RULE 26. General Provisions Governing Discovery; Duty of Disclosure

(a) **Required Disclosures**

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 court proceedings subject to sections 37-92-302 to 37-92-305, C.R.S., 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 the following information, whether or not supportive of the disclosing party's claims or defenses:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to the claims and defenses of any party and a brief description of the specific information that each such individual is known or believed to possess;

(B) a listing, together with a copy of, or a description by category, of the subject matter and location of all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to the claims and defenses of any party, making available for inspection and copying such documents and 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 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 relevant to the damages sought, 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; 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.

Disclosures shall be served within 28 days after the case is at issue as defined in C.R.C.P. 16(b)(1). 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 disclosure or because another party has not made the required disclosures. Parties shall make these disclosures in good faith and may not object to the adequacy of the disclosures until the case management conference pursuant to C.R.C.P. 16(d).

(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) Except as otherwise stipulated or directed by the court:

(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.

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).

(4) **Form of Disclosures; Filing.** All disclosures pursuant to subparagraphs (a)(1) and (a)(2) of this Rule shall be made in writing, in a form pursuant to C.R.C.P. 10, signed pursuant to C.R.C.P. 26(g)(1), and served upon all other parties. Disclosures shall not be filed with the court

unless requested by the court or necessary for consideration of a particular issue.

(5) **Methods to Discover Additional Matters.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, pursuant to C.R.C.P. 34; physical and mental examinations; and requests for admission. Discovery at a place within a country having a treaty with the United States applicable to the discovery must be conducted by methods authorized by the treaty except that, if the court determines that those methods are inadequate or inequitable, it may authorize other discovery methods not prohibited by the treaty.

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

(1) **In General.** Subject to the limitations and considerations contained in subsection (b)(2) of this Rule, parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within the scope of discovery need not be admissible in evidence to be discoverable.

(2) **Limitations.** Except upon order for good cause shown and subject to the proportionality factors in subsection (b)(1) of this Rule, 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. 26, 28, 29, 30, 31, 32 and 45.

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

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

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

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

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

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

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

(III) whether the proposed discovery is outside the scope permitted by C.R.C.P. 26(b)(1); 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.

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

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request,

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

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

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

(4) **Trial Preparation: Experts**

(A) A party may depose any person who has been identified as an expert disclosed pursuant to subsection 26(a)(2) of this Rule whose opinions may be presented at trial. Each deposition shall not exceed 6 hours. On the application of any party, the court may decrease or increase the time permitted after considering the proportionality criteria in subsection (b)(1) of this Rule. Except to the extent otherwise stipulated by the parties or ordered by the court, no discovery, including depositions, concerning either the identity or the opinion of experts shall be conducted until after the disclosures required by subsection (a)(2) of this Rule.

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

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

(D) Rule 26(b)(3) protects from disclosure and discovery drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded, and protects communications between the party's

attorney and any witness disclosed under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(I) relate to the compensation for the expert's study, preparation, or testimony;

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

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

(5)

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

(B) If information produced in disclosures or discovery is subject to a claim of privilege or of protection as trial-preparation material the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must not review, use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and shall give notice to the party making the claim within 14 days if it contests the claim. If the claim is not contested within the 14-day period, or is timely contested but resolved in favor of the party claiming privilege or protection of trial-preparation material, then the receiving party must also promptly return, sequester, or destroy the specified information and any copies that the receiving party has. If the claim is contested, the party making the claim shall 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.

(c) **Protective Orders.** Upon motion by a party or by the person from whom disclosure is due or discovery is sought, accompanied by a certificate that the movant has in good faith conferred or attempted to confer with

other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

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

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

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

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

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

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

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

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

(d) **Timing and Sequence of Discovery.** Except when authorized by these Rules, by order, or by agreement of the parties, a party may not seek discovery from any source before service of the Case Management Order pursuant to C.R.C.P. 16(b)(18). Any discovery conducted prior to issuance of the Case Management Order shall not exceed the limitations established by C.R.C.P. 26(b)(2). Unless the parties stipulate or the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) **Supplementation of Disclosures, and Responses, and Expert Reports and Statements.** A party is under a duty to supplement its disclosures under section (a) of this Rule when the party learns that the information disclosed 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 during the disclosure or discovery process, including information relating to anticipated rebuttal but not including information to be used solely for impeachment of a witness. A party is under a duty to amend a prior response to an interrogatory, request for production or request for admission when the party learns that the prior response 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 during the discovery process. With respect to experts, the duty to supplement or correct extends both to information contained in the expert's report or statement disclosed pursuant to section (a)(2)(B) of this Rule and to information provided through any deposition of the expert. If a party intends to offer expert testimony on direct examination that has not been disclosed pursuant to section (a)(2)(B) of this Rule on the basis that the expert provided the information through a deposition, the report or statement previously provided shall be supplemented to include a specific description of the deposition testimony relied on. Nothing in this section requires the court to permit an expert to testify as to opinions other than those disclosed in detail in the initial expert report or statement except that if the opinions and bases and reasons therefor are disclosed during the deposition of the expert by the adverse party, the court must permit the testimony at trial unless the court finds that the opposing party has been unfairly prejudiced by the failure to make disclosure in the initial expert report. Supplementation shall be performed in a timely manner.

(f) No Colorado Rule-See C.R.C.P. 16.

(g) **Signing of Disclosures, Discovery Requests, Responses, and Objections**

(1) Every disclosure made pursuant to 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 shall sign the disclosure and state the party's address. The 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 shall sign the request, response, or objection and state the party's address. The 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 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.

History:

Source: Entire rule repealed April 14, 1994, effective January 1, 1995; entire rule adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; committee comment approved June 10, 1994; f corrected and effective January 9, 1995; g2 and g3 amended and adopted October 30, 1997, effective January 1, 1998; entire rule and committee comment amended and adopted May 24, 2001, effective July 1, 2001; b1 and committee comment amended and adopted November 15, 2001, effective January 1, 2002; a4 amended and adopted October 20, 2005, effective January 1, 2006; a1 last paragraph, 2CI, 2CII, and 2CIII amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1 b; amended and effective September 18, 2014. Amendments effective July 1, 2015 for cases filed on or after July 1, 2015; amended and adopted by the Court, En Banc, August 17, 2020 effective 8/17/2020, effective immediately; amended January 7, 2021, effective 4/1/2021.

Note:

Committee Comment

1995

Scope

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

Colorado Differences

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

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

[4] 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

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

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

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

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

2002

2001 Colorado Changes

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

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

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

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

2015

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

[14] Scope of discovery.

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

concept is to allow discovery of what a party/ lawyer needs to prove its case, but not what a party/lawyer *wants* to know about the subject of a case.

[15] Proportionality analysis.

C.R.C.P. 26(b)(1) requires courts to apply the principle of proportionality in determining the extent of discovery that will be permitted. The Rule lists a number of non-exclusive factors that should be considered. Not every factor will apply in every case. The nature of the particular case may make some factors predominant and other factors insignificant. For example, the amount in controversy may not be an important consideration when fundamental or constitutional rights are implicated, or where the public interest demands a resolution of the issue, irrespective of the economic consequences. In certain types of litigation, such as employment or professional liability cases, the parties' relative access to relevant information may be the most importantfactor. These examples show that the factors cannot be applied as a mathematical formula. Rather, trial judges have and must exercise discretion, on a case-by-case basis, to effectuate the purposes of these rules, and, in particular, abide by the overarching command that the rules "shall be liberally construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action." C.R.C.P. 1.

[16] Limitations on discovery.

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

[17] Initial disclosures.

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

in the pleadings. Thus, it was intended that disclosures were to include matter that might be harmful as well as supportive. (Limiting disclosure to supportive information likely would only encourage initial interrogatories and document requests that would require disclosure of harmful information.)

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

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

"Other" (non-retained) experts must make disclosures that are less detailed. Many times a lawyer has no control over a non-retained expert, such as a treating physician or police officer, and thus the option of a "statement" must be preserved with respect to this type of expert, which, if necessary, may be prepared by the lawyers For example, in addition to the opinions and diagnoses reflected in a plaintiff's medical records, a treating physician may have reached an opinion as to the cause of those injuries based upon treating the patient. Those opinions may not have been noted in the medical records but if sufficiently disclosed in a written report or statement as described in Comment [21], below, such opinions may be offered at trial without the witness having first prepared a full, retained expert report. In any event, the expert testimony is to be limited to what is disclosed in detail in the disclosure. Rule 26(a)(2)(B)(II).

[19] Retained or non-retained experts.

Non-retained experts are persons whose opinions are formed or reasonably derived from or based on their occupational duties.

[20] Expert discovery.

The prohibition of depositions of experts was perhaps the most controversial aspect of CAPP. Many lawyers, particularly those involved in professional liability cases, argued that a blanket prohibition of depositions of experts would impair lawyers' ability to evaluate cases and thus frustrate settlement of cases. The 2015 amendment permits limited depositions of experts. Retained experts may be deposed for up to 6 hours, unless changed by the court, which must consider proportionality. Rule 26(b)(4)(A).

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

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

[21] Sufficiency of disclosure of expert opinions and the bases therefor.

This rule requires detailed disclosures of "all opinions to be expressed [by the expert] and the basis and reasons therefor." Such disclosures ensure that the parties know, well in advance of trial, the substance of all expert opinions that may be offered at trial. Detailed disclosures facilitate the trial, avoid delays, and enhance the prospect for settlement. At the same time, courts and parties must "liberally construe[], administer[] and employ[]" these rules "to secure the just, speedy, and inexpensive determination of every action." C.R.C.P. 1. Rule 26(a)(2) does not prohibit disclosures that incorporate by specific page reference previously disclosed records of the designated expert (including non-retained experts), provided that the designated pages set forth the opinions to be expressed, along with the reasons and basis therefor. This Rule does not require that disclosures match, verbatim, the testimony at trial. Reasonableness and the overarching goal of a fair resolution of disputes are the touchstones. If an expert's opinions and facts supporting the opinions are disclosed in a manner that gives the opposing party reasonable notice of the specific opinions and supporting facts, the purpose of the rule is accomplished. In the absence of substantial prejudice to the opposing party, this rule does not require exclusion of testimony merely because of technical defects in disclosure.

I. General Consideration.

Law reviews. For article, "Depositions and Discovery: Rules 26-37 ", see 23 Rocky Mt. L. Rev. 562 (1951). For article, "Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment", see 40 Den. L. Ctr. J. 192 (1963). For article, "A Deposition Primer, Part I: Setting Up the Deposition", see 11 Colo. Law. 938 (1982). For article, "An Upjohn Update", see 11 Colo. Law. 2137 (1982). For article, "The Search for Truth Continued: More Disclosure, Less Privilege", see 54 U. Colo. L. Rev. 51 (1982). For article, "The Search for Truth Continued, The Privilege Retained: A Response to Judge Frankel", see 54 U. Colo. L. Rev. 67 (1982). For article, "Attorney-Client Privilege-the Colorado Law", see 12 Colo. Law. 766 (1983). For comment, "Colorado's Approach to Searches and Seizures in Law Offices", see 54 U. Colo. L. Rev. 571 (1983). For article, "Sequestration of Deponents in Civil Litigation", see 15 Colo. Law. 1028 (1986). For article, "New Role for Nonparties in Tort Actions-The Empty Chair", see 15 Colo. Law. 1650 (1986). For article, "Work-Product and Attorney-Client Privileges in Colorado", see 16 Colo. Law. 15 (1987). For article, "The Role of Expert Psychological Testimony on Eyewitness Reliability", see 16 Colo. Law. 469 (1987). For article, "Colorado's New Rules of Civil Procedure, Part I: Case Management and Disclosure", see 23 Colo. Law. 2467 (1994). For article, "Common Pitfalls in Complying with C.R.C.P. 16 and 26 When Drafting Case Management Orders", see 26 Colo. Law. 39 (March 1996). For article, "Civil Rules 16 and 26: Pretrial Procedure and Discovery Revisited and Revised", see 30 Colo. Law. 9 (December 2001). For article, "Professionalism and E-Discovery: Considerations Post-Zubulake", see 41 Colo. Law. 65 (June 2012).

Annotator's note. Some of the following annotations refer to cases decided under C.R.C.P. 26 as it existed prior to the 1994 repeal and readoption of that rule, effective January 1, 1995.

The purpose of this rule is to eliminate secrets and surprises at trial, simplify the issues, and lead to fair and just settlements without having to go to trial. *Crist v. Goody*, 31 Colo. App. 496, 507 P.2d 478 (1972).

The purposes of pretrial discovery include the elimination of surprise at trial, the discovery of relevant evidence, the simplification of issues, and the promotion of expeditious settlement of cases. *Hawkins v. District Court*, 638 P.2d 1372 (Colo. 1982).

This rule must be construed liberally. *Crist v. Goody*, 31 Colo. App. 496, 507 P.2d 478 (1972); *Sherman v. District Court*, 637 P.2d 378 (Colo. 1981).

Legislative intent. The general assembly did not intend that the open records laws would supplant discovery practice in civil litigation. *Martinelli v. District Court*, 199 Colo. 163, 612 P.2d 1083 (1980).

Certain basic principles govern discovery disputes: First, the rules should be construed liberally to effectuate the full extent of their truth-seeking purpose. Second, in close cases, the balance must be struck in favor of allowing discovery. Third, the party opposing discovery bears the burden of showing good cause that he is entitled to a protective order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. *Hawkins v. District Court*, 638 P.2d 1372 (Colo. 1982).

Fifth amendment privilege against self-incrimination did not apply to evidence of insurance coverage statutorily required to be maintained by a motor vehicle carrier. These documents came within both the "collective entity" and "required records" doctrines of fifth amendment jurisprudence. *People ex rel. Pub. Utils. Comm'n v. Entrup*, 143 P.3d 1120 (Colo. App. 2006).

If knowledge or intent of a defendant is an issue, information regarding collisions prior to one at issue, even those not involving the plaintiff, may be relevant for discovery purposes. *Sewell v. Pub. Serv. Co. of Colorado*, 832 P.2d 994 (Colo. App. 1991).

Party entitled to complete discovery for case preparation. Regardless of the burden of proof, a party is entitled to complete discovery in order to adequately prepare his case. *Kerwin v. District Court*, 649 P.2d 1086 (Colo. 1982).

Party entitled to reasonable discovery as prerequisite to trial where supreme court had previously ruled that summary judgment in favor of opposing party was erroneously granted by water court, even though summary judgment motion was decided on the day originally set for the due diligence hearing and discovery related to certain issues had not been sought by the party prior to that date. Even if the summary judgment proceeding were characterized as a trial on the merits, the party is still entitled to a new trial governed by proper standards determined in previous supreme court ruling and discovery related to those standards. *Pub. Serv. Co. v. Blue River Irr.*, 782 P.2d 792 (Colo. 1989).

This rule and C.R.C.P. 37 must be construed together along with the requirement that plaintiff establish a prima facie case for punitive damages, as a condition precedent to the plaintiff's right to discovery of the defendant's financial information. *Leidholt v. District Court*, 619 P.2d 768 (Colo. 1980).

Since use of all discovery methods is sanctioned, the frequency of use of these methods should not be limited, unless there is a showing of good cause

in the particular circumstances of the case. *Sanchez v. District Court*, 624 P.2d 1314 (Colo. 1981).

Discovery shall be allowed to proceed without interruption. Discovery procedures to secure information relevant to the subject matter of the action must be allowed to proceed without interruption or obstruction. *Sherman v. District Court*, 637 P.2d 378 (Colo. 1981).

Discovery matters ordinarily are within the discretion of the trial court. In re Mann, 655 P.2d 814 (Colo. 1982); *Silva v. Wilcox*, 223 P.3d 127 (Colo. App. 2009).

Although evidence sought through a reopening of discovery would have been discoverable in the first instance, the trial court did not err in declining to reopen discovery for that purpose. *Silva v. Wilcox*, 223 P.3d 127 (Colo. App. 2009).

Trial courts have broad discretion to manage the discovery process and protect parties from discovery requests that would cause annoyance, embarrassment, oppression, or undue hardship. It is incumbent upon the party seeking a protective order to show the requisite conditions for issuance of such an order. *Bond v. District Court*, 682 P.2d 33 (Colo. 1984); *Sheid v. Hewlett Packard*, 826 P.2d 396 (Colo. App. 1991).

Matters relating to pretrial discovery are ordinarily reviewable only by appeal and not in an original proceeding. *Curtis, Inc. v. District Court*, 186 Colo. 226, 526 P.2d 1335 (1974).

Late disclosure did not cause prejudice. County's untimely disclosure of witnesses and exhibits required under section (a) did not constitute serious misconduct that denied defendant an adequate opportunity to defend against the witnesses and exhibits. *Camp Bird Colo., Inc. v. Bd. of County Comm'rs of Ouray*, 215 P.3d 1277 (Colo. App. 2009).

Public documents equally available to both parties are not disclosures under subsection (a)(1) and need not be automatically disclosed. *Averyt v. Wal-Mart Stores, Inc.*, 265 P.3d 456 (Colo. 2011).

Board of assessment appeals should not rule on a discovery request before the opposing party objects to the request. *FirstBank Longmont v. Boulder County Bd. of Equaliz.*, 990 P.2d 1109 (Colo. App. 1999).

Board of assessment appeals erred in denying a board of equalization request for loan appraisals, because, even if such documents were not admissible in evidence at the board of assessment appeals hearing, they were discoverable under the broad standards applicable to district court

discovery proceedings. *FirstBank Longmont v. Boulder County Bd. of Equaliz.*, 990 P.2d 1109 (Colo. App. 1999).

Original writ in nature of prohibition may issue in certain cases. Matters relating to pretrial discovery are ordinarily within the trial court's discretion and are reviewable only by appeal rather than in an original proceeding. However, where a gross abuse of discretion is shown and damage to the petitioners could not be cured by appeal, an original writ in the nature of prohibition may issue. *Phillips v. District Court*, 194 Colo. 455, 573 P.2d 553 (1978).

By binding plaintiff to the damage computations listed in plaintiff's initial disclosure statement merely because plaintiff did not designate the computations as estimates, the trial court effectively imposed a settlement on plaintiff and improperly involved the court in the settlement process. The trial court overemphasized plaintiff's failure to state that the initial disclosure of damages was an estimate, neglected to view the initial disclosures in the context of being information "now known and reasonably available," and was insufficiently attentive to the importance of an early exchange of information and the resulting need to update information under this rule. Absent some indication plaintiff tried to mislead the defendants or the court in plaintiff's initial disclosure or tried to frustrate the settlement process, plaintiff not required to accept an offer limited to plaintiff's initial disclosures. By granting the defendants' joint motion for judgment for a specific amount of damages over the objection of plaintiff, the court abused its discretion. *Morgan v. Genesee Co.*, 86 P.3d 388 (Colo. 2004).

Applied in *Weissman v. District Court*, 189 Colo. 497, 543 P.2d 519 (1975); *Ricci v. Davis*, 627 P.2d 1111 (Colo. 1981); *Franco v. District Court*, 641 P.2d 922 (Colo. 1982); *Hadley v. Moffat County Sch. Dist. RE-1*, 681 P.2d 938 (Colo. 1984); *Leland v. Travelers Indem. Co. of Illinois*, 712 P.2d 1060 (Colo. App. 1985); *Watson v. Reg'l Transp. Dist.*, 762 P.2d 133 (Colo. 1988); Sunahara v. State Farm Mut. Auto. Ins. Co., 2012 CO 30M, 280 P.3d 649.

Methods

Statutes for the perpetuation of testimony are not discovery statutes. *Rozek v. Christen*, 153 Colo. 597, 387 P.2d 425 (1963).

Destructive testing is not a matter of right, but lies in the sound discretion of the trial court. *Cameron v. District Court*, 193 Colo. 286, 565 P.2d 925 (1977).

The appropriate analysis in deciding whether to allow a destructive test as part of discovery where the owner of the object sought the testing was

parallel to that involved in a conventional request for inspection under C.R.C.P. 34 and a resulting motion for a protective order under this rule. *Cameron v. District Court*, 193 Colo. 286, 565 P.2d 925 (1977).

Balance shall be established. The dilemma which arises when the proposed test will somehow alter the original state of the object requires that a balance be established based upon the particular facts of the case and the broad policies of the discovery rules. *Cameron v. District Court*, 193 Colo. 286, 565 P.2d 925 (1977).

A balance must be struck where a test will alter the original state of an object between the "costs" of the alteration of the object and the "benefits" of ascertaining the true facts of the case. *Cameron v. District Court*, 193 Colo. 286, 565 P.2d 925 (1977).

Certain factors shall be considered in creating balance. Alternative means of ameliorating "costs", resulting from alteration of an object in destructive testing such as the use of detailed photographs to preserve the appearance of the object, or use of other samples for the test, are relevant to the creation of the balance. *Cameron v. District Court*, 193 Colo. 286, 565 P.2d 925 (1977).

Alternative, "nondestructive" means of obtaining the facts should be considered in evaluating the putative benefits of the tests. *Cameron v. District Court*, 193 Colo. 286, 565 P.2d 925 (1977).

Bad faith or overreaching is a special factor to be considered in all cases of destructive testing. *Cameron v. District Court*, 193 Colo. 286, 565 P.2d 925 (1977).

Destructive testing shall be undertaken last. A request for destructive testing compels that the court ensure that it is not undertaken until after other testing procedures have been completed by the parties. *Cameron v. District Court*, 193 Colo. 286, 565 P.2d 925 (1977).

Applied in *Gottesleben v. Luckenbach*, 123 Colo. 429, 231 P.2d 958 (1951).

III. Scope

A. In General.

Law reviews. For comment on *Lucas v. District Cour*t appearing below, see 31 Rocky Mt. L. Rev. 387 (1959).

Scope of discovery is very broad. The information sought need only be relevant to the subject matter. It need not be admissible as long as it is reasonably calculated to lead to admissible evidence. *Kerwin v. District*

Court, 649 P.2d 1086 (Colo. 1982); In re A.H. Robins Co., Inc., 681 P.2d 540 (Colo. App. 1984).

Information sought by written interrogatories is in accordance with this rule where the information sought is not privileged, is relevant to the subject matter involved in a pending action, and is either admissible in evidence or is information that is reasonably calculated to lead to the discovery of admissible evidence. *Denver & Rio Grande W. R. R. v. District Court*, 141 Colo. 208, 347 P.2d 495 (1959).

Under this rule, the information sought by an examination must be "relevant to the subject matter of a pending action". *Lucas v. District Court*, 140 Colo. 510, 345 P.2d 1064 (1959).

The term "relevant" as used in this rule is not limited to matter which is either admissible in evidence at a trial or which will properly lead to admissible evidence, but includes all matters which are relevant to the subject matter of an action. *Lucas v. District Court*, 140 Colo. 510, 345 P.2d 1064 (1959).

While plaintiff's request was for relevant information and she must be allowed to discover the extent of PSC's knowledge of prior aircraft collisions with transmission lines and of the circumstances surrounding those collisions, trial court may place reasonable restrictions upon these discovery demands, at least with respect to a reasonable time frame, if the absence of such restrictions would result in unnecessary annoyance, embarrassment, oppression, or undue burden or expense to PSC. *Sewell v. Pub. Serv. Co. of Colo.*, 832 P.2d 994 (Colo. App. 1991).

This rule expressly provides that the scope of examination is not limited to testimony which will be admissible in a trial. *Lucas v. District Court*, 140 Colo. 510, 345 P.2d 1064 (1959).

It is error for the court to effectively preclude discovery concerning information which, regardless of its admissibility at trial, is reasonably calculated to lead to the discovery of admissible evidence, since the purpose of this section is to permit the discovery of material regardless of its admissibility at trial. *Seymour v. District Court*, 196 Colo. 102, 581 P.2d 302 (1978).

The purpose of the final sentence of subsection (b)(1) of this rule, which provides that "it is not ground for objection that testimony will be inadmissible at a trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence" is not to limit the scope of examination, but rather to enlarge it by eliminating the objection that the

testimony sought would not be admissible at a trial. It is not intended to limit the preceding clause of this rule which conditions discovery to that which is "relevant to the subject matter involved in the pending action", so that it embraces only that testimony calculated to lead to the discovery of admissible evidence. *Lucas v. District Court*, 140 Colo. 510, 345 P.2d 1064 (1959).

It is not necessary to establish the admissibility of testimony; it is sufficient that an inquiry be made as to matters generally bearing on an issue and relevant thereto. *Lucas v. District Court*, 140 Colo. 510, 345 P.2d 1064 (1959).

Information may be "relevant" for purposes of discovery, although not admissible at trial. *Sewell v. Pub. Serv. Co. of Colo.*, 832 P.2d 994 (Colo. App. 1991).

The fact that evidence may not be admissible at trial under C.R.E. 404(b) does not preclude discovery of that information. *Williams v. District Court*, 866 P.2d 908 (Colo. 1993).

Objections based on admissibility shall be saved until an actual trial. *Lucas v. District Court*, 140 Colo. 510, 345 P.2d 1064 (1959).

Examination before trial may be had not merely for the purpose of producing evidence to be used at a trial, but also for discovery of evidence, indeed, for leads as to where evidence may be located. *Lucas v. District Court*, 140 Colo. 510, 345 P.2d 1064 (1959).

A trial court has a wide range of discretionary devices available to it in enforcing proper pretrial procedure and discovery. *Advance Loan Co. v. Degi*, 30 Colo. App. 551, 496 P.2d 325 (1972).

This rule contemplates that a deponent shall answer all questions except those to which he objects on the ground of privilege. *Lucas v. District Court*, 140 Colo. 510, 345 P.2d 1064 (1959).

A refusal to answer interrogatories may be the basis of reversing a favorable judgment. Where the correctness of a ruling of a trial court denying the right to have a party answer interrogatories can be reviewed by writ of error, a party refusing to answer such interrogatories does so at his peril, since such refusal may be the basis for reversal of a favorable judgment. *Denver & Rio Grande W. R. R. v. District Court*, 141 Colo. 208, 347 P.2d 495 (1959).

Where the information sought is subject to discovery pursuant to section (b) of this rule, the refusal to supply to information requested is in itself a ground for reversal. *Dolan v. Mitchell*, 179 Colo. 359, 502 P.2d 72 (1972).

Refusal to supply names of witnesses intended to be called is ground for reversal. *Dolan v. Mitchell*, 179 Colo. 359, 502 P.2d 72 (1972).

If one of the issues is the knowledge or intent of a defendant, information respecting prior incidents, even those not involving the plaintiff, may be relevant for discovery purposes. *Sewell v. Pub. Serv. Co. of Colo.*, 832 P.2d 994 (Colo. App. 1991).

Limited discovery on the issue of falsity is appropriate in a defamation suit where the materials may contain information relevant to the issue of falsity and are admissible in evidence or reasonably calculated to lead to the discovery of admissible evidence. *The Living Will Center v. NBC Subsidiary (KCNC-TV), Inc.*, 857 P.2d 514 (Colo. App. 1993).

B. Materials.

The attorney-client privilege and the work-product exemption are distinct but related theories, arising out of similar policy interests. *A v. District Court*, 191 Colo. 10, 550 P.2d 315 (1976), cert. denied, 429 U.S. 1040, 97 S. Ct. 737, 50 L. Ed. 2d 751 (1977); *Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215 (Colo. 1982).

Generally, the attorney-client privilege protects communications between the attorney and the client, and the promotion of such confidences is said to exist for the benefit of the client. On the other hand, the work-product exemption generally applies to "documents and tangible things . . . prepared in anticipation of litigation or for trial", and its goal is to insure the privacy of the attorney from opposing parties and counsel. *A v. District Court*, 191 Colo. 10, 550 P.2d 315 (1976), cert. denied, 429 U.S. 1040, 97 S. Ct. 737, 50 L. Ed. 2d 751 (1977); *Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215 (Colo. 1982).

Attorney-client privilege not absolute. Neither the attorney-client privilege nor the work-product exemption is absolute. The social policies underlying each doctrine may sometimes conflict with other prevailing public policies and, in such circumstances, the attorney-client privilege and the work-product doctrine must give way. *Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215 (Colo. 1982).

Neither the attorney-client privilege nor the work-product doctrine creates an absolute immunity for statements made to attorneys or to their agents. *Kay Labs., Inc. v. District Court*, 653 P.2d 721 (Colo. 1982).

The work-product privilege is perverted if it is used to further illegal activities, and there are no overpowering considerations that would justify

the shielding of evidence that aids continuing or future criminal activity. *Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215 (Colo. 1982).

Attorney-client relationship must exist for privilege to apply. Documents made for an insurance company acting as the agent of an attorney are also covered by the privilege, but the attorney-client relationship between the insurance company and its lawyer must exist at the time the documents are created for the privilege to apply. *Kay Labs., Inc. v. District Court*, 653 P.2d 721 (Colo. 1982).

The work-product exemption is applicable even when the client is a corporation. *A v. District Court*, 191 Colo. 10, 550 P.2d 315 (1976), cert. denied, 429 U.S. 1040, 97 S. Ct. 737, 50 L. Ed. 2d 751 (1977).

Work-product privilege is subject to the crime or fraud exception. *Caldwell v. District Court*, 644 P.2d 26 (Colo. 1982).

The "crime-fraud" or "criminal purposes" exception has developed as a limitation on the applicability of the attorney-client privilege and the work-product exemption. *Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215 (Colo. 1982).

The privilege created for an attorney's work product cannot be allowed to protect the perpetration of wrongful conduct. *Caldwell v. District Court*, 644 P.2d 26 (Colo. 1982).

The crime-fraud exception provides that communications between a client and his attorney are not privileged if they are made for the purpose of aiding the commission of a future crime or of a present continuing crime. *Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215 (Colo. 1982).

Prima facie showing required. A prima facie showing-one which gives a foundation in fact for the assertion of ongoing or future criminal conduct-is sufficient to invoke the applicability of the crime-fraud exception. *Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215 (Colo. 1982).

There must be a prima facie showing that the "crime-fraud" exception applies before the communication is stripped of its privilege. *People v. Board*, 656 P.2d 712 (Colo. App. 1982).

Applicability of crime-fraud exception within trial court's discretion. Whether the prosecution has established a proper foundation in fact for the application of the crime-fraud exception is best left for determination by the

trial court, whose exercise of discretion will not be overturned unless the record shows an abuse of that discretion. *People v. Board*, 656 P.2d 712 (Colo. App. 1982).

Work-product exemption applies in situations before grand jury. The work-product exemption should apply in situations before a grand jury where the work-product was gathered for the purpose of preparing to defend the client against an anticipated or pending criminal charge, which charge was also the subject of the grand jury investigation. *A v. District Court*, 191 Colo. 10, 550 P.2d 315 (1976), cert. denied, 429 U.S. 1040, 97 S. Ct. 737, 50 L. Ed. 2d 751 (1977).

Work-product prepared by counsel in anticipation of specific civil litigation which is sought by a grand jury is not protected by the work-product exemption unless the subject matter of the civil case and the grand jury proceeding are closely related. *A v. District Court*, 191 Colo. 10, 550 P.2d 315 (1976), cert. denied, 429 U.S. 1040, 97 S. Ct. 737, 50 L. Ed. 2d 751 (1977).

Some matters formerly protected as work product now discoverable. Subsection (b)(3) broadens the scope of discovery to include matters formerly protected by some courts under the work-product doctrine. *Hawkins v. District Court*, 638 P.2d 1372 (Colo. 1982).

Attorney's participation in preparation of documents has significance. The significance of documents, reports and statements being prepared by or under the direction of an attorney, rather than a nonattorney agent of a party, is that the attorney's participation is some indication that the materials were prepared in anticipation of litigation or for trial. *Hawkins v. District Court*, 638 P.2d 1372 (Colo. 1982).

Statements do not fall within the scope of the attorney-client privilege where attorneys were not involved in the investigation that produced them. *Compton v. Safeway*, Inc., 169 P.3d 135 (Colo. 2007).

Insurance company's investigative materials are ordinary business records. Because a substantial part of an insurance company's business is to investigate claims made by an insured against the company or by some other party against an insured, it must be presumed that such investigations are part of the normal business activity of the company and that reports and witness' statements compiled by or on behalf of the insurer in the course of such investigations are ordinary business records as distinguished from trial preparation materials. *Hawkins v. District Court*, 638 P.2d 1372 (Colo. 1982); *Lazar v. Riggs*, 79 P.3d 105 (Colo. 2003); *Compton v. Safeway, Inc.*, 169 P.3d 135 (Colo. 2007).

Materials are business records notwithstanding that the investigative material was prepared by outside counsel for insurer's general counsel. *Nat'l Farmers Union Prop. & Cas. v. District Court*, 718 P.2d 1044 (Colo. 1986).

Insurance has burden of demonstrating that its reports and statements are trial preparation materials. In the case of an insurance company defending a claim and asserting that its reports and witness' statements are trial preparation materials under section (b)(3), the insurance company has the burden of demonstrating that the document was prepared or obtained in order to defend the specific claim which already had arisen and, when the documents were prepared or obtained, there was a substantial probability of imminent litigation over the claim or a lawsuit had already been filed. *Hawkins v. District Court*, 638 P.2d 1372 (Colo. 1982); *Lazar v. Riggs*, 79 P.3d 105 (Colo. 2003); *Compton v. Safeway, Inc.*, 169 P.3d 135 (Colo. 2007).

Petitioner may obtain discovery. Even if an insurance company demonstrates that the requested documents constitute trial preparation materials, a petitioner nevertheless may obtain discovery upon a showing of substantial need of the materials in the preparation of his case and an inability without undue hardship to obtain the substantial equivalent of the requested information by other means. *Hawkins v. District Court*, 638 P.2d 1372 (Colo. 1982).

The "substantial need" requirement for discovery of trial preparation materials in general is subject to differing standards which have been adopted for materials prepared by experts specifically. *Phillips v. District Court*, 194 Colo. 455, 573 P.2d 553 (1978).

A medical malpractice plaintiff had substantial need for nurse interview notes made by defendant's attorney where the notes were the only contemporaneous record of the hospital's medical care given to plaintiff. The trial court must conduct an in camera review of the notes to redact the attorney's work product, if any. *Cardenas v. Jerath*, 180 P.3d 415 (Colo. 2008).

Attorney forfeits right to exclusive possession of client's papers relevant to fee dispute and can be required to produce them for inspection. *Jenkins v. District Court*, 676 P.2d 1201 (Colo. 1984).

Settlement authority is not a matter prepared by the attorney in anticipation of litigation subject to the attorney work product doctrine. *South Carolina Ins. Co. v. Fisher*, 698 P.2d 1369 (Colo. App. 1984).

Discovery of reserve amounts and settlement authority not discoverable information in a matter claimed by a third-party against an insured. *Silva v. Basin W. Inc.*, 47 P.3d 1184 (Colo. 2002).

For background of work-product doctrine, *see Hawkins v. District Court*, 638 P.2d 1372 (Colo. 1982).

C. Experts.

Certificate of review requirement under §13-20-602 is independent of the requirement to file initial disclosures under subsection (a)(2) of this rule. *Williams v. Boyle*, 72 P.3d 392 (Colo. App. 2003).

Subsection (b)(4) does not apply where discovery relates to information obtained by an expert as an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the law suit and not obtained by the expert in anticipation of litigation or for trial. *Water Rights v. No. Colo. Water Conservancy D.*, 677 P.2d 320 (Colo. 1984).

The rule allows discovery of attorney work product shared with a testifying expert witness, provided the expert witness considers the work product in forming an opinion. A communication is discoverable even if the expert did not rely on it in forming his or her opinion; the expert need only consider the communication in developing the opinion. An expert considers documents or materials for purposes of the rule where the expert reads or reviews them before or in connection with forming the opinion, even if the expert does not rely upon or ultimately rejects them. *Gall v. Jamison*, 44 P.3d 233 (Colo. 2002).

Under subsection (a)(2)(B)(I) of this rule, an expert witness considers information "in forming the opinions" if the expert witness reviews the information with the purpose of forming opinions about the particular case at issue. *Garrigan v. Bowen*, 243 P.3d 231 (Colo. 2010).

In medical malpractice case where defendant retained co-author of published medical study as an expert witness, trial court erred in excluding expert witness's testimony for failure to disclose raw data underlying the study. Because the raw data was not "data or other information considered by the expert witness in forming opinions", defendant was not required to disclose or produce the data. *Garrigan v. Bowen*, 243 P.3d 231 (Colo. 2010).

The trial court's discretion under subsection (b)(4)(A)(ii) of this rule is not limited by the "substantial need" requirement. *Phillips v. District Court*, 194 Colo. 455, 573 P.2d 553 (1978).

Exceptional circumstances must be demonstrated to discover facts and opinions held by an expert who will not testify at trial, whether listed in the past as a potential witness or not. *Phillips v. District Court*, 194 Colo. 455, 573 P.2d 553 (1978).

There is no reversible error in not excluding expert physician's testimony. Where, although a summary of an expert physician's opinion is not furnished until just prior to trial, but the defendant is furnished with medical records and raw medical data prior to trial, a trial data certificate is filed, defense counsel knows the name of the witness, and defense counsel does request a continuance in order to obtain whatever information he needs, there is no reversible error in not excluding the testimony. *Kussman v. City & County of Denver*, 671 P.2d 1000 (Colo. App. 1983).

Failure to exclude testimony of financial expert regarding insolvency was harmless where witness had been listed as an expert witness on related matters, and other witnesses also testified as to insolvency of corporation in a case involving wrongful distribution of assets. *Ajay Sports, Inc. v. Casazza*, 1 P.3d 267 (Colo. App. 2000).

For differing standards adopted for materials prepared by experts, *see Phillips v. District Court*, 194 Colo. 455, 573 P.2d 553 (1978).

Failure to disclose microscope slides of samples of tissue from decedent that experts based diagnosis and causation of decedent's illness to defendants prior to trial was not a discovery violation because the tissue samples from which they were prepared were available to all parties. *Fenton v. Fibreboard Corp.*, 827 P.2d 564 (Colo. App. 1991).

The specific disclosure requirements of this rule do not apply to expert testimony regarding requests for attorney fees awarded as costs to a prevailing party. *Chartier v. Weinland Homes, Inc.*, 25 P.3d 1279 (Colo. App. 2001).

Trial court in dissolution of marriage action did not abuse its discretion when it declined to strike the testimony of wife's rebuttal expert where husband failed to show he was prejudiced by the late receipt of the expert's report. In re Antuna, 8 P.3d 589 (Colo. App. 2000).

Trial court was not required to preclude expert witness's entire testimony. Where expert's report was submitted 11 days before trial and defendant knew the substance of the expert's testimony, had received all other disclosures required by this rule, and deposed the expert before trial, trial court did not abuse its discretion in allowing expert to testify after redacting portions of the report that previously had not been made known to the

defendant. *Camp Bird Colo., Inc. v. Bd. of County Comm'rs of Ouray*, 215 P.3d 1277 (Colo. App. 2009).

Trial court did not abuse its discretion in precluding doctor's testimony when the doctor failed to include adequate information regarding testimony at prior trials and depositions. A listing of any other cases in which a witness has testified as an expert at trial or by deposition within the preceding four years shall include, at a minimum, the name of the court or administrative agency, where the testimony occurred, the names of the parties, the case numbers, and whether the testimony was by deposition or at trial. *Carlson v. Ferris*, 58 P.3d 1055 (Colo. App. 2002), aff'd on other grounds, 85 P.3d 504 (Colo. 2003).

The trial court did not abuse its discretion in precluding the testimony of a standard of care expert witness when the disclosing party failed to identify the prior trials and depositions at which the witness testified. Prior to the deposition of the expert witness, the disclosing party provided only dates and attorneys' names to the discovering party, thus shifting the burden to identify the case names and depositions at which the expert testified from the disclosing party to the discovering party, therefore, the preclusion of the witness was justified. *Svendsen v. Robinson*, 94 P.3d 1204 (Colo. App. 2004).

Incompleteness of list of cases in which expert had testified did not require preclusion of testimony where opposing party was allowed to cross-examine the expert on the failure to keep an accurate list of the cases in which he testified, and pretrial disclosure identified 54 of 100 cases in which he had testified. *Estate of Ford v. Eicher*, 220 P.3d 939 (Colo. App. 2008), aff'd, 250 P.3d 262 (Colo. 2011).

Trial court abused its discretion by refusing plaintiffs' uncontested motions to postpone the deadline for disclosure of expert testimony and to continue the trial. Parties were in agreement to wait for the NTSB's plane crash investigative report instead of hiring expert investigators on short notice. *Burchett v. S. Denver Windustrial*, 42 P.3d 19 (Colo. 2002).

Failure to produce a timely formal written report that contains the qualifications of the expert witness and a complete statement describing the substance of all opinions to be expressed does not result in prejudice to defendant when defendant was aware of all the information summarized in the report long before the trial. *Saturn Sys., Inc. v. Militare*, 252 P.3d 516 (Colo. App. 2011).

Plaintiff's counsel abandoned any objection to testimony of expert witness based on a failure to timely produce expert's report and therefore waived the

issue for appellate review. Vanderpool v. Loftness, 2012 COA 115M, 300 P.3d 953.

D. Other Illustrative Cases

Trial courts should apply a comprehensive framework incorporating the principles from the Martinelli and Stone tests to all discovery requests implicating a right to privacy. The party requesting the information must always first prove that the information requested is relevant to the subject of the action. Next, the party opposing the discovery request must show that it has a legitimate expectation that the requested information is confidential and will not be disclosed. If the trial court determines that there is a legitimate expectation of privacy in the information, the requesting party must prove either that disclosure is required to serve a compelling state interest or that there is a compelling need for the information. If the requesting party is successful in proving one of these two elements, it must then also show that the information is not available from other sources. Lastly, if the information is available from other sources, the requesting party must prove that it is using the least intrusive means to obtain the information. In re District Court, 256 P.3d 687 (Colo. 2011).

When a party asserts a privacy right in response to a motion to compel discovery, the court must make findings of fact that balance the moving party's need for the information sought against the privacy right. A court abuses its discretion if it grants a motion to compel discovery without first performing this required balancing test. Gateway Logistics, Inc. v. Smay, 2013 CO 25, 302 P.3d 235.

Official information privilege is significant in context of civil discovery under subsection (b)(1) since that rule allows a litigant to obtain discovery of any matter, not privileged, which is relevant to the subject matter involved in the pending action. *Martinelli v. District Court*, 199 Colo. 163, 612 P.2d 1083 (1980).

Determination of extent to which official information privilege applies to materials sought to be discovered requires an ad hoc balancing of: (a) The discoverant's interests in disclosure of the materials; and (b) the government's interests in their confidentiality. *Martinelli v. District Court*, 199 Colo. 163, 612 P.2d 1083 (1980).

Certain factors shall be considered where official information privilege claimed for police files. In a litigation arising from allegations of police misconduct, when the official information privilege is claimed for files and reports maintained by a police department, concerning the incident on which the allegations of misconduct are based, or about the officers involved

in the incident, the trial court has the advantage of the following formulation of factors to be considered in applying the privilege: (1) The extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is nonfrivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information sought to the plaintiff's case. *Martinelli v. District Court*, 199 Colo. 163, 612 P.2d 1083 (1980).

Doctrine of stare decisis has limited effect on application of official information privilege. Because the balancing process proceeds on an ad hoc basis, the effect of the doctrine of stare decisis in cases requiring application of the official information privilege is limited. *Martinelli v. District Court*, 199 Colo. 163, 612 P.2d 1083 (1980).

Tripartite balancing inquiry undertaken when right to confidentiality is invoked. When the right to confidentiality is invoked to prevent disclosure of personal materials or information, a tripartite balancing inquiry must be undertaken by the court, as follows: (1) Does the party seeking to come within the protection of the right to confidentiality have a legitimate expectation that the materials or information will not be disclosed? (2) is disclosure nonetheless required to serve a compelling state interest? and (3) if so, will the necessary disclosure occur in that manner which is least intrusive with respect to the right to confidentiality? *Martinelli v. District Court*, 199 Colo. 163, 612 P.2d 1083 (1980); *Corbetta v. Albertson's, Inc.*, 975 P.2d 718 (Colo. 1999).

Trial court should have applied Martinelli balancing test and conducted an in camera examination before ordering disclosure of food store's personnel records. *Corbetta v. Albertson's, Inc.*, 975 P.2d 718 (Colo. 1999).

Trial court abused its discretion in ordering defendant to produce his personal laptop for inspection without applying the balancing test and establishing parameters. *Cantrell v. Cameron*, 195 P.3d 659 (Colo. 2008).

To establish legitimate expectation of nondisclosure, claimant must show: First, that he or she has an actual or subjective expectation that the information will not be disclosed; and, second, that the material or information which he or she seeks to protect against disclosure is highly personal and sensitive and that its disclosure would be offensive and objectionable to a reasonable person of ordinary sensibilities. *Martinelli v. District Court*, 199 Colo. 163, 612 P.2d 1083 (1980).

Compelling state interest can override constitutional right to confidentiality. Even if it is determined that a claimant has a legitimate expectation that the personal materials or information in question will not be disclosed through state action, a compelling state interest can override the constitutional right to confidentiality which arises from that expectation. *Martinelli v. District Court*, 199 Colo. 163, 612 P.2d 1083 (1980).

Compelling state interest necessary to override claimant's legitimate expectation of privacy must consist in disclosure of the very materials or information which would otherwise be protected. *Martinelli v. District Court*, 199 Colo. 163, 612 P.2d 1083 (1980).

When it is determined that compelling state interest mandates disclosure of otherwise protected materials or information, the trial court must further inquire into the manner in which the disclosure will occur and disclosure must only be made in a manner consistent with the state interest to be served, which will intrude least on the claimant's right to confidentiality. *Martinelli v. District Court*, 199 Colo. 163, 612 P.2d 1083 (1980).

Personnel files and police reports may be protected from discovery. To the extent that they come within the scope of the official information privilege, the personnel files and staff investigation bureau reports of the Denver police department are protected from discovery. *Martinelli v. District Court*, 199 Colo. 163, 612 P.2d 1083 (1980).

Extent of discovery of defendant's financial condition is not unlimited even after a prima facie case for punitive damages is made. *Leidholt v. District Court*, 619 P.2d 768 (Colo. 1980).

Because tax returns are confidential in nature, a court may compel discovery of tax returns only if the returns are relevant to the subject matter of the case and there is a compelling need for the returns because specific information contained in the returns is not otherwise readily obtainable. Even if the need for discovery of tax returns is established, the court should limit discovery to those portions of the returns relevant and necessary to the assertion of the legal claims or defenses of the party seeking discovery. *Stone v. State Farm Mut. Auto. Ins. Co.*, 185 P.3d 150 (Colo. 2008).

Burden is cast upon party who seeks protective order to show annoyance, embarrassment or oppression. *Leidholt v. District Court*, 619 P.2d 768 (Colo. 1980).

Specific requests may constitute unnecessary harassment. Specific questions requesting detailed information regarding the defendant's financial status may constitute unnecessary harassment. *Leidholt v. District Court*, 619 P.2d 768 (Colo. 1980).

Existence of triable issue on punitive damages may be established through discovery, by evidentiary means, or by an offer of proof. *Leidholt v. District Court*, 619 P.2d 768 (Colo. 1980).

Prima facie proof of triable issue on liability for punitive damages is necessary to discover information relating to the defendant's financial status. *Leidholt v. District Court*, 619 P.2d 768 (Colo. 1980).

Permissible scope of discovery of defendant's financial worth for punitive damages includes only material evidence. The permissible scope of discovery of defendant's financial worth where a prima facie case for punitive damages has been made should include only material evidence of the defendant's financial worth, and should be framed in such a manner that the questions proposed are not unduly burdensome. *Leidholt v. District Court*, 619 P.2d 768 (Colo. 1980).

Mere allegation that plaintiff is entitled to punitive damages will not support order for discovery of a defendant's financial condition. *Leidholt v. District Court*, 619 P.2d 768 (Colo. 1980).

Information related to infection with AIDS virus. Patient entitled to discover information relating to established screening and testing procedures where policy of blood center which supplied patient with blood infected with the AIDS virus required follow-up questions to unsatisfactory responses on initial donor information cards and cards failed to reveal whether guidelines had been followed. *Belle Bonfils Mem'l Blood Ctr. v. District Court*, 763 P.2d 1003 (Colo. 1988).

In determining the discoverability of the identity of an anonymous blood donor who has tested positive for the AIDS virus, the court must apply a balancing test comparing the state's interest against the donor's interest in privacy. *Belle Bonfils Mem'l Blood Ctr. v. District Court*, 763 P.2d 1003 (Colo. 1988).

Blood donor's privacy interest in remaining anonymous to avoid embarrassment and humiliation associated with being identified as a carrier

of the AIDS virus does not outweigh the recipient's interest in seeking information necessary to adequately pursue a claim. Nor does societal interest in maintaining abundant supply of volunteer blood outweigh society's interest in assuring that such blood is free from contamination. *Belle Bonfils Mem'l Blood Ctr. v. District Court*, 763 P.2d 1003 (Colo. 1988).

Privileges protect against pretrial discovery. The physician-patient and psychologist-patient privileges, once they attach, prohibit not only testimonial disclosures in court but also pretrial discovery of information within the scope of the privilege. *Clark v. District Court*, 668 P.2d 3 (Colo. 1983).

Refusal of discovery in marriage dissolution action may constitute abuse of discretion. An abuse of discretion serious enough to invoke the supreme court's mandamus power occurs when the trial judge refuses discovery, in a marriage dissolution action, of evidence concerning the post-dissolution value and use of assets, various reinvestments derived from those assets, and the husband's income and expenditures. *Mayer v. District Court*, 198 Colo. 199, 597 P.2d 577 (1979).

The discovery of customer lists depends on the particular circumstances of each case. *Chicago Cutlery Co. v. District Court*, 194 Colo. 10, 568 P.2d 464 (1977).

In light of the unique nature of mutual ditch companies, which are not organized under general corporation statutes but under special statutes designed specifically for ditch and reservoir companies, the identity of shareholders for the determination of their intent is relevant in water court diligence proceedings. *Pub. Serv. Co. v. Blue River Irrigation Co.*, 753 P.2d 737 (Colo. 1988); *Pub. Serv. Co. v. Blue River Irr.*, 782 P.2d 792 (Colo. 1989).

Hospital inspection committees' privilege not expanded. Absent legislative action and in light of the general policy favoring liberal discovery, the public interest in the confidentiality of hospital inspection committees is insufficient to warrant judicial expansion of the privilege contained in § 12-43.5-102(3)(e). *Sherman v. District Court*, 637 P.2d 378 (Colo. 1981).

Trial judge may properly deny motion for tape recorded depositions where the objecting party shows that there exists a potential for abuse or harassment of a witness or party or where the objecting party otherwise establishes a bona fide claim for protective orders under section (c) of this rule. *Sanchez v. District Court*, 624 P.2d 1314 (Colo. 1981).

Exercise of discretion in ruling on discovery motion for tape recorded depositions should be limited, absent exceptional circumstances, to considerations of accuracy and trustworthiness with respect to the procedures and conditions to be followed in the recording, transcription, and filing of the depositions. *Sanchez v. District Court*, 624 P.2d 1314 (Colo. 1981).

"Surveillance movies" are discoverable. *Crist v. Goody*, 31 Colo. App. 496, 507 P.2d 478 (1972).

For trial court's refusal to recognize reporter's privilege, *see Gagnon v. District Court*, 632 P.2d 567 (Colo. 1981).

By binding plaintiff to the damage computations listed in plaintiff's initial disclosure statement merely because plaintiff did not designate the computations as estimates, the trial court effectively imposed a settlement on plaintiff and improperly involved the court in the settlement process. The trial court overemphasized plaintiff's failure to state that the initial disclosure of damages was an estimate, neglected to view the initial disclosures in the context of being information "now known and reasonably available," and was insufficiently attentive to the importance of an early exchange of information and the resulting need to update information under this rule. Absent some indication plaintiff tried to mislead the defendants or the court in plaintiff's initial disclosure or tried to frustrate the settlement process, plaintiff not required to accept an offer limited to plaintiff's initial disclosures. By granting the defendants' joint motion for judgment for a specific amount of damages over the objection of plaintiff, the court abused its discretion. *Morgan v. Genesee Co.*, 86 P.3d 388 (Colo. 2004).

No abuse of discretion by trial court in excluding evidence of settlement between general contractor and homeowners. Trial court struck information contained in new disclosures because it was untimely. It apparently accepted subcontractors' argument that allowing information about newly disclosed settlement would be unfairly prejudicial to them and that the settlement was not binding on them. Trial court acknowledged public policy encouraging settlements but noted that indemnification claim was present from the beginning of litigation and all parties had time to prepare for it. *D.R. Horton, Inc.-Denver v. Bischoff & Coffman Constr.*, LLC, 217 P.3d 1262 (Colo. App. 2009).

IV. Protective Orders.

Law reviews. For article, "Litigating Disputes Involving the Medical Marijuana Industry", see 41 Colo. Law. 103 (August 2012).

What constitutes good cause for a protective order under section (c) is a matter to be decided on the basis of the facts of each particular case. *Curtis, Inc. v. District Court*, 186 Colo. 226, 526 P.2d 1335 (1974).

Interrogatories which request information and data obtainable from available documents are "oppressive" under section (c) of this rule where the documents are available by use of C.R.C.P. 34 as a party should not be required to do the requesting party's investigative work. *Val Vu, Inc. v. Lacey*, 31 Colo. 55, 497 P.2d 723 (1972).

Where a strong case involving probable "annoyance, embarrassment, or oppression" is presented concerning out-of-state document, the court should not require production of all the documents in Colorado; rather, the court could provide that the inspection, copying, and photostating of all documents, except those claimed to be confidential or to contain trade secrets, take place where they are located. *Bristol Myers Co. v. District Court*, 161 Colo. 354, 422 P.2d 373 (1967).

Protective orders may be granted by a trial court to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, and must be decided on the basis of the particular facts before the court. People in Interest of J.L.P., 870 P.2d 1252 (Colo. App. 1994).

The plain language of section (c) does not authorize a protective order that would restrict the use of documents originally obtained outside the discovery process in the pending action. *Jessee v. Farmers Ins. Exch.*, 147 P.3d 56 (Colo. 2006).

In worker's compensation case, administrative law judge may, upon good cause shown, grant a protective order that discovery may not be had in order to protect a party from annoyance, embarrassment, oppression, or undue burden or expense. Powderhorn *Coal Co. v. Weaver*, 835 P.2d 616 (Colo. App. 1992).

Trial court properly denied discovery request and granted protective order where the information sought through discovery would have been fundamentally unfair and burdensome to and would have interfered with the sovereignty of Oglala Sioux Indian Tribe. People in Interest of J.L.P., 870 P.2d 1252 (Colo. App. 1994).

The trial court must balance the competing interests that would be served by granting or denying discovery when determining whether good cause exists for the issuance of a protective order. *Williams v. District Court*, 866 P.2d 908 (Colo. 1993).

There is no absolute right to hide trade secrets. There is no absolute right to hide the nature or existence of trade secrets from an opposing party. *Curtis, Inc. v. District Court*, 186 Colo. 226, 526 P.2d 1335 (1974); *Direct Sales Tire Co. v. District Court*, 686 P.2d 1316 (Colo. 1984).

Subsection (c)(7) does not bar disclosure of trade secrets, but permits the trial court to grant disclosure "in a designated way". *Curtis, Inc. v. District Court*, 186 Colo. 226, 526 P.2d 1335 (1974).

Test of whether good cause exists in a particular case under subsection (c)(7) is largely determined by balancing the need to limit the exposure of a trade secret against the need of the opposing party to have knowledge of the nature of the secret. *Curtis, Inc. v. District Court*, 186 Colo. 226, 526 P.2d 1335 (1974); *Direct Sales Tire Co. v. District Court*, 686 P.2d 1316 (Colo. 1984).

A three-part balancing inquiry must be undertaken by the trial court when the right to confidentiality is invoked. This inquiry entails determining whether the party seeking to prevent disclosure has a legitimate expectation that the information will not be disclosed, whether the state interest in facilitating the truth-seeking process through litigation is sufficiently compelling to overcome the asserted privacy interests, and whether disclosure can occur in a less intrusive manner. *Williams v. District Court*, 866 P.2d 908 (Colo. 1993).

Documents containing matters confidential or trade secrets should be forwarded to the clerk of the court and handled pursuant to the conditions imposed by the order of the court, as these documents should be physically present in order that full protection of their contents may be more effectively enforced. *Bristol Myers Co. v. District Court*, 161 Colo. 354, 422 P.2d 373 (1967).

For the purposes of determining who may be excluded from a pretrial deposition, this rule and not C.R.E. 615 controls. *Hamon Contractors, Inc. v. District Court*, 877 P.2d 884 (Colo. 1994).

Under this rule, a party or the representative of a party that is not a natural person may be excluded from a pretrial deposition only under exceptional circumstances. *Hamon Contractors, Inc. v. District Court*, 877 P.2d 884 (Colo. 1994).

Financially stressed nonresident need not incur unnecessarily expense of cross-country trip to take his deposition. Where one desires in good faith the deposition of a party living in another state before trial, he should have it, but not at a time or place involving the expense of a cross-country trip when

it is shown that the nonresident party is without funds for the expense of such journey and a deposition taken shortly before the trial, which the nonresident party agrees to, will adequately serve the ends of justice. *Manning v. Manning*, 136 Colo. 380, 317 P.2d 329 (1957).

The allowance of travel and attorney expenses for the taking of depositions is a matter solely within the discretion of the trial court under this rule. *Orth v. Bauer*, 163 Colo. 136, 429 P.2d 279 (1967).

Party requesting discovery must pay all expenses. All reasonable expenses in connection with the production, inspection, copying, or photostating of the documents are to be paid by the party requesting discovery as the same are incurred. *Bristol Myers Co. v. District Court*, 161 Colo. 354, 422 P.2d 373 (1967).

Plaintiff cannot shift financial burden of preparing his case. The plaintiff has the burden of proof at the trial and where the expenditure of substantial sums of money is involved in complying with the order for production of documents, the plaintiff cannot shift the financial burden of preparing his case to the defendant by suggesting that these expenses may be ultimately assessed against either party as costs, since a defendant cannot be required to finance the legal action of his adversary. *Bristol Myers Co. v. District Court*, 161 Colo. 354, 422 P.2d 373 (1967).

Governmental officials of foreign state cannot be compelled to appear in Colorado to take depositions. Where a motion was filed under this rule in behalf of the attorney general and tax commissioner of another state who had been ordered to appear in Colorado for the purpose of taking depositions, the district court could not compel them to so appear, and this fact is true even though the foreign state had brought the action in which defendant sought these depositions, inasmuch as this rule grants jurisdiction to the district courts over all persons for the purpose of taking depositions with the implied limitation that those properly summoned must be within the jurisdiction of the court either as residents, or if as nonresidents, then subject to such jurisdiction due to mutual compact or uniform act. *Minnesota ex rel. Minnesota Att'y Gen. v. District Court*, 155 Colo. 521, 395 P.2d 601 (1964).

The unrestricted use of discovery is ill-suited to the special problems and character of "habeas corpus" proceedings, especially where the scope of inquiry is limited to a determination of a matter of law as, for example, whether or not a petitioner is substantially charged with a crime in a state requesting extradition and whether or not he is a fugitive. *Hithe v. Nelson*, 172 Colo. 179, 471 P.2d 596 (1970).

A court when confronted with a petition for writ of habeas corpus which establishes a prima facie case for relief may authorize the use of suitable discovery procedures reasonably fashioned to elicit facts necessary to help the court dispose of the matter as law and justice may require. *Hithe v. Nelson*, 172 Colo. 179, 471 P.2d 596 (1970).

The court in a "habeas corpus" matter may properly restrict the taking of a deposition where its use relates not to the narrow issues of "habeas corpus", but to broad range issues not relevant in a habeas corpus determination. *Hithe v. Nelson*, 172 Colo. 179, 471 P.2d 596 (1970).

Hospital records of plaintiff held properly impounded, sealed, and not opened except under court order. *CeBuzz, Inc. v. Sniderman*, 171 Colo. 246, 466 P.2d 457 (1970).

Petitioners waive physician-patient or psychologist-patient privilege by placing their mental condition at issue. When petitioners place their mental condition into issue by bringing a personal injury action to recover damages for mental suffering and expenses for psychiatric counseling, they waive the physician-patient or psychologist-patient privilege. *Bond v. District Court*, 682 P.2d 33 (Colo. 1984).

Balancing standard required for protective order relating to physician-patient privilege. Trial court abused its discretion when it failed to balance the petitioners' interests in confidential communications with their therapists with the competing interest of the defendant in obtaining sufficient evidence to contest the damage claims for mental suffering and emotional distress. *Bond v. District Court*, 682 P.2d 33 (Colo. 1984).

Information subject to discovery that is of a confidential nature may be protected from public disclosure even if the pending litigation is a matter of public interest. *Bowlen v. District Court*, 733 P.2d 1179 (Colo. 1987).

V. Supplementation.

The continuing duty of a party to supplement his responses and to identify and provide the location of persons who have knowledge of discoverable matters is expressly required by subsection (e)(1) of this rule. *Dolan v. Mitchell*, 179 Colo. 359, 502 P.2d 72 (1972).

A party must continue to inform as to new witnesses. Where written interrogatories are directed to a party pursuant to C.R.C.P. 33 requesting the names of the witnesses to be called by that party, the responding party has a continuing duty to inform the requesting party of newly discovered witnesses. *Dolan v. Mitchell*, 179 Colo. 359, 502 P.2d 72 (1972).

Court may determine sanction for failure to disclose and supplement. The trial court has broad discretion to determine the sanctions to be imposed on a party for failure to disclose the substance of testimony intended to be elicited from a witness. This is especially true in view of the continuing duty to disclose and supplement in a reasonable manner the substance of an expert witness' testimony. *Great W. Sugar Co. v. Northern Natural Gas Co.*, 661 P.2d 684 (Colo. App. 1982).

C.R.C.P. 37(c) provides for the exclusion of non-disclosed evidence unless the failure to disclose is either substantially justified or harmless to the opposing party. *Todd v. Bear Valley Vill. Apts.*, 980 P.2d 973 (Colo. 1999); *Cook v. Fernandez-Rocha*, 168 P.3d 505 (Colo. 2007).

Reading sections (a) and (e) of this rule together with C.R.C.P. 37(c), a party may request sanctions based on the opposing party's providing, without substantial justification, misleading disclosures or its failure, without substantial justification, seasonably to correct misleading disclosures. In legal malpractice case, because the trial court did not consider the defendant's claim that attorneys representing plaintiff provided misleading disclosures or failed seasonably to correct such disclosures, it incorrectly denied the motion under C.R.C.P. 37(c). *Brown v. Silvern*, 141 P.3d 871 (Colo. App. 2005).

RULE 26.1. Special Provisions Regarding Limited and Simplified Discovery

History:

Repealed April 14, 1994, effective January 1, 1995.

RULE 26.2. General Provisions Governing Discovery; Duty of Disclosure (Domestic Relations)

Rule repealed and replaced by Rule 16.2 on September 30, 2004, effective for Domestic Relations Cases as defined in 16.2(a) filed on or after January 1, 2005, and for post-decree motions filed on or after January 1, 2005.

RULE 26.3. Limited Monetary Claim Actions

History:

Repealed November 6, 2003, effective July 1, 2004.

RULE 27. Depositions Before Action or Pending Appeal

(a) **Before Action**

(1) **Petition; Order; Notice.** A person who desires to perpetuate his own testimony or that of other persons may file in a district court a petition verified by his oath (or, if there be more than one petitioner, then by the oath of at least one of them) stating either:

(1) That the petitioner expects to be a party to an action in a court in this state and, in such case, the name of the persons who he expects will be adverse parties; or (2) that the proof of some facts is necessary to perfect the title to property in which petitioner is interested or others similarly situated may be interested or to establish any other matter which it may hereafter become material to establish, including marriage, divorce, birth, death, descent or heirship, though no action may at any time be anticipated, or, if anticipated, the expected adverse parties to such action are unknown to petitioner. The petition shall also state the names of the witnesses to be examined and their places of residence and a brief outline of the facts expected to be proved, and if any person named in the petition as an expected adverse party is known to the petitioner to be an infant or incompetent person the petition shall state such fact. If the expected adverse parties are unknown, it shall be so stated. The court shall make an order allowing the examination and directing notice to be given, which notice, if the expected adverse parties are named in the petition, shall be personally served on them in the manner provided in Rule 4(e) and, if the expected adverse parties are stated to be unknown, and if real property is to be affected by such testimony a copy of such notice shall be served on the county clerk and recorder, or his deputy, of the county where the property to be affected by such testimony or some part of such property is situated but in any event said notice shall be published for not less than two weeks in some newspaper to be designated by the court making the order in such manner as may be designated by such court. If service of said notice cannot with due diligence be made, in the manner provided in Rule 4(e), upon any expected adverse party named in the petition, the court may make such order as is just for service upon him by publication or otherwise and shall appoint, for persons named in the petition as expected adverse parties who are not served in the manner provided in Rule 4(e), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the witness. Such notice shall state the title of the proceeding, including the court and county in which it is pending, the time and place of the examination and either a brief outline of the facts expected to be proved or a description of the property to be affected by such testimony. Any notice heretofore given which contains the above required matters shall be deemed sufficient. Any personal service required by the provisions hereof shall be

made at least 14 days before the testimony is taken. If any person named in the petition as an expected adverse party is stated in any paper filed in such proceeding to be an infant or incompetent person, the provisions of Rule 17(c) apply, but no guardian ad litem need be appointed for any expected adverse party whose name is unknown.

(2) **Testimony Taken.** Upon proof of the service of the notice the court shall take the testimony of the witnesses named in the petition upon the facts therein set forth; and the taking of same may be continued from time to time, in the discretion of the court, without giving any further notice. The testimony shall be taken on question and answer unless the court otherwise direct, and any party to the proceeding may question witnesses either orally or upon written interrogatories. The testimony, when taken, shall be signed and sworn to in writing by each respective witness and certified by the court. If any witness is absent from the county in which the proceedings are pending, the court shall designate some person authorized to administer oaths, by name or otherwise, to take and certify his testimony and the person so designated shall take his testimony in manner aforesaid and certify and return same to the court with his certificate attached thereto showing that he has complied with the requirements of said order.

(3) **Proofs Prima Facie Evidence.** The affidavit, return, certificate and other proofs of compliance with the provisions of this section (a), or certified copies thereof, shall be prima facie evidence of the facts therein stated.

(4) **How and When Used.** If a trial be had in which the petitioner named in the petition or any successor in interest of such petitioner or any person similarly situated shall be a party, or between any parties, in which trial it may be material to establish the facts which such testimony proves or tends to prove, upon proof of the death or insanity of the witness or witnesses, or of his or their inability to attend the trial by reason of age, sickness, infirmity, absence or for any other cause, any testimony, which shall have been taken as herein provided, or certified copies thereof, may be introduced and used by either party to such trial.

(b) **After Judgment or After Appeal.** If an appeal of a judgment is pending, or, if none is pending, then at any time within 35 days from the entry of such judgment, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in such court. In such case the party who desires to perpetuate the testimony may make a motion in such court for leave to take the depositions, upon the same notice and service thereof as if the action were pending in such court. The motion shall show:

(1) The names and addresses of the persons to be examined and the substance of the testimony, so far as known, which he expects to elicit from each;

(2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in trial courts.

History:

Source: a1 and b amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1 b.

Case Note:

Annotation

I. General Consideration.

Law reviews. For article on Colorado Rules of Civil Procedure concerning depositions, discovery, and pretrial procedure, see 21 Rocky Mt. L. Rev. 38 (1948). For article, "Depositions and Discovery, Rules 26 to 37 ", see 28 Dicta 375 (1951). For article, "Depositions and Discovery: Rules 26-37 ", see 23 Rocky Mt. L. Rev. 562 (1951). For article, "Marketable Title: What Certifiable Copies of Court Papers Should Appear of Record", see 34 Dicta 7 (1957). For article, "Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment", see 40 Den. L. Ctr. J. 192 (1963). For comment on *Rozek v. Christen* appearing below, see 36 U. Colo. L. Rev. 565 (1964). For article, "Determination of Heirship by Special Proceedings and Temporary Conservatorship", see 14 Colo. Law. 1781 (1985). For article, "Alternative Depositions: Practice and Procedure", see 19 Colo. Law. 57 (1990). For article, "Enforcing Civility: The Rules of Professional Conduct in Deposition Settings", see 33 Colo. Law. 75 (March 2004).

Under the common law, depositions could not be taken in cases to be filed, pending, or at all. *Rozek v. Christen*, 153 Colo. 597, 387 P.2d 425 (1963).

At common law, in actions at law, it was deemed the right of the parties to have witnesses produced and examined viva voce and the right to take depositions was unknown; litigants, therefore, were obliged to resort to chancery or to procure the consent of the adverse party, which the court

could compel by deferring the trial or by refusing to render judgment. *Rozek v. Christen*, 153 Colo. 597, 387 P.2d 425 (1963).

Subsequently, statutes were enacted empowering common-law courts to authorize the taking of depositions. *Rozek v. Christen*, 153 Colo. 597, 387 P.2d 425 (1963).

Such subsequent statutes must be strictly complied with. Statutory provisions for taking of depositions are generally considered in derogation of the common law, and, although they are to be liberally construed, such statutes must be strictly or substantially complied with. *Rozek v. Christen*, 153 Colo. 597, 387 P.2d 425 (1963).

C.R.C.P. 26 to 37 must be construed together along with the requirement that the plaintiff establish a prima facie case for punitive damages, as a condition precedent to the plaintiff's right to discovery of defendant's financial information. *Leidholt v. District Court*, 619 P.2d 768 (Colo. 1980).

Applied in *Peoples Natural Gas Div. v. Pub. Utils. Comm'n*, 626 P.2d 159 (Colo. 1981); *Ricci v. Davis*, 627 P.2d 1111 (Colo. 1981).

II. Before Action

A. Petition; Order; Notice.

Statutory or rule authority for perpetuating testimony has since territorial days continuously been available in Colorado. *Rozek v. Christen*, 153 Colo. 597, 387 P.2d 425 (1963).

Present authority for perpetuating testimony supplants the ancient chancery equitable procedures, inherent in the use of which is the element of good faith, seeking justice. *Rozek v. Christen*, 153 Colo. 597, 387 P.2d 425 (1963).

This rule takes the place of the equitable bill in "memoriam sui perpetuam", the origin of which has been traced to canon law, which, taking hold of men's consciences, extended its right to all cases in which it was important in the interest of justice to register testimony which would otherwise be lost, the object being to preserve evidence, to assist courts, to prevent future litigation, and especially to secure and preserve such testimony as might be in danger of being lost before the matter to which it related could be made the subject of investigation. *Rozek v. Christen*, 153 Colo. 597, 387 P.2d 425 (1963).

In a proceeding to perpetuate testimony,a court of equity will not entertain the bill if it is possible that the matter in controversy can be made the subject of immediate judicial investigation by the party who seeks to

perpetuate the testimony, and it must appear that the testimony may be lost by delay. *Rozek v. Christen*, 153 Colo. 597, 387 P.2d 425 (1963).

"Absolute rights" are not granted by this rule, which conditions exercise of the right on many expressed factors: Going to court; paying a docket fee; preparing, verifying, and filing a petition containing certain material; notifying others; and the implied condition that one who seeks justice shall proceed in good faith in efforts to attain his goal. *Rozek v. Christen*, 153 Colo. 597, 387 P.2d 425 (1963).

The right to take depositions in "perpetuam memoriam" as provided by this rule is conditioned on proceeding in good faith to avail oneself of the privileges of the rule. *Rozek v. Christen*, 153 Colo. 597, 387 P.2d 425 (1963).

A petitioner to perpetuate testimony fails to comply with the provisions of this rule where he does not state in unequivocal language that "he expects to be a party to an action" in that he is not proceeding in good faith to avail himself of the privileges granted by the rule. *Rozek v. Christen*, 153 Colo. 597, 387 P.2d 425 (1963).

Where the statement that the petitioner seeking to perpetuate testimony "expects to be a party" is followed by the statement that others will be named as adverse parties "in the event a complaint is filed", such is not such a direct and positive statement by petitioner as to constitute strict compliance with the requirements of this rule when considered in light of the party plaintiff provisions of C.R.C.P. 3. *Rozek v. Christen*, 153 Colo. 597, 387 P.2d 425 (1963).

An application to perpetuate testimony must be made in good faith for the purpose of obtaining, preserving, and using material testimony, and a sham application must be denied. *Rozek v. Christen*, 153 Colo. 597, 387 P.2d 425 (1963).

The taking of a deposition will not be permitted where it is evidence that applicant is not proceeding in good faith, as where the application is a "fishing expedition" to discover in advance of the trial what the witness will testify to. *Rozek v. Christen*, 153 Colo. 597, 387 P.2d 425 (1963).

Statutes for the perpetuation of testimony are not discovery statutes. *Rozek v. Christen*, 153 Colo. 597, 387 P.2d 425 (1963).

Where the record was convincing that petitioner was not proceeding in good faith to perpetuate testimony in an expected libel suit, but rather as a guise to embark upon a "fishing expedition" on matters wholly unrelated to libel and to conduct an inquisition designed to help resolve a "political" matter in

a manner acceptable to petitioner, the court could not grant a petition under this rule. *Rozek v. Christen*, 153 Colo. 597, 387 P.2d 425 (1963).

For cases construing former provisions as to perpetuation of testimony, *see Darrow v. People ex rel. Norris*, 8 Colo. 417, 8 P. 661 (1885); *Levy v. Dwight*, 12 Colo. 101, 20 P. 12 (1888).

B. How and When Used.

The deposition of a witness may be used by any party if the court finds that the witness is unavailable at the time of trial for any of the reasons listed in this rule. *J. R. Watkins Co. v. Smith*, 29 Colo. App. 340, 483 P.2d 988 (1971).

In order that a deposition may be admitted into evidence, the party offering the deposition must make a sufficient showing of the unavailability of the deponent at the time of trial. *J. R. Watkins Co. v. Smith*, 29 Colo. App. 340, 483 P.2d 988 (1971).

Where plaintiff failed to make any effort to establish the unavailability of a witness whose testimony comprised a deposition, the deposition should not have been admitted into evidence. *J. R. Watkins Co. v. Smith*, 29 Colo. App. 340, 483 P.2d 988 (1971).

Cross Reference Note:

For personal service of process, see C.R.C.P. 4(e); for capacity of infants or incompetents as parties, see C.R.C.P. 17(c); for subpoena for taking depositions, see C.R.C.P. 45(d); for period of publication, see §24-70-106, C.R.S.; for persons before whom depositions may be taken, see C.R.C.P. 28; for depositions upon oral examination, see C.R.C.P. 30; for depositions upon written questions, see C.R.C.P. 31; for evidence, see C.R.C.P. 43; for appeals from judgments, see applicable rules in C.A.R.

RULE 28. Persons Before Whom Depositions May Be Taken

(a) **Outside the State of Colorado.** Depositions outside the State of Colorado shall be taken only upon proof that notice to take deposition has been given as provided in these rules. The deposition shall be taken before an officer authorized to administer oaths by the laws of this state, the United States or the place where the examination is to be held, or before a person appointed by the court in which the action is pending. A person so appointed has the power to administer oaths and take testimony.

(b) **Disqualification for Interest.** No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is financially interested in the action.

(c) **Commission or Letters Rogatory.** A commission or letters rogatory shall be issued when necessary, on application and notice, and on terms that are just and appropriate. It is not a requisite to the issuance of a commission or letters rogatory that the taking of the deposition in any other manner is impracticable or inconvenient. Both a commission and letters rogatory may be issued in proper cases. Officers may be designated in the commission either by name or descriptive title. Letters rogatory may be addressed "to the appropriate authority in (here name the appropriate place)." The clerk shall issue a commission or letters rogatory in the form prescribed by the jurisdiction where the deposition is to be taken, such form to be prepared by the party seeking the deposition. The commission or letters rogatory shall inform the officer that the original sealed deposition shall be filed according to subsection (d) of this rule. Any error in the form or in the commission or letters rogatory is waived unless an objection is filed and served before the time fixed in the notice.

(d) **Filing of the Deposition.** The officer transcribing the deposition shall file the original sealed deposition pursuant to C.R.C.P. 30(f)(1).

Note:

Committee Comment

Commissions and letters rogatory are unnecessary when: (1) the deposition is being taken before an officer authorized to administer oaths in Colorado, (2) the Court has appointed a person under subsection (a), or (3) when the parties have stipulated to the person pursuant to C.R.C.P. 29.

The Federal Rules of Civil Procedure specifically define court-appointed persons or stipulated persons as "officers" under rules 30, 31 and 32. The

Committee follows this principle but feels that it need not be specifically set forth in the Colorado rule.

Case Note:

Annotation

I. General Consideration.

Law reviews. For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Depositions and Discovery, Rules 26 to 37 ", see 28 Dicta 375 (1951). For article, "Depositions and Discovery: Rules 26-37 ", see 23 Rocky Mt. L. Rev. 562 (1951). For article, "Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment", see 40 Den. L. Ctr. J. 192 (1963). For article, "Taking Evidence Abroad for Use in Litigation in Colorado", see 14 Colo. Law. 523 (1985). For article, "Securing the Attendance of a Witness at a Deposition", see 15 Colo. Law. 2000 (1986). For article, "Alternative Depositions: Practice and Procedure", see 19 Colo. Law. 57 (1990).

C.R.C.P. 26 to 37 must be construed together along with the requirement that plaintiff establish a prima facie case for punitive damages, as a condition precedent to the plaintiff's right to discovery of defendant's financial information. *Leidholt v. District Court*, 619 P.2d 768 (Colo. 1980).

Applied in *Sanchez v. District Court*, 624 P.2d 1314 (Colo. 1981); *Ricci v. Davis*, 627 P.2d 1111 (Colo. 1981).

II. Outside of Colorado.

Annotator's note. Since section (a) of this rule is similar to § 384 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

There is no way by which depositions of witnesses living out of the state can be taken except on due observance of the statutory course; any deviation from the statutory provisions on this subject is fatal, and the use of depositions erroneously taken constitutes an error for which a cause has to be reversed. *Argentine Falls Silver Mining Co. v. Molson*, 12 Colo. 405, 21 P. 190 (1889); *Gibbs v. Gibbs*, 6 Colo. App. 368, 40 P. 781 (1895).

A Colorado court does not have jurisdiction to compel a witness residing in a foreign state to appear in the foreign jurisdiction and give testimony by

deposition and to furnish his personal records at said hearing by virtue of a dedimus issued in Colorado and a subpoena duces tecum issued in the foreign state where the witness is not a party to the suit. *Solliday v. District Court*, 135 Colo. 489, 313 P.2d 1000 (1957).

This rule which provides for taking deposition outside of Colorado of nonresidents not parties to an action in Colorado or served within Colorado is subject to implied limitations of mutual compact or uniform act. *Solliday v. District Court*, 135 Colo. 489, 313 P.2d 1000 (1957); *Minnesota ex rel. Minnesota Att'y Gen. v. District Court*, 155 Colo. 521, 395 P.2d 601 (1964).

No state court or government has authority beyond its own borders, each state being sovereign as to its own territory and those residing therein. *Solliday v. District Court*, 135 Colo. 489, 313 P.2d 1000 (1957); *Minnesota ex rel. Minnesota Att'y Gen. v. District Court*, 155 Colo. 521, 395 P.2d 601 (1964).

Such recognition as is given Colorado laws or court orders by other states must be based solely upon full faith and credit, comity, contract due to uniform acts, or compact. *Solliday v. District Court*, 135 Colo. 489, 313 P.2d 1000 (1957); *Minnesota ex rel. Minnesota Att'y Gen. v. District Court*, 155 Colo. 521, 395 P.2d 601 (1964).

The matter of lack of jurisdiction cannot be waived, and this defense may be raised at any stage of the proceedings. *Solliday v. District Court*, 135 Colo. 489, 313 P.2d 1000 (1957).

Provisions for taking depositions outside the state under this rule do not apply to criminal proceedings. *Bresnahan v. District Court*, 164 Colo. 263, 434 P.2d 419 (1967).

III. Disqualification for Interest.

Law reviews. For article, "The Federal Rules from the Standpoint of the Colorado Code", see 17 Dicta 170 (1940).

Cross Reference Note:

For persons authorized to administer oaths, see §24-12-103, C.R.S.; for objections to admissibility, see C.R.C.P. 32(b).

RULE 29. Stipulations Regarding Discovery Procedure

Unless otherwise directed by the court, the parties may by written stipulation:

(1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions; and

(2) modify other procedures governing the timing of discovery, except that stipulations extending the time provided in C.R.C.P. Rules 33, 34, and 36 for responses to discovery may, if they would interfere with any time set for completion of discovery, for hearing of a motion, or for trial, be made only with the approval of the court.

History:

History: Source: Entire rule amended and adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date.

Case Note:

Annotation

Law reviews. For article, "Depositions and Discovery, Rules 26 to 37 ", see 28 Dicta 375 (1951). For article, "Depositions and Discovery: Rules 26-37 ", see 23 Rocky Mt. L. Rev. 562 (1951). For article, "Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment", see 40 Den L. Ctr. J. 192 (1963). For article, "A Deposition Primer, Part I: Setting Up the Deposition", see 11 Colo. Law. 938 (1982). For article, "A Deposition Primer, Part II: At the Deposition", see 11 Colo. Law. 1215 (1982). For article, "Taking Evidence Abroad for Use in Litigation in Colorado", see 14 Colo. Law. 523 (1985).

C.R.C.P. 26 to 37 must be construed together along with the requirement that plaintiff establish a prima facie case for punitive damages, as a condition precedent to the plaintiff's right to discovery of defendant's financial information. *Leidholt v. District Court*, 619 P.2d 768 (Colo. 1980).

Applied in *Ricci v. Davis*, 627 P.2d 1111 (Colo. 1981).

Cross Reference Note:

For stipulations extending time in interrogatories for responses to discovery, see C.R.C.P. 33; for stipulations extending time in the production of documents and things and entry upon land for inspection and other

purposes for responses to discovery, see C.R.C.P. 34; for stipulations extending time in admissions for responses to discovery, see C.R.C.P. 36.

RULE 30. Depositions Upon Oral Examination

(a) **When Depositions May Be Taken.**

(1) Subject to the provisions of C.R.C.P. Rules 26(b)(2)(A) and 26(d), a party may take the testimony of any person, including a party, 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.C.P. 45.

(2) Leave of court must be obtained pursuant to C.R.C.P. Rules 16(b)(1) and 26(b) 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) A party seeks to take a deposition before the time specified in C.R.C.P. 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave the state and be unavailable for examination within the state if the person's deposition is not taken before the expiration of such time period; or

(D) The person to be examined is confined in prison.

(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.C.P. 121, sec. 1-12, 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 C.R.C.P. 28 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 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 Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(6) A party may in its notice or subpoena name as the deponent a public or private corporation, partnership, association governmental agency, or other entity and designate with reasonable particularity the matters on which examination is requested. The named organization 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 the person will testify. Before a notice is served, or promptly after a subpoena is served, the serving party and the organization shall confer in good faith about the matters for examination. A subpoena shall advise a nonparty organization of its duty to confer with the serving party and to designate each person who 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. The duration of a deposition under this subsection (b)(6), regardless of the number of persons designated, is governed by Rule 30(d)(2)(A).

(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.C.P. Rules 28(a), 37(a)(1), and 37(b)(1), 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)

(A) Unless otherwise authorized by the court or stipulated by the parties, a deposition of a person other than a retained expert disclosed pursuant to C.R.C.P. 26(a)(2)(B)(I) whose opinions may be offered at trial is limited to one day of 6 hours. Upon the motion of any party, the court may limit the time permitted for the conduct of a deposition to less than 6 hours, or may allow additional time if needed for a fair examination of the deponent and

consistent with C.R.C.P. 26(b)(2), 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 disclosed pursuant to C.R.C.P. 26(a)(2)(B)(I) whose opinions may be offered at trial are governed by C.R.C.P. 26(b)(4).

(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 as provided in C.R.C.P. 26(c). 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.C.P. 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(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 35 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.

History:

Source: a, b1 to b4, b7, c, d, e, and f amended and adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; committee comment approved June 10, 1994; a1 corrected and effective January 9, 1995; entire rule corrected and effective June 4, 2001; d amended and adopted November 15, 2001, effective January 1, 2002; e amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1 b. Amendments effective July 1, 2015 for cases filed on or after July 1, 2015; amended and adopted by the Court, En Banc, January 6, 2022, effective 3/1/2022.

Note:

Comments

1995

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

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

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

2015

[4] Rule 30 is amended to reduce the time for ordinary depositions from 7 to 6 hours, so that they can be more easily accomplished in a normal business day.

2022

Rule 30(b)(6) depositions differ from ordinary depositions and impose additional obligations on both the party taking the deposition and the organization being deposed. First, the serving party must provide advance notice of topics that are sufficiently detailed and reasonable in relation to the time for the deposition such that the organization may fairly prepare a representative(s) to testify. Second, the serving party and the organization must engage in substantive conferral on matters to be covered in the examination. Third, the organization has an obligation to identify and adequately prepare its witness(es) to testify on the specified topics.

Case Note:

Annotation

I. General Consideration.

Law reviews. For article, "Depositions of Parties on Oral Interrogatories, Within the State of Colorado", see 10 Dicta 256 (1933). For article, "Use of Summary Judgments and the Discovery Procedure", see 24 Dicta 193 (1947). For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Depositions and Discovery, Rules 26 to 37 ", see 28 Dicta 375 (1951). For article, "Depositions and Discovery: Rules 26-37 ", see 23 Rocky Mt. L. Rev. 562 (1951). For article, "One Year Review of Civil Procedure and Appeals", see 39 Dicta 133 (1962). For article, "Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment", see 40 Den. L. Ctr. J. 192 (1963). For article, "A Deposition Primer, Part I: Setting Up the Deposition", see 11 Colo. Law. 938 (1982). For article, "A Deposition Primer, Part II: At the Deposition", see 11 Colo. Law. 1215 (1982). For article, "Securing the Attendance of a Witness at a Deposition", see 15 Colo. Law. 2000 (1986). For article, "Alternative Depositions: Practice and Procedure", see 19 Colo. Law. 57 (1990). For formal opinion of the Colorado Bar Association on Use of Subpoenas in Civil Proceedings, see 19 Colo. Law. 1556 (1990).

C.R.C.P. 26 to 37 must be construed together along with the requirement that plaintiff establish a prima facie case for punitive damages, as a condition precedent to the plaintiff's right to discovery of defendant's financial information. *Leidholt v. District Court*, 619 P.2d 768 (Colo. 1980).

Rules of civil procedure sanction use of all discovery methods and the frequency of use of these methods should not be limited unless there is a showing of good cause based on the particular circumstances of the case. *Sanchez v. District Court*, 624 P.2d 1314 (Colo. 1981).

Civil discovery rules inapplicable to release hearings. Based on §§16-8-115 to 16-8-117 and on the special nonadversary nature of a release inquiry, the participants in release proceedings do not have the broad right of discovery as provided in the rules of civil procedure. *People v. District Court*, 192 Colo. 225, 557 P.2d 414 (1976).

Under C.R.C.P. 81(a), the procedure in release hearings under §16-8-115 is so inconsistent and in conflict with the rules of civil procedure as to make civil discovery rules inapplicable to release hearings. *People v. District Court*, 192 Colo. 225, 557 P.2d 414 (1976).

It is in the trial court's discretion whether a video deposition will be ordered absent agreement between the parties. Such a deposition, while it may be desirable under certain circumstances, is a luxury not a necessity. *Cherry Creek Sch. Dist. v. Voelker*, 859 P.2d 805 (Colo. 1993).

When choosing a subsection (b)(6) designee, companies have a duty to make a conscientious, good-faith effort to designate knowledgeable persons and to prepare them to fully and unevasively answer questions about the designated subject matter. The company should, if necessary, prepare deponents by having them review prior fact witness deposition testimony as well as documents and deposition exhibits. *D.R. Horton, Inc. v. D&S Landscaping, LLC*, 215 P.3d 1163 (Colo. App. 2008).

Allowing a company to designate a witness under subsection (b)(6) who is unprepared or not knowledgeable would simply defeat the purpose of the rule and sandbag the opposition. *D.R. Horton, Inc. v. D&S Landscaping, LLC*, 215 P.3d 1163 (Colo. App. 2008).

Where a corporation designates a deponent pursuant to subsection (b)(6) who is unable to answer all the questions specified in the notice, a court may issue sanctions for failure to appear under C.R.C.P. 37. *D.R. Horton, Inc. v. D&S Landscaping, LLC*, 215 P.3d 1163 (Colo. App. 2008).

Nothing in the rule or its interpretation suggests that persons who are designated and testify under subsection (b)(6) will not bind their corporate principal. Nothing in the rule precludes a principal from offering contrary or clarifying evidence where its designee has made an error or has no knowledge of a matter. *D.R. Horton, Inc. v. D&S Landscaping, LLC*, 215 P.3d 1163 (Colo. App. 2008).

A corporation should be excused from sanctions and granted a protective order where it had no means available to prepare a subsection (b)(6) designee. *D.R. Horton, Inc. v. D&S Landscaping, LLC*, 215 P.3d 1163 (Colo. App. 2008).

Not being listed under section (b)(6) does not disqualify a person from testifying, but rather being listed under section (b)(6) mandates that the witness's testimony include certain subject matter and knowledge. Where county produced undesignated witnesses who were knowledgeable both as to the facts regarding the county and as to those at issue at trial, and defendant was aware of the witnesses and deposed them, trial court did not abuse its discretion in allowing their testimony. *Camp Bird Colo., Inc. v. Bd. of County Comm'rs of Ouray*, 215 P.3d 1277 (Colo. App. 2009).

Applied in *Seymour v. District Court*, 196 Colo. 102, 581 P.2d 302 (1978); *Peoples Natural Gas Div. v. Pub. Utils. Comm'n*, 626 P.2d 159 (Colo. 1981); *Ricci v. Davis*, 627 P.2d 1111 (Colo. 1981); *Falzon v. Home Ins. Co.*, 661 P.2d 696 (Colo. App. 1982); *Black ex rel. Bayless v. Cullar*, 665 P.2d 1029 (Colo. App. 1983).

II. When May be Taken.

While this rule allows the taking of the deposition of "any person", a court in a "habeas corpus" matter may properly restrict the taking of a deposition where its use relates not to the narrow issues of habeas corpus, but to broad range issues not relevant in a habeas corpus determination. *Hithe v. Nelson*, 172 Colo. 179, 471 P.2d 596 (1970).

III. Notice

Law reviews. For article, "In Defense of H.B. 109-Re-serving Notice Before a Witness's Deposition May Be Taken", see 22 Dicta 152 (1945).

Section (b)(4) is identical to its federal counterpart F.R.C.P. 30(b)(4). *Sanchez v. District Court*, 624 P.2d 1314 (Colo. 1981).

Purpose of section (b)(4) is to facilitate less expensive procedures as an alternative to the high cost of stenographic recording. *Sanchez v. District Court*, 624 P.2d 1314 (Colo. 1981).

Motion and notice for which provision is made in this rule must be made and served prior to the time specified in the notice for the taking of the deposition. *Reserve Life Ins. Co. v. District Court*, 126 Colo. 217, 247 P.2d 903 (1952).

There was no "reasonable notice" within the meaning of this rule where the record disclosed that the party was given three days notice that the depositions were to be taken, the notice was served in Colorado, and the depositions were taken in Los Angeles. *Nielsen v. Nielsen*, 111 Colo. 344, 141 P.2d 415 (1943).

If, for good cause, a deposition should be taken in some place other than that mentioned in the notice, this matter should be called to the attention of the trial court by a motion filed and service thereof seasonably made on opposing counsel; otherwise, such objection is waived, and the place designated in the notice is definitely and finally fixed. *Reserve Life Ins. Co. v. District Court*, 126 Colo. 217, 247 P.2d 903 (1952).

Service of notice to take deposition on a party's attorney is sufficient notice pursuant to C.R.C.P. 5(b)(1). *Reserve Life Ins. Co. v. District Court*, 126 Colo. 217, 247 P.2d 903 (1952).

A party is not entitled to a subpoena nor to a per diem allowance or mileage when he is noticed to appear for the taking of his deposition. *Reserve Life Ins. Co. v. District Court*, 126 Colo. 217, 247 P.2d 903 (1952).

Court has discretion in determining assessment of stenographic expense as cost. There is no provision authorizing the assessment, as costs, of stenographic expense incurred in the taking of a deposition for purposes of discovery, but if the testimony of the person whose deposition is taken is not available at the trial, and the deposition is offered in lieu thereof, then the court would have discretion in determining whether the expense of procuring the deposition should be assessed as costs against the losing party. *Morris v. Redak*, 124 Colo. 27, 234 P.2d 908 (1951).

Governmental officials of foreign state cannot be compelled to appear in Colorado to take depositions. Where the attorney general and tax commissioner of another state had been ordered to appear in Colorado for the purpose of taking depositions, the court could not compel them to so appear, and this fact is true even though the foreign state had brought the action in which defendant sought these depositions, inasmuch as no state court or government has authority beyond its own borders, each state being sovereign as to its own territory and those residing therein; such recognition as is given Colorado laws or court orders by other states must be based solely upon full faith and credit, comity, contract due to uniform acts, or compact. Minnesota ex rel. *Minnesota Att'y Gen. v. District Court*, 155 Colo. 521, 395 P.2d 601 (1964).

Showing of indigency unnecessary for application of section (b)(4) to inexpensive mode of deposition discovery. Application of section (b)(4) of this rule to an inexpensive mode of deposition discovery should not be conditioned on a showing of indigency, a showing of financial need, or economic disparity between the parties. *Sanchez v. District Court*, 624 P.2d 1314 (Colo. 1981).

Exercise of discretion in ruling on discovery motion for tape recorded depositions should be limited to considerations of accuracy and trustworthiness with respect to the procedures and conditions to be followed in the recording, transcription, and filing of the depositions. *Sanchez v. District Court*, 624 P.2d 1314 (Colo. 1981).

Trial judge may properly deny motion for tape recorded depositions where the objecting party shows that there exists a potential for abuse or harassment of a witness or party or where the objecting party otherwise establishes a bona fide claim for protective orders under C.R.C.P. 26(c). *Sanchez v. District Court*, 624 P.2d 1314 (Colo. 1981).

IV. Motion to Terminate or Limit.

The taking of a deposition is not precluded by an application for writ of prohibition where an order to show cause is issued pursuant thereto by the supreme court; rather, only proceedings in the trial court are suspended by such an order, and not those in preparation of trial. And where the case is still pending and undetermined, an application for a writ of prohibition against the taking of a deposition would be denied as premature. *Cox v. District Court*, 129 Colo. 99, 267 P.2d 656 (1954).

Party desiring to protect trade secrets entitled to protective order. Taken together, section (d) of this rule and C.R.C.P. 26 establish that a party desiring to protect trade secrets is entitled to a protective order upon a showing of good cause. *Curtis, Inc. v. District Court*, 186 Colo. 226, 526 P.2d 1335 (1974).

V. Submission to Witness.

Annotator's note. Since section (e) of this rule is similar to § 378 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing this section have been included in the annotations to this rule.

Purpose of section (e), which requires submission of the deposition to the witness for examination, correction, and signature, is to provide verification of the deposition's content in order that the writing may be introduced as evidence of the witness's own words. *Transamerica Ins. Co. v. Pueblo Gas & Fuel Co.*, 33 Colo. App. 92, 519 P.2d 1201 (1973).

Object of reading deposition to witness is to give opportunity to correct. The object of the requirement that the interrogatories and answers submitted to the witness on the taking of his deposition should be first carefully read to him before he signed is that the witness might know what the scrivener had

written down, and he might, before his deposition is complete, have an opportunity to correct any errors or inaccuracies of statement which might have occurred. *Cheney v. Woodworth*, 13 Colo. App. 176, 56 P. 979 (1899).

The requirement that deposition be signed by witness can be waived by stipulation of counsel. *Chipley v. Green*, 7 Colo. App. 25, 42 P. 493 (1895).

Where parties stipulated with respect to the taking of a deposition that "the caption and all formalities are expressly waived", it was held that an irregularity as to the signature was waived by this stipulation. *Chipley v. Green*, 7 Colo. App. 25, 42 P. 493 (1895).

Section (e) inapplicable. Where proof of a contradictory statement was elicited from the mouth of the witness and not by introduction of the deposition into evidence, the safeguards for accuracy of the deposition as evidence, which are embodied in section (e), were inapplicable. *Transamerica Ins. Co. v. Pueblo Gas & Fuel Co.*, 33 Colo. App. 92, 519 P.2d 1201 (1973).

VI. Certification and Filing.

This rule sets forth the mechanics applicable to certifying and filing depositions. *Appelhans v. Kirkwood*, 148 Colo. 92, 365 P.2d 233 (1961).

After correction of the deposition and after it is signed, or following a refusal to sign it, the deposition is to be delivered to the officer who seals it promptly and files it with the court in which the action is pending. *Appelhans v. Kirkwood*, 148 Colo. 92, 365 P.2d 233 (1961).

Officer's certificate is not required to state that deposition was "carefully" read to witness before signing. The requirement that in taking depositions the interrogatories and answers should be carefully read to the witness before signing does not require the certificate of the officer to state that they were "carefully" read to the witness before signing. A certificate that certified simply that the deposition was read to the witness before signing is sufficient, as it would be presumed that it was read with that care required. *Cheney v. Woodworth*, 13 Colo. App. 176, 56 P. 979 (1899) (decided under § 378 of the former code of civil procedure, which was replaced by rules of civil procedure in 1941).

Sham affidavit doctrine permits a court under certain circumstances to disregard an affidavit submitted by a party in response to a summary judgment motion where that affidavit contradicts the party's previous sworn deposition testimony. *Luttgen v. Fischer*, 107 P.3d 1152 (Colo. App. 2005).

Contradictory affidavits should be considered in light of totality of the circumstances test. Affidavit that directly contradicts affiant's own earlier deposition testimony can be rejected as sham affidavit only if it fails to include an explanation for the contradiction that could be found credible by a reasonable jury. This determination cannot be limited to any set of factors, but must be considered in light of the totality of the circumstances, and such determination is a matter of law to be reviewed de novo. *Andersen v. Lindenbaum*, 160 P.3d 237 (Colo. 2007).

Where deposition was taken but not subscribed, certified, or filed pursuant to this rule, and was for that reason suppressed by the trial court notwithstanding agreement of counsel that it might be admitted for a limited purpose, such ruling, while erroneous, was not prejudicial. *Appelhans v. Kirkwood*, 148 Colo. 92, 365 P.2d 233 (1961).

Cross Reference Note:

For service of process, see C.R.C.P. 4; for subpoena for taking depositions, see C.R.C.P. 45(d); for sanctions for failing to make disclosure or cooperate in discovery, see C.R.C.P. 37; for production of documents and things, see C.R.C.P. 34; for protective orders, see C.R.C.P. 26(c); for award of expenses of motion, see C.R.C.P. 37(a)(4); for effect of errors and irregularities in depositions concerning completion and return thereof, see C.R.C.P. 32(d)(4).

RULE 31. Depositions Upon Written Questions

(a) **Serving Questions; Notice.**

(1) A party may take the testimony of any person, including a party, 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.C.P. 45.

(2) A party must obtain leave of court, and the court must grant leave to the extent consistent with C.R.C.P. 26(b)(2) 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) a party seeks to take a deposition before the time specified in C.R.C.P. 26(d); or

(D) the person to be examined is confined in prison.

(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.C.P. 30(b)(6).

(4) Within 21 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 14 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 7 days after being served with redirect questions, a party may serve re-cross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(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 Rule 30(c), (e), and (f), 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.

History:

Source: a amended and adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; committee comment approved June 10, 1994; a4 amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1 b. Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.

Note:

Comments

1995

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

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

Case Note:

Annotation

Law reviews. For article, "Depositions and Discovery, Rules 26 to 37 ", see 28 Dicta 375 (1951). For article, "Depositions and Discovery: Rules 26-37 ", see 23 Rocky Mt. L. Rev. 562 (1951). For article, "Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment", see 40 Den. L. Ctr. J. 192 (1963). For article, "A Deposition Primer, Part I: Setting Up the

Deposition", see 11 Colo. Law. 938 (1982). For article, "Alternative Depositions: Practice and Procedure", see 19 Colo. Law. 57 (1990).

C.R.C.P. 26 to 37 must be construed together along with the requirement that plaintiff establish a prima facie case for punitive damages, as a condition precedent to the plaintiff's right to discovery of defendant's financial information. *Leidholt v. District Court*, 619 P.2d 768 (Colo. 1980).

For purposes of discovery in negligence action by patient who was infected with the AIDS virus after a blood transfusion, patient-plaintiff was entitled to submit written questions to anonymous blood donor, but may not ask donor's name or address. *Belle Bonfils Memorial Blood Center v. District Court*, 763 P.2d 1003 (Colo. 1988).

Applied in *Ricci v. Davis*, 627 P.2d 1111 (Colo. 1981).

Cross Reference Note:

For subpoena for taking depositions, see C.R.C.P. 45(d); for taking of deposition of public or private corporation, partnership, association, or governmental agency, see C.R.C.P. 30(b)(6); for proceedings in taking depositions, see C.R.C.P. 30(c), (e), and (f); for notice of filing with depositions upon oral examination, see C.R.C.P. 30(f).

RULE 32. Use of Depositions in Court Proceedings

(a) **Use of Depositions.** At the trial 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 Rule 30(b)(6) or 31(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) There is No Colorado (D).

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

(F) 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.C.P. 30(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 pursuant to Rule 25 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 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 Rules 28(b) and subsection (d)(3) of this Rule, 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 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 Rule 31 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 Rules 30 and 31 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.

History:

Source: IPa and a3 amended and adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; committee comment approved June 10, 1994; a5 added and adopted June 25, 1998, effective January 1, 1999; d3C amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1 b.

Note:

Committee Comment

Revised C.R.C.P. 32 is patterned after Fed. R. Civ. P. 32 as amended in 1993 with several exceptions: (1) there is no State Rule 32(l)(D) pertaining to use of depositions of experts whether or not unavailable; (2) there is a difference in what constitutes "reasonable notice," which is instead contained in C.R.C.P. 121 section 1-12; and (3) there is no State Rule 32(e) pertaining to offering of non-stenographic depositions.

Case Note:

Annotation

I. General Consideration.

Law reviews. For article, "Depositions and Discovery, Rules 26 to 37 ", see 28 Dicta 375 (1951). For article, "Depositions and Discovery: Rules 26-37 ", see 23 Rocky Mt. L. Rev. 562 (1951). For article, "Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment", see 40 Den. L. Ctr. J. 192 (1963). For article, "A Deposition Primer, Part I: Setting Up the Deposition", see 11 Colo. Law. 938 (1982). For article, "A Deposition Primer, Part II: At the Deposition", see 11 Colo. Law. 1215 (1982). For article, "Using Depositions in the Courtroom", see 39 Colo. Law. 49 (April 2010).

C.R.C.P. 26 to 37 must be construed together along with the requirement that plaintiff establish a prima facie case for punitive damages, as a condition precedent to the plaintiff's right to discovery of defendant's financial information. Leidholt v. District Court, 619 P.2d 768 (Colo. 1980).

Applied in Hamilton v. Hardy, 37 Colo. App. 375, 549 P.2d 1099 (1976); Ricci v. Davis, 627 P.2d 1111 (Colo. 1981).

II. Use

Annotator's note. Since section (a) of this rule is similar to §§ 378 and 379 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, and to C.R.C.P. 26(d) as it existed prior to the revision of Rules of Civil Procedure in 1970, relevant cases construing those sections and former rule 26(d) have also been included in the annotations to this rule.

Section (a) is identical to F.R.C.P. 32(a). Schafer v. Nat'l Tea Co., 32 Colo. App. 372, 511 P.2d 949 (1973).

This rule is an independent and alternative vehicle to C.R.E. 804(b)(1) for admitting deposition testimony into evidence in civil cases. Margenau v. Bowlin, 12 P.3d 1214 (Colo. App. 2000).

To be introduced into evidence under this rule, the deposition testimony must be of a nature that would itself be admissible if the deponent were present and testifying in court. In addition, the opposing party must have had reasonable notice of the deposition and either been present or represented at the taking of the deposition, and one of the five circumstances set forth in section (a) must be present. Margenau v. Bowlin, 12 P.3d 1214 (Colo. App. 2000).

Unless there are no viable alternatives, "appearance" by deposition is a wholly inadequate manner for the presentation of a party's case. Gonzales v. Harris, 189 Colo. 518, 542 P.2d 842 (1975).

Should a party attempt to offer a portion of a deposition into evidence rather than call the adverse party as a witness, that party may do so, provided no other rules of evidence are violated and provided, prior to its admission, some showing of a legitimate purpose is made. Stauffer v. Karabin, 30 Colo. App. 357, 492 P.2d 862 (1971); Scruggs v. Otteman, 640 P.2d 259 (Colo. App. 1981).

The burden of proof of unavailability is on the party offering the deposition, and the failure to carry the burden precludes the use of the deposition as evidence. Evans v. Century Cas. Co., 159 Colo. 596, 413 P.2d 457 (1966); J.R. Watkins Co. v. Smith, 29 Colo. App. 340, 483 P.2d 988 (1971).

The burden of proof as to the unavailability of the witness is on the party offering the deposition in lieu of the testimony. Rowland v. Ditlow, 653 P.2d 61 (Colo. App. 1982).

In order that a deposition may be admitted into evidence, the party offering the deposition must make a sufficient showing of the unavailability of the deponent at the time of trial. Evans v. Century Cas. Co., 159 Colo. 596, 413 P.2d 457 (1966); J.R. Watkins Co. v. Smith, 29 Colo. App. 340, 483 P.2d 988 (1971).

Admission of video depositions of available witnesses violated this rule but was harmless error where plaintiff failed to explain or make an offer of proof as to how live courtroom testimony of the deposed witnesses would have differed from their video depositions. Maloney v. Brassfield, 251 P.3d 1097 (Colo. App. 2010).

Question of sufficient evidence to establish absence is for court. The amount and kind of evidence to establish absence of the witness from the jurisdiction or beyond the 100-mile limit is a question for the determination of the trial court. Campbell v. Graham, 144 Colo. 532, 357 P.2d 366 (1960).

Deposition testimony held sufficient to establish whereabouts of deponent. Court erred in refusing to consider deposition testimony and disallowing deposition on grounds that competent evidence under rules of evidence had to prove whereabouts of deponent. Donley v. State, 817 P.2d 629 (Colo. App. 1991).

It cannot be said that a showing of unavailability by means of attempted subpoena is indispensable in connection with the 100-mile provision, since

it is for the court to decide whether this rule has been complied with. Campbell v. Graham, 144 Colo. 532, 357 P.2d 366 (1960).

This rule also allows a deposition to be offered if the party has been unable to procure attendance by subpoena, but this use, however, is an alternative to the 100-mile provision. Campbell v. Graham, 144 Colo. 532, 357 P.2d 366 (1960).

Deposition cannot be introduced as an admission. Colorado practice, unlike that under the federal rules, does not permit the introduction of a deposition as an admission. Appelhans v. Kirkwood, 148 Colo. 92, 365 P.2d 233 (1961).

Timely notice in a trial data certificate of the intent to call a witness by way of video deposition constitutes appropriate "application and notice" under this rule. Miller v. Solaglas California, Inc., 870 P.2d 559 (Colo. App. 1993).

A party is entitled to refer to a deposition which would serve to bring to the attention of a witness any prior statement which the witness had made looking to ultimate impeachment, notwithstanding the fact that section (d)(4) of this rule as to certifying and filing depositions has not been complied with. The question of the inadmissibility of the deposition is not a valid issue until such time as the party proposes to impeach the witness by introducing the deposition. Appelhans v. Kirkwood, 148 Colo. 92, 365 P.2d 233 (1961).

When a deposition is not offered as substantive evidence, but rather is used to impeach by prior inconsistent statements, this rule does not operate to preclude the deposition from being so used. Schafer v. Nat'l Tea Co., 32 Colo. App. 372, 511 P.2d 949 (1973).

Defendants cannot use deposition in argument for directed verdict or in their defense. Where defendants had taken the deposition of the plaintiff and were permitted to use it in an attempt to impeach him, the court properly refused defendants' request to use the deposition in connection with their argument for a directed verdict and as a part of their defense. Foster v. Howell, 122 Colo. 64, 220 P.2d 717 (1950).

Governmental officials of foreign states cannot be compelled to appear in Colorado to take depositions. Despite the fact that section (a)(2) of this rule states, in relevant part, that: "The depositions of ... an officer, director, or managing agent of a ... (governmental agency which is a party)... may be used by an adverse party ...", it has been held that the attorney general and tax commissioner of another state could not be compelled to appear in Colorado for the purpose of taking depositions, and that this fact was true even though the foreign state had brought the action in which defendant

sought their depositions, inasmuch as no state court or government has authority beyond its own borders, each state being sovereign as to its own territory and those residing therein; rather, such recognition as is given Colorado laws or court orders by other states must be based solely upon full faith and credit, comity, contract due to uniform acts, or compact. Minnesota ex rel. Minnesota Att'y Gen. v. District Court, 155 Colo. 521, 395 P.2d 601 (1964).

Deposition may not be used by adverse party for "any purpose". Blind reliance on the portion of this rule in section (a)(2) that the deposition of a party "may be used by an adverse party for any purpose" does not establish error when the court refuses to admit portions of a deposition, for the permissive rule of this statute does not override the other rules of evidence and the discretion of the trial court. Stauffer v. Karabin, 30 Colo. App. 357, 492 P.2d 862 (1971).

Deponent must be an adverse party to the proponent at the time the deposition is offered into evidence in order for the deposition to be admissible. Rojhani v. Meagher, 22 P.3d 554 (Colo. App. 2000).

This rule permits the admission of a deposition where the witness is dead or more than 100 miles from the place of trial or hearing. Campbell v. Graham, 144 Colo. 532, 357 P.2d 366 (1960).

Court's refusal to order additional parts of depositions introduced held not error. Where the trial court informed defendants that they might offer any and all additional parts of the depositions into evidence as part of their case and there was no showing on the part of the defendants that the plaintiff did not offer all relevant portions of the depositions into evidence, then the trial court's refusal to order the plaintiff to introduce additional parts of the depositions was not error under section (a)(4) of this rule. Linker v. Linker, 28 Colo. App. 136, 470 P.2d 882 (1970).

Depositions held admissible to prove plaintiff's claim where plaintiff not personally present. Where at the trial plaintiff did not appear in person, being then a resident of another state, and defendant's counsel moved that the action be dismissed for the reason that defendant would have no opportunity to cross-examine the witness who was the real party in interest and the jury would have no basis upon which to weigh the testimony or to judge the credibility of the witness, it was held that whether plaintiff could produce sufficient evidence to avert a motion for dismissal at the conclusion of her case was beside the question, but clearly she was entitled to introduce whatever evidence was available in support of her claim, and thus the depositions and interrogatories taken in the case were admissible as evidence in support of plaintiff's cause of action, and it was error to dismiss

plaintiff's suit because plaintiff was not personally present to assert it. Hiltibrand v. Brown, 124 Colo. 52, 234 P.2d 618 (1951).

Depositions taken in original action held admissible in separate action. Where plaintiff had originally filed one action against defendants seeking to set aside an antenuptial agreement and to have a transfer of notes declared invalid and the cause of action on the notes was subsequently transferred to probate proceedings, the depositions of defendants taken in plaintiff's original action were admissible in the separate action on the validity of the notes, since these depositions were taken in plaintiff's original action and involved the same parties and same subject matter. Linker v. Linker, 28 Colo. App. 136, 470 P.2d 882 (1970).

The supreme court of Colorado is not bound by the findings of the jury as to any matters contained in depositions but is at liberty to place its own interpretation upon the testimony therein given. Morrison v. McCluer, 27 Colo. App. 264, 148 P. 380 (1915); Rinderie v. Morse, 27 Colo. App. 457, 150 P. 245 (1915), aff'd, 64 Colo. 32, 169 P. 648 (1917).

This fact does not abrogate rule of not disturbing trial court findings upon conflicting evidence. Where the evidence given upon issues of the fact is partly by depositions and partly by that submitted in open court, this fact does not abrogate, but only pro tanto affects, the rule that the findings of the trial court upon conflicting evidence should not be disturbed. Morrison v. McCluer, 27 Colo. App. 264, 148 P. 380 (1915).

It is in court's discretion to exclude repetitious matters or require identification of relevant portions. In determining whether a deposition may be used in evidence, the trial court has discretion to exclude repetitious matter and to require counsel to identify the relevant portions of a deposition. Scruggs v. Otteman, 640 P.2d 259 (Colo. App. 1981).

Deposition used for impeachment purposes is always admissible to discredit witness if the deposition is relevant, material, and not collateral, even if opposing party was not present or represented at deposition and did not have notice of its taking. Appel v. Sentry Life Ins. Co., 739 P.2d 1380 (Colo. 1987).

Trial court may refuse to admit deposition to promote fairness where conditions of admissibility were met but plaintiff had been led to believe witness would give live testimony. Stocynski v. Livermore, 782 P.2d 834 (Colo. App. 1989).

III. Objections.

Annotator's note. Prior to revision of the Rules of Civil Procedure which took effect in 1970, section (b) of this rule was C.R.C.P. 26(e) and cases decided under that rule have been included in the annotations to this rule.

Admissibility of deposition is not an issue until deposition is introduced. The question of the inadmissibility of a deposition used for impeachment purposes is not a valid issue until such time as a party proposes to impeach a witness by introducing the deposition. Appelhans v. Kirkwood, 148 Colo. 92, 365 P.2d 233 (1961).

The court cannot determine admissibility or relevancy if not given specific purpose or purposes for reading portions of a deposition when faced with an objection from the opposing party. Stauffer v. Karabin, 30 Colo. App. 357, 492 P.2d 862 (1971).

Objections to leading questions cannot be made at trial. The objection that a question propounded to a witness examined upon commission was leading cannot be made at the trial. Greenlaw Lumber & Timber Co. v. Chambers, 46 Colo. 587, 105 P. 1091 (1909) (decided under § 388 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

Admission of deposition where party is present at trial can be harmless error. Where the admission of a deposition of a party is objected to on the ground that the party is in court and available to testify, such admission is harmless error when the evidence contained therein is merely cumulative to the evidence already before the court and its admission neither adds to nor detracts from evidence previously admitted. Sentinel Petroleum Corp. v. Bernat, 29 Colo. App. 109, 478 P.2d 688 (1970).

Entry of the deposition of a defendant into evidence does not deny him the full benefit of having his credibility judged by the jury, or impair his right of rehabilitation, for upon presentation of his defense, defendant may protect both these rights by taking the stand in his own behalf. Stauffer v. Karabin, 30 Colo. App. 357, 492 P.2d 862 (1971).

This rule allows method of preserving objection. Should a deposition eventually be used at trial, the rules allow a party to preserve his objection to the wording of a question for trial by simply objecting to the question at the time the deposition is taken. Seymour v. District Court, 196 Colo. 102, 581 P.2d 302 (1978).

For purposes of section (d)(1), court endorses interpretation of "promptly" that calls for notice within a reasonable time under all the facts and circumstances of the case. This interpretation, allowing for more flexibility, is more in keeping with the scheme of the state's discovery rules. The

nonexclusive list of factors identified in Todd v. Bear Valley Village Apartments, 980 P.2d 973 (Colo. 1999), may be considered to determine whether an objection to the inadequacy of a deposition notice is prompt. A party should not be denied the ability to defend himself or herself in court because of an inflexible application of a procedural rule. Keenan ex rel. Hickman v. Gregg, 192 P.3d 485 (Colo. App. 2008).

IV. Effect of Taking or Using.

Annotator's note. Prior to revision of the Rules of Civil Procedure which took effect in 1970, section (c) of this rule was C.R.C.P. 26(f) and, cases decided under that rule have been included in the annotations to this rule.

Under this rule, the taking of a deposition was held not to be a waiver of objection to the competency of a witness where the deposition of the party was avowedly taken for the purpose of discovery under C.R.C.P. 26(a), and neither the deposition nor any part of it was offered in evidence. Gottesleben v. Luckenbach, 123 Colo. 429, 231 P.2d 958 (1951).

As to the rebuttal of evidence this rule is made applicable to interrogatories by the language of C.R.C.P. 33(b), by which it is provided: "Interrogatories may relate to any matters which can be inquired into under C.R.C.P. 26(b), and the answers may be used to the extent (permitted by the rules of evidence)". Ridley v. Young, 127 Colo. 46, 253 P.2d 433 (1953).

V. Errors and Irregularities.

A. Taking.

Objections to leading questions cannot be made at trial. The objection that a question propounded to a witness examined upon commission was leading cannot be made at the trial. Greenlaw Lumber & Timber Co. v. Chambers, 46 Colo. 587, 105 P. 1091 (1909) (decided under § 388 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

B. Completion and Return.

This rule is intended to render technical objections unavailable at the trial. Appelhans v. Kirkwood, 148 Colo. 92, 365 P.2d 233 (1961).

This rule provides that irregularities in the preparation, etc., of a deposition are waived unless a motion to suppress the deposition is made with reasonable promptness after such defect is discovered or with due diligence might have been ascertained. Appelhans v. Kirkwood, 148 Colo. 92, 365 P.2d 233 (1961).

A deposition is not inadmissible on the basis that it is unsigned where an objection to such is not promptly made. Linker v. Linker, 28 Colo. App. 136, 470 P.2d 882 (1970).

Objections must be substantial and must affect the value of the deposition as evidence in order to preclude its use at the trial. Appelhans v. Kirkwood, 148 Colo. 92, 365 P.2d 233 (1961).

It was error for the trial court to order a deposition suppressed upon the basis of the first appearance of irregularities in the deposition of not being properly certified and filed where counsel for defendants was merely seeking to establish an impeaching foundation by asking the plaintiff whether she had made particular statements on the occasion of the giving of the deposition, since under no circumstances would a motion to suppress be proper at this point. Rather, the question of the inadmissibility of the deposition would not be a valid issue until such time as defendant's counsel proposed to impeach plaintiff by introducing the deposition. Appelhans v. Kirkwood, 148 Colo. 92, 365 P.2d 233 (1961).

Cross Reference Note:

For substitution of parties, see C.R.C.P. 25; for deposition of party who is an officer, director, or managing agent of a public or private corporation, partnership, association, or governmental agency, see C.R.C.P. 30(b)(6) and 31(a); for notice requirement, see C.R.C.P. 30(b) and 31(a); for responsibilities of officer, see C.R.C.P. 30(f) and 31(b); for depositions upon oral examination, see C.R.C.P. 30; for depositions upon written questions, see C.R.C.P. 31.

RULE 33. Interrogatories to Parties

(a) **Availability.** Any party may serve upon any other party written interrogatories, not exceeding the number, including all discrete subparts, set forth in the Case Management Order, to be answered by the party served or, if the party served is a public or private corporation, or a partnership, or association, or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave of court must be obtained, consistent with the principles stated in C.R.C.P. Rules 16(b)(1) and 26(b) and subsection (e) of this Rule, to serve more interrogatories than the number set forth in the Case Management Order. Without leave of court or written stipulation, interrogatories may not be served before the time specified in C.R.C.P. 26(d).

(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.C.P. 26(c) 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 35 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 pursuant to C.R.C.P. 29.

(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 the interrogatories may move for an order pursuant to C.R.C.P. 37(a) with respect to any objection to or other failure to answer an interrogatory.

(c) **Scope; Use at Trial.** Interrogatories may relate to any matters which can be inquired into pursuant to C.R.C.P. 26(b), and the answers may be used to the extent permitted by the Colorado Rules of Evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

(d) **Option to Produce Business Records.** Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served, or from an examination, audit, or inspection of such business records, or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries.

(e) **Pattern and Non-Pattern Interrogatories; Limitations.** The pattern interrogatories set forth in the Appendix to Chapters 1 to 17A, Form 20, are approved. Any pattern interrogatory and its subparts shall be counted as one interrogatory. Any discrete subparts in a non-pattern interrogatory shall be considered as a separate interrogatory.

History:

Source: (a) to (c) amended and adopted and (e) added and adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; committee comment approved June 10, 1994; (b)(3) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); (b)(1) and (e) amended January 12, 2017, effective 3/1/2017.

Note:

Comments

1995

[1] Revised C.R.C.P. 33 now interrelates with the differential case management features of C.R.C.P. 16 and C.R.C.P. 26. Because of mandatory disclosure, substantially less discovery is needed.

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

2017

[1] Pattern interrogatories [Form 20, pursuant to C.R.C.P. 33(e)] have been modified to more appropriately conform to the 2015 amendments to C.R.C.P. 16, 26, and 33. A change to or deletion of a pre-2017 pattern interrogatory should not be construed as making that former interrogatory improper, but instead, only that the particular interrogatory is, as of the effective date of the 2017 rule change, modified as stated or no longer a "pattern interrogatory."

[2] The change to C.R.C.P. 33(e) is made to conform to the holding of Leaffer v. Zarlengo, 44 P.3d 1072 (Colo. 2002).

Case Note:

Annotation

I. General Consideration.

Law reviews. For article, "Use of Summary Judgments and the Discovery Procedure", see 24 Dicta 193 (1947). For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Depositions and Discovery, Rules 26 to 37 ", see 28 Dicta 375 (1951). For article, "Depositions and Discovery: Rules 26-37 ", see 23 Rocky Mt. L. Rev. 562 (1951). For article, "Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment", see 40 Den. L. Ctr. J. 192 (1963).

C.R.C.P. 26 to 37 must be construed together along with the requirement that plaintiff establish a prima facie case for punitive damages, as a

condition precedent to the plaintiff's right to discovery of defendant's financial information. Leidholt v. District Court, 619 P.2d 768 (Colo. 1980).

Civil discovery rules inapplicable to release hearings. Based on §§16-8-115 to 16-8-117 and on the special nonadversary nature of a release inquiry, the participants in release proceedings do not have the broad right of discovery as provided in the rules of civil procedure. People v. District Court, 192 Colo. 225, 557 P.2d 414 (1976).

Under C.R.C.P. 81(a), the procedure in release hearings under §16-8-115 is so inconsistent and in conflict with the rules of civil procedure as to make civil discovery rules inapplicable to release hearings. People v. District Court, 192 Colo. 225, 557 P.2d 414 (1976).

Applied in Ricci v. Davis, 627 P.2d 1111 (Colo. 1981); Hawkins v. District Court, 638 P.2d 1372 (Colo. 1982).

II. Availability and Procedure.

If interrogatories, otherwise objectionable, are made material to the issues involved by virtue of stipulation, then the petitioner is entitled to answers to them. Mote v. Koch, 173 Colo. 82, 476 P.2d 255 (1970).

Refusal to answer valid interrogatories is grounds for reversal. Where the information sought by interrogatories is subject to discovery under C.R.C.P. 26(b) and 33, the refusal to supply the information requested is in itself a ground for reversal. Dolan v. Mitchell, 179 Colo. 359, 502 P.2d 72 (1972).

Refusal to supply names of witnesses intended to be called is ground for reversal. Where Dolan v. Mitchell, 179 Colo. 359, 502 P.2d 72 (1972).

Where the primary cause for defendants' failure to answer interrogatories was the inexcusable neglect of defendants' attorney in whom they had placed their confidence, the trial court abused its discretion in refusing to set aside a default judgment for failure of the defendants to answer interrogatories, particularly since setting aside the default judgment and ordering a trial on the merits would not unwarrantedly prejudice the plaintiff. Coerber v. Rath, 164 Colo. 294, 435 P.2d 228 (1967).

Where interrogatories which are not answered involve matters entirely foreign to the issues involved, any error, therefore, cannot be prejudicial. Mote v. Koch, 173 Colo. 82, 476 P.2d 255 (1970).

Interrogatories may be served on governmental official of another state though they cannot be compelled to appear in Colorado for taking

depositions. Minnesota ex rel. Minnesota Att'y Gen. v. District Court, 155 Colo. 521, 395 P.2d 601 (1964).

Existence of triable issue on punitive damages may be established through discovery, by evidentiary means, or by an offer of proof. Leidholt v. District Court, 619 P.2d 768 (Colo. 1980).

Extent of discovery of defendant's financial condition is not unlimited. Leidholt v. District Court, 619 P.2d 768 (Colo. 1980).

Scope of discovery of defendant's financial worth for punitive damages case should include only material evidence and should be framed in simple manner. The permissible scope of discovery of defendant's financial worth where a prima facie case for punitive damages has been made should include only material evidence of the defendant's financial worth, and should be framed in such a manner that the questions proposed are not unduly burdensome. Leidholt v. District Court, 619 P.2d 768 (Colo. 1980).

Plaintiff has burden of establishing prima facie right to punitive damages. When punitive damages are in issue and information is sought by the plaintiff relating to the defendant's financial condition, justice requires no less than the imposition on the plaintiff of the burden of establishing a prima facie right to punitive damages. Leidholt v. District Court, 619 P.2d 768 (Colo. 1980).

Specific requests may constitute unnecessary harassment. Specific questions requesting detailed information regarding the defendant's financial status may constitute unnecessary harassment. Leidholt v. District Court, 619 P.2d 768 (Colo. 1980).

Burden is cast upon party who seeks protective order to show annoyance, embarrassment or oppression. Leidholt v. District Court, 619 P.2d 768 (Colo. 1980).

Applied in Godfrit v. Judd, 116 Colo. 489, 182 P.2d 907 (1947).

III. Scope and Use.

Law reviews. For comment on Ridley v. Young appearing below, see 25 Rocky Mt. L. Rev. 392 (1953).

Annotator's note. Where reference is made in the annotations to the Rules of Civil Procedure, citation and language have been changed where needed to comport with the nomenclature and wording of the 1970 revision of the rules in any still-relevant case decided previous thereto.

Only discrete subparts of non-pattern interrogatories, and not those subparts logically or factually subsumed within and necessarily related to the primary question, must be counted toward the interrogatory number limit set forth in the case management order. Leaffer v. Zarlengo, 44 P.3d 1072 (Colo. 2002).

Supreme court adopts test set forth in Kendall v. GES Exposition Servs., Inc., 174 F.R.D. 684 (D. Nev. 1997), to aid courts in distinguishing between discrete subparts of non-pattern interrogatories and those that are logically or factually subsumed within and necessarily related to the primary question. Leaffer v. Zarlengo, 44 P.3d 1072 (Colo. 2002).

Answers made by a party to interrogatories submitted by his adversary are not evidence until introduced as such during the course of trial. Ridley v. Young, 127 Colo. 46, 253 P.2d 433 (1953).

When answers to interrogatories are introduced in evidence, they stand on the same plane as other evidence. Ridley v. Young, 127 Colo. 46, 253 P.2d 433 (1953).

Answers to interrogatories may be treated as admissions against interest. Ridley v. Young, 127 Colo. 46, 253 P.2d 433 (1953).

An answer filed by a party to an interrogatory has the same effect as a judicial admission made in a pleading or in open court, for it relieves the opposing party of the necessity of proving the fact admitted. Ridley v. Young, 127 Colo. 46, 253 P.2d 433 (1953).

An answer to an interrogatory treated as an admission is not conclusive and will not prevail over evidence offered at the trial. Ridley v. Young, 127 Colo. 46, 253 P.2d 433 (1953).

Answers to the interrogatories are not "judicial admissions" which are conclusive. Ridley v. Young, 127 Colo. 46, 253 P.2d 433 (1953).

Furnishing false answers to interrogatories may constitute first-degree perjury. People v. Chaussee, 847 P.2d 156 (Colo. App. 1992), aff'd in part and rev'd in part on other grounds, 880 P.2d 749 (Colo. 1994).

Court need not reject testimony of witnesses which contradicts answers. Where a defendant answers interrogatories under this rule, making admissions therein against his own interest, and thereafter does not appear upon the trial, with plaintiff offering the answers to the interrogatories in evidence, the trial court need not reject the evidence of witnesses, who are called by counsel appearing for defendant, if the testimony of such witnesses

contradicts the statements of defendant as contained in the answers to the interrogatories. Ridley v. Young, 127 Colo. 46, 253 P.2d 433 (1953).

Rebuttal of evidence is applicable to interrogatories. The language of this rule by which it is provided: "Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent (permitted by the rules of evidence)", made the rebuttal of evidence under C.R.C.P. 32(c), applicable to interrogatories. Ridley v. Young, 127 Colo. 46, 253 P.2d 433 (1953).

Interrogatory answers for discovery should not be irrevocably binding. Answers to interrogatories propounded primarily for the purpose of discovery and to prevent surprise should not be held to be irrevocably binding upon the person making said answers. Ridley v. Young, 127 Colo. 46, 253 P.2d 433 (1953).

IV. Option to Produce Business Records.

With regard to interrogatories which request information and data obtainable from available documents, the general rule is that a party should not be permitted to compel his opponent to make compilations or perform research and investigations with respect to statistical information which he might make for himself by obtaining the production of the books and documents pursuant to C.R.C.P. 34(a) or by doing a little footwork, as the case may be. Val Vu, Inc. v. Lacey, 31 Colo. App. 55, 497 P.2d 723 (1972).

Where one furnishes certain business records and furnishes other documents as they become available by use of C.R.C.P. 34(a), there is no prejudice resulting from the trial court's discretionary ruling that interrogatories are of an oppressive nature. Val Vu, Inc. v. Lacey, 31 Colo. App. 55, 497 P.2d 723 (1972).

Cross Reference Note:

For protective orders concerning discovery, see C.R.C.P. 26(c); for answer to a motion for order compelling discovery, see C.R.C.P. 37(a); for sanctions for failure of party to serve answers to interrogatories, see C.R.C.P. 37(b)(2) and (d); for scope of discovery, see C.R.C.P. 26(b). Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.

RULE 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(a) **Scope.** Subject to the limitations contained in the Case Management Order, a party may serve on any other party a request:

(1) 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 respondent 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.C.P. 26(b) and which are in the possession, custody, or control of the party upon whom the request is served; or

(2) 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.C.P. 26(b).

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

The party upon whom the request is served shall serve a written response within 35 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.C.P. 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, 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.C.P. 26(c) is required. The party submitting the request may move for an order pursuant to C.R.C.P. 37(a) 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.

(c) **Persons Not Parties.** As provided in C.R.C.P. 45, this Rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

History:

Source: (a) and (b) amended and adopted effective April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; committee comment approved June 10, 1994; committee comment corrected and effective January 9, 1995; (b) 2supnd/sup paragraph amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b). Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.

Note:

Comments

1995

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

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

2015

[3] Rule 34 is changed to adopt similar revisions as those proposed to Fed. R. Civ. P. 34, which are designed to make responses to requests for documents more meaningful and transparent. The first amendment is to avoid the practice of repeating numerous boilerplate objections to each request which do not identify specifically what is objectionable about each specific request. The second amendment is to allow production of

documents in place of permitting inspection but to require that the production be scheduled to occur when the response to the document request is due, or some other specific and reasonable date. The third amendment is to require that when an objection to a document request is made, the response must also state whether, in fact, any responsive materials are being withheld due to that objection. The fourth and final amendment is simply to clarify that a written objection to production under this Rule is adequate to stop production without also filing a motion for a protective order.

Case Note:

Annotation

I. General Consideration.

Law reviews. For article, "Use of Summary Judgments and the Discovery Procedure", see 24 Dicta 193 (1947). For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Depositions and Discovery, Rules 26 to 37 ", see 28 Dicta 375 (1951). For article, "Depositions and Discovery: Rules 26-37 ", see 23 Rocky Mt. L. Rev. 562 (1951). For note, "Comments on Rule 34 ", see 30 Dicta 367 (1953). For article, "Civil Remedies and Civil Procedure", see 30 Dicta 465 (1953). For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21 (1960). For article, "Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment", see 40 Den. L. Ctr. J. 192 (1963). For article, "Taking Evidence Abroad for Use in Litigation in Colorado", see 14 Colo. Law. 523 (1985). For article, "Rule 34(c): Discovery of Non-Party Land and Large Intangible Things", see 14 Colo. Law. 562 (1985). For article, "Discovery and Spoliation Issues in the High-Tech Age", see 32 Colo. Law. 81 (September 2003).

C.R.C.P. 26 to 37 must be construed together along with the requirement that plaintiff establish a prima facie case for punitive damages, as a condition precedent to the plaintiff's right to discovery of defendant's financial information. Leidholt v. District Court, 619 P.2d 768 (Colo. 1980).

Civil discovery rules inapplicable to release hearings. Based on §§16-8-115 to 16-8-117 and on the special nonadversary nature of a release inquiry, the participants in release proceedings do not have the broad right of discovery as provided in the rules of civil procedure. People v. District Court, 192 Colo. 225, 557 P.2d 414 (1976).

Under C.R.C.P. 81(a), the procedure in release hearings under §16-8-115 is so inconsistent and in conflict with the rules of civil procedure as to make civil discovery rules inapplicable to release hearings. People v. District Court, 192 Colo. 225, 557 P.2d 414 (1976).

Applied in Petrini v. Sidwell, 38 Colo. App. 454, 558 P.2d 447 (1976); Globe Drilling Co. v. Cramer, 39 Colo. App. 153, 562 P.2d 762 (1977); City & County of Denver v. District Court, 199 Colo. 223, 607 P.2d 984 (1980); City & County of Denver v. District Court, 199 Colo. 303, 607 P.2d 985 (1980); Ricci v. Davis, 627 P.2d 1111 (Colo. 1981); Wilson v. United States Fid. & Guar. Co., 633 P.2d 493 (Colo. App. 1981); Pietramale v. Robert G. Fisher Co., 638 P.2d 847 (Colo. App. 1981); Hawkins v. District Court, 638 P.2d 1372 (Colo. 1982); Caldwell v. District Court, 644 P.2d 26 (Colo. 1982).

II. Scope.

Production of statistical data should be made pursuant to this rule instead of using interrogatories. With regard to interrogatories which request information and data obtainable from available documents, the general rule is that a party should not be permitted to compel his opponent to make compilations or perform research and investigations with respect to statistical information which he might make for himself by obtaining the production of the books and documents pursuant to this rule. Val Vu, Inc. v. Lacey, 31 Colo. App. 55, 497 P.2d 723 (1972).

Under this rule, a party does not have an unqualified right to examine a statement signed by him and delivered to the other party during an investigation conducted prior to the time suit is filed. McCoy v. District Court, 126 Colo. 32, 246 P.2d 619 (1952).

If a litigant is entitled to th, 126 Colo. 32, 246 P.2d 619 (1952).

The limitations set forth in this rule are: (1) Relevancy under C.R.C.P. 26(b); and (2) possession, custody, or control. Michael v. John Hancock Mut. Life Ins. Co., 138 Colo. 450, 334 P.2d 1090 (1959).

It is not error to require a party to produce documents which are under his control, though not in his actual possession, and which are obtainable upon his order or direction. Michael v. John Hancock Mut. Life Ins. Co., 138 Colo. 450, 334 P.2d 1090 (1959).

Denial of motion to compel production of documents on grounds that voluminous documentation had been provided and that the attorney-client privilege had not been waived was not an abuse of the trial court's discretion in discovery matters. Hill v. Boatright, 890 P.2d 180 (Colo. App. 1994), aff'd

in part and rev'd in part on other grounds sub nom. Boatright v. Derr, 919 P.2d 221 (Colo. 1996).

Limitation in protective order prohibiting defendant from copying petitioner's documentary evidence goes far beyond what discovery requires, and flies in the face of that aspect of this rule which specifically authorizes such copying. Curtis, Inc. v. District Court, 186 Colo. 226, 526 P.2d 1335 (1974).

Discovery of documents rather than ex parte questioning appropriate. Ex parte questioning of physicians or others concerning documents to be examined cannot be ordered by the court in personal injury action, and, if an inspecting party needs further information concerning documentary material, the formal method of eliciting the same is by further discovery procedure. Fields v. McNamara, 189 Colo. 284, 540 P.2d 327 (1975).

Ordering plaintiff authorization allowing inspection proper. Under this rule, court order permitting the inspection and copying of records, reports, and X-rays, and ordering plaintiff to execute and deliver an authorization allowing such inspection and copying, where the plaintiff brought an action for damages for injuries allegedly sustained in an automobile accident, was not error in the provisions of the authorization. Fields v. McNamara, 189 Colo. 284, 540 P.2d 327 (1975).

A party may be required to obtain copies of tax returns filed by him, since he has a potential right to the custody or control of such copies. Michael v. John Hancock Mut. Life Ins. Co., 138 Colo. 450, 334 P.2d 1090 (1959).

"Surveillance movies" are discoverable. Crist v. Goody, 31 Colo. App. 496, 507 P.2d 478 (1972).

A party cannot be compelled to produce X-ray photographs taken and retained by his physician in the absence of a showing that the party has a legal right to demand the photographs. Michael v. John Hancock Mut. Life Ins. Co., 138 Colo. 450, 334 P.2d 1090 (1959).

Order to produce privileged communications improper. Order compelling defendant-insurer to make available to plaintiffs' attorneys all correspondence between its home office and its local counsel and local agents as well as all correspondence between insurer and its attorneys or agents and insured was improper as a violation of the attorney-client privilege. General Accident Fire & Life Assurance Corp. v. Mitchell, 128 Colo. 11, 259 P.2d 862 (1953).

A privilege may be waived by authorized parties. A trustee in bankruptcy for a corporation stands in the shoes of the board of directors and therefore has the power, in the exercise of his discretion, to waive the privilege under §13-90-107 that the work product of a certified public accountant is nondiscoverable without the client's consent. Weck v. District Court, 161 Colo. 384, 422 P.2d 46 (1967).

Personnel files and police reports within scope of privilege are protected from discovery. To the extent that they come within the scope of the official information privilege, the personnel files and staff investigation bureau reports of the Denver police department are protected from discovery. Martinelli v. District Court, 199 Colo. 163, 612 P.2d 1083 (1980).

To establish legitimate expectation of nondisclosure, claimant must show, first, that he or she has an actual or subjective expectation that the information will not be disclosed, and second, the claimant must show that the material or information which he or she seeks to protect against disclosure is highly personal and sensitive and that its disclosure would be offensive and objectionable to a reasonable person of ordinary sensibilities. Martinelli v. District Court, 199 Colo. 163, 612 P.2d 1083 (1980).

Certain factors shall be considered when official information privilege claimed. In a litigation arising from allegations of police misconduct, when the official information privilege is claimed for files and reports maintained by a police department, concerning an incident upon which the allegations of misconduct are based, or about the officers involved in the incident, the trial court has the advantage of the following formulation of factors to be considered in applying the privilege: (1) The extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is nonfrivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information sought to the plaintiff's case. Martinelli v. District Court, 199 Colo. 163, 612 P.2d 1083 (1980).

Balancing competing interests required where official information privilege claimed. Where the official information privilege is raised in opposition to a request for discovery, the trial court must balance the competing interests through an in camera examination of the materials for which the official information privilege is claimed. Martinelli v. District Court, 199 Colo. 163, 612 P.2d 1083 (1980).

Tripartite balancing inquiry undertaken when right to confidentiality is invoked. When the right to confidentiality is invoked to prevent disclosure of personal materials or information, a tripartite balancing inquiry must be undertaken by the court, as follows: (1) Does the party seeking to come within the protection of the right to confidentiality have a legitimate expectation that the materials or information will not be disclosed? (2) is disclosure nonetheless required to serve a compelling state interest? and (3) if so, will the necessary disclosure occur in that manner which is least intrusive with respect to the right to confidentiality? Martinelli v. District Court, 199 Colo. 163, 612 P.2d 1083 (1980).

Compelling state interest can override right to confidentiality. Even if it is determined that a claimant has a legitimate expectation that the personal materials or information in question will not be disclosed through state action, a compelling state interest can override the constitutional right to confidentiality which arises from that expectation. Martinelli v. District Court, 199 Colo. 163, 612 P.2d 1083 (1980).

Compelling state interest in disclosure must consist of the very materials or information which would otherwise be protected. Martinelli v. District Court, 199 Colo. 163, 612 P.2d 1083 (1980).

In certain cases, the court shall inquire into the manner of disclosure. When it is determined that a compelling state interest mandates the disclosure of otherwise protected materials or information, the trial court must further inquire into the manner in which the disclosure will occur and disclosure must only be made in a manner, consistent with the state interest to be served, which will intrude least on the claimant's right to confidentiality. Martinelli v. District Court, 199 Colo. 163, 612 P.2d 1083 (1980).

Effect of doctrine of stare decisis is limited. Because the balancing process proceeds on an ad hoc basis, the effect of the doctrine of stare decisis in cases requiring application of the official information privilege is limited. Martinelli v. District Court, 199 Colo. 163, 612 P.2d 1083 (1980).

Destructive testing is not a matter of right, but lies in the sound discretion of the trial court. Cameron v. District Court, 193 Colo. 286, 565 P.2d 925 (1977).

The appropriate analysis in deciding whether to allow a destructive test as part of discovery where the owner of the object sought the testing was parallel to that involved in a conventional request for inspection under this rule and a resulting motion for a protective order under C.R.C.P. 26. Cameron v. District Court, 193 Colo. 286, 565 P.2d 925 (1977).

Balance must be established. The dilemma which arises when the proposed test will somehow alter the original state of the object requires that a balance be established based upon the particular facts of the case and the broad policies of the discovery rules. Cameron v. District Court, 193 Colo. 286, 565 P.2d 925 (1977).

A balance must be struck where a test will alter the original state of an object between the "costs" of the alteration of the object and the "benefits" of ascertaining the true facts of the case. Cameron v. District Court, 193 Colo. 286, 565 P.2d 925 (1977).

Certain factors shall be considered in creating balance. Alternative means of ameliorating "costs", resulting from alteration of an object in destructive testing, such as the use of detailed photographs to preserve the appearance of the object, or use of other samples for the test, are relevant to the creation of the balance. Cameron v. District Court, 193 Colo. 286, 565 P.2d 925 (1977).

Alternative, "nondestructive" means of obtaining the facts should be considered in evaluating the putative benefits of the tests. Cameron v. District Court, 193 Colo. 286, 565 P.2d 925 (1977).

Bad faith or overreaching is a special factor to be considered in all cases of destructive testing. Cameron v. District Court, 193 Colo. 286, 565 P.2d 925 (1977).

Destructive testing shall be undertaken last. A request for destructive testing compels that the court ensure that it is not undertaken until after other testing procedures have been completed by the parties. Cameron v. District Court, 193 Colo. 286, 565 P.2d 925 (1977).

III. Procedure.

Burden placed on party opposing discovery. Requirement that party requesting discovery make out a prima facie case is not imposed by this rule, and any burden that exists should be placed on those opposing discovery. Curtis, Inc. v. District Court, 186 Colo. 226, 526 P.2d 1335 (1974).

A party seeking a subpoena duces tecum requiring production of documents by the other party at a deposition hearing must show good cause for the

issuance of such a subpoena, and under such circumstances, C.R.C.P. 45(b), which provides for subpoena for the production of documentary evidence, must be read in conjunction with this rule. Lee v. Missouri P. R. R., 152 Colo. 179, 381 P.2d 35 (1963).

File should be produced upon "good cause" shown. Where it was proved by uncontradicted testimony that a claims agent who investigated the accident could not testify or give a "coherent story about the results of his investigation" without first refreshing his memory from his file on the investigation, such was sufficient to show good cause why the file should be produced at the time of the taking of the agent's deposition. Lee v. Missouri P. R. R., 152 Colo. 179, 381 P.2d 35 (1963).

Production of documents is still subject to protective orders by court and objections. Where good cause for the production of documents at time of taking depositions is shown, such required presentation is subject to any protective orders the court might make concerning the use to be made of the documents and is subject to any objections to specific questions asked of deponent concerning the documents. Lee v. Missouri P. R. R., 152 Colo. 179, 381 P.2d 35 (1963).

Pretrial order reviewable in certain circumstances. Orders pertaining to pretrial discovery are interlocutory in nature and are not ordinarily reviewable in an original proceeding. Because, however, the exercise of original jurisdiction is discretionary and governed by the particular circumstances of the case, there are exceptions to this general rule when, for example, a pretrial discovery order significantly departs from the controlling standards of discovery, or when a pretrial discovery order will cause a party unwarranted damage that cannot be cured on appeal, such as where treatment records are protected from disclosure by statutory privileges. Clark v. District Court, 668 P.2d 3 (Colo. 1983).

A party produces documents requested pursuant to C.R.C.P. 34 by making them available for inspections and copying. Application of Hines Highlands Partnership, 929 P.2d 718 (Colo. 1996).

Cross Reference Note:

For scope of discovery, see C.R.C.P. 26(b); for inspection of mines, see §34-50-105, C.R.S.; for protective orders concerning discovery, see C.R.C.P. 26(c); for motion for order compelling discovery, see C.R.C.P. 37(a); for subpoena for production of documentary evidence, see C.R.C.P. 45(b); for parties, see C.R.C.P. 17 to 25.

RULE 35. Physical and Mental Examination of Persons

(a) **Order for Examination.** When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in his or her custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) **Report of Examiner.**

(1) If requested by the party against whom an order is made under section (a) of this Rule or the person examined, the party causing the examination to be made shall deliver to said other party a copy of a detailed written report of the examiner setting out his or her findings, including results of all tests made, diagnoses, and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he or she is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the person examined waives any privilege he or she may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the person in respect of the same mental or physical condition.

(3) This section (b) applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This section (b) does not preclude discovery of a report of an examiner in accordance with the provisions of any other Rule.

History:

Source: Amended October 8, 1992, effective January 1, 1993.

Case Note:

Annotation

I. General Consideration.

Law reviews. For article, "Depositions and Discovery, Rules 26 to 37 ", see 28 Dicta 375 (1951). For article, "Depositions and Discovery: Rules 26-37 ", see 23 Rocky Mt. L. Rev. 562 (1951). For article, "Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment", see 40 Den. L. Ctr. J. 192 (1963).

C.R.C.P. 26 to 37 must be construed together along with the requirement that the plaintiff establish a prima facie case for punitive damages, as a condition precedent to the plaintiff's right to discovery of defendant's financial information. Leidholt v. District Court, 619 P.2d 768 (Colo. 1980).

Determination of motion lies within the sound discretion of the trial court. In a dependency and neglect proceeding, denying intervenor's motion for mental examination of the mother when evaluation had been updated six months before the hearing was not an abuse of discretion. People ex rel. A.W.R., 17 P.3d 192 (Colo. App. 2000).

There is no absolute quasi-judicial immunity for professionals conducting an independent medical or psychiatric examination pursuant to this rule. Dalton v. Miller, 984 P.2d 666 (Colo. App. 1999).

However, such professional is entitled to witness immunity where such professional examined a person pursuant to this rule. Dalton v. Miller, 984 P.2d 666 (Colo. App. 1999).

Applied in Phillips v. District Court, 194 Colo. 455, 573 P.2d 553 (1978); People v. Elam, 198 Colo. 170, 597 P.2d 571 (1979); People v. Shuldham, 625 P.2d 1018 (Colo. 1981); Ricci v. Davis, 627 P.2d 1111 (Colo. 1981); Clark v. District Court, 668 P.2d 3 (Colo. 1983).

II. Order.

Law reviews. For note, "One Year Review of Colorado Law-1964", see 42 Den. L. Ctr. J. 140 (1965). For comment on Timpte v. District Court appearing below, see 39 U. Colo. L. Rev. 592 (1967).

Motion for physical examination is addressed to the sound discretion of the trial court. Hildyard v. Western Fasteners, Inc., 33 Colo. App. 396, 522 P.2d 596 (1974).

It is necessary to demonstrate good cause therefor. Hildyard v. Western Fasteners, Inc., 33 Colo. App. 396, 522 P.2d 596 (1974).

Rule does not by its terms limit a party to one examination. Hildyard v. Western Fasteners, Inc., 33 Colo. App. 396, 522 P.2d 596 (1974).

Circumstances held sufficient to justify a second physical examination are: (a) Separate injuries calling for analysis from distinct medical specialties such as "whip-lash sprain" and "aggravation of preexisting heart condition", (b) where the examining physician requires the assistance of other consultants before he can make a diagnosis, or (c) where a substantial time lag occurs between the initial examination and trial. Hildyard v. Western Fasteners, Inc., 33 Colo. App. 396, 522 P.2d 596 (1974).

A trial court is authorized to issue an order requiring a party to submit to a physical or mental examination upon a showing of good cause and that such order shall specify the conditions of the examination. Hayes v. District Court, 854 P.2d 1240 (Colo. 1993).

Court may compel examination in Colorado where party has been examined in another jurisdiction. Where, on motion to vacate an interlocutory decree of divorce, defendant husband contended that he was insane at the time of the alleged commission of the acts relied upon as grounds for divorce, at the time of service of process, and throughout the pendency of the action, the trial court did not err in ruling that it would not receive in evidence depositions concerning husband's purported insanity by doctors in another state where husband had wilfully absented himself until such time as the husband made himself available for examination within the jurisdiction of Colorado by psychiatrists or physicians who might be selected by the wife. Richardson v. Richardson, 124 Colo. 240, 236 P.2d 121 (1951).

Defendant has same right as plaintiff to have his own doctor testify. So long as a plaintiff may select his own doctor to testify as to his physical condition, fundamental fairness dictates that a defendant shall have the same right, in the absence of an agreement by the parties as to whom the examining physician will be. Timpte v. District Court, 161 Colo. 309, 421 P.2d 728 (1966).

Defendant's right to select a doctor to testify is subject to protective orders by the trial court such as, among others: Those limiting the number of doctors who may examine; those providing who may be present at the examinations, including plaintiffs' attorneys if the court deems it wise; and those setting the time, type, place, scope, and conduct of the examination. Timpte v. District Court, 161 Colo. 309, 421 P.2d 728 (1966); Hayes v. District Court, 854 P.2d 1240 (Colo. 1993).

The court may reject a particular physician upon a finding, sustained by a showing of bias and prejudice, and order the defendant to submit the names of other physicians. Timpte v. District Court, 161 Colo. 309, 421 P.2d 728 (1966).

The fact that certain doctors testify only for the defense in matters of personal injury does not in itself suggest bias and prejudice which demands disqualification of such a doctor; rather, it is a matter relevant only as to weight and credibility, and cross-examination upon this subject affords full protection to the plaintiff's rights. Timpte v. District Court, 161 Colo. 309, 421 P.2d 728 (1966).

In no case, however, may the court select a so-called "neutral" physician. The trial judge may not permit the plaintiffs as well as the defendants to submit a list of doctors from which the trial court would select a so-called "neutral" physician. Timpte v. District Court, 161 Colo. 309, 421 P.2d 728 (1966).

A trial court has the power to order a psychiatric examination of the parties in a domestic relations case even though not provided for in section (a) of this rule, since where matters such as custody of children are in dispute in a divorce or separation action and the mental stability of either or both of the parents is seriously challenged, a psychiatric examination may well provide a key to a wise determination of custody, a determination, the sole aim of which must be the best interests of the children. Kane v. Kane, 154 Colo. 440, 391 P.2d 361 (1964).

Where the record fails to disclose any evidence necessitating a forced psychiatric examination of one of the spouses as insisted by the other spouse, there is no abuse of discretion in the trial court's refusal to so order. Kane v. Kane, 154 Colo. 440, 391 P.2d 361 (1964).

Questions concerning the conduct of physical examinations conducted pursuant to section (a) of this rule, including the presence of third parties and tape recorders during such examinations, are to be resolved by the trial court in the exercise of its discretion. Hayes v. District Court, 854 P.2d 1240 (Colo. 1993).

The party seeking such protective orders bears the burden of establishing the need for such relief. Hayes v. District Court, 854 P.2d 1240 (Colo. 1993).

"In controversy" and "good cause" requirements. This rule requires that either the party's physical or mental condition be "in controversy" and that the movant show "good cause" before the court may order that a party

submit to a physical or mental examination. Tyler v. District Court, 193 Colo. 31, 561 P.2d 1260 (1977).

Affirmative showing required. The "in controversy" and "good cause" requirements of this rule are not met by mere conclusory allegations of the pleadings-nor by mere relevance to the case-but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination. Tyler v. District Court, 193 Colo. 31, 561 P.2d 1260 (1977).

A plaintiff's general allegations of mental suffering, mental anguish, emotional distress, and the like, do not place his mental condition in controversy under this rule. Tyler v. District Court, 193 Colo. 31, 561 P.2d 1260 (1977).

Trial court did not abuse its discretion in denying defendant's motion for an independent medical examination where, although the plaintiff brought a claim for mental distress, his mental condition was not in controversy. Further, the court did not err in allowing the plaintiff to testify regarding the embarrassment and humiliation he suffered as a result of the defendant's actions in telling others of plaintiff's sexual orientation. Borquez v. Robert C. Ozer, P.C., 923 P.2d 166 (Colo. App. 1995), aff'd in part and rev'd in part on other grounds, 940 P.2d 371 (Colo. 1997).

A plaintiff in a negligence action who asserts mental or physical injury places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury. Braxton v. Luff, 38 Colo. App. 451, 558 P.2d 444 (1976).

Complaint alleging that injuries suffered in the collision resulted in past and future medical expenses, loss of time from work, pain and suffering, and other impairment was sufficient to place plaintiff's physical condition in controversy and give defendant good cause for an order to submit to a physical examination. Braxton v. Luff, 38 Colo. App. 451, 558 P.2d 444 (1976).

The notice provisions of this rule are mandatory and, absent proper notice, the court may refuse to order a physical or a mental examination. Tyler v. District Court, 193 Colo. 31, 561 P.2d 1260 (1977).

Where irregularities in formalities leading to an order did not prejudice plaintiff, the order was properly granted. Braxton v. Luff, 38 Colo. App. 451, 558 P.2d 444 (1976).

Dismissal of case with prejudice held justified. Where plaintiff at no time objected to an examination, sought to cancel or change the appointments, or offered any excuse for his failure to keep at least six scheduled appointments, since the claim was based entirely on the personal injuries he allegedly suffered, and since he repeatedly failed to appear for examination without giving any reason therefor, the trial court was justified in dismissing the case with prejudice. Braxton v. Luff, 38 Colo. App. 451, 558 P.2d 444 (1976).

Proper case for supreme court's original jurisdiction. Petitioner's allegations that respondent court exceeded its jurisdiction and abused its discretion by ordering a psychiatric examination in violation of section (a) of this rule presented a proper case for exercise of the supreme court's original jurisdiction. Post-judgment appeal obviously cannot reverse the possible adverse consequences of a pretrial psychiatric examination of petitioner. Tyler v. District Court, 193 Colo. 31, 561 P.2d 1260 (1977).

III. Report.

This rule does not place upon a party the burden of procuring copies of records of hospitals or of office records of physicians. Palmer Park Gardens, Inc. v. Potter, 162 Colo. 178, 425 P.2d 268 (1967).

This rule is limited to medical examinations conducted at the request of a party, and the reports, copies of which are subject to production, are the reports made by the physician as the result of such an examination. Palmer Park Gardens, Inc. v. Potter, 162 Colo. 178, 425 P.2d 268 (1967).

A physician was not required to prepare written reports concerning his treatment of plaintiff where defendant had been furnished, by agreement, the only report prepared by the doctor of a medical examination of plaintiff. Palmer Park Gardens, Inc. v. Potter, 162 Colo. 178, 425 P.2d 268 (1967).

Cross Reference Note:

For protective orders concerning discovery, see C.R.C.P. 26(c); for sanctions for failure to comply with order, see C.R.C.P. 37(b).

RULE 36. Requests for Admission

(a) **Request for Admission.** Subject to the limitations contained in the Case Management Order, a party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of C.R.C.P. 26(b) 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, consistent with the principles stated in C.R.C.P. Rules 16(b)(1) and 26(b), to serve more requests for admission than the number set forth in the Case Management Order. Without leave of court or written stipulation, requests for admission may not be served before the time specified in C.R.C.P. 26(d).

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 35 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.C.P. 29, 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. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of C.R.C.P. 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.

The party who has requested the 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.C.P. 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) **Effect of Admission.** Any matter admitted under this Rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. 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.

History:

Source: (a) amended and adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; committee comment approved June 10, 1994; (a) amended and adopted October 30, 1997, effective January 1, 1998; (a) 2supnd/sup paragraph amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Note:

Committee Comment

Revised C.R.C.P. 36 now interrelates with the differential case management features of C.R.C.P. 16 and C.R.C.P. 26. Because of mandatory disclosure, substantially less discovery is needed.

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

Case Note:

Annotation

I. General Consideration.

Law reviews. For article on Colorado Rules of Civil Procedure concerning depositions, discovery, and pretrial procedure, see 21 Rocky Mt. L. Rev. 38 (1948). For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Depositions and Discovery, Rules 26 to 37 ", see 28 Dicta 375 (1951). For article, "Depositions and Discovery: Rules 26-37 ", see 23 Rocky Mt. L. Rev. 562 (1951). For article, "One Year Review of Civil Procedure and Appeals", see 39 Dicta 133 (1962). For comment on McGee v. Heim appearing below, see 34 Rocky Mt. L. Rev. 577 (1962). For article, "Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment", see 40 Den. L. Ctr. J. 192 (1963). For article, "A Litigator's Guide to Summary Judgments", see 14 Colo. Law. 216 (1985).

C.R.C.P. 26 to 37 must be construed together along with the requirement that the plaintiff establish a prima facie case for punitive damages, as a condition precedent to the plaintiff's right to discovery of defendant's financial information. Leidholt v. District Court, 619 P.2d 768 (Colo. 1980).

District court's decision to deny a motion to withdraw or amend a response to a request for admission is reviewed for abuse of discretion. Grynberg v. Karlin, 134 P.3d 563 (Colo. App. 2006).

Civil discovery rules inapplicable to release hearings. Based on §§16-8-115 to 16-8-117 and on the special nonadversary nature of a release inquiry, the participants in release proceedings do not have the broad right of discovery as provided in the rules of civil procedure. People v. District Court, 192 Colo. 225, 557 P.2d 414 (1976).

Under C.R.C.P. 81(a), the procedure in release hearings under §16-8-115 is so inconsistent and in conflict with the rules of civil procedure as to make civil discovery rules inapplicable to release hearings. People v. District Court, 192 Colo. 225, 557 P.2d 414 (1976).

Applied in Ricci v. Davis, 627 P.2d 1111 (Colo. 1981).

II. Request.

When one fails to properly reply to requests for admissions, for the purpose of trial, those statements made in the request will be deemed admitted. McGee v. Heim, 146 Colo. 533, 362 P.2d 193 (1961); Cox v. Pearl Inv. Co., 168 Colo. 67, 450 P.2d 60 (1969); Moses v. Moses, 30 Colo. App. 173, 494 P.2d 133 (1971); Grynberg v. Karlin, 134 P.3d 563 (Colo. App. 2006).

The genuineness of all documents not denied stands admitted under the provisions of this rule where a "request for admission of facts and genuineness of documents" is filed. Roemer v. Sinclair Ref. Co., 151 Colo. 401, 380 P.2d 56 (1963).

There is no binding effect on the requesting party of a request for admission pursuant to this rule and the response thereto. The purpose of this rule is to bind the party making the admission, not the party requesting it, and the submission of such a request and the response thereto admits nothing as to the requesting party. Aspen Petroleum Prods., Inc. v. Zedan, 113 P.3d 1290 (Colo. App. 2005).

An admission can constitute an adequate showing for the purpose of a summary judgment motion under C.R.C.P. 56. Roemer v. Sinclair Ref. Co., 151 Colo. 401, 380 P.2d 56 (1963); Cox v. Pearl Inv. Co., 168 Colo. 67, 450 P.2d 60 (1969); Cortez v. Brokaw, 632 P.2d 635 (Colo. App. 1981); Grynberg v. Karlin, 134 P.3d 563 (Colo. App. 2006).

Lack of adherence to formalities in verifying answers which do not result in prejudice should not interfere with the determination of the issues on the merits. Swan v. Zwahlen, 131 Colo. 184, 280 P.2d 439 (1955).

Late filings may be permitted. Where there is a request for admission, a late filing of a denial does not create a nonrebuttable presumption of the truth of the admitted fact, and late filings may be permitted where no prejudice is shown. Moses v. Moses, 180 Colo. 398, 505 P.2d 1302 (1973); Cortez v. Brokaw, 632 P.2d 635 (Colo. App. 1981); Sanchez v. Moosburger, 187 P.3d 1185 (Colo. App. 2008).

Court should not have granted summary judgment based entirely on plaintiff's deemed admission. Though plaintiff failed to timely reply to request for admission, plaintiff moved for an extension of time to reply and submitted a denial of the request, an affidavit, and documentary evidence before the court granted summary judgment. Sanchez v. Moosburger, 187 P.3d 1185 (Colo. App. 2008).

Officials of an administrative agency cannot be compelled to answer requests for admissions concerning the procedure or manner in which they made their findings and rendered a decision in a given case. P.U.C. v. District Court, 163 Colo. 462, 431 P.2d 773 (1967).

The only exception to this rule is where an allegation has been made and there is a clear showing of illegal or unlawful action, misconduct, bias, or bad faith on the part of the administrative officials or a specific violation of

an applicable statute. P.U.C. v. District Court, 163 Colo. 462, 431 P.2d 773 (1967).

Cross Reference Note:

For scope of discovery, see C.R.C.P. 26(b); for award of expenses of motion to determine the sufficiency of answer or objections, see C.R.C.P. 37(a)(4); for expenses on failure to admit, see C.R.C.P. 37(c).

RULE 37. 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 C.R.C.P. 26(a), 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 question propounded or submitted pursuant to C.R.C.P. Rules 30 or 31, or a corporation or other entity fails to make a designation pursuant to C.R.C.P. Rules 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted pursuant to C.R.C.P. 33, or if a party, in response to a request for inspection submitted pursuant to C.R.C.P. 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. 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 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 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 C.R.C.P. 26(c) 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 C.R.C.P. 26(c) 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 under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this Rule or Rule 35, 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 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 C.R.C.P. 26(a) or 26(e) shall not, be permitted to present any evidence not so disclosed at trial or on a motion made pursuant to C.R.C.P. 56, 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 subsections (b)(2)(A), (b)(2)(B) and (b)(2)(C) of this Rule, and the payment of reasonable expenses including attorney fees caused by the failure.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested pursuant to C.R.C.P. 36, 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 pursuant to C.R.C.P. 36(a), 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 pursuant to C.R.C.P. Rules 30(b)(6) or 31(a) 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 submitted pursuant to C.R.C.P. 33, after proper service of the interrogatories; or (3) to serve a written response to a request for inspection submitted pursuant to C.R.C.P. 34, 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 subparagraphs (A), (B), and (C) of subsection (b)(2) of this Rule. 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 C.R.C.P. 26(c).

History:

Source: (a), (c), and (d) amended and adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; committee comment approved June 10, 1994; (c)(1) corrected and effective January 9, 1995; (a)(4) amended and adopted October 30, 1997, effective January 1, 1998. Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.

Note:

Comments

1990

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

1995

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

2015

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

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

Case Note:

Annotation

I. General Consideration.

Law reviews. For article, "Depositions and Discovery, Rules 26 to 37 ", see 28 Dicta 375 (1951). For article, "Depositions and Discovery: Rules 26-37 ", see 23 Rocky Mt. L. Rev. 562 (1951). For article, "Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment", see 40 Den. L. Ctr. J. 192 (1963). For article, "A Deposition Primer, Part I: Setting Up the Deposition", see 11 Colo. Law. 938 (1982). For article, "Securing the Attendance of a Witness at a Deposition", see 15 Colo. Law. 2000 (1986). For article, "Rule 37: Discovery Sanctions Put "Teeth in the Tiger"", see 16 Colo. Law. 1998 (1987). For article, "Recovery of Attorney Fees and Costs in Colorado", see 23 Colo. Law. 2041 (1994).

Reasonable discretion must be exercised in applying this rule. Weissman v. District Court, 189 Colo. 497, 543 P.2d 519 (1975).

A party should not be denied a day in court because of an inflexible application of a procedural rule. Todd v. Bear Valley Vill. Apts., 980 P.2d 973 (Colo. 1999); Camp Bird Colo., Inc. v. Bd. of County Comm'rs of Ouray, 215 P.3d 1277 (Colo. App. 2009).

Trial court should impose the least severe sanction, commensurate with the extent of the violation, contemplated in this section. Pinkstaff v. Black & Decker (U.S.), Inc., 211 P.3d 698 (Colo. 2009).

"Opportunity to be heard", as used in section (a)(4)(A), does not mandate that a separate hearing be held before sanctions may be imposed. People ex rel. Pub. Utils. Comm'n v. Entrup, 143 P.3d 1120 (Colo. App. 2006).

C.R.C.P. 26 to 36 and this rule must be construed together along with the requirement that plaintiff establish a prima facie case for punitive damages, as a condition precedent to the plaintiff's right to discovery of defendant's financial information. Leidholt v. District Court, 619 P.2d 768 (Colo. 1980).

Civil discovery rules inapplicable to release hearings. Based on §§16-8-115 to 16-8-117 and on the special nonadversary nature of a release inquiry, the participants in release proceedings do not have the broad right of discovery as provided in the rules of civil procedure. People v. District Court, 192 Colo. 225, 557 P.2d 414 (1976).

Under C.R.C.P. 81(a), the procedure in release hearings under §16-8-115 is so inconsistent and in conflict with the rules of civil procedure as to make civil discovery rules inapplicable to release hearings. People v. District Court, 192 Colo. 225, 557 P.2d 414 (1976).

Tripartite balancing inquiry undertaken when right to confidentiality invoked. When the right to confidentiality is invoked to prevent disclosure of personal materials or information, a tripartite balancing inquiry must be undertaken by the court, as follows: (1) Does the party seeking to come within the protection of the right to confidentiality have a legitimate expectation that the materials or information will not be disclosed? (2) is disclosure nonetheless required to serve a compelling state interest? and (3) if so, will the necessary disclosure occur in that manner which is least intrusive with respect to the right to confidentiality? Martinelli v. District Court, 199 Colo. 163, 612 P.2d 1083 (1980).

Court may order sanction if order sufficient. Where order required defendant to produce "requested" documents, plaintiff's motion to compel such production clearly listed the types of documents defendant was to produce, and evidence established that the requested documents were either in the defendant's custody or control, the court could properly order a sanction pursuant to section (b)(2)(A). N.S. by L.C.-K. v. S.S., 709 P.2d 6 (Colo. App. 1985).

A court is not required to, sua sponte, convert a motion to dismiss for failure to prosecute into a motion for sanctions under this rule. Cornelius v. River Ridge Ranch Landowners Ass'n, 202 P.3d 564 (Colo. 2009).

Sanctions for destruction of evidence may not be awarded under this rule absent an order compelling production. However, under a court's inherent powers, sanctions for the destruction of evidence may be awarded. Lauren Corp. v. Century Geophysical Corp., 953 P.2d 200 (Colo. App. 1998).

Plaintiff's motion for sanctions for destruction of evidence denied because defendant was not provided with clear, prompt notice that a complaint would be filed and evidence was preserved for a year and a half after incident. Defendant's conduct in discarding evidence was not in bad faith. Castillo v. Chief Alternative, LLC, 140 P.3d 234 (Colo. App. 2006).

The appellate standard of review governing sanctions under this rule is whether the tribunal that imposed the sanction abused its discretion. When three separate hearings on the merits were vacated, and proceedings deadlocked for 18 months by claimant's refusal to sign an unconditional release, the sanction of dismissal was not an abuse of discretion. Sheid v. Hewlett Packard, 826 P.2d 396 (Colo. App. 1991).

Trial court may not impose sanctions under C.R.C.P. 37(b)(2) where no violation of a court order has occurred. O'Reilly v. Physicians Mut. Ins. Co., 992 P.2d 644 (Colo. App. 1999).

Rule as basis for jurisdiction. See Beebe v. Pierce, 185 Colo. 34, 521 P.2d 1263 (1974).

Applied in City & County of Denver v. District Court, 199 Colo. 223, 607 P.2d 984 (1980); Ricci v. Davis, 627 P.2d 1111 (Colo. 1981); Wilson v. United States Fid. & Guar. Co., 633 P.2d 493 (Colo. App. 1981); Cross v. District Court, 643 P.2d 39 (Colo. 1982); Caldwell v. District Court, 644 P.2d 26 (Colo. 1982); Biella v. State Dept. of Hwys., 652 P.2d 1100 (Colo. App. 1982); Black ex rel. Bayless v. Cullar, 665 P.2d 1029 (Colo. App. 1983); Asamera Oil (U.S.) Inc. v. KMOCO Oil Co., 759 P.2d 808 (Colo. App. 1988); Colo. State Bd. of Nursing v. Lang, 842 P.2d 1383 (Colo. App. 1992).

II. Motion for Order.

A. In General.

Motion to compel discovery is committed to discretion of trial court and will be upheld on appeal absent a clear abuse of discretion. Gagnon v. District Court, 632 P.2d 567 (Colo. 1981).

Order reviewable in certain circumstances. Orders pertaining to pretrial discovery are interlocutory in nature and are not ordinarily reviewable in an original proceeding. Because, however, the exercise of original jurisdiction is discretionary and governed by the particular circumstances of the case, there are exceptions to this general rule when, for example, a pretrial discovery order significantly departs from the controlling standards of discovery, or when a pretrial discovery order will cause a party unwarranted damage that cannot be cured on appeal, such as where treatment records are protected from disclosure by statutory privileges. Clark v. District Court, 668 P.2d 3 (Colo. 1983).

When supreme court will review denial of motion to compel. While orders pertaining to pretrial discovery are interlocutory in nature and generally not reviewable, the supreme court will exercise original jurisdiction where the trial courts denial of a petitioner's motion to compel discovery will preclude the petitioner from obtaining information vital to his claims for relief. Hawkins v. District Court, 638 P.2d 1372 (Colo. 1982).

Trial court properly declined to award attorney's fees to nonparty deponent who moved the court not for a protective order but for an order striking defense counsel's endorsement of nonparty as an expert witness without any request for attorney's fees. Roberts-Henry v. Richter, 802 P.2d 1159 (Colo. App. 1990).

Trial court finding that discovery motion was "not without justification" is insufficient to support denial of award of attorney's fees to person opposing motion which was denied. A remand is necessary because trial court must find that denied motion was "substantially justified" to deny award of attorney's fees to opponent of motion. Roberts-Henry v. Richter, 802 P.2d 1159 (Colo. App. 1990).

B. Failure to Answer.

Sections (a)(1) and (d) are independent. The wording of the two sections (a)(1) and (d) of this rule establishes that these sections are independent significance and operation. Petrini v. Sidwell, 38 Colo. App. 454, 558 P.2d 447 (1976).

The requirement of a motion and order under subsection (a)(1) should not be read into the provisions of section (d) as a condition precedent to entry of default judgment. Petrini v. Sidwell, 38 Colo. App. 454, 558 P.2d 447 (1976).

When answers to interrogatories are not made, or are defective in some particular, the remedy is to compel proper answers, and one may not expect an answer on file to be disregarded by the court on the basis of technical defects unless he has properly raised the defects for consideration by the court. Moses v. Moses, 180 Colo. 398, 505 P.2d 1302 (1973).

But employees, particularly nonresidents, of corporation cannot be compelled to answer or produce private records. Corporations are "sui generis", and a suit against a principal is not a suit against its agents or employees. So the fact that defendants are sued by a foreign corporation in Colorado does not mean that all of the plaintiff-corporation's officers and employees located and domiciled outside Colorado are subject to the jurisdiction of Colorado courts. Moreover, no employer, corporate or otherwise, can compel its personnel to travel to a foreign state or furnish their private records for the use of its opponents. Solliday v. District Court, 135 Colo. 489, 313 P.2d 1000 (1957).

C. Award of Expenses of Motion.

Entry of an award is mandatory under subsection (a)(3). Graefe & Graefe v. Beaver Mesa Exploration, 695 P.2d 767 (Colo. App. 1984).

Although wife's motion in dissolution of marriage action included language used in C.R.C.P. 26(c), neither the motion nor the argument made at the hearing indicated that she was requesting discovery and the trial court had no authority to assess attorney fees pursuant to this rule. In re Smith, 757 P.2d 1159 (Colo. App. 1988).

III. Failure to Comply.

A. Sanctions by Court in District.

Strict compliance with contempt procedures must be followed before jurisdiction to adjudicate contempt and punishment therefor attaches. Metcalf v. Roberts, 158 Colo. 255, 406 P.2d 103 (1965).

Where the order of the court is one requiring a party to answer "any questions desired to be asked by counsel", violation of such a broad order cannot be adjudicated a contempt under this rule. Metcalf v. Roberts, 158 Colo. 255, 406 P.2d 103 (1965).

Sections (a) and (b)(1) of this rule must be read together and contemplate a specific order to answer specific questions, followed by an opportunity to resume the taking of the deposition, and, if there then occurs a refusal by the deponent to answer the specific questions as ordered, citation for contempt may issue. Metcalf v. Roberts, 158 Colo. 255, 406 P.2d 103 (1965).

Party must refuse to be sworn or answer to be in contempt. Where there is no contention that a party refused to be sworn or that he refused to answer any question after being directed to do so by the court, which are the only circumstances from which contempt of court will lie under section (b)(1) of this rule, then it is error for a court to find a party in contempt. Salter v. Bd. of County Comm'rs, 126 Colo. 39, 246 P.2d 890 (1952), aff'd, 130 Colo. 504, 277 P.2d 232 (1954).

A party who fails to attend the taking of a deposition cannot be adjudged in contempt under section (b)(1) of this rule. Salter v. Bd. of County Comm'rs, 126 Colo. 39, 246 P.2d 890 (1952), aff'd, 130 Colo. 504, 277 P.2d 232 (1954).

B. Sanctions by Court in Which Action is Pending.

This rule provides that under limited circumstances if corporate officials fail to testify in a suit concerning the corporation, as may be required by the court, then certain pleading penalties may be invoked against the corporation, but not the corporation's agents or employees, and particularly those residing in another state. Solliday v. District Court, 135 Colo. 489, 313 P.2d 1000 (1957).

Pleading penalties may be invoked. If corporate officials fail to testify in a suit concerning the corporation, as may be required by our courts, then certain pleading penalties may be invoked against the corporation. Weissman v. District Court, 189 Colo. 497, 543 P.2d 519 (1975).

Default judgment should be set aside where trial court enters the default in the absence of any showing that the party against whom the default is entered had personal knowledge of the duties imposed upon him by a pretrial order and without a showing that the three-day notice of application for default requirement of C.R.C.P. 55(b)(2), has been observed. Colo. Ranch Estates, Inc. v. Halvorson, 163 Colo. 146, 428 P.2d 917 (1967).

Gross negligence on the part of counsel resulting in a default judgment being entered pursuant to subsection (b)(2)(C) of this rule is considered excusable neglect on the part of the client entitling him to have the judgment set aside under C.R.C.P. 60(b), for to hold otherwise, would be to punish the innocent client for the gross negligence of his attorney. *Temple v. Miller*, 30 Colo. App. 49, 488 P.2d 252 (1971).

Finding of willfulness or bad faith not required. Entry of a default judgment under subsection (b)(2) does not require a finding of willfulness or bad faith on the part of the disobedient party. Callahan v. Wadsworth Ltd., 669 P.2d 141 (Colo. App. 1983).

Judgment dismissing complaint under subsection (b)(2) does not require a finding of willfulness or bad faith by disobedient party. McRill v. Guar. Fed. Savings & Loan Ass'n, 682 P.2d 498 (Colo. App. 1984).

Notice requirement of C.R.C.P. 55(b)(2) must be scrupulously adhered to; however, default judgment is permissible even though proper time between service and entry of judgment was not met where the trial court's order was sufficiently clear to provide requisite notice to defendant that failure to provide discovery could result in entry of a default judgment. Muck v. Stubblefield, 682 P.2d 1237 (Colo. App. 1984); Audio-Visual Sys., Inc. v. Hopper, 762 P.2d 696 (Colo. App. 1988).

Appropriateness of sanction not held error. Although sanction establishing personal jurisdiction over defendant was overbroad and improper in relation to the motion on which it was based, it did not constitute reversible error because evidence adduced at the hearing was sufficient to establish personal jurisdiction. N.S. by L.C.-K. v. S.S., 709 P.2d 6 (Colo. App. 1985).

Trial court did not abuse its discretion in accepting plaintiffs' interpretation of contract as sanction for defendants' unexcused failure to appear for scheduled depositions. Scrima v. Goodley, 731 P.2d 766 (Colo. App. 1986).

Dismissal is not required where corporation's C.R.C.P. 30(b)(6) deponent failed to have personal knowledge regarding the question specified in the deposition subpoena, despite the fact that the district court's sanction of an award of costs did not cure the prejudice to the party noticing the

deposition. Mun. Subdist., Northern Colo. Water Conservancy Dist. v. OXY USA, Inc., 990 P.2d 701 (Colo. 1999).

Court did not abuse its discretion in failing to impose attorney fees as sanction for failure to respond to discovery requests in post-dissolution of marriage modification of child support case. In re Emerson, 77 P.3d 923 (Colo. App. 2003).

IV. Expenses on Failure to Admit.

Law reviews. For article, "One Year Review of Civil Procedure and Appeals", see 39 Dicta 133 (1962).

The awarding of costs is within the sound discretion of the trial court. Superior Distrib. Corp. v. White, 146 Colo. 595, 362 P.2d 196 (1961); Lamont v. Riverside Irrigation Dist., 179 Colo. 134, 498 P.2d 1150 (1972).

The awarding of costs is within the sound discretion of the trial court and will not be interfered with on appeal absent an abuse of that discretion. Prof'l Rodeo Cowboys Ass'n v. Wilch, Smith & Brock, 42 Colo. App. 30, 589 P.2d 510 (1978).

Trial court erred in not awarding reasonable costs and attorney fees incurred by the defendant in disproving plaintiff's denial of fact which was material in proving truth of statement charged as defamatory in libel action. Gomba v. McLaughlin, 180 Colo. 232, 504 P.2d 337 (1972).

Under section (c) of this rule, there must be something more than simply a refused admission and its subsequent proof. Lamont v. Riverside Irrigation Dist., 179 Colo. 134, 498 P.2d 1150 (1972).

Under this rule, such costs are awarded only upon proper finding of the requirements by the trial court. Superior Distrib. Corp. v. White, 146 Colo. 595, 362 P.2d 196 (1961).

The absence of an express finding of good faith on the part of one party does not entitle the other party to recover. Lamont v. Riverside Irrigation Dist., 179 Colo. 134, 498 P.2d 1150 (1972).

V. Failure to Disclose.

Section (c) provides for the exclusion of non-disclosed evidence unless the failure to disclose is either substantially justified or harmless to the opposing party. Todd v. Bear Valley Vill. Apts., 980 P.2d 973 (Colo. 1999); Cook v. Fernandez-Rocha, 168 P.3d 505 (Colo. 2007); Trattler v. Citron, 182 P.3d 674 (Colo. 2008); Warden v. Exempla, Inc., 2012 CO 74, 291 P.3d 30.

For a non-exhaustive list of factors identified by federal courts that may be used to guide a trial court in evaluating whether a failure to disclose is either substantially justified or harmless, see Todd v. Bear Valley Vill. Apts., 980 P.2d 973 (Colo. 1999).

Failure to disclose was harmless under the facts of this case. Todd v. Bear Valley Vill. Apts., 980 P.2d 973 (Colo. 1999).

Reading section (c) of this rule together with C.R.C.P. 26(a) and 26(c), a party may request sanctions based on the opposing party's providing, without substantial justification, misleading disclosures or its failure, without substantial justification, seasonably to correct misleading disclosures. In legal malpractice case, because the trial court did not consider the defendant's claim that attorneys representing plaintiff provided misleading disclosures or failed seasonably to correct such disclosures, it incorrectly denied the motion under section (c) of this rule. Brown v. Silvern, 141 P.3d 871 (Colo. App. 2005).

Because section (c) expressly requires the court to afford an opportunity to be heard, on remand, trial court must hold a hearing on defendant's motion seeking sanctions and attorney fees from plaintiff's attorneys. In doing so, the court must determine whether the disclosures were misleading or there was a failure seasonably to supplement misleading disclosures and, if so, whether the failure was, 980 P.2d 973 (Colo 1999); Brown v. Silvern, 141 P.3d 871 (Colo. App. 2005).

Trial court abused its discretion in precluding expert witness testimony. Where plaintiff failed to fully disclose the testimonial history of expert witnesses as required by C.R.C.P. 26(a)(2)(B)(I) but otherwise provided all required disclosures, the entire proposed testimony of the expert witnesses could not be considered undisclosed evidence and witness preclusion was a disproportionately harsh sanction. Because sanctions should be directly commensurate with the prejudice caused to the opposing party, in lieu of witness preclusion, the trial court should have considered use of the alternative sanctions referenced in section (c). Trattler v. Citron, 182 P.3d 674 (Colo. 2008); Erskine v. Beim, 197 P.3d 225 (Colo. App. 2008).

Trial court abused its discretion in denying motion for extension of time for C.R.C.P. 26(a)(2) expert witness without conducting an inquiry into the harmlessness of party's non-compliance with C.R.C.P. 26(a)(2). Cook v. Fernandez-Rocha, 168 P.3d 505 (Colo. 2007).

Trial court did not abuse its discretion in striking affirmative defenses where defendant failed to respond to motion for limited sanctions and thereby failed to show that its failure to make initial disclosure was harmless.

Furthermore, in striking the affirmative defenses the court did not deny defendants the opportunity to be heard because there were still issues of fact that could be challenged. Weize Co., LLC v. Colo. Reg'l Constr., 251 P.3d 489 (Colo. App. 2010).

Trial court abused its discretion in barring an expert medical witness where the facts of the case showed that plaintiff's untimely disclosure of the expert witness was substantially justified because it resulted from the progressive nature of the plaintiff's alleged injuries, the expert's testimony was potentially central to the plaintiff's case, and the delayed disclosure was harmless to the defendant because the trial date had not yet been set. Berry v. Keltner, 208 P.3d 247 (Colo. 2009).

Late disclosure did not cause prejudice. County's untimely disclosure of witnesses and exhibits required under C.R.C.P. 26(a) did not constitute serious misconduct that denied defendant an adequate opportunity to defend against the witnesses and exhibits. Camp Bird Colo., Inc. v. Bd. of County Comm'rs of Ouray, 215 P.3d 1277 (Colo. App. 2009).

Trial court was not required to preclude expert witness's entire testimony. Where expert's report was submitted 11 days before trial and defendant knew the substance of the expert's testimony, had received all other disclosures required by C.R.C.P. 26, and deposed the expert before trial, trial court did not abuse its discretion in allowing expert to testify after redacting portions of the report that previously had not been made known to the defendant. Camp Bird Colo., Inc. v. Bd. of County Comm'rs of Ouray, 215 P.3d 1277 (Colo. App. 2009).

Trial court did not abuse its discretion by precluding expert witness's testimony. The sanction of preclusion of expert medical witness was not disproportionate because it was based not only on witness's failure to fully disclose testimonial history, but also on witness's failure to produce materials used to formulate opinions pursuant to C.R.C.P. 26(a)(2)(B)(I). Clements v. Davies, 217 P.3d 912 (Colo. App. 2009).

No abuse of discretion by trial court in excluding evidence of settlement between general contractor and homeowners. Trial court struck information contained in new disclosures because it was untimely. It apparently accepted subcontractors' argument that allowing information about newly disclosed settlement would be unfairly prejudicial to them and that the settlement was not binding on them. Trial court acknowledged public policy encouraging settlements but noted that indemnification claim was present from the beginning of litigation and all parties had time to prepare for it. D.R. Horton, Inc.-Denver v. Bischoff & Coffman Constr., LLC, 217 P.3d 1262 (Colo. App. 2009).

VI. Failure of Party to Attend Deposition.

Sections (a)(1) and (d) are independent. The wording of the two sections (a)(1) and (d) of this rule establishes that these sections are of independent significance and operation. Petrini v. Sidwell, 38 Colo. App. 454, 558 P.2d 447 (1976).

The requirement of a motion and order under section (a)(1) should not be read into the provisions of section (d) as a condition precedent to entry of default judgment. Petrini v. Sidwell, 38 Colo. App. 454, 558 P.2d 447 (1976).

For intent of 1970 amendment, see Petrini v. Sidwell, 38 Colo. App. 454, 558 P.2d 447 (1976).

Under this rule if the failure to appear before the officer who is to take the deposition is willful, the court, on notice and motion, may strike out all or any part of the pleadings, dismiss the action or proceeding, or enter judgment by default against the party so failing. Reserve Life Ins. Co. v. District Court, 126 Colo. 217, 247 P.2d 903 (1952).

There must be a clear showing of "willful failure". The court should not resort to the drastic action of dismissing a complaint for failure to appear for a deposition in the absence of a clear showing that the party "willfully fails" to respond. Manning v. Manning, 136 Colo. 380, 317 P.2d 329 (1957).

A trial court may rule confidential information admissible as a discovery sanction when the violating party fails to object timely to the discovery requests which originally sought confidential information. Scott v. Matlack, Inc., 39 P.3d 1160 (Colo. 2002).

Default judgment proper where party fails to appear for deposition. Judgment by default may be entered against a party who willfully fails to appear in response to a proper notice to have his deposition taken under this rule. Salter v. Bd. of County Comm'rs, 126 Colo. 39, 246 P.2d 890 (1952), aff'd, 130 Colo. 504, 277 P.2d 232 (1954).

Default and judgment properly taken against party where he refuses to answer interrogatories or produce documents. Where interrogatories are properly served on a party and he is also duly served with an order for production of documents pertinent to the issues involved in the cause, and the party fails and refuses either to answer the interrogatories or produce the documents ordered by the court, then a default and judgment is properly taken against that party for such refusal. Johnson v. George, 119 Colo. 594, 206 P.2d 345 (1949).

Before the penalty of default is imposed, there must be given an opportunity to show cause for nonappearance. Salter v. Bd. of County Comm'rs, 126 Colo. 39, 246 P.2d 890 (1952), aff'd, 130 Colo. 504, 277 P.2d 232 (1954).

This rule requires that, before a default can be entered, it must be on "motion and notice", including the three-day notice requirement of C.R.C.P. 55(b)(2), where the party against whom judgment by default is sought has appeared in the action. Salter v. Bd. of County Comm'rs, 126 Colo. 39, 246 P.2d 890 (1952), aff'd, 130 Colo. 504, 277 P.2d 232 (1954).

Contempt is not a penalty that goes along with a default judgment under this rule. Salter v. Bd. of County Comm'rs, 126 Colo. 39, 246 P.2d 890 (1952), aff'd, 130 Colo. 504, 277 P.2d 232 (1954).

Entering a default judgment is discretionary under this rule. This rule provides that where a party fails to appear for his deposition the court "may" enter a default judgment. Freeland v. Fife, 151 Colo. 339, 377 P.2d 942 (1963).

There is an abuse of discretion to enter default where party was financially unable to appear and offered to give deposition prior to trial. There was no willful failure of a nonresident party to appear for the taking of a deposition as would justify the trial court in dismissing that party's action where she was financially unable to pay her expenses to the place where the deposition was to be taken; since there are other procedures available to the opposing party by way of interrogatories and requests for admissions which afford protection against surprise, and counsel for the nonappearing party offered to have the party appear a few days prior to the date of trial, thereby involving the expenditure of but one trip and not denying the opposing party his right to a deposition. Manning v. Manning, 136 Colo. 380, 317 P.2d 329 (1957).

There is no abuse of discretion in not entering default where party offered to appear in another place. Where a party, a resident of another state, notified counsel for the other party that she either could not or would not appear at the place in Colorado indicated in the notice to take her deposition, but would be available at another place in Colorado for such purpose, and did not appear at the place indicated, the trial court did not abuse its discretion in denying a motion to strike the nonappearing party's answer and enter a default judgment under section (d) of this rule. Freeland v. Fife, 151 Colo. 339, 377 P.2d 942 (1963).

The trial court must consider whether a party's failure to comply with discovery was willful or in bad faith in determining which sanctions should

be applied under section (d). Petrini v. Sidwell, 38 Colo. App. 454, 558 P.2d 447 (1976).

Imposition of default judgment is a drastic sanction requiring specific finding of willfulness, bad faith, or culpable fault consisting of at least gross negligence in failing to comply with discovery obligations. Kwik Way Stores, Inc., v. Caldwell, 745 P.2d 672 (Colo. 1987).

Finding of willful disobedience justifies imposition of default. Audio-Visual Sys., Inc. v. Hopper, 762 P.2d 696 (Colo. App. 1988); Kennedy by and through Kennedy v. Pelster, 813 P.2d 845 (Colo. App. 1991).

Before entering order of dismissal, court is required to consider and to determine whether plaintiffs had the practical ability to pay the attorney fees awarded. Lewis v. J.C. Penney Co., Inc., 841 P.2d 385 (Colo. App. 1992).

Sanction of dismissal should be imposed only if the sanctioned party has engaged in culpable conduct consisting of willful disobedience, a flagrant disregard of that party's discovery obligations, or a substantial deviation from reasonable care in complying with those obligations. Lewis v. J.C. Penney Co., Inc., 841 P.2d 385 (Colo. App. 1992).

Party's pattern of noncompliance and sabotage in connection with court-ordered psychiatric examination warranted dismissal under subsection (b)(2). Newell v. Engel, 899 P.2d 273 (Colo. App. 1994).

Failure to pay attorneys fees and costs can result in dismissal only if it is established that such failure was willful or in bad faith, and not because of an inability to pay. Lewis v. J.C. Penney Co., Inc., 841 P.2d 385 (Colo. App. 1992).

If there is a genuine factual issue as to the party's ability to pay, the trial court must undertake to resolve that issue and to adopt sufficient findings and conclusions to disclose the basis for its decision. Lewis v. J.C. Penney Co., Inc., 841 P.2d 385 (Colo. App. 1992).

The actions of a party acting as "next friend" for a minor plaintiff cannot be the basis for punitive sanctions against the minor where there is no evidence the minor refused to cooperate in discovery and there are lesser sanctions to compel discovery which would not result in dismissal of the minor's claim for events beyond his control. Kennedy by and through Kennedy v. Pelster, 813 P.2d 845 (Colo. App. 1991).

Cross Reference Note:

For general provisions governing discovery, see C.R.C.P. 26; for protective orders, see C.R.C.P. 26(c); for depositions upon oral examination, see C.R.C.P. 30; for depositions upon written questions, see C.R.C.P. 31; for depositions of public or private corporations, partnerships or associations, or governmental agencies, see C.R.C.P. 30(b)(6) and 31(a); for interrogatories to parties, see C.R.C.P. 33; for production of documents and things and entry upon land for inspection and other purposes, see C.R.C.P. 34; for scope of discovery, see C.R.C.P. 26(b); for stipulations regarding discovery procedure, see C.R.C.P. 29; for civil contempt, see C.R.C.P. 107; for vacating a default judgment, see C.R.C.P. 60(b); for requests for admission, see C.R.C.P. 36.

RULE 43. Evidence

(a) **Form and Admissibility**. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these Rules, the Colorado Rules of Evidence, or any statute of this state or of the United States (except the Federal Rules of Evidence).

(b) to (d) Repealed.

(e) **Evidence on Motions**. When a motion is based on facts not appearing of record, the court may hear the matter on affidavits presented by the respective parties, or the court may direct that the matter be heard wholly or partly on oral testimony or depositions. This shall include applications to grant or dissolve an injunction and for the appointment or discharge of a receiver.

(f) to (h) Repealed.

(i)

(1) **Request for absentee testimony**. A party may request that testimony be presented at a trial or hearing by a person absent from the courtroom by means of telephone or some other suitable and equivalent medium of communication. A request for absentee testimony shall be made by written motion or stipulation filed as soon as practicable after the need for absentee testimony becomes known. The motion shall include:

(A) The reason(s) for allowing such testimony.

(B) A detailed description of all testimony which is proposed to be taken by telephone or other medium of communication.

(C) Copies of all documents or reports which will be used or referred to in such testimony.

(2) **Response**. If any party objects to absentee testimony, said party shall file a written response within 3 days following service of the motion unless the opening of the proceeding occurs first, in which case the objection shall be made orally in open court at the commencement of the proceeding or as soon as practicable thereafter. If no response is filed or objection is made, the motion may be deemed confessed.

(3) **Determination**. The court shall determine whether in the interest of justice absentee testimony may be allowed. The facts to be considered by the court in determining whether to permit absentee testimony shall include but not be limited to the following:

(A) Whether there is a statutory right to absentee testimony.

(B) The cost savings to the parties of having absentee testimony versus the cost of the witness appearing in person.

(C) The availability of appropriate equipment at the court to permit the presentation of absentee testimony.

(D) The availability of the witness to appear personally in court.

(E) The relative importance of the issue or issues for which the witness is offered to testify.

(F) If credibility of the witness is an issue.

(G) Whether the case is to be tried to the court or to a jury.

(H) Whether the presentation of absentee testimony would inhibit the ability to cross examine the witness.

(I) The efforts of the requesting parties to obtain the presence of the witness.

If the court orders absentee testimony to be taken, the court may issue such orders as it deems appropriate to protect the integrity of the proceedings.

History:

Source: (a) amended, (b), (c), (d), (f), (g), and (h) repealed, and (i) added March 17, 1994, effective July 1, 1994; (i) amended and adopted October 20, 2005, effective January 1, 2006.

Case Note:

Annotation

I. General Consideration.

Law reviews. For article, "Trials: Rules 38-53 ", see 23 Rocky Mt. L. Rev. 571 (1951). For article, "A Deposition Primer, Part I: Setting Up the Deposition", see 11 Colo. Law. 938 (1982). For article, "2006 Amendments to the Civil Rules: Modernization, New Math, and Polishing", see 35 Colo. Law. 21 (May 2006).

The plaintiff always has the burden of proving his or her case. *Lockwood v. Travelers Ins. Co.*, 179 Colo. 103, 498 P.2d 947 (1972).

Once a "prima facie" case is established, the burden of going forward to rebut the "prima facie" case shifts to the defendant. *Lockwood v. Travelers Ins. Co.*, 179 Colo. 103, 498 P.2d 947 (1972).

The burden of going forward is met when the defendant introduces enough evidence to present a jury question where formerly there was a "prima facie" case. *Lockwood v. Travelers Ins. Co.*, 179 Colo. 103, 498 P.2d 947 (1972).

Lack of direct testimony as to cause of action is not necessarily fatal to plaintiff's case, as causation may be shown by circumstantial evidence alone and jurors may draw upon ordinary human experience as to the reasonable probabilities. *Irish v. Mountain States Tel. & Tel. Co.*, 31 Colo. App. 89, 500 P.2d 151 (1972).

To recover loss of profits, the plaintiff not only has to establish the existence of such loss but also has to provide evidence from which such loss could be computed. *Irish v. Mountain States Tel. & Tel. Co.*, 31 Colo. App. 89, 500 P.2d 151 (1972).

When the "accident-suicide" dichotomy is placed in issue by the pleadings and by rebuttable presumption, the plaintiff has the burden of proving accident to the exclusion of suicide by a preponderance of the evidence. *Lockwood v. Travelers Ins. Co.*, 179 Colo. 103, 498 P.2d 947 (1972).

Applied in *Keefe v. Bekins Van & Storage Co.*, 36 Colo. App. 382, 540 P.2d 1132 (1975); *Union Supply Co. v. Pust*, 196 Colo. 162, 583 P.2d 276 (1978); *Berger v. Coon*, 199 Colo. 133, 606 P.2d 68 (1980).

II. Form and Admissibility.

Colorado favors the admissibility and not the rejection of evidence in civil actions in accordance with the most convenient methods prescribed by statute and the rules of evidence. *Dept. of Highways, v. Intermountain Term. Co.*, 164 Colo. 354, 435 P.2d 391 (1967).

All evidence admissible under federal statutes applies in state court. *Powell v. Brady*, 30 Colo. App. 406, 496 P.2d 328 (1972), aff'd, 181 Colo. 218, 508 P.2d 1254 (1973).

The applicability of the federal business act (28 U.S.C. §1732) to hospital records has been firmly established. *Powell v. Brady*, 30 Colo. App. 406, 496 P.2d 328 (1972), aff'd, 181 Colo. 218, 508 P.2d 1254 (1973).

Hospital records are ordinarily admissible under section (a) of this rule. *Good v. A.B. Chance Co.*, 39 Colo. App. 70, 565 P.2d 217 (1977).

The admission of hospital records requires that they be relevant to the issues. *Good v. A.B. Chance Co.*, 39 Colo. App. 70, 565 P.2d 217 (1977).

The sufficiency, probative effect, and weight of all evidence, including documentary evidence, and the inferences and conclusions to be drawn therefrom are all within the province of the trial court, whose conclusions will not be disturbed unless so clearly erroneous as to find no support in the record. *Dominion Ins. Co. v. Hart*, 178 Colo. 451, 498 P.2d 1138 (1972); *Jones v. Adkins*, 34 Colo. App. 196, 526 P.2d 153 (1974).

Evidence will be viewed on appeal in the light most favorable to upholding the judgment. *Hayes v. State*, 178 Colo. 447, 498 P.2d 1119 (1972).

Where an insurance company attempted to introduce evidence concerning other insurance policies owned by the decedent before his death, the trial court must weigh the prejudicial effect of such evidence against its relevancy to the issue of whether the death was accidental or suicidal, and where, at a hearing before the judge outside the presence of the jury, the insurance company informed the court that the policies were at least three years old at the time of decedent's death, the probative value of such evidence was virtually nonexistent, so that the discretionary decision of the trial court to exclude this evidence as irrelevant and potentially prejudicial was not error. *Simonton v. Continental Cas. Co.*, 32 Colo. App. 138, 507 P.2d 1132 (1973).

Evidence of testamentary capacity held properly received outside presence of jury. In re Estate of Gardner, 31 Colo. App. 361, 505 P.2d 50 (1972).

Considerations of credibility of witnesses and the weight to be accorded their testimony are for the trial court. *Hayes v. State*, 178 Colo. 447, 498 P.2d 1119 (1972).

Trial court shall determine whether witness has the right to express an opinion. The sufficiency of the evidence to establish the qualifications and knowledge of a witness to entitle him to express an opinion is a question to be determined by the trial court, and its decision will be upheld unless clearly erroneous. *Oglesby v. Conger*, 31 Colo. App. 504, 507 P.2d 883 (1972).

Determination of the pertinency of omitted facts from a hypothetical question to a witness rests in the discretion of the trial court and will not be reversed unless clearly erroneous. *Oglesby v. Conger*, 31 Colo. App. 504, 507 P.2d 883 (1972).

Where a witness has no personal knowledge of a fact, he should not be allowed to give testimony concerning that fact because there would then be

reliance on the out-of-court declaration of another and the normal safeguards of oath, confrontation, and cross-examination would be precluded. *Simonton v. Continental Cas. Co.*, 32 Colo. App. 138, 507 P.2d 1132 (1973).

It is within the discretion of the trial court to determine the competence of an expert witness to testify. *Martin v. Bralliar*, 36 Colo. App. 254, 540 P.2d 1118 (1975).

Expert opinion is permissible only where a proper foundation is laid. *Simpson v. Anderson*, 186 Colo. 163, 526 P.2d 298 (1974).

Trial judge should decide whether witness is a qualified expert on subject appropriate for expert testimony, but basis of his opinion and weight to be given opinion should be left for advocates to challenge and for jury to determine. *Dolan v. Mitchell*, 179 Colo. 359, 502 P.2d 72 (1972).

Evidence of opinion of experts is admissible only when subject matter of controversy renders it necessary or proper to resort to opinion evidence. *Dolan v. Mitchell*, 179 Colo. 359, 502 P.2d 72 (1972).

In admitting the testimony of a medical witness on the issue of standard of care, there is no abuse of discretion when the evidence shows that the proposed witness is familiar with the standard of care in the same or similar communities at the time in question. *Martin v. Bralliar*, 36 Colo. App. 254, 540 P.2d 1118 (1975).

Where expert opinion is based on evidence adduced at trial which is hearsay, it is error to include it. *Nat'l State Bank v. Brayman*, 180 Colo. 304, 505 P.2d 11 (1973).

Where an accident-reconstruction expert offers testimony, such evidence is admissible where based on photographs properly admitted even though expert had failed to personally examine scene of accident and vehicles involved within short time after accident. *Dolan v. Mitchell*, 179 Colo. 359, 502 P.2d 72 (1972).

The sufficiency of evidence qualifying a law enforcement officer to express an expert opinion based upon physical facts he has observed is a question to be determined by the trial court, and its decision will be upheld unless clearly erroneous. *Nat'l State Bank v. Brayman*, 30 Colo. App. 554, 497 P.2d 710 (1972), rev'd on other grounds, 180 Colo. 305, 505 P.2d 11 (1973).

Where witness is officer who conducted investigation of scene of accident minutes after accident is an expert as to point of impact and the extent of movement of vehicles is fully testified to by competent witness before

officer's opinion is illicited, officer's testimony as to point of impact should be admitted despite absence of skid marks and fact that prior to officer's arrival at scene, automobiles had been moved slightly. *Dolan v. Mitchell*, 179 Colo. 359, 502 P.2d 72 (1972).

Facts supporting only conjectural inferences have no probative value and should not be admitted in evidence. *Dolan v. Mitchell*, 179 Colo. 359, 502 P.2d 72 (1972).

Where the owner is an occupant of his own vehicle at the time of an accident, it is "prima facie" evidence that he was the driver. *Brayman v. Nat'l State Bank of Boulder*, 180 Colo. 305, 505 P.2d 11 (1973).

Replicas of physical evidence usually admissible. While replicas of physical evidence are usually admissible where the original item has been lost or destroyed, the admissibility of such evidence is a matter within the discretion of the trial judge. *Reaves v. Horton*, 33 Colo. App. 186, 518 P.2d 1380 (1973), modified, 186 Colo. 149, 526 P.2d 304 (1974).

Where a written document is a complete and accurate expression of the agreement between the parties, evidence is not admissible for the purpose of varying or contradicting the terms of the written document. *Aztec Sound Corp. v. Western States Leasing Co.*, 32 Colo. App. 248, 510 P.2d 897 (1973).

A certified copy of a death certificate is admissible and is "prima facie" evidence of the facts recited therein. *Lockwood v. Travelers Ins. Co.*, 179 Colo. 103, 498 P.2d 947 (1972).

Soil sample should not be admitted where vehicle was towed in area after accident. Where evidence in wrongful death action against motorist arising from automobile collision indicates that soil taken from defendant's automobile matches soil samples taken from parking lot, such evidence should not be admitted to prove that defendant's automobile had been in parking lot before accident where, immediately after accident, defendant's automobile had been towed through parking lot in question. *Dolan v. Mitchell*, 179 Colo. 359, 502 P.2d 72 (1972).

Where a photograph of the scene of an accident taken after vehicles had been removed is offered to show scene of accident and not the condition of the road surface, then the wetness or dryness of road surface is not significant, and the photograph should be admitted. *Dolan v. Mitchell*, 179 Colo. 359, 502 P.2d 72 (1972).

In order to warrant admission of a photograph in evidence, if it is otherwise competent, it is only necessary to show that it is correct likeness of objects it purports to represent, and this may be shown by person who made it or by any competent witness. *Dolan v. Mitchell*, 179 Colo. 359, 502 P.2d 72 (1972).

Fact that photographic evidence may be cumulative is not alone ground for its rejection. *Dolan v. Mitchell*, 179 Colo. 359, 502 P.2d 72 (1972).

Testimony properly excluded as hearsay. Where the trial court refuses to permit witnesses to testify to conversations with other persons concerning the knowledge of such other persons about the activities of an individual, such testimony is properly excluded as hearsay. *Am. Nat'l Bank v. Quad Constr., Inc.*, 31 Colo. App. 373, 504 P.2d 1113 (1972).

Past recollection recorded exception to hearsay rule. A determination by the trial court that a statement was made too remote in point of time to the date of an accident to be admissible under the past recollection recorded exception to the hearsay rule was a matter resting within the discretion of the trial court and such determination will be disturbed only if the trial court abused its discretion. *McCall v. Roper*, 32 Colo. App. 352, 511 P.2d 541 (1973).

Hearsay is admissible as evidence against the interest of a deceased. The testimony of an individual, who brings suit against the estate of a deceased for proceeds from the sale of property allegedly held in trust, to the effect that the deceased told the claimant that he was holding some property in trust for one of the claimant's parents is hearsay but admissible as evidence against the interest of the deceased. In re Estate of Granberry, 30 Colo. App. 550, 498 P.2d 960 (1972).

It is not error to admit hearsay to demonstrate intention or state of mind. Where the trial court took adequate precautions in admitting hearsay testimony, including instructing the jury as to the manner and purpose for which the evidence might be considered, the trial court did not err in admitting evidence of a declaration for the limited purpose of demonstrating intention or state of mind. *Simonton v. Continental Cas. Co.*, 32 Colo. App. 138, 507 P.2d 1132 (1973).

A person's intentions may be reflected by the declarations of that person, and these declarations are therefore admissible not for the proof of the facts stated by the declaration but to demonstrate the state of mind of the declarant; when offered for this purpose, the hearsay rule is not applicable to such a declaration. *Simonton v. Continental Cas. Co.*, 32 Colo. App. 138, 507 P.2d 1132 (1973).

In determining whether to admit hearsay evidence to establish state of mind, the court must make a judgment based on a weighing of the materiality and relevance of the testimony for a limited purpose against the possibility that, in spite of an instruction by the court to the contrary, the jury might consider a statement for the truth of the facts it contains. *Simonton v. Continental Cas. Co.*, 32 Colo. App. 138, 507 P.2d 1132 (1973).

Where testimony is hearsay, its admission is harmless when the essential and operative facts upon which a judgment rests are established by competent evidence in the record. *San Isabel Elec. Ass'n v. Bramer*, 31 Colo. App. 134, 500 P.2d 821 (1972), aff'd, 182 Colo. 15, 510 P.2d 438 (1973).

Defendant could not predicate error on trial court's denial of admission of hearsay evidence; since defendant made no offer of proof, it was not apparent from the context what the substance of the testimony would have been, and defense counsel made no objection to the denial. *People v. Hoover*, 165 P.3d 784 (Colo. App. 2006).

A deed may be proven by parol evidence to be a mortgage, but the evidence must be clear, certain, and unequivocal as well as be convincing beyond a reasonable doubt. *Padia v. Hobbs*, 132 Colo. 165, 286 P.2d 613 (1955).

Admitting exhibits out of the usual order is immaterial where the objecting party is the only witness, the order of proof being in the sound discretion of the court. *Shearer v. Snyder*, 115 Colo. 232, 171 P.2d 663 (1946).

Applied in *Hamilton v. Hardy*, 37 Colo. App. 375, 549 P.2d 1099 (1976).

III. Evidence on Motions.

Trial court erred in awarding fees and expenses to receiver over objection of an interested party, without a hearing, without any representation that fees and expenses were reasonable and necessary, and without receiving sworn testimony or verified documents. *Cedar Lane Invs. v. St. Paul Fire & Marine Ins. Co.*, 883 P.2d 600 (Colo. App. 1994).

Applied in *Sollitt v. District Court*, 180 Colo. 114, 502 P.2d 1108 (1972).

Cross Reference Note:

For general provisions concerning evidence and witnesses, see article 25 and part 1 of article 90 of title 13, C.R.S.; for rights of examination of party in interest by adverse party, see §13-90-116, C.R.S.; for costs, see C.R.C.P. 54(d); for admissibility of evidence of lost instruments, see §13-25-113, C.R.S.; for admissibility of copies of lost instruments and records, see §§24-

72-101 and 24-72-111, C.R.S.; for admissibility of copies of documents kept by county officers, see §30-10-103, C.R.S.

RULE 45. Subpoena

(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.C.P. 26. A subpoena must not be used to avoid the limits on discovery imposed by C.R.C.P. 16.1, 16.2 or 26 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) **Tender of payment for mileage.** If the subpoena requires a person's attendance, the payment for 1 day's mileage allowed by law must be tendered to the subpoenaed person at the time of service of the subpoena or within a reasonable time after service of the subpoena, but in any event prior to the appearance date. Payment for mileage need not be tendered when the subpoena issues on behalf of the state of colorado or any of its officers or agencies.

(4) **Proof of service.** Proof of service shall be made as provided in C.R.C.P. 4(H). original subpoenas and returns of service of such subpoenas need not be filed with the court.

(5) **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 pursuant to C.R.C.P. 5; provided that such service is not required for a subpoena issued pursuant to C.R.C.P. 69.

(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 must 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;

(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 Rule 45(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 organize and label them to correspond to the categories in the demand and must permit inspection, copying, testing, or sampling of the materials.

(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.**

(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.

(3) Subpoena for deposition of an organization. A subpoena commanding a public or private corporation, partnership, association, governmental agency, or other entity to attend and testify at a deposition is subject to the requirements of Rule 30(b)(6). Responses to such subpoenas are also subject to Rule 30(b)(6).

(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 Rule 45(e).

History:

Source: (c) amended and adopted October 30, 1997, effective January 1, 1998; (c) and (d)(1) amended and adopted December 14, 2011, effective

January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); entire rule repealed and readopted and Committee Comments added October 18, 2012, effective January 1, 2013; amended and adopted by the Court, En Banc, January 6, 2022, effective 3/1/2022.

Note:

Committee Comments

If a subpoena to attend a deposition is sought pursuant to Rule 45(c)(2)(A) in order to produce and authenticate documents, the issuing party should consider establishing admissibility under C.R.E. 902(11) as a means of reducing undue burden and expense upon the subpoenaed person.

For scope of provision contained in Rule 45(c)(3)(B)(ii) relating to "unretained experts", see Official Comments to Federal Rules of Civil Procedure, 1991 Amendment, Clause (c)(3)(B)(ii).

Case Note:

Annotation

I. General Consideration.

Law reviews. For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Trials: Rules 38-53 ", see 23 Rocky Mt. L. Rev. 571 (1951). For article, "A Deposition Primer, Part I: Setting Up the Deposition", see 11 Colo. Law. 938 (1982). For article, "Taking Evidence Abroad for Use in Litigation in Colorado", see 14 Colo. Law. 523 (1985). For article, "Rule 34(c): Discovery of Non-Party Land and Large Intangible Things", see 14 Colo. Law. 562 (1985). For article, "Securing the Attendance of a Witness at a Deposition", see 15 Colo. Law. 2000 (1986). For formal opinion of the Colorado Bar Association on Use of Subpoenas in Civil Proceedings, see 19 Colo. Law. 1556 (1990). For article, "New CRCP 45 Impacts Medical Records Subpoenas and Tracks Federal Rule", see 42 Colo. Law. 23 (January 2013). For article, "The Changes to Colorado and Federal Civil Rule 45 ", see 42 Colo. Law. 57 (December 2013).

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Applied in *Stubblefield v. District Court*, 198 Colo. 569, 603 P.2d 559 (1979); *Black ex rel. Bayless v. Cullar*, 665 P.2d 1029 (Colo. App. 1983).

II. Attendance of Witnesses.

Protections not grounds for quashing subpoena. It was error for trial court to quash subpoena of a witness on the basis of the attorney-client privilege and attorney work product doctrine. These protections may be asserted at trial as a bar to specific questions, but are not grounds for quashing a subpoena properly issued. *South Carolina Ins. Co. v. Fisher*, 698 P.2d 1369 (Colo. App. 1984).

A motion to quash subpoenas issued to third persons allegedly contributing to support of children is properly granted where the voluntary donations of such parties have nothing to do with a defendant's duty to support children. *Garrow v. Garrow*, 152 Colo. 480, 382 P.2d 809 (1963).

III. Production of Documentary Evidence.

A party seeking a "subpoena duces tecum" requiring production of documents by the other party must show good cause for the issuance of such a subpoena. *Lee v. Missouri P. R. R.*152 Colo. 179, 381 P.2d 35 (1963).

A "tangible thing" described in section (b) does not include real estate or fixtures. *Thompson v. Thornton*, 198 P.3d 1281 (Colo. App. 2008).

For purposes of section (b), a subpoena duces tecum cannot compel the inspection of premises. *Thompson v. Thornton*, 198 P.3d 1281 (Colo. App. 2008).

This rule must be read in conjunction with C.R.C.P. 34, governing the production of documents. *Lee v. Missouri P. R. R.*, 152 Colo. 179, 381 P.2d 35 (1963).

Colorado rules of civil procedure are not directly applicable to enforcement proceedings under the securities act. However, a court may consider the policies underlying section (b) of this rule in ruling on a motion for the advancement of costs incurred in complying with an administrative subpoena. *Feigin v. Colo. Nat'l Bank*, 897 P.2d 814 (Colo. 1995).

In the exercise of their equitable authority, district courts may quash an administrative subpoena found to be unreasonable or oppressive. *Feigin v. Colo. Nat'l Bank*, 897 P.2d 814 (Colo. 1995).

Where it was shown that a claim agent of a railroad could not give coherent story of an accident he investigated without first refreshing his memory from the file of such investigation, such evidence was sufficient to show good cause for the production of the file and it was error to quash a "subpoena duces tecum". *Lee v. Missouri P. R. R.*, 152 Colo. 179, 381 P.2d 35 (1963).

Trial court did not have discretion to order disclosure of psychologist's records during discovery, even for in camera review. Absent a clear waiver of psychologist-patient privilege, a trial court may not review documents related to a patient's treatment even in camera. *People v. Sisneros*, 55 P.3d 797 (Colo. 2002).

Taxpayer has standing to raise legitimacy of access to records in motion to quash subpoena. Once the court allows intervention in a §39-21-112 proceeding, it follows that a taxpayer with an expectation of privacy in his bank records has standing to raise the legitimacy of governmental access to the records in a motion to quash the subpoena for the records. *Charnes v. DiGiacomo*, 200 Colo. 94, 612 P.2d 1117 (1980).

As a general rule, recipients of subpoenas in criminal proceedings must assume the cost of compliance as a matter of civic responsibility. However, an individualized determination is called for when it is claimed that the cost of compliance with a subpoena renders the subpoena itself unreasonable and oppressive. The person seeking to quash an administrative subpoena on such grounds has the burden of establishing the precise amount of the cost and that such amount exceeds the amount the recipient would reasonably be expected to incur as a civic responsibility. *Feigin v. Colo. Nat'l Bank*, 897 P.2d 814 (Colo. 1995).

If an attorney desires to receive subpoenaed documents from a subpoenaed witness in advance of the time and place specified in the subpoena, or if the subpoenaed witness offers to produce the documents ahead of time, the attorney must confer with and obtain consent from all other parties to the case as well as the subpoenaed witness. If the other parties or the subpoenaed witness does not consent, then production must wait until the time and place of the event specified in the subpoena. Obtaining consent for the advance production of subpoenaed documents not only satisfies the procedural safeguards of this rule but also affords pragmatic accommodation to the realities of litigation practice. In re Wiggins, 2012 CO 44, 279 P.3d 1.

Manner by which father's attorney obtained mother's former employment file and any other documents from mother's former place of employment in response to a subpoena violated rule. Rule requires that, unless subpoenaed witness and other parties consent to an alternate arrangement or by other court order, subpoenaed documents be produced only at the deposition, hearing, or trial specified in the subpoena. Attorney's unilateral arrangements violated rule because they prevented mother from having an opportunity to object to the subpoena before her entire employment file was disclosed. In re Wiggins, 2012 CO 44, 279 P.3d 1.

IV. Service.

Failure to find "good cause" for serving subpoena fewer than 48 hours in advance of appearance or to grant continuance held abuse of discretion. *Montoya v. Career Serv. Bd.*, 708 P.2d 478 (Colo. App. 1985).

Subpoenas that were served on Friday morning, directing the witnesses to appear on Monday morning, were not served 48 hours before the time the witnesses were to appear and were properly quashed. *Wilkerson v. State*, 830 P.2d 1121 (Colo. App. 1992).

Service on registered agent. Personal delivery of interrogatories on foreign corporation's registered agent constitutes effective service. *Isis Litig., L.L.C., v. Svensk Filmindustri*, 170 P.3d 742 (Colo. App. 2007).

V. Depositions.

Section (d)(2) of this rule, relating to nonresidents, is limited solely to those persons who are either parties to the action or witnesses therein, both of which classes of nonresidents must first have been properly served in the action in order to subject them to the jurisdiction of the court, unless they have waived or consented to the jurisdiction of a Colorado court. *Solliday v. District Court*, 135 Colo. 489, 313 P.2d 1000 (1957); *Minnesota ex rel. Minnesota Att'y Gen. v. District Court*, 155 Colo. 521, 395 P.2d 601 (1964).

This rule, as applied to nonresidents not parties to an action in Colorado and not served in Colorado, is subject to the implied limitations that nonresidents are subject to jurisdiction due to mutual compact or uniform act. *Solliday v. District Court*, 135 Colo. 489, 313 P.2d 1000 (1957); *Minnesota ex rel. Minnesota Att'y Gen. v. District Court*, 155 Colo. 521, 395 P.2d 601 (1964).

Applied in *CeBuzz, Inc. v. Sniderman*, 171 Colo. 246, 466 P.2d 457 (1970).

VI. Hearing or Trial.

The refusal to reopen a compensation case for the purpose of taking testimony from a witness is not error where there was no showing that any subpoena was issued under the provisions of section (e) of this rule. *Pacific Employers Ins. Co. v. Kirkpatrick*, 111 Colo. 470, 143 P.2d 267 (1943).

Cross Reference Note:

For manner of proof of service of process, see C.R.C.P. 4(i); for scope of discovery, see C.R.C.P. 26(b); for protective orders in discovery, see C.R.C.P. 26(c); for notice of taking depositions, see C.R.C.P. 30(b) and 31(a).

RULE 121. Local Rules-Statewide Practice Standards

(a) **Repeal of local rules.** All District Court local rules, including local procedures and standing orders having the effect of local rules, enacted before April 1, 1988 are hereby repealed.

(b) **Authority to enact local rules on matters which are strictly local.** Each court by action of a majority of its judges may from time to time propose local rules and amendments of local rules not inconsistent with the Colorado Rules of Civil Procedure or Practice Standards set forth in C.R.C.P. 121(c), nor inconsistent with any directive of the Supreme Court. A proposed rule or amendment shall not be effective until approved by the Supreme Court. No local procedure shall be effective unless adopted as a local rule in accordance with this Section (b) of C.R.C.P. 121. To obtain approval, three copies of any proposed local rule or amendment of a local rule shall be submitted to the Supreme Court through the office of the State Court Administrator. Reasonable uniformity of local rules is required. Numbering and format of any proposed local rule or amendment of a local rule shall be as prescribed by the Supreme Court. The Supreme Court's approval of a local rule or local procedure shall not preclude review of that rule or procedure under the law of circumstances of a particular case.

(c) **Matters of statewide concern.** The Colorado Rules of Civil Procedure and the following rule subject areas called "Practice Standards" are declared to be of statewide concern and shall preempt and control in their form and content over any differing local rule:

District Court* Practice Standards

§§ 1-1 to End

*Includes Denver Probate Court where applicable.

Section 1-1

Entry of Appearance and Withdrawal

(1) **Entry of Appearance.**

No attorney shall appear in any matter before the court unless that attorney has entered an appearance by filing an Entry of Appearance or signing a pleading. An entry of appearance shall state (a) the identity of the party for whom the appearance is made; (b) the attorney's office address; (c) the attorney's telephone number; (d) the attorney's E-Mail address; and (e) the attorney's registration number.

(2) **Withdrawal From an Active Case.**

(a) An attorney may withdraw from a case, without leave of court where the withdrawing attorney has complied with all outstanding orders of the court and either files a notice of withdrawal where there is active co-counsel for the party represented by the withdrawing attorney, or files a substitution of counsel, signed by both the withdrawing and replacement attorney, containing the information required for an Entry of Appearance under subsection 1 of this Practice Standard as to the replacement attorney.

(b) Otherwise an attorney may withdraw from a case only upon approval of the court. Such approval shall rest in the discretion of the court, but shall not be granted until a motion to withdraw has been filed and served on the client and the other parties of record or their attorneys and either both the client and all counsel for the other parties consent in writing at or after the time of the service of said motion, or at least 14 days have expired after service of said motion. Every motion to withdraw shall contain the following advisements:

(I) the client has the burden of keeping the court and the other parties informed where notices, pleadings or other papers may be served;

(II) if the client fails or refuses to comply with all court rules and orders, the client may suffer possible dismissal, default or other sanctions;

(III) the dates of any proceedings, including trial, which dates will not be delayed nor proceedings affected by the withdrawal of counsel;

(IV) the client's and the other parties' right to object to the motion to withdraw within 14 days after service of the motion;

(V) if the client is not a natural person, that it must be represented by counsel in any court proceedings unless it is a closely held entity and first complies with section 13-1-127, C.R.S.; and

(VI) the client's last known address and telephone number.

(c) The client and the opposing parties shall have 14 days after service of a motion to withdraw within which to file objections to the withdrawal.

(d) If the motion to withdraw is granted, the withdrawing attorney shall promptly notify the client and the other parties of the effective date of the withdrawal.

(3) **Withdrawal From Completed Cases.**

In any civil case which is concluded and in which all related orders have been submitted and entered by the court and complied with by the withdrawing attorney, an attorney may withdraw from the case without leave of court by filing a notice in the form and content of Appendix to Chapters 1 to 17A, Form 36, C.R.C.P. JDF Form 83, which shall be served upon the client and all other parties of record or their attorneys, pursuant to C.R.C.P. 5. The withdrawal shall automatically become effective 14 days after service upon the client and all other parties of record or their attorneys unless there is an objection filed, in which event the matter shall be assigned to an appropriate judicial officer for determination.

(4) **Entries of Appearance and Withdrawals by Members or Employees of Law Firms, Professional Corporations or Clinics.**

The entry of an appearance or withdrawal by an attorney who is a member or an employee of a law firm, professional corporation or clinic shall relieve other members or employees of the same law firm, professional corporation or clinic from the necessity of filing additional entries of appearance or withdrawal in the same litigation unless otherwise indicated.

(5) **Notice of Limited Representation Entry of Appearance and Withdrawal.**

In accordance with C.R.C.P. 11(b) and C.R.C.P. Rule 311(b), an attorney may undertake to provide limited representation to a pro se party involved in a court proceeding. Upon the request and with the consent of a pro se party, an attorney may make a limited appearance for the pro se party in one or more specified proceedings, if the attorney files and serves with the court and the other parties and attorneys (if any) a notice of the limited appearance prior to or simultaneous with the proceeding(s) for which the attorney appears. At the conclusion of such proceeding(s), the attorney's appearance terminates without the necessity of leave of court, upon the attorney filing a notice of completion of limited appearance. Service on an attorney who makes a limited appearance for a party shall be valid only in connection with the specific proceeding(s) for which the attorney appears.

Committee Comment

The purpose of section 1-1 (5) is to implement Colorado Rules of Civil Procedure 11(b) and 311(b), which authorize limited representation of a pro se party either on a pro bono or fee basis, in accordance with Colorado Rule of Professional Conduct 1.2. This provision provides assurance that an attorney who makes a limited appearance for a pro se party in a specified case proceeding(s), at the request of and with the consent of the pro se party,

can withdraw from the case upon filing a notice of completion of the limited appearance, without leave of court.

Source: Committee comment amended and adopted June 17, 1999, effective July 1, 1999; entire section and committee comment repealed and readopted October 20, 2005, effective January 1, 2006; 2.(b) amended and effective January 7, 2010; 5. added and effective October 20, 2011; IP 2.(b), 2.(b)(IV), 2.(c), and 3. amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Committee Comment

An "active case" is any case other than a "completed case" as described in subsection 3 of the Practice Standard.

Section 1-2

Special Admission of Out-of-State and Foreign Attorneys

Special admission of an out-of-state or foreign attorney shall be in accordance with C.R.C.P. Chapter 18, Rules Governing Admission to the Bar 205.3 and 205.5.

Source: Entire section amended and adopted and committee comment repealed October 20, 2005, effective January 1, 2006.

Section 1-3

Jury Fees

Each party exercising the right to trial by jury shall file and serve a demand therefor and simultaneously pay the requisite jury fee. The demand and payment of the jury fee shall be in accordance with Rule 38. The jury fee shall not be returned under any circumstances. Failure of a party to timely file and serve a demand for trial by jury and pay the jury fee shall constitute a waiver of that party's right to trial by jury. When any party exercises the right to trial by jury, every other party to the action must pay the requisite jury fee unless such other party files a notice of waiver of the right to trial by jury pursuant to Rule 38(a)(2). Any party who has demanded a trial by jury and has paid the requisite jury fee and any party who has not waived the right to trial by jury and has paid the requisite jury fee is entitled to trial by jury of all issues properly designated for trial by jury unless that party waives such right pursuant to Rule 38(e).

Source: Entire section repealed and reenacted July 12, 1990, effective September 1, 1990.

Committee Comment

Amendment of this practice standard is to conform it to the requirements of C.R.S. 13-71-144 (1989) and amended C.R.C.P 38. Under that statutory requirement, each party who wishes to be assured of having a jury trial, must demand a jury trial and pay a jury fee within the time specified. The case will be tried to a jury if the party demanding a jury trial makes a timely demand, pays the jury fee at the time of the demand and does not later waive a jury trial. If a demand is timely made and the jury fee timely paid, the right to jury trial cannot be withdrawn as against a party who has demanded a jury trial and timely paid a jury fee. For a party to be certain of having a jury trial, that party must demand it and timely pay a jury fee.

Section 1-4

Suppression for Service of Process

In any civil action, upon written request of the claiming party, the fact of the filing of a case shall be suppressed by the clerk only upon order of the court to secure service of summons or other process and such order shall expire upon service of such summons or other process.

Committee Comment

This Practice Standard was a local rule found in most districts. It provides the machinery for the clerk to temporarily suppress the fact of filing of a case temporarily to avoid publicity that may affect ability to serve process. Such temporary suppression in aid of service of process, is different from the Practice Standard pertaining to limitation of access to court files.

Section 1-5

Limitation of Access to Court Files

(1) **Nature of Order.** Upon motion by any party named in any civil action, the court may limit access to court files. The order of limitation shall specify the nature of limitation, the duration of the limitation, and the reason for limitation.

(2) **When Order Granted.** An order limiting access shall not be granted except upon a finding that the harm to the privacy of a person in interest outweighs the public interest.

(3) **Application for Order.** A motion for limitation of access may be granted, ex parte, upon motion filed with the complaint, accompanied by supporting affidavit or at a hearing concerning the motion.

(4) **Review by Order.** Upon notice to all parties of record, and after hearing, an order limiting access may be reviewed by the court at any time on its own motion or upon the motion of any person.

Committee Comment

This Practice Standard was made necessary by lack of uniformity throughout the districts concerning access to court files. Some districts permitted free access after service of process was obtained. Others, particularly in malpractice or domestic relations cases, almost routinely prohibited access to court file information. The committee deemed it preferable to have machinery available for limitation in an appropriate case, but also a means for other entities having interest in the litigation, including the media, to have access.

Section 1-6

Settings for Trials or Hearings/Settings by Telephone

(1) All settings of trials and hearings, other than those set on the initiative of the court, shall be by the courtroom clerk upon notice to all other parties. Settings by telephone are encouraged. The original or a copy of the notice shall be on file with the courtroom clerk before the setting and shall contain the following:

(a) The caption of the case with designation "Notice to Set" or "Notice to Set by Telephone."

(b) The nature of the matter being set.

(c) The date and time at which the setting will occur.

(d) The courtroom clerk's address, by division or courtroom number if applicable and telephone number.

(e) A statement that the party or attorney being notified may appear or if not present, will be called at or about the time specified.

(f) A statement if the setting is to be by telephone.

(2) The party issuing the notice to set shall be responsible for contacting all other counsel and clearing available dates with them.

(3) Any attorney receiving the notice to set who does not personally appear at the setting shall have personnel at his or her office, supplied with a current appointment calendar and authorized to make settings for that attorney, at the date and time in the notice.

(4) The party requesting the setting shall immediately confirm in writing the date and time of the matter that has been set with all other parties or their attorneys and shall file that confirmation with the court.

Committee Comment

The change in Standard 1-6 is to allow for settings on initiative of the Court. This change is to resolve the question raised by several districts as to whether the Court had the power to initiate its own settings. There has also been a slight tidying-up of language of the first sentence.

Section 1-7

Audio-Visual Devices

The photographing, broadcasting, televising or recording of court proceedings in any courtroom shall be governed in accordance with Canon 3 of the Code of Judicial Conduct of the State of Colorado.

Committee Comment

This Practice Standard was deemed necessary because it was apparent from local rules of a number of counties that there was a general lack of awareness of Canon 3 of the Code of Judicial Conduct pertaining to photographing, broadcasting, televising or recording court proceedings. This Practice Standard draws attention to Canon 3 and incorporates its provisions by reference.

Section 1-8

Consolidation

A party seeking consolidation shall file a motion to consolidate in each case sought to be consolidated. The motion shall be determined by the court in the case first filed in accordance with Practice Standard § 1-15. If consolidation is ordered, all subsequent filings shall be in the case first filed and all previous filings related to the consolidated cases placed together under that case number, unless otherwise ordered by the court. Consolidation of matters pending in other districts shall be determined in accordance with C.R.C.P. 42.1.

Section 1-9

RELATED CASES

1. A party to a civil case shall file a notice identifying all related cases of which the party has actual knowledge.

2. Related cases are civil, criminal, or other proceedings that: a) involve one or more of the same parties and common questions of fact; and b) are pending in any state or federal court or were terminated within the previous 12 months.

3. A party shall file the required notice at the time of its first pleading under Rule 7(a) or its first motion under Rule 12(b).

4. A party shall promptly file a supplemental notice of any change in the information required under this rule.

Committee Comment

The purpose of this Practice Standard is to afford notice of related state or federal cases that are pending or were recently terminated. Any actions to be taken following such notice are left to the parties and the court.

Section 1-10

Dismissal for Failure to Prosecute

(1) Upon due notice to the opposite party, any party to a civil action may apply to have any action dismissed when such action has not been prosecuted or brought to trial with due diligence.

(2) The court, on its own motion, may dismiss any action not prosecuted with due diligence, upon 35 days' notice in writing to each attorney of record and each appearing party not represented by counsel, or require the parties to show cause in writing why the case should not be dismissed. Showing of cause and objections thereto shall be determined in accordance with Practice Standard § 1-15 (Determination of motions).

(3) If the case has not been set for trial, no activity of record in excess of 12 continuous months shall be deemed prima facie failure to prosecute.

(4) Failure to show cause on or before the date set forth in the court's notice shall justify dismissal without further proceedings.

(5) Any dismissal under this rule shall be without prejudice unless otherwise specified by the court.

Source: 2. amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Committee Comment

The purpose of this Practice Standard is to encourage prosecution of pending cases and permit machinery to dispose of matters which are not being prosecuted. Dismissal is without prejudice, and there are sufficient safeguards incorporated into the Practice Standard to permit retention on the docket if cause for the delay and interest in the case is shown. The Practice Standard does not mandate that the court search its files and send out notices, but permits such action if the court wishes. The Practice Standard also permits initiation of the procedure by motion.

Section 1-11

Continuances

Motions for continuances of hearings or trials shall be determined in accordance with Practice Standard 1-15 and shall be granted only for good cause. Stipulations for continuance shall not be effective unless and until approved by the court. A motion for continuance or request for extension of time will not be considered without a certificate that a copy of the motion has also been served upon the moving attorney's client.

Source: Entire section amended and adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date.

Section 1-12

Matters Related to Discovery

(1) Unless otherwise ordered by the court, reasonable notice for the taking of depositions pursuant to C.R.C.P. 30(b)(1) shall not be less than 7 days. Before serving a notice to take a deposition, counsel seeking the deposition shall make a good faith effort to schedule it by agreement at a time reasonably convenient and economically efficient to the proposed deponent and counsel for all parties. Prior to scheduling or noticing any deposition, all counsel shall confer in a good faith effort to agree on a reasonable means of limiting the time and expense of that deposition. Pending resolution of any motion pursuant to C.R.C.P. 26(c), the filing of the motion shall stay the discovery at which the motion is directed. If the court directs that any discovery motion under Rule 26(c) be made orally, then movant's written notice to the other parties that a hearing has been requested on the motion shall stay the discovery to which the motion is directed.

(2) Motions under Rules 26(c) and 37(a), C.R.C.P., shall set forth the interrogatory, request, question or response constituting the subject matter of the motion.

(3) Interrogatories and requests under Rules 33, 34, and 36, C.R.C.P., and the responses thereto shall be served upon other counsel or parties, but shall not be filed with the court. If relief is sought under Rule 26(c), C.R.C.P., or Rule 37(a), C.R.C.P., copies of the portions of the interrogatories, requests, answers or responses in dispute shall be filed with the court contemporaneously with the motion. If interrogatories, requests, answers or responses are to be used at trial, the portions to be used shall be made available and placed, but not filed, with the trial judge at the outset of the trial insofar as their use reasonably can be anticipated.

(4) The originals of all stenographically reported depositions shall be delivered to the party taking the deposition after submission to the deponent as required by Rule 30(e), C.R.C.P. The original of the deposition shall be retained by the party to whom it is delivered to be available for appropriate use by any party in a hearing or trial of the case. If a deposition is to be used at trial, it shall be made available for inspection and placed, but not filed with the trial judge at the outset of the trial insofar as its use reasonably can be anticipated.

(5) Unless otherwise ordered, the court will not entertain any motion under Rule 37(a), C.R.C.P., unless counsel for the moving party has conferred or made reasonable effort to confer with opposing counsel concerning the matter in dispute before the filing of the motion. Counsel for the moving party shall file a certificate of compliance with this rule at the time the motion under Rule 37(a), C.R.C.P., is filed. If the court requires that any discovery motion be made orally, then movant must make a reasonable effort to confer with opposing counsel before requesting a hearing from the court.

Source:

1.

amended April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; committee comment approved June 10, 1994; committee comment corrected and effective January 9, 1995;

1.

amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Comments

1994

[1] Provisions of the practice standard are patterned in part after the local rule now in effect in the United States District court for the District of Colorado. This practice standard specifies the minimum time for the serving of a notice to take deposition. Before serving a notice, however, counsel are required to make a good faith effort to schedule the deposition by agreement at a time reasonably convenient and economically efficient to the deponent and all counsel. Counsel are also required to confer in a good faith effort to agree on a reasonable means of limiting the time and expense of any deposition. The provisions of this Practice Standard are also designed to lessen paper mass/filing space problems and resolve various general problems related to discovery.

2015

[2] This rule was amended to address situations arising in courts that require oral discovery motions.

Section 1-13

Deposition by Audio Tape Recording

When a deposition is taken by audio tape recording under C.R.C.P. 30(b)(4), the following procedures shall be followed:

(a) An oath or affirmation shall be administered to the witness by a notary public or other officer authorized to administer oaths.

(b) Two tape recorders with separate microphones shall be used.

(c) Speakers shall identify themselves before each statement except during extended colloquy between examiner and deponent.

(d) The recording shall be transcribed at the expense of the party taking the deposition.

(e) The transcribed testimony shall be made available for correction and signature by the deponent in accordance with Rule 30(e), C.R.C.P.

(f) The tape from which the transcription is made shall be retained by the party taking the deposition. The second tape shall be retained by the adverse party. Both tapes shall be preserved until the litigation is concluded.

(g) The party responsible for the transcription shall make available to the other parties upon request copies of the transcription at a reasonable charge and shall also submit to the other parties copies of changes, if any, which are made by the deponent and shall also inform the other parties of the date when the deposition is available for signature and whether signature is obtained.

(h) The transcription shall be retained by the party taking the deposition and made available in accordance with Paragraph 4 Practice Standard 1-12 (Matters Related To Discovery).

Source: Entire section amended and adopted October 20, 2005, effective January 1, 2006.

Committee Comment

This Practice Standard sets forth detailed procedural safeguards for taking of depositions by tape recording as set out in *Sanchez v. District Court*, 200 Colo. 33, 624 P.2d 1314 (1981).

Section 1-14

Default Judgments

(1) To enter a default judgment under C.R.C.P. 55(b) of the Colorado Rules of Civil Procedure, the following documents in addition to the motion for default judgment are necessary:

(a) The original summons showing valid service on the particular defendant in accordance with Rule 4, C.R.C.P.

(b) An affidavit stating facts showing that venue of the action is proper. The affidavit may be executed by the attorney for the moving party.

(c) An affidavit or affidavits establishing that the particular defendant is not a minor, an incapacitated person, an officer or agency of the State of Colorado, or in the military service. The affidavit must be executed by the attorney for the moving party on the basis of reasonable inquiry.

(d) An affidavit or affidavits or exhibits establishing the amount of damages and interest, if any, for which judgment is being sought. The affidavit may

not be executed by the attorney for the moving party. The affidavit must be executed by a person with knowledge of the damages and the basis therefor.

(e) If attorney fees are requested, an affidavit that the defendant agreed to pay attorney fees or that they are provided by statute; that they have been paid or incurred; and that they are reasonable. The attorney for the moving party may execute the affidavit setting forth those matters listed in or required by Colorado Rule of Professional Conduct 1.5.

(f) If the action is on a promissory note, and the original note is paper based, the original note shall be presented to the court in order that the court may make a notation of the judgment on the face of the note.

(g) A proposed form of judgment which shall recite in the body of the judgment:

(1) The name of the party or parties to whom the judgment is to be granted;

(2) The name of the party or the parties against whom judgment is being taken;

(3) Venue has been considered and is proper;

(4) When there are multiple parties against whom judgment is taken, whether the relief is intended to be a joint and several obligation;

(5) Where multiple parties are involved, language to comply with C.R.C.P. 54(b), if final judgment is sought against less than all the defendants;

(6) The principal amount, interest and attorney's fees, if applicable, and costs which shall be separately stated.

(2) If further documentation, proof or hearing is required, the court shall so notify the moving party.

(3) If the party against whom default judgment is sought is in the military service, or his status cannot be shown, the court shall require such additional evidence or proceeding as will protect the interests of such party in accordance with the Servicemembers Civil Relief Act (SCRA), 50 USC § 3931, including the appointment of an attorney when necessary. The appointment of an attorney shall be made upon application of the moving party, and expense of such appointment shall be borne by the moving party, but taxable as costs awarded to the moving party as part of the judgment except as prohibited by law.

(4) In proceedings which come within the provisions of Rules 55 or 120, C.R.C.P., attendance by the moving party or his attorney shall not be necessary in any instance in which all necessary elements for entry of default under those rules are self-evident from verified motion in the court file. When such matter comes up on the docket with no party or attorney appearing and the court is of the opinion that necessary elements are not so established, the court shall continue or vacate the hearing and advise the moving party or attorney accordingly.

Source: 1., 3., and committee comment amended and adopted October 20, 2005, effective January 1, 2006.

Comment

2006

This Practice Standard was needed because neither C.R.C.P. 55, nor any local rule specified the elements necessary to obtain a default judgment and each court was left to determine what was necessary. One faced with the task of attempting to obtain a default judgment usually found themselves making several trips to the courthouse, numerous phone calls and redoing needed documents several times. The Practice Standard is designed to minimize both court and attorney time. The Practice Standard sets forth a standardized check list which designates particular items needed for obtaining a default judgment. For guidance on affidavits, see C.R.C.P. 108. See also Section 13-63-101, C.R.S., concerning affidavits and requirements by the court.

Section 1-15

Determination of Motions

(1) **Motions and Briefs; When Required; Time for Serving and Filing-Length.**

(a) Except motions during trial or where the court orders that certain or all non-dispositive motions be made orally, any motions involving a contested issue of law shall be supported by a recitation of legal authority incorporated into the motion, which shall not be filed with a separate brief. Unless the court orders otherwise, motions and responsive briefs not under C.R.C.P. 12(b)(1) or (2), or 56 are limited to 15 pages, and reply briefs to 10 pages, not including the case caption, signature block, certificate of service and attachments. Unless the court orders otherwise, motions and responsive briefs under C.R.C.P. 12(b)(1) or (2) or 56 are limited to 25 pages, and reply briefs to 15 pages, not including the case caption, signature block, certificate

of service and attachments. All motions and briefs shall comply with C.R.C.P.10(d)

(b) The responding party shall have 21 days after the filing of the motion or such lesser or greater time as the court may allow in which to file a responsive brief. If a motion is filed 42 days or less before the trial date, the responding party shall have 14 days after the filing of the motion or such lesser or greater time as the court may allow in which to file a responsive brief.

(c) Except for a motion pursuant to C.R.C.P. 56, the moving party shall have 7 days after the filing of the responsive brief or such greater or lesser time as the court may allow to file a reply brief. For a motion pursuant to C.R.C.P. 56, the moving party shall have 14 days after the filing of the responsive brief or such greater or lesser time as the court may allow to file a reply brief.

(d) A motion shall not be included in a response or reply to the original motion.

(2) **Affidavits.** If facts not appearing of record may be considered in disposition of the motion, the parties may file affidavits with the motion or within the time specified for filing the party's brief in this section 1-15, Rules 6, 56 or 59, C.R.C.P., or as otherwise ordered by the court. Copies of such affidavits and any documentary evidence used in connection with the motion shall be served on all other parties.

(3) **Effect of Failure to File Legal Authority.** If the moving party fails to incorporate legal authority into a written motion, the court may deem the motion abandoned and may enter an order denying the motion. Other than motions seeking to resolve a claim or defense under C.R.C.P. 12 or 56, failure of a responding party to file a responsive brief may be considered a confession of the motion.

(4) **Motions to be Determined on Briefs, When Oral Argument is Allowed; Motions Requiring Immediate Attention.** Motions shall be determined promptly if possible. The court has discretion to order briefing or set a hearing, on the motion. If possible, the court shall determine oral motions at the conclusion of the argument, but may take the motion under advisement or require briefing before ruling. Any motion requiring immediate disposition shall be called to the attention of the courtroom clerk by the party filing such motion.

(5) **Notification of Court's Ruling; Setting of Argument or Hearing When Ordered.** Whenever the court enters an order denying or granting a motion without a hearing, all parties shall be forthwith notified by the court

of such order. If the court desires or authorizes oral argument or an evidentiary hearing, all parties shall be so notified by the court. After notification, it shall be the responsibility of the moving party to have the motion set for oral argument or hearing. Unless the court orders otherwise, a notice to set oral argument or hearing shall be filed in accordance with Practice Standard § 1-6 within 7 days of notification that oral argument or hearing is required or authorized.

(6) **Effect of Failure to Appear at Oral Argument or Hearing.** If any of the parties fails to appear at an oral argument or hearing, without prior showing of good cause for non-appearance, the court may proceed to hear and rule on the motion.

(7) **Sanctions.** If a frivolous motion is filed or if frivolous opposition to a motion is interposed, the court may assess reasonable attorney's fees against the party or attorney filing such motion or interposing such opposition.

(8) **Duty to Confer.** Unless a statute or rule governing the motion provides that it may be filed without notice, moving counsel and any self-represented party shall confer with opposing counsel and any self-represented parties before filing a motion. The requirement of self-represented parties to confer and the requirement to confer with self-represented parties shall not apply to any incarcerated person, or any self-represented party as to whom the requirement is contrary to court order or statute, including, but not limited to, any person as to whom contact would or precipitate a violation of a protection or restraining order. The motion shall, at the beginning, contain a certification that the movant in good faith has conferred with opposing counsel and any self-represented parties 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, including all efforts to confer, shall be stated.

(9) **Unopposed Motions.** All unopposed motions shall be so designated in the title of the motion.

(10) **Proposed Order.** EXCEPT FOR ORDERS CONTAINING SIGNATURES OF THE PARTIES OR ATTORNEYS AS REQUIRED BY STATUTE OR RULE, each motion shall be accompanied by a proposed order submitted in editable format. The proposed order complies with this provision if it states that the requested relief be granted or denied.

(11) **Motions to Reconsider.** Motions to reconsider interlocutory orders of the court, meaning motions to reconsider other than those governed by C.R.C.P. 59 or 60, are disfavored. A party moving to reconsider must show more than a disagreement with the court's decision. Such a motion must

allege a manifest error of fact or law that clearly mandates a different result or other circumstance resulting in manifest injustice. The motion shall be filed within 14 days from the date of the order, unless the party seeking reconsideration shows good cause for not filing within that time. Good cause for not filing within 14 days from the date of the order includes newly available material evidence and an intervening change in the governing legal standard. The court may deny the motion before receiving a responsive brief under paragraph 1(b) of this standard.

Source:

1.

amended and effective September 6, 1990;

1.

and committee comment amended July 9, 1992, effective October 1, 1992; 1., 3., and 8. amended and adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; committee comment approved June 10, 1994; committee comment corrected May 14, 1996;

1.

and 8. amended and adopted and 9. added and adopted October 20, 2005, effective January 1, 2006;

1.

amended and effective June 28, 2007;

1.

corrected and effective November 5, 2007; 8. and committee comment para. 2 amended and effective October 12, 2009;

1.

and 5. amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); 10. added and effective February 29, 2012; 10. amended and effective June 7, 2013;

2. amended and effective December 31, 2013; 11. added and committee comment amended effective September 18, 2014.

Comments

1994

[1] This Practice Standard was necessary because of lack of uniformity among the districts concerning how motions were to be made, set and determined. The Practice Standard recognizes that oral argument and hearings are not necessary in all cases, and encourages disposition of motions upon written submissions. The standard also sets forth the uniform requirements concerning filing of legal authority, filing of matters not already of record necessary to determination of motions, and the manner of setting an oral argument if argument is permitted. The practice standard is broad enough to include all motions, including venue motions. Some motions will not require extended legal analysis or affidavits. Obviously, if the basis for a motion is simple and routine, the citation of authorities can be correspondingly simple. Motions or briefs in excess of 10 pages are discouraged.

[2] This standard specifies contemporaneous recitation of legal authority either in the motion itself for all motions except those under C.R.C.P. Rule 56. Moving counsel should confer with opposing counsel before filing a motion to attempt to work out the difference prompting the motion. Every motion must, at the beginning, contain a certification that the movant, in good faith, has conferred with opposing counsel about the motion. If there has been no conference, the reason why must be stated. To assist the court, if the relief sought by the motion has been agreed to or will not be opposed, the court is to be so advised in the motion.

[3] Paragraph 4 of the standard contains an important feature. Any matter requiring immediate action should be called to the attention of the courtroom clerk by the party filing a motion for forthwith disposition. Calling the urgency of a matter to the attention of the court is a responsibility of the parties. The court should permit a forthwith determination.

2014

[4] Paragraph 11 of the standard neither limits a trial court's discretion to modify an interlocutory order, on motion or sua sponte, nor affects C.R.M. 5(a).

2015

[5] The sentence in the 1994 comment that "motions or briefs in excess of 10 pages are discouraged" has been superseded by the 2015 amendments to the rule on the length of motions and briefs. The sentence in the 1994 comment that "moving counsel should confer with opposing counsel before filing a

motion to attempt to work out the difference prompting the motion" is corrected to change the word "should" to "shall" to be consistent with the wording of the rule.

Section 1-16

Preparation of Orders and Objections as to Form

(1) When directed by the court, the attorney for the prevailing party or such attorney as the court directs shall file and serve a proposed order within 14 days of such direction or such other time as the court directs. Prior to filing the proposed order, the attorney shall submit it to all other parties for approval as to form. The proposed order shall be timely filed even if all parties have not approved it as to form. A party objecting to the form of the proposed order as filed with court shall have 7 days after service of the proposed order to file and serve objections and suggested modifications to the form of the proposed order.

(2) Alternatively, when directed by the court, the attorney for the prevailing party or such attorney as the court directs shall file and serve a stipulated order within 14 days after the ruling, or such other time as the court directs. Any matter upon which the parties cannot agree as to form shall be designated in the proposed order as "disputed." The proposed order shall set forth each party's specific alternative proposal for each disputed matter.

(3) Objecting, proposing modification or agreeing to the form of a proposed order or stipulated order, shall not affect a party's rights to appeal the substance of the order.

Source: Entire section repealed and readopted October 20, 2005, effective January 1, 2006;

1. and 2. amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Section 1-17

Court Settlement Conferences

(1) At any time after the filing of Disclosure Certificates as required by C.R.C.P. 16, any party may file with the courtroom clerk and serve a request for a court settlement conference, together with a notice for setting of such request. The court settlement conference shall, if the request is granted, be conducted by any available judge other than the assigned judge. In all

instances, the assigned judge shall arrange for the availability of a different judge to conduct the court settlement conference.

(2) All discussions at the settlement conference shall remain confidential and shall not be disclosed to the judge who presides at trial. Statements at the settlement conference shall not be admissible evidence for any purpose in any other proceeding.

(3) This Rule shall not apply to proceedings conducted pursuant to Rule 16.2(i).

Source: Entire section amended and adopted September 30, 2004, effective for Domestic Relations Cases as defined in 16.2(a) filed on or after January 1, 2005, and for post-decree motions filed on or after January 1, 2005.

Committee Comment

This Practice Standard provides machinery for settlement conference upon request of the parties. The Practice Standard was deemed necessary because it was previously not possible to have a settlement conference in some districts. The committee recognized that there may be practical difficulties in a particular district because of nonavailability of a separate judge. It was felt that this problem could perhaps be largely overcome by cooperation between several districts or by use of a retired judge to make the service available.

Part 2 of the Practice Standard was deemed necessary to encourage settlement conference participation by litigants. Confidentiality and nonadmissibility of statements or communications made at settlement conference should override and prevail as a matter of policy over any asserted right or interest to the contrary.

Section 1-18

Pre-Trial Procedure, Case Mangement, Disclosure and Simplification of Issues

Pretrial procedure, case management, disclosure and simplification of issues shall be in accordance with C.R.C.P. 16.

Editor's note: The Committee Comment to this section, was deleted from these rules when changes were made to this section November 12, 1987, pursuant to Court change #1987 (17).

Section 1-19

Jury Instructions

Jury instructions shall be prepared and tendered to the court pursuant to C.R.C.P. 16(g).

1983

This Standard makes preparation and timing of submission of jury instructions uniform throughout the state. It reasonably assures preparation of instructions and verdict forms before commencement of trial, but retains some needed flexibility in their final form. To permit use of preprepared forms, save time and expense, and to facilitate last-moment revision, the Standard mandates use of photocopies rather than typed originals for submission to the jury.

Source: Entire section amended and adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date.

Section 1-20

Size, and Format of Documents

All court documents shall be prepared in 8-1/2" x 11" format with black type or print and conform to the format, and spacing requirements specified in C.R.C.P. 10(d). Except documents filed by E-Filing or facsimile copy, all court documents shall be on recycled white paper. Any form required by these rules may be reproduced by word processor or other means, provided that the reproduction substantially follows the format of the form and indicates the effective date of the form which it reproduces.

Source: Entire section amended and effective September 6, 1990; entire section and committee comment amended July 9, 1992, effective October 1, 1992; entire section amended March 17, 1994, effective July 1, 1994; entire section and committee comment amended and adopted October 20, 2005, effective January 1, 2006.

Committee Comments

This standard draws attention to the requirements of C.R.C.P. 10(d) pertaining to paper size, paper quality, format and spacing of court documents. Color of paper and print requirements for documents not filed by E-Filing or facsimile copy were made necessary because colors other than black and white create photocopying and microfilming difficulties. Provision is also made to clarify that forms reproduced by word processor are acceptable if they follow the format of the form and state the effective date of the form which it reproduces.

Section 1-21

Court Transcripts

(1) A party requesting a transcript shall arrange for preparation of the transcript directly with the reporter, or if the session or proceeding was recorded by mechanical or electronic means, the courtroom clerk. Where a transcript is to be made a part of the record on appeal, a party shall request preparation of the transcript by reference in the Designation of Record and by direct arrangement with the court reporter or courtroom clerk as provided herein.

(2) Unless otherwise ordered by the court, a court reporter may require a deposit of sufficient money to cover the estimated cost of preparation before preparing the transcript.

(3) The transcript shall be signed and certified by the person preparing the transcript. A transcript lodged with the court shall not be removed from the court without court order except when transmitted to the appellate court.

Source: 1. and 3. amended and adopted October 20, 2005, effective January 1, 2006.

Committee Comment

This Practice Standard sets forth uniform requirements for obtaining, paying for, certification and removal of court reporter transcripts.

Section 1-22

Costs and Attorney Fees

(1) **Costs** A party claiming costs shall file a Bill of Costs within 21 days of the entry of order or judgment, or within such greater time as the court may allow. The Bill of Costs shall itemize and total costs being claimed. Taxing and determination of costs shall be in accordance with C.R.C.P. 54(d) and Practice Standard § 1-15. Any party that may be affected by the Bill of Costs may request a hearing within the time permitted to file a reply in support of the Bill of Costs. Any request shall identify those issues that the party believes should be addressed at the hearing. When required to do by law, the court shall grant a party's timely request for a hearing. In other cases where a party has made a timely request for a hearing, the court shall hold a hearing if it determines in its discretion that a hearing would materially assist the court in ruling on the motion.

(2) **Attorney Fees.**

(a) **Scope.** This practice standard applies to requests for attorney fees made at the conclusion of the action, including attorney fee awards requested pursuant to Section 13-17-102, C.R.S. It also includes awards of fees made to the prevailing party pursuant to a contract or statute where the award is dependent upon the achievement of a successful result in the litigation in which fees are to be awarded and the fees are for services rendered in connection with that litigation. This practice standard does not apply to attorney fees which are part of a judgment for damages and incurred as a result of other proceedings, or for services rendered other than in connection with the proceeding in which judgment is entered. This practice standard also does not apply to requests for attorney fees on matters relating to pre-trial sanctions and motions for default judgment unless otherwise ordered by the court.

(b) **Motion and Response.** Any party seeking attorney fees under this practice standard shall file and serve a motion for attorney fees within 21 days of entry of judgment or such greater time as the court may allow. The motion shall explain the basis upon which fees are sought, the amount of fees sought, and the method by which those fees were calculated. The motion shall be accompanied by any supporting documentation, including materials evidencing the attorney's time spent, the fee agreement between the attorney and client, and the reasonableness of the fees. Any response and reply, including any supporting documentation, shall be filed within the time allowed in practice standard § 1-15. The court may permit discovery on the issue of attorney fees only upon good cause shown when requested by any party.

(c) **Hearing; Determination of Motion.** Any party which may be affected by the motion for attorney fees may request a hearing within the time permitted to file a reply. Any request shall identify those issues which the party believes should be addressed at the hearing. When required to do so by law, the court shall grant a party's timely request for a hearing. In other cases where a party has made a timely request for a hearing, the court shall hold a hearing if it determines in its discretion that a hearing would materially assist the court in ruling on the motion. In exercising its discretion as to whether to hold a hearing in these cases, the court shall consider the amount of fees sought, the sufficiency of the disclosures made by the moving party in its motion and supporting documentation, and the extent and nature of the objections made in response to the motion. The court shall make findings of fact to support its determination of the motion. Attorney fees awarded under this practice standard shall be taxed as costs.

Source: Amended and committee comment added, July 9, 1992, effective October 1, 1992;

1. and 2.(b) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b). Amendments effective July 1, 2015 for cases filed on or after July 1, 2015.

Comments

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

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

2015

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

Section 1-23

Bonds in Civil Actions

(1) **Bonds Which Are Automatically Effective Upon Filing With The Court.** The following bonds are automatically effective upon filing with the clerk of the court:

(a) Cash bonds in the amount set by court order, subsection 3 of this rule, or any applicable statute.

(b) Certificates of deposit issued by a bank chartered by either the United States government or the State of Colorado, in the amount set by court order, subsection 3 of this rule, or any applicable statute. The certificate of deposit shall be issued in the name of the clerk of the court and payable to

the clerk of the court, and the original of the certificate of deposit must be deposited with the clerk of the court.

(c) Corporate surety bonds issued by corporate sureties presently authorized to do business in the State of Colorado in the amount set by court order, subsection 3 of this rule, or any applicable statute. A power of attorney showing the present or current authority of the agent for the surety signing the bond shall be filed with the bond.

(2) **Bonds Which Are Effective Only Upon Entry of an Order Approving the Bond.**

(a) Letters of credit issued by a bank chartered by either the United States government or the State of Colorado, in the amount set by court order, subsection 3 of this rule, or any applicable statute. The beneficiary of the letter of credit shall be the clerk of the district court. The original of the letter of credit shall be deposited with the clerk of the court.

(b) Any Other Proposed Bond.

(3) **Amounts of Bond.**

(a) **Supersedeas Bonds.** Unless the court otherwise orders, or any applicable statute directs a higher amount, the amount of a supersedeas bond to stay execution of a money judgment shall be 125% of the total amount of the judgment entered by the court (including any prejudgment interest, costs and attorneys fees awarded by the court). The amount of a supersedeas bond to stay execution of a non-money judgment shall be determined by the court. Nothing in this rule is intended to limit the court's discretion to deny a stay with respect to non-money judgments. Any interested party may move the trial court (which shall have jurisdiction not withstanding the pendency of an appeal) for an increase in the amount of the bond to reflect the anticipated time for completion of appellate proceedings or any increase in the amount of judgment.

(b) **Other Bonds.** The amounts of all other bonds shall be determined by the court or by any applicable statute.

(4) **Service of Bonds Upon All Parties of Record.** A copy of all bonds or proposed bonds filed with the court shall be served on all parties of record in accordance with C.R.C.P. 5(b).

(5) **No Unsecured Bonds.** Except as expressly provided by statute, and except with respect to appearance bonds, no unsecured bond shall be accepted by the court.

(6) **Objections to Bonds.** Any party in interest may file an objection to any bond which is automatically effective under subsection 1 of this rule or to any proposed bond subject to subsection 2 of this rule. A bond, which is automatically effective under subsection 1 remains in effect unless the court orders otherwise. Any objections shall be filed not later than 14 days after service of the bond or proposed bond except that objections based upon the entry of any amended or additional judgment shall be made not later than 14 days after entry of any such amended or additional judgment.

(7) **Bonding over a Lien.** If a money judgment has been made a lien upon real estate by the filing of a transcript of the judgment record by the judgment creditor, the lien shall be released upon the motion of the judgment debtor or other interested party if a bond for the money judgment has been approved and filed as provided in this section 1-23. The order of the court releasing the lien may be recorded with the clerk and recorder of the county where the property is located. Once the order is recorded, all proceedings by the judgment creditor to enforce the judgment lien shall be discontinued, unless a court orders otherwise.

(8). Proceedings against Surety or other Security Provider. When these rules require or permit the giving of a bond or other type of security, the surety or other security provider submits to the jurisdiction of the court. The liability of the surety or other security provider may be enforced on motion without the necessity of an independent action. At the time any party seeks to enforce such liability, it shall provide notice of its motion or other form of request to all parties of record and the surety or other security provider in accordance with C.R.C.P. 5(b).

(9). Definition. The term "bond" as used in this rule includes any type of security provided to stay enforcement of a money judgment or any other obligation including providing security underC.R.C.P. 65.

Source: Entire section and committee comment repealed and readopted October 20, 2005, effective January 1, 2006; 6. amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Comment

2006

[1] The Committee is aware that issues have arisen regarding the effective date of a bond, and thus the effectiveness of injunction orders and other orders which are conditioned upon the filing of an acceptable bond. Certain types of bonds are almost always acceptable and thus, under this rule, are

automatically effective upon filing with the Court subject to the consideration of timely filed objections. Other types of bonds may or may not be acceptable and should not be effective until the Court determines the sufficiency of the bond. The court may permit property bonds upon such conditions as are appropriate to protect the judgment creditor (or other party sought to be protected). Such conditions may include an appraisal by a qualified appraiser, information regarding liens and encumbrances against the property, and title insurance.

[2] This rule also sets the presumptive amount of a supersedeas bond for a money judgment. The amount of a supersedeas bond for a non-money judgment must be determined in the particular case by the court and this rule is not intended to affect the court's discretion to deny a supersedeas bond in the case of a non-money judgment.

Section 1-24

Reserved

Section 1-25

Facsimile Copies

(1) Facsimile copy, defined. A facsimile copy is a copy generated by a system that encodes a document into electrical signals, transmits these electrical signals over a telephone/data line, then reconstructs the signals to print an exact duplicate of the original document at the receiving end.

(2) Facsimile copies which conform with the quality requirements specified in C.R.C.P. 10(d)(1) may be filed with the court in lieu of the original document. Once filed with the court, the facsimile copy shall be treated as an original for all court purposes. If a facsimile copy is filed in lieu of the original document, the attorney or party filing the facsimile shall retain the original document for production to the court, if requested to do so.

(3) The court is not required to provide confirmation that it has received a facsimile transmission.

(4) Any facsimile copy transmitted directly to the court shall be accompanied by a cover sheet which states the title of the document, case number, number of pages, identity and voice telephone number of transmitter and any instructions.

(5) Payment of any required filing fees shall not be deferred for documents filed with the court by facsimile transmission.

(6) This rule shall not require courts to have a fascimile machine nor shall the court be required to transmit orders or other material to attorneys or parties via facsimile transmission.

Source: Entire section and committee comment added and effective September 6, 1990.

Committee Comment

Facsimile transmissions are becoming commonplace in the business world. It was therefore deemed reasonable that the court system adapt to accommodate the use of this technology. Use of the technology, however, should not create more work for court staff. In order not to add to the duties of overburdened court personnel, provision is made that court personnel need not provide confirmation that a facsimile transmission has been received. This should not create difficulty for attorneys because almost all equipment manufactured today provides confirmation that a document has been received. This confirmation should be attached to the document sent and retained with the original document in the party's file.

The committee envisioned at least two ways in which facsimile filings could be accomplished. The first would be an arrangement where the facsimile machine would be located in a court clerk's office. The other would be where transmissions would be made to a machine outside the courthouse and then delivered to the clerk for filing. These rules were designed to accommodate both kinds of filings.

Ordinary thermofax paper fades in sunlight, deteriorates with handling and has a short shelf life. Therefore, only permanent plain paper which is not subject to these infirmities is acceptable for court purposes.

The committee also recognized that a requirement for filing of the original after filing of a facsimile copy would create more work for court staff. The committee therefore decided to accept facsimile copies in lieu of the original with the provision that the original would be maintained if it were ever needed for any purpose.

The requirement under C.R.C.P. 121, Sec. 1-15 for filing of a copy of any motions or briefs has been modified so that a copy is also filed with the clerk of the court. The clerk of the court is then responsible for distributing the copy to the courtroom clerk. This change is necessary because the courtroom clerk will ordinarily not have a separate facsimile machine.

Some judicial districts have or are acquiring the ability to accept credit cards or bank cards for payment of fees and fines. In the judicial districts where

bank cards can be used for payment, parties may file complaints, answers and other pleadings which require a filing fee by faxing an appropriate bank card authorization along with the pleadings. If a judicial district does not accept payment by bank card, those types of pleadings cannot be filed by facsimile transmission because payment of filing fees will not be deferred.

The committee believes that reasonable fees can be charged for the costs associated with facsimile filings. However, the setting of such fees is not within the scope of the Rules of Civil Procedure.

The adoption of this rule does not require an attorney to have a designated facsimile telephone number.

Section 1-26

Electronic Filing and Service System

(1) **Definitions:**

(a) **Document:** A pleading, motion, writing or other paper filed or served under the E-System.

(b) **E-Filing/Service System:** The E-Filing/Service System ("E-System ") approved by the Colorado Supreme Court for filing and service of documents via the Internet through the Court-authorized E-System provider.

(c) **Electronic Filing:** Electronic filing ("E-Filing ") is the transmission of documents to the clerk of the court, and from the court, via the E-System.

(d) **Electronic Service:** Electronic service ("E-Service ") is the transmission of documents to any party in a case via the E-System. Parties who have subscribed to the E-System have agreed to receive service, other than service of a summons, via the E-System.

(e) **E-System Provider:** The E-Service/E-Filing System Provider authorized by the Colorado Supreme Court.

(f) **Signatures:**

(I) **Electronic Signature:** an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by the person with the intent to sign the E-filed or E-served document.

(II) **Scanned Signature:** A graphic image of a handwritten signature.

(2) **Types of Cases Applicable:** E-Filing and E-Service may be used for certain cases filed in the courts of Colorado as the service becomes available. The availability of the E-System will be determined by the Colorado Supreme Court and announced through its web site http://www.courts.state.co.us/supct/supct.htm and through published directives to the clerks of the affected court systems. E-Filing and E-Service may be mandated pursuant to Subsection 13 of this Practice Standard 1-26.

(3) **To Whom Applicable:**

(a) Attorneys licensed or certified to practice law in Colorado, or admitted pro hac vice under C.R.C.P. 205.3 or 205.5, may register to use the E-System. The E-System provider will provide an attorney permitted to appear pursuant to C.R.C.P. 205.3 or 205.5 with a special user account for purposes of E-Filing and E-Serving only in the case identified by a court order approving pro hac vice admission. The E-System provider will provide an attorney certified as pro bono counsel pursuant to C.R.C.P. 204.6 with a special user account for purposes of E-Filing and E-Serving in pro bono cases as contemplated by that rule. An attorney may enter an appearance pursuant to Rule 121, Section 1-1, through E-Filing. In districts where E-Filing is mandated pursuant to Subsection 13 of this Practice Standard 1-26, attorneys must register and use the E-System.

(b) Where the system and necessary equipment are in place to permit it, pro se parties and government entities and agencies may register to use the E-System.

(4) **Commencement of Action-Service of Summons:** Cases may be commenced under C.R.C.P. 3 by E-Filing the initial pleading. Service of a summons shall be made in accordance with C.R.C.P. 4.

(5) **E-Filing-Date and Time of Filing:** Documents filed in cases on the E-System may be filed under C.R.C.P. 5 through an E-Filing. A document transmitted to the E-System Provider by 11:59 p.m. Colorado time shall be deemed to have been filed with the clerk of the court on that date.

(6) **E-Service-When Required - Date and Time of Service:** Documents submitted to the court through E-Filing shall be served under C.R.C.P. 5 by E-Service. A document transmitted to the E-System Provider for service by 11:59 p.m. Colorado time shall be deemed to have been served on that date.

(7) **Filing Party to Maintain the Signed Copy-Paper Document Not to Be Filed-Duration of Maintaining of Document:** A printed or printable copy of an E-Filed or E-Served document with original, electronic,

or scanned signatures shall be maintained by the filing party and made available for inspection by other parties or the court upon request, but shall not be filed with the court. When these rules require a party to maintain a document, the filer is required to maintain the document for a period of two years after the final resolution of the action, including the final resolution of all appeals. For domestic relations decrees, separation agreements and parenting plans, original signature pages bearing the attorneys, parties', and notaries' signatures must be scanned and E-filed. For probate of a will, the original must be lodged with the court.

(8) **Documents Requiring E-Filed Signatures:** For E-Filed and E-Served documents, signatures of attorneys, parties, witnesses, notaries and notary stamps may be affixed electronically or documents with signatures obtained on a paper form scanned.

(9) **C.R.C.P. 11 Compliance:** An e-signature is a signature for the purposes of C.R.C.P. 11.

(10) **Documents under Seal:** A motion for leave to file documents under seal may be E-Filed. Documents to be filed under seal pursuant to an order of the court may be E-Filed at the direction of the court; however, the filing party may object to this procedure.

(11) **Transmitting of Orders, Notices and Other Court Entries:** Beginning January 1, 2006, courts shall distribute orders, notices, and other court entries using the E-System in cases where E-Filings were received from any party.

(12) **Form of E-Filed Documents:**C.R.C.P. 10 shall apply to E-Filed documents. A document shall not be transmitted to the clerk of the court by any other means unless the court at any later time requests a printed copy.

(13) **E-Filing May be Mandated:** With the permission of the Chief Justice, a chief judge may mandate E-Filing within a county or judicial district for specific case classes or types of cases. A judicial officer may mandate E-Filing and E-Service in that judicial officer's division for specific cases, for submitting documents to the court and serving documents on case parties. Where E-Filing is mandatory, the court may thereafter accept a document in paper form and the court shall scan the document and upload it to the E-Service Provider. After notice to an attorney that all future documents are to be E-Filed, the court may charge a fee of $50 per document for the service of scanning and uploading a document filed in paper form. Where E-Filing and E-Service are mandatory, the Chief Judge or appropriate judicial officer may exclude pro se parties from mandatory E-Filing requirements.

(14) **Relief in the Event of Technical Difficulties:**

(a) Upon satisfactory proof that E-Filing or E-Service of a document was not completed because of:

(1) an error in the transmission of the document to the E-System Provider which was unknown to the sending party;

(2) a failure of the E-System Provider to process the E-Filing when received, or

(3) other technical problems experienced by the filer or E-System Provider, the court may enter an order permitting the document to be filed nunc pro tunc to the date it was first attempted to be sent electronically.

(b) Upon satisfactory proof that an E-Served document was not received by or unavailable to a party served, the court may enter an order extending the time for responding to that document.

(15) **Form of Electronic Documents**

(a) **Electronic document format, size and density.** Electronic document format, size, and density shall be as specified by Chief Justice Directive # 11-01.

(b) **Multiple Documents:** Multiple documents (including proposed orders) may be filed in a single electronic filing transaction. Each document (including proposed orders) in that filing must bear a separate document title.

(c) **Proposed Orders:** Proposed orders shall be E-Filed in editable format. Proposed orders that are E-Filed in a non-editable format shall be rejected by the Court Clerk's office and must be resubmitted.

History:

Source: Entire section and committee comment added and effective March 7, 2000; entire section and committee comment amended and effective April 17, 2003; entire section and committee comment repealed and readopted October 20, 2005, effective January 1, 2006; 6. amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); 1.(f), 4., 6. to 9., and 15.(a) amended and effective June 21, 2012; 4. and 6. amended and effective May 9, 2013; 3. and committee comment amended and effective December 31, 2013; §§1-14(3), 1-19, and 1-23 amended effective 1/12/2017, effective 1/1/2018; amended December 7, 2017, effective

1/1/2018; amended, effective 4/5/2018; amended, effective 3/5/2020; amended and adopted by the Court, En Banc, August 17, 2020 effective 8/17/2020, effective immediately; amended January 7, 2021, effective 4/1/2021.

Note:

COMMENTS

2000

[1] C.R.C.P. 77 provides that courts are always open for business. This Practice Standard is intended to comport with that rule.

2013

[2] The Court authorized service provider for the program is the Integrated Colorado Courts E-Filing System (http://www.jbits.courts.state.co.us/icces/). "Editable Format" is one which is subject to modification by the court using standard means such as Word or WordPerfect format.

2017

[3] Effective November 1, 2016, the name of the court authorized service provider changed from the "Integrated Colorado Courts E-Filing System" to "Colorado Courts E-Filing" (www.jbits.courts.state.co.us/efiling/).

Case Note:

Annotation

Law reviews. For article, "Keeping up With Local Dissolution Procedures", see 12 Colo. Law. 767 (1983). For article, "Alternative Depositions: Practice and Procedure", see 19 Colo. Law. 57 (1990). For article, "Colorado's New Rules of Civil Procedure, Part I: Case Management and Disclosure", see 23 Colo. Law. 2467 (1994). For article, "Motions for Default Judgments", see 24 Colo. Law. 1295 (1995). For article, "Discrete Task Representation a/k/a Unbundled Legal Services", see 29 Colo. Law. 5 (January 2000). For article, "Electronic Filing's First Year in Colorado", see 31 Colo. Law. 41 (April 2002). For article, "Revisiting the Recovery of Attorney Fees and Costs in Colorado", see 33 Colo. Law.11 (April 2004). For article, "Bonds in Colorado Courts: A Primer for Practitioners", see 34 Colo. Law. 59 (March 2005). For article, "2006 Amendments to the Civil Rules: Modernization, New Math, and Polishing", see 35 Colo. Law. 21 (May 2006). For article, "Limited Scope Representation Under the Proposed Amendment to C.R.C.P. 121, § 1-1 ", see 40 Colo. Law. 89 (November 2011).

Purpose of rule. This rule is intended to provide uniformity among the various district courts as to procedural matters. People ex rel. Sullivan v. Swihart, 897 P.2d 822 (Colo. 1995).

Authority of district court rules is recognized so long as they do not conflict with the Colorado rules of civil procedure or with any directive of the supreme court. Danburg v. Realties, Inc., 677 P.2d 439 (Colo. App. 1984).

Not all standing orders are local rules. Section (a) of this rule clearly distinguishes between "standing orders having the effect of local rules" and those that do not. Therefore, not all standing orders are required to be reviewed by the supreme court. People ex rel. Sullivan v. Swihart, 897 P.2d 822 (Colo. 1995).

Standing order of chief judge of judicial district prohibiting possession of a deadly weapon or firearm in designated areas of courthouse was a valid exercise of the chief judge's authority as to administrative matters, did not affect the procedural rights of litigants, and did not require supreme court approval under this rule. People ex rel. Sullivan v. Swihart, 897 P.2d 822 (Colo. 1995).

Late filings. This rule applies only to the failure to file a brief and does not apply to late filings. Charles Milne Assoc. v. Toponce, 770 P.2d 1313 (Colo. App. 1988).

Trial court's failure to comply with procedural requirements concerning notice and time for filing responsive brief before ruling on motion to dismiss is an abuse of discretion. Lanes v. Scott, 688 P.2d 251 (Colo. App. 1984).

Court's sua sponte order of dismissal for failure to prosecute cannot stand if it is not preceded by the notice required by § 1-10 and C.R.C.P. 41. In re Custody of Nugent, 955 P.2d 584 (Colo. App. 1997); Koh v. Kumar, 207 P.3d 900 (Colo. App. 2009).

A delay reduction order does not suffice to provide notice of dismissal under § 1-10. Koh v. Kumar, 207 P.3d 900 (Colo. App. 2009).

Juvenile court did not abuse its discretion in declining to consider failure of the mother to file a responsive pleading to the father's posttrial motion as a confession of motion. M.H.W. by M.E.S. v. D.J.W., 757 P.2d 1129 (Colo. App. 1988).

Failure to give an opportunity to respond to authority cited in support of or in opposition to a motion is harmless unless prejudice is shown. Benson v. Colo. Comp. Ins. Auth., 870 P.2d 624 (Colo. App. 1994).

Where there has been an unusual delay in prosecuting an action, prejudice to the defendant will be presumed. Therefore, in the absence of mitigating circumstances, an unusual delay in prosecuting an action justifies dismissal with prejudice. Richardson v. McFee, 687 P.2d 517 (Colo. App. 1984).

Trial court held not to have abused discretion in dismissing action with prejudice for failure to prosecute. Rossi v. Mathers, 749 P.2d 964 (Colo. App. 1987).

Scope of issues raised by a trial data certificate is limited only by the breadth of notice provided by the complaint. Under our rules of civil procedure, the precise legal theory asserted by a claimant is not controlling, so long as the complaint gives sufficient notice of the transaction sued upon. Yoder v. Hooper, 695 P.2d 1182 (Colo. App. 1984), aff'd, 732 P.2d 852 (Colo. 1987).

Trial court erred when it concluded deponent received "reasonable notice" of deposition under § 1-12 (1). Deponent received deposition notice only two days before the deposition, and one of those days was a Sunday. As such, deponent did not receive at least five days notice before the deposition. However, under C.R.C.P. 32(d)(1), "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". Keenan ex rel. Hickman v. Gregg, 192 P.3d 485 (Colo. App. 2008)

Provision inapplicable to summary judgment motions. Because of the drastic nature of summary judgment, provisions under § 1-15 concerning confession of motions are inapplicable to motions for summary judgment under this rule. Seal v. Hart, 755 P.2d 462 (Colo. App. 1988).

Failure to present controverting affidavit or other evidentiary materials are not grounds for summary judgment. Murphy v. Dairyland Ins. Co., 747 P.2d 691 (Colo. App. 1987).

Failure of nonmoving party to present affidavits or other evidentiary materials opposing a motion for summary judgment does not alone provide a proper basis for the entry of a judgment on the pleadings. Quiroz v. Goff, 46 P.3d 486 (Colo. App. 2002).

Only under extreme circumstances should sanction of dismissal or entry of default judgment be imposed. This rule should not be applied in a manner which unreasonably denies a party its day in court. Nagy v. District Court, 762 P.2d 158 (Colo. 1988) (decided under rule in effect prior to 1987 repeal and readoption); Pinkstaff v. Black & Decker (U.S.), Inc., 211 P.3d 698 (Colo. 2009).

It is within the district court's discretion to conduct an evidentiary hearing or rule on the submitted motions to vacate or modify an arbitration award. BFN-Greely, LLC v. Adair Group, Inc., 141 P.3d 937 (Colo. App. 2006).

Mere citation of a rule of civil procedure is not a "recitation of legal authority" as required by § 1-15 (7) of this rule. Box v. Wickham, 713 P.2d 415 (Colo. App. 1985).

Trial court improperly awarded attorney fees upon determining that a motion was frivolous due to an erroneous finding that the court had no jurisdiction. In re Smith, 757 P.2d 1159 (Colo. App. 1988).

Post-trial motion for the award of attorney fees is analogous to a request for taxing costs and should follow procedures established by C.R.C.P. 54(d) and § 1-22 of this rule. A trial court may address the issue of the award of attorney fees for services rendered in connection with the underlying litigation on a post-trial basis, whether or not counsel has previously sought to "reserve" the issue. Roa v. Miller, 784 P.2d 826 (Colo. App. 1989).

An award of attorney fees under §13-17-102 cannot be held to be confessed by failure to respond to a motion for fees. Artes-Roy v. Lyman, 833 P.2d 62 (Colo. App. 1992).

A claim or defense is frivolous for purposes of assessing attorney fees if the proponent can present no rational argument based on the evidence or law in support of that claim or defense. McKown-Katy v. Rego Co., 776 P.2d 1130 (Colo. App. 1989), rev'd in part on other grounds, 801 P.2d 536 (Colo. 1990).

Determination of whether motion is frivolous is a matter within the discretion of the trial court. McKown-Katy v. Rego Co., 776 P.2d 1130 (Colo. App. 1989), rev'd in part on other grounds, 801 P.2d 536 (Colo. 1990).

Whether motion was frivolous under § 1-15 (7) is applied in Liebowitz v. Aimexco Inc., 701 P.2d 140 (Colo. App. 1985).

Award of attorney fees incurred in pursuing motions for sanctions improper under § 1-15 (7) where the defense to the motions, while ultimately unsuccessful, had a rational basis in fact and law and did not lack substantial justification. Boulder County Bd. of County Comm'rs v. Kraft Bldg. Contractors, 122 P.3d 1019 (Colo. App. 2005).

The provisions of § 1-15 concerning confession of a motion by failing to respond thereto are inapplicable to a motion for summary judgment. Koch v. Sadler, 759 P.2d 792 (Colo. App. 1988).

Rule is permissive, not mandatory, so that failure to file brief in opposition to motion for partial summary judgment may be considered a confession of the motion, but is not automatically considered such. Visintainer Sheep v. Centennial Gold, 748 P.2d 358 (Colo. App. 1987).

A motion to dismiss for failure to state a claim must be considered on its merits like a motion for summary judgment and cannot be deemed confessed by a failure to respond. Therefore, trial court erred in failing to consider the merits of plaintiffs' claims for relief as required by C.R.C.P. 12(b)(5) in resolving defendant's motion to dismiss. Hemmann Mgmt. Servs. v. Mediacell, Inc., 176 P.3d 856 (Colo. App. 2007).

A party has 15 days to respond to a motion and it is an abuse of discretion for a trial court to grant a motion only 12 days after it was filed. Weatherly v. Roth, 743 P. 2d 453 (Colo. App. 1987).

Trial court's ex-parte communication with defendant's counsel directing counsel to prepare the form of order was not improper and did not require the attorney fee order to be vacated, where the communication was made after the court had reached its decision based on full briefing of the issues and a telephone hearing, where plaintiff's counsel was given an opportunity to object and did in fact object, and where there was no evidence of bias on the part of the judge or prejudice to plaintiff as a result of the court's action. Aztec Minerals Corp. v. State, 987 P.2d 895 (Colo. App. 1999).

Trial judge's refusal to disqualify himself from proceeding amounted to abuse of discretion where trial judge acted as settlement judge in litigation underlying the present legal malpractice case and allegations, in light of policies expressed in § 1-17 of this rule that a settlement judge for a particular action should not thereafter have any dealings with the case and that a judge assigned for proceedings other than settlement should not be privy to discussions that occurred at court settlement conferences, were sufficient to raise a reasonable inference of the appearance of actual or apparent bias or prejudice. Tripp v. Borchard, 29 P.3d 345 (Colo. App. 2001).

For factors to use in determining appropriateness and severity of sanctions for failure to file a trial data certificate, see Nagy v. District Court, 762 P.2d 158 (Colo. 1988) (decided under rule in effect prior to 1987 repeal and readoption).

Sanction imposed for violation of § 1-18 's requirement of timely filing of trial data certificate denied defendant its right to defend against plaintiff's claim. AAA Crane Serv. v. Omnibank, 723 P.2d 156 (Colo. App. 1986).

Sanctions may include dismissal, but only if court follows notice requirements of C.R.C.P. 41(b) and § 1-10 (2) of this rule. Maxwell v. W.K.A. Inc., 728 P.2d 321 (Colo. App. 1986).

In addition, it was an abuse of discretion for court to impose a sanction for both parties' failure to file trial data certificates which was detrimental only to plaintiff, and benefitted the equally noncomplying defendants. Maxwell v. W.K.A. Inc., 728 P.2d 321 (Colo. App. 1986).

Imposition of sanctions for noncompliance is not mandated; the language of § 1-18 (1)(d) is permissive in nature. Nagy v. District Court, 762 P.2d 158 (Colo. 1988) (decided under rule in effect prior to 1987 repeal and readoption).

The trial court has considerable discretion to determine whether noncompliance with mandatory pretrial procedures justifies the imposition of sanctions against the noncomplying party. People v. Milton, 732 P.2d 1199 (Colo. 1987).

Trial court's decision not to impose any sanction for noncompliance with pretrial procedures is an abuse of discretion only if, based on the particular circumstances, the decision was manifestly arbitrary, unreasonable, or unfair. People v. Milton, 732 P.2d 1199 (Colo. 1987).

Trial court did not abuse its discretion for failing to prohibit the state's witnesses from testifying in case in chief for failure to file trial data certificate setting forth the names of the witnesses. People v. Milton, 732 P.2d 1199 (Colo. 1987).

Trial court did not apply an erroneous legal standard in determining reasonableness of plaintiff's attorney fees. Without any supporting affidavit or exhibit, defendants' opposition to award of attorney fees incurred in connection with contempt proceedings constituted mere argument and did not create a genuine issue of material fact as to the reasonableness of the fees. Moreover, the award of attorney fees was based on sufficient evidence supporting the reasonableness of the fees. Madison Capital Co., LLC v. Star Acquisition VIII, 214 P.3d 557 (Colo. App. 2009).

Notwithstanding the discretionary language in § 1-22 (2)(c), a party is entitled to an evidentiary hearing to determine a reasonable amount of attorney fees, when the party presents an expert's affidavit raising disputed issues of fact and a significant amount of fees has been requested. Roberts v. Adams, 47 P.3d 690 (Colo. App. 2001).

Discretion to grant or deny belated request. Where party did not file motion for fees until 24 days after expiration of 15-day period and did not request extension of time nor offer excuse for delay, court did not abuse its discretion by denying the motion. Major v. Chons Bros., Inc., 53 P.3d 781 (Colo. App. 2002).

Although § 1-22 requires a party seeking costs to file a request within 15 days of the judgment, it also permits the request to be filed within such greater time as the court may allow. Although plaintiff filed the request for costs outside of the deadline, the court chose to address the issue. There is no abuse of discretion in the trial court's decision to address plaintiff's request under the "within such greater time as the court may allow" standard. Phillips v. Watkins, 166 P.3d 197 (Colo. App. 2007).

A request for an award of costs and fees under § 1-22 which has been filed beyond the 15-day deadline does not preclude the trial court's consideration even though the party fails to request an extension of time. In re Wright, 841 P.2d 358 (Colo. App. 1992).

Not an abuse of discretion for trial court to award attorney fees under § 1-22 beyond the 15-day deadline and without expressly granting an extension. US Fax Law Ctr., Inc. v. Henry Schein, Inc., 205 P.3d 512 (Colo. App. 2009); Anderson v. Pursell, 244 P.3d 1188 (Colo. 2010).

The court relied on specified information indicating the reasons for the late filing of the motion for attorney fees. US Fax Law Ctr., Inc. v. Henry Schein, Inc., 205 P.3d 512 (Colo. App. 2009).

Trial court not required to deny a motion for costs and attorney fees if it is filed outside of the 15-day time limit, even if the submitting party does not request an extension of time. Anderson v. Pursell, 244 P.3d 1188 (Colo. 2010).

Issues concerning recovery of attorney fees not sought as damages are outside the purview of C.R.C.P. 59 and outside the purview of C.R.C.P. 59(j) 's requirement that a motion be denied as a matter of law if it is not decided within 60 days. Anderson v. Pursell, 244 P.3d 1188 (Colo. 2010).

Even though plaintiff filed his bill of costs and an amended bill of costs more than 15 days after the entry of judgment, the trial court considered both the bill of costs and the amended bill in awarding minimal costs. Thus, the bill of costs was filed within "such greater time as the court may allow" and the trial court was required under §13-17-202 to award the plaintiff "reasonable costs" incurred after the offer of settlement. Borquez v. Robert C. Ozer, P.C.,

923 P.2d 166 (Colo. App. 1995), aff'd in part and rev'd in part on other grounds, 940 P.2d 371 (Colo. 1997).

The rule does not require a court to determine that a filing made outside the 15-day period was attributable to excusable neglect or to make any other findings such as those required under C.R.C.P. 6(b). Parry v. Kuhlmann, 169 P.3d 188 (Colo. App. 2007).

Section 1-22 (2) does not require a party seeking attorney fees as costs to provide the disclosures mandated under C.R.C.P. 26 for experts who will testify at trial. Chartier v. Weinland Homes, Inc., 25 P.3d 1279 (Colo. App. 2001).

Failure of wife to file a motion in conformity with this rule in dissolution of marriage action does not operate as a waiver of her request for fees where wife had properly requested fees in her response to husband's petition; attorney fees were also listed as a disputed issue in the parties' joint trial management certificate; and husband acknowledged that wife raised the issue at the permanent orders hearing. In re Hill, 166 P.3d 269 (Colo. App. 2007).

The right to a jury trial, once proper demand is made and fee is paid pursuant to § 1-3 of this rule, may be lost only for reasons stated in C.R.C.P. 39(a). The trial court, in an action for payment of medical benefits, abused its discretion in denying the insured a jury trial on the basis that the insured failed to file jury instructions in accordance with § 1-19 of this rule. Neither this rule nor C.R.C.P. 39(a) includes a waiver provision on such basis. Whaley v. Keystone Life Ins. Co., 811 P.2d 404 (Colo. App. 1989).

Where defendant in prior action sought and obtained dismissal for failure to prosecute but did not specifically request dismissal with prejudice, order of dismissal did not so specify, and no good cause was shown for defendant's failure to request dismissal with prejudice, subsequent "clarification" of order to specify dismissal with prejudice was ineffective. McElvaney v. Batley, 824 P.2d 73 (Colo. App. 1991).

Expert's designation and summary of testimony was available and met the requirement of this rule to provide both sides with the opportunity to prepare adequately for trial and to prevent undue surprise. Fenton v. Fibreboard Corp., 827 P.2d 564 (Colo. App. 1991).

Confession of motion due to failure to respond in accordance with subsection (3) does not automatically render a pro se litigant's claims "frivolous and groundless". Separate findings on the issue are required

before court may award attorney fees against such parties under §13-17-102. Artes-Roy v. Lyman, 833 P.2d 62 (Colo. App. 1992).

Defendants waived their rights to a hearing on costs pursuant to this section where they did not request such hearing at trial. Van Schaack v. Van Schaack Holdings, Ltd., 856 P.2d 15 (Colo. App. 1992).

It was within the trial court's discretion to award expert witness fees for designated experts who did not testify at trial where such award was supported by evidence in the record. Van Schaack v. Van Schaack Holdings, Ltd., 856 P.2d 15 (Colo. App. 1992).

Trial court had discretion to impose sanctions, including issuing an order limiting scope of expert's testimony at trial where plaintiff failed to disclose identity of experts or their opinions and failed to supplement responses to discovery when additional information became known. Locke v. Vanderark, 843 P.2d 27 (Colo. App. 1992).

Trial court properly excluded psychiatrist's testimony regarding the association between IQ and hydrocephalic condition where plaintiff failed to disclose opinion, failed to disclose psychiatrist's qualifications, and failed to update discovery responses. Locke v. Vanderark, 843 P.2d 27 (Colo. App. 1992).

Trial court properly held that tardily disclosed expert opinion went beyond fair scope of previously disclosed opinion where plaintiff failed to make timely disclosure of expert's opinion concerning damages relating to matters beyond those provided in discovery. Locke v. Vanderark, 843 P.2d 27 (Colo. App. 1992).

Generally, the trial court determines a motion on the written motion and submitted briefs, and it is within the discretion of the court whether to allow an evidentiary hearing. City & County of Denver v. Ameritrust, 832 P.2d 1054 (Colo. App. 1992).

Section 1-5 creates a presumption that all court records are to be open. Anderson v. Home Ins. Co., 924 P.2d 1123 (Colo. App. 1996).

Section 1-5 places the burden upon the party seeking to limit access to a court file to overcome this presumption in favor of public accessibility by demonstrating that the harm to the privacy of a person in interest outweighs the public interest in the openness of court files. Anderson v. Home Ins. Co., 924 P.2d 1123 (Colo. App. 1996).

The fact that the parties claim that a court file contains extremely personal, private, and confidential matters is generally insufficient to constitute a

privacy interest warranting the sealing of that entire file under § 1-5. In re Purcell, 879 P.2d 468 (Colo. App. 1994); Anderson v. Home Ins. Co., 924 P.2d 1123 (Colo. App. 1996).

The expectation of privacy or confidentiality in court records has been found to exist only in those limited instances involving sexual assault claims, trade secrets, potentially defamatory material, or threats to national security. Anderson v. Home Ins. Co., 924 P.2d 1123 (Colo. App. 1996).

A broad limited access order denying access to the entire court file was not warranted where a medical malpractice charge against a licensed health care professional implicates the public interest and involves more than a private dispute between individuals. Anderson v. Home Ins. Co., 924 P.2d 1123 (Colo. App. 1996).

Court may not enter a limited access order based solely upon an agreement between the parties to the litigation. If the evidence does not support the required finding under § 1-5 (2), no such order may be entered. Anderson v. Home Ins. Co., 924 P.2d 1123 (Colo. App. 1996).

Court did not abuse its discretion in denying party's request to seal record where it was not required to seal the record under this section and the record contained nothing unusual and no material that would mandate that it be sealed. In re Purcell, 879 P.2d 468 (Colo. App. 1994).

Movant's constitutional right to due process was not violated by trial court's denial of motion for costs and damages without a separate hearing on the motion where movant did not request an evidentiary hearing on its motion and trial court, in ruling on the motion, assumed movant could prove damages but determined, based on written motion and briefs, that an award of damages would be oppressive and inequitable. City & County of Denver v. Ameritrust, 832 P.2d 1054 (Colo. App. 1992).

Trial court did not abuse its discretion in allowing defendants to file their reply to plaintiff's response more than ten days after the response was filed where, in accepting the reply, the court stated that it had been filed within a reasonable time and that, in the interest of fundamental fairness, substance would be placed ahead of procedure. Armstead v. Memorial Hosp., 892 P.2d 450 (Colo. App. 1995).

Letter of credit was properly released by trial court, since the court was the beneficiary of the letter of credit. Vento v. Colo. Nat'l Bank, 985 P.2d 48 (Colo. App. 1999).

Section 1-1 (2) is applied in Barry v. Ashley Anderson, P.C., 718 F. Supp. 1492 (D. Colo. 1989).

Section 1-10 is applied in Powers v. Prof'l Rodeo Cowboys, 832 P.2d 1099 (Colo. App. 1992).

Section 1-10 (2) is applied in Maxwell v. W.K.A. Inc., 728 P.2d 321 (Colo. App. 1986).

Section 1-11 is applied in Herrera v. Anderson, 736 P.2d 416 (Colo. App. 1987); Todd v. Bear Valley Village Apts., 980 P.2d 973 (Colo. 1999).

Section 1-15 is applied in Herrera v. Anderson, 736 P.2d 416 (Colo. App. 1987); Ogawa v. Riley, 949 P.2d 118 (Colo. App. 1997).

Section 1-18 is applied in Baumann v. Rhode, 710 P.2d 493 (Colo. App. 1985); Conrad v. Imatani, 724 P.2d 89 (Colo. App. 1986); Coffee v. Inman, 728 P.2d 376 (Colo. App. 1986).

Section 1-19 is applied in Whaley v. Keystone Life Ins. Co., 811 P.2d 404 (Colo. App. 1989).