

Rule Change #2001(10)

**The Colorado Rules of Civil Procedure
Chapter 4. Disclosure and Discovery**

The following rules are Amended and Adopted as of May 24, 2001:

C.R.C.P. 26. General Provisions Governing Discovery; Duty of Disclosure

Amended and Adopted by the Court, En Banc, May 24, 2001,
effective July 1, 2001.

BY THE COURT:

Gregory J. Hobbs, Jr.
Justice, Colorado Supreme Court

C.R.C.P. 26. General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter.

Unless otherwise ordered by the court or stipulated by the parties, provisions of this Rule shall not apply to domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, C.R.C.P. 120, or other expedited proceedings.

(1) Disclosures. Except to the extent otherwise directed by the court, a party shall, without awaiting a discovery request, provide to other parties:

(A) [*** NO CHANGE]

(B) A listing, together with a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings~~+~~, making available for inspection and copying the documents or other evidentiary material, not privileged or protected from disclosure, as though a request for production of those documents had been served pursuant to C.R.C.P. 34;

(C) A description of the categories of damages sought and a ~~A~~ computation of any category of economic damages claimed by the disclosing party, making available for inspection and copying pursuant to C.R.C.P. 34 the documents or other evidentiary material, not privileged or protected from disclosure, ~~on which such computation is based, including materials bearing on the nature and extent of injuries suffered as though a request for production of those documents had been served pursuant to C.R.C.P. 34;~~ and

(D) Any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment, making such agreement available for inspection and copying pursuant to C.R.C.P. 34.

The timing of disclosures shall be within 30 days after the case is at issue as defined in ~~pursuant to~~ C.R.C.P. 16(b). A party shall make the required disclosures based on the information then known and reasonably available to the party and is not excused from making such disclosures because the party has not completed investigation of the case or because the party challenges the sufficiency of another party's disclosures or because another party has not made the required disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by subsection (a)(1) of this Rule, a party shall disclose to other parties the identity of any person who may present evidence at trial, pursuant to Rules 702, 703, or 705 of the Colorado Rules of Evidence together with an identification of the person's fields of expertise.

(B)(I)-(II) [*** NO CHANGE]

~~(C) These disclosures shall be made at the times and in the sequence established by the Case Management Order, pursuant to C.R.C.P. 16(b). 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 120 days before the trial date. ~~set for the commencement of trial.~~

(II) The disclosure by a defending party shall be made within 30 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 90 days 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)(B)~~ (a)(2)(C)(II) of this Rule, such disclosure shall be made within 20 days after the disclosure made by the other party.

(3) [*** NO CHANGE]

(4) Form of Disclosures; Filing. ~~Unless otherwise directed by the Case Management Order, all~~ All disclosures pursuant to subparagraphs (a)(1) and (a)(2) of this Rule shall be made in writing, signed pursuant to C.R.C.P. 26(g)(1), served and promptly filed with the court, but such court filings shall not include copies of any disclosed documents or other evidentiary material, or any expert reports or summaries. ~~All disclosures other than the disclosures made pursuant to C.R.C.P. 16(b) and described in the Case Management Order shall include a description, by category or other appropriate designation, of the information being disclosed.~~

(5) [*** NO CHANGE]

~~(6) Claims of Privilege or Protection of Trial Preparation Materials.~~ When a party withholds information required to be disclosed 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 amended and moved to new subsection (b)(5)]

(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) [*** NO CHANGE]

(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)-(D) [*** NO CHANGE]

(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.

~~In determining good cause the court shall consider the following:~~

(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)(A)-(B) [*** NO CHANGE]

(4)(A)-(C) [*** NO CHANGE]

(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)-(g) [*** NO CHANGE]

COMMITTEE COMMENT

SCOPE [*** NO CHANGE]

COLORADO DIFFERENCES

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

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

of the expense of the discovery they schedule (C.R.C.P. 16(b)(1)(IV)); (9) the parties cannot stipulate out of the C.R.C.P. 26(b)(2) presumptive discovery limitations (C.R.C.P. 29); and (10) pretrial endorsements governed by Fed.R.Civ.P. 26(a)(3) are part of Colorado's trial management system established by C.R.C.P. 16(c) and C.R.C.P. 16(d).

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

FEDERAL COMMITTEE NOTES [*** NO CHANGE]

NOTES TO CHANGES ADOPTED 2001

Subsection (a)(2)(C)(II) is intended to prevent a plaintiff, who may have had a year or more to prepare his or her case, from filing an expert report early in the case in order to force a defendant to prepare a virtually immediate response. This section provides that the defendant's expert report will not be due until 90 days prior to trial.

Subsection (b)(2)(A) has been changed to clarify that the deposition limitation does not apply to persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2).

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