

CRCP 16.1: Simplified Procedure

An Important Tool in the Litigator's Toolbox

by Andrew LaFontaine

Litigation is, at best, an imperfect method for resolving disputes. Although the Colorado Rules of Civil Procedure (CRCP or Rules) are ostensibly geared toward providing a “just, speedy, and inexpensive determination of every action,” the value of a successful verdict can be outweighed by the time, money, and effort required to bring a case to trial. This problem is most acute in cases where the parties have limited financial resources and where the stakes involved are relatively small.¹ To address this concern, the Colorado Supreme Court recently instituted a major overhaul of the pre-trial process through its Colorado Civil Access Pilot Project (CAPP) initiative. With all the attention currently being paid to CAPP, however, it is easy to forget that a similar effort was undertaken back in 2003, with the result being CRCP 16.1, Simplified Procedure.

Simplified Procedure often gets short shrift, with many lawyers viewing it as a kind of procedural trap to be opted out of at the earliest possible moment. My colleague Stuart Jorgensen is among those who hold this belief. He argues in his counterpoint article that choosing to remain in Simplified Procedure is tantamount to malpractice. I submit that this view is incorrect. Simplified Procedure may not be appropriate in all cases, but in the proper circumstances, it can increase access to justice for plaintiffs and defendants alike.

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A Rule That's Ready for Retirement

by Stuart Jorgensen

I recently attended a presentation by a spokesperson for the Institute for the Advancement of the American Legal System (IAALS)¹ regarding the organization's work on the Colorado Rules of Civil Procedure (CRCP or Rules). I posed a short and straightforward question suitable for cross-examination: “What percentage of Colorado cases actually proceed under Rule 16.1?” I expected a numeric answer like “5%” drawn from available court data. As sometimes happens with experts, the response was wonderfully robust and informative, but there was no short numeric answer embedded anywhere in it.

Nonetheless, I learned that the judiciary doesn't track comparative statistics on Rule 16.1 usage—IAALS has manually gathered such information through a painstaking review of individual court records. I also learned that IAALS interviewed judges, litigators, and trial lawyers over many months, and that a comprehensive report on CRCP 16.1 would be published sometime in November 2012,² shortly after the deadline for writing this opinion article had passed. Alas, the very data and materials on which I had hoped to discover and employ for a well-informed discussion on the success or failure of Rule 16.1 would not be available while I was writing this counterpoint to Andy LaFontaine's article. I wanted to be well-armed with the facts when facing Andy, who is a very bright and capable attorney with law review experience and

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The Rationale Behind the Rule

As the prefatory language to Rule 16.1 makes clear, the goal of Simplified Procedure is “to limit discovery and its attendant expense.” This may seem counterintuitive at first glance. The popular conception is that lawsuits are a search for truth, and thus anything that furthers this search must be desirable. However, as every practicing attorney knows, litigation is conducted not in the exalted realm of Platonic ideals but in the messy and imperfect real world, where parties are constrained largely by their checkbooks. So powerful are these constraints that they give rise to an entire legal strategy—known as “scorched earth litigation”—whereby the better financed party is able to grind down the opponent through exhaustive pre-trial wrangling. These tactics need not rise to the level of impropriety to be effective. I would venture that we all can recall a case or three in which we were able to secure an advantage for our client simply by being unusually punctilious in applying the exist-

ing discovery rules. Any criticism of this approach can be easily turned aside with the refrain, “Just doing my job, ma’am.”

Given this state of affairs, the drafters of Rule 16.1 concluded that the standard discovery process was, in many ways, a sideshow that had taken over the circus. The drafters took special note of the fact that under the criminal justice system—where the stakes are every bit as high as in the civil system—discovery is the exception rather than the rule. Why should a run-of-the-mill bodily injury claim involve a protracted discovery period when a violent assault does not? Chief Justice Luis Rovira made the point nicely when, in a hearing on a prior revision to Rule 16, he asked, “Why don’t we do away with discovery completely? Why don’t we just file our complaints and go to trial, like we used to?”²

Simplified Procedure does not go that far, but rather charts a middle course between the civil and criminal systems. Parties are required to make full initial disclosures, which must be signed under oath by the parties themselves.³ These disclosures are buttressed by a provision that allows parties to designate specific information or documents they believe should be part of the other side’s disclosures.⁴ Additional mandatory disclosures are required in personal injury⁵ and employment cases, which can be avoided only by moving for a protective order.⁶ Although standard discovery is prohibited, requests for production and independent medical examinations are permitted.⁷

Before trial, parties must provide a “detailed statement of the expected testimony” of each of their witnesses and the “expected subject matter” of the testimony of all hostile witnesses. Trial testimony then is limited to matters identified “in reasonable detail” by these disclosure statements.⁸ Recognizing that even small cases can require opinion testimony, expert witnesses are permitted, and their opinions are subject to the standard disclosure requirements of CRCP 26(a)(2).⁹ Finally, exhibits are deemed admitted unless there is a timely objection.¹⁰

A Breakdown of the Benefits

Simplified Procedure provides several advantages over the default rules. For the plaintiff, it eliminates the expensive and time-consuming discovery period, and provides an expedited trial date.¹¹ For the defendant, it caps the plaintiff’s recovery at \$100,000, while also helping to control bills of costs.¹² In addition, it allows both sides to introduce depositions in lieu of live testimony at trial, which can greatly simplify the process of witness scheduling and avoid duplication of expert fees.¹³

Perhaps the most overlooked aspect of Simplified Procedure is its flexibility. Parties can elect for inclusion into the rule, even if the case is not one for which it would automatically apply.¹⁴ When parties elect inclusion in this fashion, the cap on damages is removed, allowing even very large cases to be tried simply and quickly. Parties can conduct discovery by agreement, allowing the rule to be used even in lawsuits where the parties may lack some essential piece of information necessary to present their case, but still wish to avail themselves of the other advantages of the rule.¹⁵ The cost of such voluntary discovery is not taxable as costs.¹⁶ Finally, if circumstances change and the continued application of

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a penchant for being amply prepared when facing his opponents. That's why I hired him!

Perhaps it is fitting that I am asked to debate Rule 16.1 with Andy in a "just, speedy and inexpensive" manner (or "half blind") by the "earliest possible" deadline (that is, before I can get my hands on good facts). As I go out on a limb with this opinion piece before the court of public opinion, I console myself with the knowledge that, although I remain ignorant of the facts contained within the pending IAALS publication, I have been freed from the "attendant expense" and effort associated with gathering such relevant and potentially dispositive facts.

A Unanimous Rejection of the Rule

I estimate that Rule 16.1 has been trounced by Rule 16 year after year in a side-by-side "taste test," with about 95% of consumers taking the extra steps and effort needed to choose the competing brand. Yet, Rule 16.1 stubbornly clings to its self-image as the best choice in the marketplace of ideas.

Among active trial lawyers, Rule 16.1 has become an exemplar of an idea paved with the best of intentions but woefully out-of-touch with the actual destination to which it leads us. Nonetheless, Rule 16.1 has forged some common ground among most opposing counsel—we join in our rejection of it! Plaintiffs reject it because it creates the danger of malpractice claims. Defendants reject it because it eliminates highly efficient discovery tools that effectively cure memory lapses. Both sides reject it because it eliminates short, effective discovery that actually leads to settlement and avoids the expense of trial.

Threat of Malpractice

When Rule 16.1 first emerged eight years ago, I was somewhat concerned that the dual signature requirement did not fully appreciate my professional relationship with my clients.³ I also thought it might create needless logistical problems for clients who preferred the competing provisions of Rule 16 but were difficult to contact. I quickly shelved my concern when all but a very small number of personal injury plaintiffs and their attorneys began opting out before I had the opportunity to discuss the issue with my own clients. But why? Why would my opposing counsel almost unanimously opt out of Rule 16.1 to subject themselves to the dreaded "scorched earth" tactics suggested by Andy LaFontaine and so feared by the authors of Rule 16.1?

Many of my friends on the other side of the courtroom have shared the answer with me. They confide that they opt out of 16.1 to avoid the danger of malpractice claims by disgruntled clients, suddenly armed with the pecuniary wisdom that only hindsight can achieve when the court reduces a verdict to the hidden \$100,000 cap after a jury awards more.⁴ Apparently, the possibility of a disgruntled client with hindsight is more fearsome than the possibility of "scorched earth" tactics.⁵

However, this is not the only reason most plaintiffs opt out. There are plenty of other good reasons to avoid the path of Rule 16.1.

Bipartisan Desire for Basic Discovery

With misplaced pride, Rule 16.1 boldly announces, "The purpose of this rule is . . . to limit discovery and its attendant expense."⁶

It then effectively eliminates most true discovery depositions, including those of parties and experts.⁷ Rule 16.1 boldly limits the very thing that most personal injury parties actually need—face-to-face discovery. Then it brashly boasts that this is good.

Rule 16.1 fails to recognize that basic discovery actually benefits both sides in most cases. Rather than assume the worst motivation among parties, the authors of the rule just as easily could have assumed the best of motivation behind the desire for basic discovery. A deposition provides an opportunity to meet the other side and gather fundamental verbal and nonverbal information in a short amount of time. In minutes, an artful deposition of an opposing party or expert can lead to settlement that avoids the much greater expenditure of time, effort, and resources needed to prepare for and conduct a three-to-five day jury trial. Most attorneys prefer to discern these truths and facts after a couple of short depositions, rather than spending two weeks of trial preparations and performance where \$100,000 is at stake.

Defense Need for Discovery

Andy LaFontaine, along with the authors of Rule 16.1, may consider the "search for truth" with fundamental discovery tools to be naïve and overly optimistic. After all, litigation can be a gritty, grinding business where motivation is not always pristine and Platonic. Andy notes that most trial attorneys have experienced an opposing counsel "or three" who can be "unusually punctilious" at times. Those are the exceptions, not the rule. Frankly, when this happens, the power of discovery becomes absolutely indispensable. The rule would be naïve to suggest otherwise.

My suspicion, after asking the IAALS representative my question and before digesting the IAALS report, was that Rule 16.1 has been successful for niche cases where both sides have relatively equal access to full information about the issues in dispute, such as in employment, rental, or contract cases. With good intentions, the rule innocently attempts to create this same equality through mandatory disclosures rather than through discovery. Rule 16.1 presumes that if it doth decree it, litigants will have no choice but to fully disclose five years of health-care information or ten years of employment information.⁸ The rule suggests that if it makes

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Simplified Procedure would be unfair, the parties may request that the court return the case to the standard rules.¹⁷ Termination will be granted only on a showing of good cause, but this provides a “safety valve” to ensure that litigants are not prejudiced by the use of Simplified Procedure due to forces beyond their control.

Attorney Resistance

Despite the advantages that Simplified Procedure offers, some lawyers still may be reluctant to use CRCP 16.1, even for cases that would otherwise be suitable candidates. This reticence is understandable. In a profession as hidebound as ours, there can be a strong temptation to go with what you know. There are powerful financial disincentives, as well. Plaintiffs' attorneys may not want to risk leaving money on the table at trial, while defense attorneys may be loath to forego the lucrative discovery phase of the case. Although my able opponent treats this “bipartisan” resistance to Simplified Procedure as evidence that the rule is ill conceived, I believe it highlights a fundamental misunderstanding of why the rule exists in the first place.

A lawyer evaluating the merits of Simplified Procedure must remember that his or her first duty is always to the client. Because a Notice to Elect Exclusion requires a client signature, the lawyer must be prepared to explain to the client how opting out advances the client's interests and not simply the lawyer's interests. If this explanation cannot be readily provided, then the case is probably

one that should stay in CRCP 16.1. For example, if a clear-eyed evaluation of the case shows that there is little realistic possibility of recovering more than \$100,000 in damages, then a plaintiff's attorney should not subject the client to invasive discovery to gamble on an indeterminate award. Similarly, if a defense attorney already has all the information necessary to present the case (or can obtain this information through the other side's disclosures), then the impulse to “leave no stone unturned” may serve only to run up unnecessary fees while subjecting the client to greater exposure at trial. Attorneys who opt out without first carefully considering the merits of each individual case run the risk of putting their own interests ahead of those of the client.

Conclusion

It's time to stop treating Simplified Procedure as a trap to be avoided and to start giving it the credit it deserves. The Supreme Court might even consider indexing the \$100,000 damage cap to inflation, thereby ensuring that the rule does not get left behind with the passage of time. In the right case, Rule 16.1 can be a powerful tool for controlling costs, and it belongs in every civil litigator's toolbox.

Notes

1. Holme, “Back To The Future—New Rule 16.1: Simplified Procedure For Civil Cases Up To \$100,000,” 33 *The Colorado Lawyer* 11 (May 2004), available at www.cobar.org/tcl/tcl_articles.cfm?articleid=3427.

2. *Id.*

3. CRCP 16.1(k)(1)(a).

4. CRCP 16.1(k)(1)(B)(iii).

5. A plaintiff is required to disclose records not only from providers seen for complaints related to the body part(s) in question, but also from all health-care providers seen within five years of the date of injury.

6. CRCP 16.1(k)(1)(B)(i) and (ii).

7. CRCP 16.1(a)(2).

8. CRCP 16.1(k)(7).

9. The disclosure of expert testimony is due nine weeks before trial, which is significantly later than the eighteen weeks provided by the standard rules. This difference can be explained by the fact that, under Rule 16.1, there is no need for extra time to conduct expert depositions.

10. CRCP 16.1(k)(6).

11. CRCP 16.1(g) and (i).

12. CRCP 16.1(c).

13. CRCP 16.1(k)(4). Under the standard rules, a deposition is admissible at trial only if the witness is unavailable. CRE 804(b)(1).

14. CRCP 16.1(e).

15. CRCP 16.1(k)(9).

16. *Id.*

17. CRCP 16.1(l). ■

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such a decree, then defendants no longer have any legitimate reason to conduct discovery other than to harass plaintiffs, drive up fees and expenses, and otherwise “scorch the earth.”

The reality for most personal injury defendants is that they lack access to a plaintiff's relevant medical and employment information, and need discovery tools to pry loose the truth, because the disclosure rules are naïve and toothless. Most defendants find a small number of discovery depositions to be indispensable in the search for hidden truth. Disclosures often are incomplete, either because of an honest memory lapse by a plaintiff or an honest lack of incentive for the plaintiff's attorney to probe his or her client's initial comments and production. I have been told by opposing colleagues that they consider it malpractice to probe their clients for information as thoroughly as defense counsel might. If they don't know about a particular medical provider, they won't have to disclose it. If they don't disclose it, the defense likely will never know about it. If the defense should happen to discover the existence of a previously undisclosed provider, that record either can be disclosed or protected in a privilege log. In reality, by limiting discovery and sweeping the parties to a quick trial, a defendant likely will never learn about missing records.

If the fact of a record is revealed at trial, then it's too late to do anything about it. Ignorance becomes a low-risk option! Unfortunately, as much as Rule 16.1 would like us to believe otherwise, sometimes a plaintiff—unbeknownst to his or her counsel, of course—actually might commit an intentional and wrongful omission or misrepresentation that can be revealed only with a pre-trial deposition where the plaintiff or his expert faces unknown questions and must provide answers that are not carefully scripted in advance.

Also, don't forget about the “f-word” that professors tried to beat out of us in law school: fairness. When a plaintiff sues for as much as \$100,000, isn't it fair and reasonable to ask that person to answer a few questions under oath before trial? Isn't it fair to pose a few questions to a driver who injured another person but denies he was careless? A party who wants to depose an expert should be able to decide for herself whether to do so, no matter how much it is considered to be a bad idea according to Rule 16.1. The rule may be well intended, but it lacks respect for a party's ability to decide what is best for his or her own self. It lacks respect for the integrity of attorney-client discussions. It's not surprising that most defendants are not particularly thrilled with the opportunity afforded by Rule 16.1 to risk \$100,000 at trial without the right of basic discovery.

Imagine similar stakes and restrictions in other circumstances. For example, when the State of Colorado selects a new judge at a salary of roughly \$100,000, would the selection committee be satisfied with a rule that forbids candidate interviews and forces it to submit three names to the governor based solely on a review of the written information disclosed in the carefully crafted *curricula vitae*? After all, the process saves on “attendant expense” and provides “maximum access” to the courts for those candidates who have already provided all the information the committee really needs to know. Perhaps parents should make the tough decision

about which college will receive their \$100,000 investment to educate their child based solely on the school's carefully prepared promotional materials. Campus inspections, course audits, and interviews with school officials are no longer needed with this speedier and less expensive process. Should a car buyer be forced to make a \$20,000 purchase based on the shiny pamphlets from car-makers? Forbid those pesky pre-purchase test-drives and questions. After all, it saves time and money, and surely the car dealer will provide all the information necessary for a good decision. If it makes little sense to select judges, schools, or cars in this manner, it makes little sense to force litigants into court without a reasonable opportunity to discover the truth before risking large sums of money.

Conclusion

If the measure of a rule's success can be found in the measure of its use, then Rule 16.1 is a clear failure except for a few small niches. Parties routinely opt out of its benevolent protective measures, yet the rule still makes itself the default choice for everyone. Like Bette Davis's “Baby Jane,” it clings to its own false image of adorability long after it should have been retired. After eight years of opting out, parties on both sides routinely bypass Rule 16.1 as an ineffective, out-of-touch path—because they actually know better.

Notes

1. The Institute for the Advancement of the American Legal System (IAALS) is available online at iaals.du.edu.

2. The report, entitled “Measuring Rule 16.1: Colorado's Simplified Civil Procedure Experiment,” is available on the IAALS website at online.iaals.du.edu/2012/11/28/new-iaals-study-asks-and-answers-what-has-happened-with-rule-16-1-in-colorado.

3. CRCP 16.1(d) allows an exclusion only if the notice is “signed by the party and its counsel.”

4. CRCP 16.1(c) mandates:

The jury shall not be informed of the \$100,000 limitation. If the jury returns a verdict for damages in excess of \$100,000, the trial court shall reduce the verdict to \$100,000.

5. It should be noted that there are possible cures to the “disgruntled client” phenomenon. Rule 16.1 could allow juries to be informed of the \$100,000 cap in much the same way juries are informed of the \$15,000 cap in county court. The state also could use an official election-for-exclusion template with an explicit waiver of any malpractice claim associated with the choice of remaining under Rule 16.1.

6. CRCP 16.1(a)(1).

7. CRCP 16.1(k)(4) stipulates that any lay or expert witness who has been deposed cannot present live trial testimony. This rule fails to recognize the difference between a discovery and trial testimony, and fails to recognize that editing a discovery deposition for trial will not result in any savings of time or cost.

8. CRCP 16.1(k)(1)(B)(i) decrees:

In actions claiming damages for personal or emotional injuries, the claimant shall disclose the names and addresses of all doctors, hospitals, clinics, pharmacies and other health care providers utilized by the claimant within five years prior to the date of injury. . . .

For employment claims, “the claimant shall disclose” employment information for the last ten years. CRCP 16.1(k)(1)(B)(ii). ■