19-3-207.

Rule 163. Subpoenas

(a) In General.

(1) **Form and Contents.**

(A) *Requirements--In General.* Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action, the court in which it is pending and its case number;

(iii) command each person to whom it is directed to do one or both of the following at a specified time and place: attend and testify at a deposition, hearing or trial; or produce designated books, papers and documents, whether in physical or electronic form ("records"), or tangible things, in that person's possession, custody, or control;

(iv) identify the party and the party's attorney, if any, who is serving the subpoena;

(v) identify the names, addresses and phone numbers and email addresses where known, of the attorneys for each of the parties and of each party who has appeared in the action without an attorney;

(vi) state the method for recording the testimony if the subpoena commands attendance at a deposition; and

(vii) if production of records or a tangible thing is sought, set out the text of sections (c) and (d) of this rule verbatim on or as an attachment to the subpoena.

(B) *Combining or Separating a Command to Produce.* A command to produce records or tangible things may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be contained in a separate subpoena that does not require attendance.

(C) *Deposition Subpoena Must Comply With Discovery rules.* A deposition subpoena may require the production of records or tangible things which are within the scope of discovery permitted by C.R.J.P. _____. A subpoena must not be used to avoid the limits on discovery imposed by C.R.J.P. _____ or by the Case Management Order applicable to that case.

(D) *Subpoenas to Named Parties.* A subpoena issued under this rule may not be utilized to obtain discovery from named parties to the action unless the court orders otherwise for good cause.

(2) **Issued by Whom.** The clerk of the court in which the case is docketed must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney who has entered an appearance in the case also may issue, complete and sign a subpoena as an officer of the court.

(b) Service.

(1) **Time for Service.** Unless otherwise ordered by the court for good cause:

(A) *Subpoena for Trial or Hearing Testimony.* Service of a subpoena only for testimony in a trial or hearing shall be made no later than 48 hours before the time for appearance set out in the subpoena.

(B) *Subpoena for Deposition Testimony.* Service of a subpoena only for testimony in a deposition shall be made not later than 7 days before compliance is required.

(C) *Subpoena for Production of Documents.* Service of any subpoena commanding a person to produce records or tangible things in that person's possession, custody, or control shall be made not later than 14 days before compliance is required. In the case of an expedited hearing pursuant to these rules or any statute, service shall be made as soon as possible before compliance is required.

(2) **By Whom Served; How Served.** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person or service as otherwise ordered by the court consistent with due process. Service is also valid if the person named in the subpoena has signed a written acknowledgement or waiver of service. Service may be made anywhere within the state of Colorado.

(3) **Proof of Service.** Proof of service shall be made as provided in C.R.J.P. _____ affidavit as to the date, place and manner of service, or if by publication, by affidavit of publication. Original subpoenas and returns of service of such subpoenas need not be filed with the court.

(4) **Notice to Other Parties.**

(A) *Service on the Parties.* Immediately following service of a subpoena, the party or attorney who issues the subpoena, shall serve a copy of the subpoena on all parties as required by C.R.J.P. _____.

(B) *Notice of Changes.* The party or attorney who issues the subpoena must give the other parties reasonable notice of any written modification of the subpoena or any new date and time for the deposition, or production of records and tangible things.

(C) *Availability of Produced Records or Tangible Things.* The party or attorney who issues the subpoena for production of records or tangible things must make available in a timely fashion for inspection and copying to all other parties the records or tangible things produced by the responding party.

(c) Protecting a Person Subject to a Subpoena.

(1) **Avoiding Undue Burden or Expense; Sanctions.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The

issuing court may enforce this duty and impose an appropriate sanction, which may include lost earnings and reasonable attorney's fees, on a party or attorney who fails to comply.

(2) **Command to Produce Records or Tangible Things.**

(A) *Attendance Not Required.* A person commanded to produce records or tangible things need not attend in person at the place of production unless also commanded to attend for a deposition, hearing, or trial.

(B) *For Production of Privileged Records.*

(i) If a subpoena commands production of records from a person who provides services subject to one of the privileges established by C.R.S. § 13-90-107, or from the records custodian for that person, which records pertain to services performed by or at the direction of that person ("privileged records"), such a subpoena must be accompanied by an authorization signed by the privilege holder or holders or by a court order authorizing production of such records.

(ii) Prior to the entry of an order for a subpoena to obtain the privileged records, the court shall consider the rights of the privilege holder or holders in such privileged records, including an appropriate means of notice to the privilege holder or holders or whether any objection to production may be resolved by redaction.

(iii) If a subpoena for privileged records does not include a signed authorization or court order permitting the privileged records to be produced by means of subpoena, the subpoenaed person shall not appear to testify and shall not disclose any of the privileged records to the party who issued the subpoena.

(C) *Objections.* Any party or the person subpoenaed to produce records or tangible things may submit to the party issuing the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials. The objection must be submitted before the earlier of the time specified for compliance or 14 days after the subpoena is served. If objection is made, the party issuing the subpoena shall promptly serve a copy of the objection on all other parties. If an objection is made, the party issuing the subpoena is not entitled to inspect, copy, test or sample the materials except pursuant to an order of the court from which the subpoena was issued. If an objection is made, at any time on notice to the subpoenaed person and the other parties, the party issuing the subpoena may move the issuing court for an order compelling production.

(3) **Quashing or Modifying a Subpoena.**

(A) *When Required.* On motion made promptly and in any event at or before the time specified in the subpoena for compliance, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to attend a deposition in any county other than where the person resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court;

Commented [md33]: The issue of whether county attorneys can be required to pay attorneys' fees is on certiorari to the Colorado State Supreme court.

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion made promptly and in any event at or before the time specified in the subpoena for compliance, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific matters in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in C.R.C.P. 10(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order attendance or production under specified conditions if the issuing party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to Subpoena.

(1) **Producing Records or Tangible Things.**

(A) Unless agreed in writing by all parties, the privilege holder or holders and the person subpoenaed, production shall not be made until at least 14 days after service of the subpoena, except that, in the case of an expedited hearing pursuant to these rules or any statute, in the absence of such agreement, production shall be made only at the place, date and time for compliance set forth in the subpoena; and

(B) If not objected to, a person responding to a subpoena to produce records or tangible things must produce them as they are kept in the ordinary course of business or must group them to correspond to the categories in the demand and must permit inspection, copying, testing, or sampling of the materials.

Commented [md34]: The original rule says organized and labeled to correspond… our committee agreed to group in lieu of organized and labeled.

(2) **Claiming Privilege or Protection.**

(A) *Information Withheld.* Unless the subpoena is subject to subsection (c)(2)(B) of this rule relating to production of privileged records, a person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) make the claim expressly; and

(ii) describe the nature of the withheld records or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person 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 person who produced the information must preserve the information until the claim is resolved.

(e) Subpoena for Deposition; Place of Examination.

(1) **Residents of This State.** A resident of this state may be required by subpoena to attend an examination upon deposition only in the county wherein the witness resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court.

(2) **Nonresidents of This State.** A nonresident of this state may be required by subpoena to attend only within forty miles from the place of service of the subpoena in the state of Colorado or in the county wherein the nonresident resides or is employed or transacts business in person or at such other convenient place as is fixed by an order of court.

(f) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of C.R.J.P. ~~10(e)~~.

Rule 174. Information Generally Not Discoverable.

The following information shall not be discoverable without a court order or release from the privilege holder:

(a) Reports, statements, or records subject to federal and/or state privilege laws; and

(b) Attorney work product.

Should we provide more detail re: work product? 26 says this:
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.

Rule 1~~85~~. Claim of Privilege or Protection of Trial Preparation Materials.

(a) **Withholding.** 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)~~ **Accidental disclosure.** 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 present the information to the court under seal for a determination of the claim within 14 days after receiving such notice, or the claim is waived. The producing party must preserve the information until the claim is resolved, and bears the burden of proving the basis of the claim and that the claim was not waived. All notices under this rule shall be in writing.

Rule 1~~986~~. 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, undue burden or expense, or as necessary to protect the best interests of the child, including one or more of the following:

(a) the disclosure or discovery not be had;

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

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

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

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

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

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

Rule ~~19~~207~~.~~. Privilege Holder Defined.

(a) **Competent Adults**. Every competent adult may exercise and/or waive his or her own privilege.

(b) **Children and/or Incompetent Person.** The privilege holder designated by the court in accordance with ~~applicable~~ law may exercise and/or waive the privilege of a child or incompetent person. The privilege holder designated by the court in accordance with law may be the incompetent person and/or child himself or herself.~~.~~

Rule 21018~~.~~. Waiver of Privilege.

(a) **Waiver via Release.** Persons wishing to waive privilege must execute a written release. While other forms of waiver may be utilized, Form 1 attached as an appendix to these rules is an approved form for waiver.

(b) **Waiver Limitations**. If a privilege holder executes a waiver or limited waiver authorizing certain parties to access privileged information, other parties seeking the privileged information must seek the privileged information from the privilege holder or the court, not the party authorized to access it through the waiver or limited waiver.

Rule ~~19~~22~~.~~. Duty to Confer.

Unless a statute or rule governing the motion provides that it may be filed without notice, moving counsel shall confer with opposing counsel before filing any disclosure or discovery related motion. The motion shall, at the beginning, contain a certification that the movant in good faith has conferred with opposing counsel about the motion. If the relief sought by the motion has been agreed to by the parties or will not be opposed, the court shall be so advised in the motion. If no conference has occurred, the reason why shall be stated.

Rule 230~~.~~. Resolution of Discovery Disputes.

(a) **Informal Resolution of Discovery Disputes.** Parties and the court are encouraged to resolve discovery disputes as informally as possible, including recorded phone conferences without written motions. Courts shall, to the extent practicable, create local informal procedures for resolving discovery disputes in a timely manner such as waiving the need for written motion and allowing counsel to argue the issues telephonically. Discovery issues should not delay the case processing guidelines of the Children's Code.

Commented [CN35]: A member of the big committee asked, "How do definitions here relate to statutory language when RP may have a GAL appointed?"

(b) **Judicial Resolution of Discovery Disputes.**

(1) Except motions during trial or where the court orders that certain or all non-dispositive motions shall be made orally, any motions involving a contested issue of law shall be supported by a recitation of legal authority incorporated into the motion. Unless the court orders otherwise, motions and responses are limited to five (5) pages at least 12-size font, not including the case caption, signature block, certificate of service, and attachments. All motions and responses shall be double-spaced, except for footnotes and quotes.

(2) Except as provided otherwise by the court ~~in these CRJP~~, the responding party shall have 7 days after the filing of the motion or such lesser or greater time as the court may allow in which to file a response. No reply may be filed unless authorized by the court.

Rule ~~21~~24. Failure to Make Disclosure or Cooperate in Discovery; Sanctions.

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

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

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

(B) If a deponent fails to answer a formal request for discovery as permitted by these rules, the discovering party may move for an order for a response. The motion shall be accompanied by a certification that the moving party in good faith has conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question shall attempt to reach the court telephonically to attempt to resolve the issue before adjourning the deposition .~~may complete or adjourn the examination before applying for an order.~~

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

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

Commented [md36]: Depending upon Supreme court determination of case regarding fees against Petitioners

party's nondisclosure, response, or objection was substantially justified or that other circumstances make an award of expenses manifestly unjust.

(B) If a motion is denied, the court may make such protective order as it could have made on a motion filed pursuant to CRJP __ ~~rule 7~~ and may, after affording an opportunity to be heard if requested, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses manifestly unjust.

(C) If the motion is granted in part and denied in part, the court may make such protective order as it could have made on a motion filed pursuant to CRCP ____ ~~rule 7~~ and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) **Failure to Comply with Order.**

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

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

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

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

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

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

~~(E) Where a party has failed to comply with an order under rule 35(a) requiring the party to produce another for examination, such orders as are listed in subparagraphs (A), (B), and (C) of this subsection (2), unless the party failing to comply shows that he is unable to produce such person for examination~~.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order, or the attorney advising the party, or both, to

Commented [CN37]: A member of the big committee asked, "Appropriate in a D/N where child's interests are separate from what other parties may do and need response to?"

Commented [md38]: This language and the above language is deleted because we omitted CRCP 35 physical or mental examinations.

pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) **Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.** (1) A party that without substantial justification fails to disclose information required by these rules shall not be permitted to present any evidence not so disclosed at trial or on a summary judgment motion made, unless such failure has not caused and will not cause significant harm, or such preclusion is disproportionate to that harm. The court, after holding a hearing if requested, may impose any other sanction proportionate to the harm, including any of the sanctions authorized in these rules, and the payment of reasonable expenses including attorney fees caused by the failure.

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

(A) the request was held objectionable under these rules, or

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

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

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

(d) **Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.** If a party ~~or an officer, director, or managing agent of a party or a person designated to testify on behalf of a party~~ fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice; or (2) to serve answers or objections to interrogatories, after proper service of the interrogatories; or (3) to serve a written response to a request for inspection, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized by these rules. Any motion specifying a failure under clauses (2) or (3) of this subsection shall be accompanied by a certification that the movant in good faith has conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has previously filed a motion for a protective order as provided by these rules.

(e) **Standard.** When making a determination regarding the failure of a party to comply with these rules or court order regarding discovery, the court shall consider the best interests of the children, the due process rights of the parties, and other relevant facts and circumstances including the time guidelines provided in the Children's Code.

~~(a) **Sanction Options.** The court may enter orders including, but not limited to, one or more of the following:~~

~~(1) Requiring the unresponsive party to permit discovery or inspection;~~

~~(2) Granting a continuance consistent with the Colorado Children's Code;~~

~~(3) Indicating that the matters related to the order, or other designated facts, shall be deemed established;~~

~~(4) Prohibiting the unresponsive party from supporting or opposing designated claims;~~

~~(5) Prohibiting the unresponsive party from introducing designated matters in evidence;~~

~~(6) Entering a finding that the petition or certain parts thereof shall be deemed established; and/or~~

~~(7) If authorized by law, requiring the unresponsive party, their counsel, or both, to pay reasonable expenses, including attorney's fees caused by the lack of the response.~~

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Trent suggested:

(A) Records and comprehensive case files in connection with prior juvenile cases involving the respondent parents and the Department, if any;
(B) With respect to any prior juvenile cases involving the respondent parents and the department in another jurisdiction, all records and case files in the possession or control of the [] County Attorney's office and/or the Department;
(C) With respect to any concurrent and/or prior criminal proceedings involving the respondent parents, all records, files, law enforcement reports, and documents in the possession or control of the [] County Attorney's office and/or the Department;
(D) All photographs relevant to the case in the possession or control of the [] County Attorney's office and/or the Department;
(E) Intake and risk assessments, screenings, social studies, safety plans, communications, and other documents re. Department contact with the family;
(F) Documents and communications regarding all services discussed with and/or provided to the respondent parents by the Department;
(G) All medical, psychological, psychosexual, and other assessments or evaluations of the respondent parents in the possession or control of the [] County Attorney's office and/or the Department. If there are objections based on confidentiality or privilege, the [] County Attorney's office shall provide a privilege log that specifically identifies the items withheld;
(H) Transcripts of all recorded interviews of the respondent parents and/or their children in the possession or control of the [] County Attorney's office and/or the Department;
(I) Any and all urinary analyses, umbilical cord tests, and other substance screens in the possession or control of the [] County Attorney's office and/or the Department;
(J) All reports and documents provided to the guardian ad litem pursuant to C.R.S. § 19-3-203;
(K) All written reports and other materials relating to the children's mental, physical, and social history in the possession or control of the [] County Attorney's office and/or the Department; and
(L) Any other documents or evidence relied upon to support allegations underlying the petition in dependency and neglect.