New Pretrial Rules for Civil Cases—Part II: What is Changed

by Richard P. Holme

Effective July 1, 2015, the Colorado Supreme Court has adopted a series of amendments to the Colorado Rules of Civil Procedure designed to significantly reduce the cost of and delays in litigation and to create a new culture for the handling of lawsuits. The amended rules will increase involvement of judges to establish early and personal judicial oversight of pretrial activities; provide for expedited discovery motions; change the breadth of required disclosures; limit discovery to what is needed, not what is wanted; limit expert discovery; clarify obligations when responding to interrogatories and requests for documents; and strengthen judges' ability to award sanctions for noncompliance with these rules. The newly amended rules are available at www.courts.state.co.us/Courts/Supreme_Court/Rule_Changes/2015.cfm (click on Rule Change 2015(05)).

These revised pretrial rules will apply only to cases filed on or after July 1, 2015. Cases filed before then will continue to be governed by the older rules.[1] This article explains, for both judges and lawyers, the nature of and justification for the changes and how the changes endeavor to foster a new culture and paradigm for handling civil cases in a way that will be faster and less expensive, while preserving the necessary search for and applicaton of justice.

Reasons for the Changed Rules

With the approaching termination of the Civil Action Pilot Project (CAPP) in early 2014, the Colorado Supreme Court asked its Civil Rules Committee to consider what should be done with those rules. The Civil Rules Committee appointed a subcommittee that considered and recommended a number of amendments to the rules,[2] which were discussed, modified, and approved by the entire Committee. The Supreme Court solicited written comments, held a public hearing to discuss the proposals, and adopted the recommended amendments with a few changes.

The reasons for these changes arose in conjunction with a dramatically increased nationwide recognition of the problem and the need for revised rules. The proposed rules were described in the April 2015 article in *The Colorado Lawyer*[3] ("Part I: A New Paradigm"). The primary influences on the changes were (1) the changes to the Federal Rules of Civil Procedure (Federal Rules) recommended by the federal Judicial Conference Committee on Rules of Practice and Procedure, which are expected to be effective December 1, 2015;[4] and (2) the June 30, 2015 expiration of CAPP for the handling of business actions applicable in five of the Denver metropolitan counties.[5] The more specific reasons and justifications for substantive changes in Colorado's various amended rules are discussed below. The amendments contain a number of other organizational and non-substantive technical and conforming changes that are not detailed in this article.

It is significant that the Supreme Court has adopted not only the revised rules (New Rules) discussed below, but also a set of Comments that are published along with the New Rules. Thus, interpretation of the New Rules, if necessary, should begin with an analysis of any pertinent provisions of the Court's "2015 Comments."

Rule 1—Scope of Rules

Other than the belated removal of the reference to the "Superior Court," gone for so long that most readers will have never heard of it,[6] the reason for amending Rule 1 was to make clear the intended breadth of its impact. Thus, securing "the just, speedy, and inexpensive determination of every action" is no longer simply a basis for "liberal construction" of the Civil Rules. As amended, Rule 1 now requires that the rules are also to be "*administered and employed* by the court *and the parties*" to achieve a just, speedy, and inexpensive determination of all cases. (Emphasis added).

The amended language in Rule 1 is taken verbatim from the change recommended for Federal Rule 1. As explained by the federal Advisory Committee on Civil Rules (Advisory Committee), a significant reason for bringing parties under the requirements of Rule 1 is to emphasize the need for the parties, and their counsel, to cooperate with each other to bring about the expeditious and effective processing of cases.[7]

No one challenges the proposition that litigation moves much more smoothly, quickly, and efficiently when parties, and especially the lawyers, cooperate with each other in handling lawsuits. Although it is difficult to legislate civility, with the broadening of

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Rule 1's applicability, lawyers can expect courts to remind them regularly of the importance—and effectiveness—of cooperating among themselves.

Rule 12—Defenses and Objections

The changes to Rule 12 are largely cosmetic. Rule 12(a) is broken into several subsections to make its provisions somewhat easier to find and read. Also, a number of changes were made to amend gender-based terminology.

It is noteworthy, however, and consistent with the aim of making litigation more just, speedy, and inexpensive, that the 2015 Comment to Rule 12 also pointedly notes that, "The practice of pleading every affirmative defense listed in Rule 8(c), irrespective of a factual basis for the defense, is improper under C.R.C.P. 11(a)." The 2015 Comment notes that defenses may be pleaded only if well founded in fact and warranted by existing law or a good-faith argument for changing existing law. If an adequate basis for a defense is subsequently discovered, a defendant may then move to amend the answer to add it.

Rule 16—Case Management

The case management provisions of Rule 16(b) through (e) are largely rewritten, and the central focus of case management has been significantly changed. The primary change has been to involve the trial judge in case management personally and actively from an early stage of the case. As noted in "Part I: A New Paradigm" in describing the proposed amendments to the Federal Rules, the federal Advisory Committee said, "What is needed can be described in two words—cooperation and proportionality—and one phrase—sustained, active, hands-on judicial case management."[8] Likewise, this judicial involvement and oversight were crucial and widely appreciated aspects of CAPP by both lawyers and judges.[9] Early, active judicial case management is also an important factor emphasized by leading judges nationwide.[10]

Early judicial involvement should include review and discussion of a number of matters, depending on the individual case. It can and should include identifying pleading and discovery issues proportional to the needs of the case, narrowing the claims and defenses, focusing and targeting discovery, establishing limits on allowable discovery, emphasizing the expectation that parties must cooperate civilly and efficiently, and setting a firm trial date.[11]

New Rule 16 provides that the initial case management conference will be held within forty-nine days of the at issue date of the case.[12] There is nothing in the Rule, however, that precludes a judge from initiating an earlier, in-person (or telephonic or video) status conference. Indeed, a number of judges use such early conferences.[13] There are several matters that can be accomplished at such an early status conference and probably within about fifteen minutes. For example, the court can impress on the parties its view of the importance that counsel cooperate and maintain civility; and in smaller cases, it can urge the parties to give serious consideration to using Simplified Procedure under Rule 16.1 as a means of avoiding the need to prepare a proposed case management order (proposed order). (One of the reasons Simplified Procedure was successful during its pilot phase, under Judges Harlan Bockman and Christopher Munch, but was not as successful later, was that the pilot judges specifically urged parties to use simplified procedure, but subsequent judges generally have not affirmatively encouraged its use.) The court can also urge parties to demonstrate genuine cooperation and to agree on appropriately proportional discovery in their proposed order so they can avoid the necessity of a subsequent initial case management conference, as provided in Rule 16(d)(3). Additionally, the court can encourage reducing unnecessary claims and defenses, as well as targeting initial discovery on a key issue or issues in the case.

To facilitate meaningful case management, the parties will need to communicate early in the case to prepare a proposed order that will provide the court the basic information it needs to meaningfully participate. The new Rule 16 also anticipates an expanded use of oral motions and the potential for more regular contact between the parties and the judge to keep the case moving efficiently.

The revisions to Rule 16 reflect several matters learned both from CAPP and from the case management experience of the members of Civil Rules Committee. Under CAPP, case management conferences were to be attended in person by lead counsel;[14] they were to be preceded by a fairly extensive report of pertinent matters; and they were then followed by a case management order from the judge.[15] Thereafter, courts were instructed by CAPP to provide "active case management," including prompt conferences by telephone if permitted by the court.[16] Firm trial dates were to be set at the case management conference and not changed absent extraordinary circumstances.[17]

After more than two years of experience with CAPP, the Institute for the Advancement of the American Legal System (IAALS) at the University of Denver published its report of the case data and experience of lawyers and judges with CAPP based on surveys, interviews, and reviews of case filings.[18] For lawyers, "CAPP's focus on early, active and ongoing judicial management of cases received more positive feedback than any other aspect of the project."[19] Similarly, judges found that the initial case management conference was "the most useful tool for determining a proportionate pretrial process."[20]

The use of the "presumed case management order" was adopted by the Colorado Supreme Court in 2002 as a means of reducing the time attorneys spend preparing individual proposed orders. Nonetheless, the intervening years have shown that it also isolated the judges from involvement in the early and frequently most expensive and time-consuming aspects of litigation. The presumed case management order also had the somewhat perverse effect of disengaging the lead trial lawyers from much thought or collaboration with opposing counsel about the genuine needs of the case. Thus, in some cases, much of the pretrial disclosure and discovery was left in the hands of junior lawyers with less experience and little or no independent responsibility and accountability to the judicial system. The prevailing culture of "leave no stone unturned regardless of the cost" remained unchanged.

Prior to the current amendments, Rule 16(b) normally meant that no case management order would be issued by the court. The Rule itself became the "presumptive" order, unless the parties filed either a stipulated or disputed case management order within forty-two days of the at-issue date. Experience suggests that having an actual court order improves compliance with the discovery terms and is easier to enforce, when needed. Without judicial awareness of pretrial activities, lawyers' financial incentives and concerns about protection against possible future malpractice claims meant that many cases proceeded on a "give us everything" basis without independent oversight and supervision.

Although Rule 16(b) focuses on the initial case management conference, courts and parties should note that nothing in this rule prevents additional status conferences when the need becomes apparent. Indeed, in complex cases, it may be desirable to have regularly scheduled status conferences (for example, "3:30 p.m. on the last Friday of every month") to deal with new issues that may have arisen or to determine which conference can be cancelled if no new problems have arisen that would benefit from the court's participation and oversight.

Rule 16(a)—Purpose and Scope

First, and importantly, the Civil Rules Committee did not revise Rule 16(a). The message and meaning of that section remain significant and should create the environment for the remainder of Rule 16 (and all other pretrial matters).

> (a) Purpose and Scope. The purpose of this Rule 16 is to establish a uniform, court-supervised procedure involving case management which encourages professionalism and cooperation among counsel and parties to facilitate disclosure, discovery, pretrial and trial procedures.

This purpose carries added weight and reemphasizes the expansion of Rule 1's requirement that court and parties now also administer and employ these rules to secure the just, speedy, and inexpensive determination of every action.

Rule 16(b)—Case Management Order

This section of Rule 16 has been completely revised. The parties must now prepare and submit to the court a proposed order not later than forty-two days after the case is at issue. There is now an approved form—JDF 622—that can be downloaded and filled in to comply with this requirement. The proposed order is to be submitted in editable format so that the court can make whatever amendments to the proposed order it deems to be appropriate and desirable. It is expected that many proposed orders will have attached pages providing the information requested in the form. Also, when the parties are not in agreement on certain issues, each party must supply on the form its own version of the information sought by any particular inquiry.

Although there are a number of items of information that must be included, the judges who had experience with the use of a detailed form under CAPP[21] have concluded that the greater amount of information was necessary for them to effectively provide guidance at the case management conference. While the required information will necessitate more thought and more conferring at the outset of the case by parties and their counsel, this information should, in any event, be discussed early in the case if the goal of just, speedy, and inexpensive is to be approached. Furthermore, although some lawyers complain that preparation of this information is unnecessary "front-loading" of expense, counsel and parties will need this same information to evaluate and expedite any possible settlement or to consider the wisdom of proceeding to trial.

Each of the requirements contained in revised Rule 16(b) is described below. Readers are cautioned to read the text of the rules, because not all details of each subsection are discussed.

Rule 16(b)(1)—At-issue date. The at-issue date still triggers the timing requirements of the proposed order, initial disclosures, and discovery. The at-issue date remains the day when all parties have been served and all Rule 7 pleadings have been filed, or defaults or dismissals have been entered. The at-issue date is included in the proposed order for the court's information.

Rule 16(b)(2)—Responsible Attorney. As in the prior Rule 16(b)(2), the responsible attorney is charged with organizing and preparing the proposed order and the steps leading to the preparation of that order. Normally, the responsible attorney will be plaintiff's counsel, unless the plaintiff is *pro se*; in that case the responsible attorney may be the defendant's counsel. The proposed order must identify the responsible attorney and provide contact information for the court's use.

Rule 16(b)(3)—Meet and Confer. Within two weeks of the at-issue date, lead counsel and unrepresented parties are to confer about the case and the proposed order. The rule specifically calls for these conferences to be person-to-person ("in person or by telephone") so that ordinary e-mails are insufficient to comply. Indeed, it is anticipated that preparing proposed orders may require multiple conferences and meetings. To ensure these conferences take place in a timely fashion, the rule also requires that the proposed order list the dates and identities of persons participating in those conferences. The conferences are held to discuss the basis for the claims and defenses, anticipated initial disclosures, the proposed order, and possible dates for the case management conference. The responsible attorney, who has arranged the conference, must obtain a date for the case management conference from the court. This sounds like a lot of time and effort, but if started in a timely fashion (and much can be done even before the final pleadings are filed), it should normally be easy to accomplish, because the time between the at-issue date and the case management conference can be up to seven weeks, and the proposed order does not have to be filed until one week before the case management conference.

Rule 16(b)(4)—Description of the Case. To advise the court of the nature of the case, each party must prepare a one-page (double-spaced) description of the case, including identification of the issues to be tried. Obviously, this is not intended to be a detailed factual recitation or a regurgitation of the entire complaint. It simply needs to be enough for the court to tell, for example, whether this is a single or multiple car accident, an antitrust case, or a building defect dispute. If publishers such as West Publishing can summarize a case decision in a paragraph or two, it was felt that parties to the litigation should also be able to describe the case succinctly.

Rule 16(b)(5)—Pending Motions. When there are motions under Rule 12 or otherwise that have not been resolved or ruled on when the proposed order is submitted, they are to be listed so the court will be reminded of them. Parties should be prepared to argue or discuss those motions at the case management conference, even if the time for full briefing has not expired. The court may decide them at that time, either by written order or orally from the bench.

Rule 16(b)(6)—Evaluation of Proportionality. For other than smaller, routine cases, this may be one of the more important parts of the proposed order. It will not be unusual for one of the major topics of discussion at the case management conference to be the proportionality of desired discovery, with the court deciding how much discovery is appropriate under the circumstances of the case. To the extent that the parties are seeking either more discovery than the limits set out in Rule 26(b)(2) or are seeking to limit even that discovery, this is the portion of the proposed order in which to address those issues. Parties should at least discuss the propor-

tionality considerations listed in Rule 26(b)(1) that are relevant to the case at hand. These may include: (1) the importance of the issues at stake in the action, (2) the amount in controversy, (3) the parties' relative access to relevant information, (4) the parties' resources, (5) the importance of the discovery in resolving the issues, and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit. Individual cases may have additional matters that a court should consider, and they should be identified in this section of the proposed order.

Rule 16(b)(7)—Initial Exploration of Prompt Settlement and Prospects for Settlement. The parties are required to discuss possible settlement, describe the prospects for settlement, and provide future dates for mediation or arbitration. Experience shows that more than 95% of the cases will not go to trial, so this requirement merely reflects that reality and seeks to have the parties start the discussions earlier rather than later. The discussion may also be helpful in organizing discovery. For example, if the defendant believes that liability is probably going to be established but that it needs to understand the plaintiff's damages before settlement discussions are likely to be useful, the parties or court may suggest phasing discovery to focus on damages before going into all other areas. This way, settlement can be reopened before unnecessary sums are spent on less pertinent issues. Thus, in this example, proposed dates for settlement could be set for shortly after the projected date for completing discovery on damages.

Rule 16(b)(8)—Proposed Deadlines for Amendments. This provision moves the date for amending pleadings and adding parties up to two weeks from the deadline in prior Rule 16(b)(8). However, if this deadline is unnecessary or can be moved sooner to the case management conference, that fact should be addressed in this portion of the proposed order. The justification for fifteen weeks following the at-issue date is: seven weeks for the case management conference, five weeks for the first set of discovery responses, and three weeks to prepare any amendments. Of course, nothing prevents parties from taking depositions to investigate this subject following the case management conference or requesting expedited written discovery responses related to this issue. Parties should be prepared for the possibility that the court may not believe that much time is needed and may expedite this deadline to keep the case moving.

Rule 16(b)(9)—Disclosures. The parties' initial disclosures under Rule 26(a)(1) are due twenty-eight days following the at-issue date—that is, three weeks before the case management conference deadline. The proposed order must state when those disclosures were actually made and when the documents were produced. Because parties sometimes disagree on whether the disclosures are complete, this proposed order requests that any objections to the other parties' disclosures be addressed here. This way, there is a significant likelihood that the judge can rule on those issues at the case management conference without further delay. Indeed, Rule 26(a)(1) specifically prohibits filing motions objecting to allegedly inadequate disclosures prior to the case management conference. This is required because the adequacy of disclosures normally can be more easily addressed in person at the case management conference at the same time the court is considering issues of proportionality.

Rule 16(b)(10)—Computation and Discovery Relating to Damages. Rule 26(a)(1)(C) requires (and has for years) disclosure of categories of damages, a computation of damages, and supporting documents. That requirement is not changed in the New Rules. However, experience has shown that frequently claimants will assert that they have not been able to establish those calculations or to have gathered the supporting documents. Because this information is often crucial to resolving the case through settlement discussions, this new provision demands at least that if the disclosures have not been made, the claiming party must explain why it was unable to provide the disclosures as required and when it expects that it can produce those disclosures and documents. If the court believes the delay does not result from inability to provide the damages or that the delay is too distant, it may well shorten those time limits when it issues the case management order.

Rule 16(b)(11)—Discovery Limits and Schedule. This provision essentially incorporates the presumptive limits on discovery contained in Rule 26(b)(2), although it expressly permits parties to request more or less discovery and allows the court to either increase or decrease those limits after considering the proportionality factors in Rule 26(b)(1). Parties should expect to be asked to support any changes in discovery when they attend the case management conference. The changes in authorized discovery may not only impact numbers of deponents or allowed hours of depositions, but might also limit the number of interrogatories, requests to produce documents, or requests for admissions. Before attending the case management conference, parties should think about what specific written discovery they might want, especially interrogatories and requests for admission, because some judges and lawyers believe that such discovery is often unproductive or not proportional.

This provision also establishes that discovery may not commence until the case management order is served. This delay is incorporated to allow the court to expand or limit discovery before the parties begin under possibly erroneous assumptions as to what discovery will be allowed or limited. Likewise, the deadline for discovery is set for not later than forty-nine days before trial—a date the court can alter if appropriate.

A provision relating to discovery limits allows the court to consider limits on awardable costs. For example, a court might include in the order that it will not allow recovery of videotape charges for depositions, travel costs for out-of-state depositions of relatively unimportant witnesses, or travel costs for the depositions that could be taken telephonically. The parties can consider how badly they really need that discovery.

Rule 16(b)(12)—Subjects for Expert Testimony. This subsection asks the parties to identify subject areas for anticipated expert testimony both for retained experts and for percipient witnesses of facts who may also be asked to provide opinion testimony (such as the investigating police officer, the attending physician, or a party's accountant). If parties on one side of a case are seeking more than one retained expert per subject, they must show the good cause for them, consistent with proportionality. (A case for negligent heart surgery may justify more experts than a case for negligent setting of a broken arm.) Sometimes, parties on one side of the case may have different perspectives and need additional experts, which this provision allows. For example, plaintiffs in medical malpractice cases may sue hospitals, nurses, and doctors, each of whom may want to have available expert testimony as to why they are not liable but other defendants might be. The same problem can be routinely expected in building defect cases.

Rule 16(b)(13)—Proposed Deadlines for Expert Disclosures. Expert disclosures are to be made within the time limits established in Rule 26(a)(2)(C), unless some different date is set in this subsection. For example, it might be expeditious for discovery to focus on liability at the outset and, therefore, to have liability experts provide their disclosures early so parties can attempt to settle or so the court could consider summary judgment on that issue before the parties undergo the entire panoply of discovery.

Rule 16(b)(14)—Oral Discovery Motions. A significant number of judges have found that requiring discovery disputes to be presented on short notice and orally is much faster, cheaper, and more efficient than using an extended written motion briefing schedule and then plowing through dozens of pages of briefs.[22] Other judges require that motions be written and fully briefed. Because of the substantial potential savings in time and expense of oral motions, it was felt desirable to bring this issue to everyone's attention and to have the judge advise the lawyers of the judge's practice in this respect. If the lawyers are not already aware of the court's procedures, they should leave unmarked the choice of "(does)(does not) require discovery motions to be presented orally" in the proposed order. The judge can then mark out the inappropriate one or may insert a more extensive description of the judge's desires concerning discovery motions.

Rule 16(b)(15)—Electronically Stored Information. The federal courts have tended to impose exhaustive and frequently onerous requirements on parties with respect to preservation, production, and handling of electronically stored information (ESI).[23] The Colorado Civil Rules Committee on the other hand has been reluctant to impose specific requirements on all Colorado cases primarily because more than 50% of the civil cases seek relief of under $100,000 and very few seek as much as $1 million. Thus, while cases will almost inevitably have some information that is in the form of ESI, a large proportion of those cases in Colorado courts will not involve unusual amounts of relevant ESI, and parties acting in good faith can normally find it easy to agree on and produce that information.

Where, however, it appears early in the case that a significant amount of the discoverable ESI will be involved, the parties must discuss, attempt to resolve, and report in the proposed order (1) issues of any search terms that should be used; (2) production, preservation, and restoration of ESI; (3) the form of production (for example, native format, with or without metadata, etc.); and, if significant, (4) an estimate of the related cost of such production. Here, as in many aspects of litigation, genuine cooperation and communication among counsel can save thousands of dollars, weeks or months of time, and substantial brain damage to all concerned. This provision does not attempt to draw a sharp line between whether and when such details are to be included, because this decision must be made on a case-by-case basis. Whatever is decided, the parties should expect to be asked about it by the judge at the case management conference.

Even if discovery of ESI is relatively simple and noncontroversial, it is important to address this topic soon after the case is at issue so the parties can understand what problems, if any, might be anticipated. Even an agreement that the parties will work together and do not need special provisions can smooth the way for better cooperation, less time, and less expense.

Rule 16(b)(16)—Trial Date and Length of Trial. The parties should discuss and report on their sense as to when they expect to complete discovery, as well as the expected length of the trial itself. In most cases, the parties should expect that the court will set a trial date during the case management conference. However, some courts decline to set trial dates until the completion of discovery or some other date further into the case preparation. This provision allows for both situations. Still, most judges expect that the case will be tried on the first trial date, so parties should not count on easy or automatic extensions of a trial date.

Rule 16(b)(17)—Other Appropriate Matters. This portion of the report is simply a catch-all for other issues unique to the particular case.

Rule 16(b)(18)—Entry of Case Management Order. Once the proposed order is prepared for filing, lead counsel are to approve and sign it before filing. After the case management conference and after reviewing and making any changes the court deems necessary or appropriate, the court shall sign the document, at which time it will become the official case management order and will bind the parties thereafter, unless modified pursuant to Rule 16(e).

Rule 16(c)—Pretrial Motions

The provisions of the prior Rule 16(c) (modified case management orders) are completely deleted because that section related to modifications of presumptive case management orders, which have been repealed. Modification of those orders is now moot. In its place, the provisions of former Rule 16(b)(9) have been moved verbatim to Rule 16(c). Thus, the need to file pretrial motions and motions *in limine* thirty-five days before trial, summary judgment motions ninety-one days before trial, and challenges to the admissibility of expert testimony seventy days before trial remain intact.

Rule 16(d)—Case Management Conferences

Again, because the prior version of this section related to resolution of disputed modified case management orders, or specially requested case management conferences, this section has been completely rewritten and is now a focal point of the effort to bring early, active judicial case management to the forefront of civil litigation. The impetus for this change was from several sources. The ACTL Final Report states:

> We believe that pretrial conferences should be held early and that in those conferences courts should identify pleading and discovery issues, specify when they should be addressed and resolved, describe the types of limited discovery that will be permitted and set a timetable for completion. We also believe the conferences are important for a speedy and efficient resolution of the litigation because they allow the court to set directions and guidelines early in the case.[24]

This conclusion was bolstered by the interviews with outstanding trial judges, virtually all of whom use in-person, initial case management conferences.[25]

Similarly, an amendment to Federal Rule 16(b) strikes the prior reference to scheduling conferences (the federal term for case management conferences) being held by "telephone, mail, or other means." Although the text of the federal rule suggests that scheduling conferences are to be conducted in person, the accompanying Committee Note urges that the conference be held "in person, by telephone or by more sophisticated electronic means," anticipating video conferences.[26] The Note adds that a "scheduling conference is more effective if the court and parties engage in direct simultaneous communication."[27]

Colorado Rule 16(d)(1) requires that the case management conference be held no later than forty-nine days (seven weeks) after the case is at issue. There is no prohibition on the court setting an earlier conference or on the parties seeking an earlier date from the court.

Rule 16(d)(2) provides that lead counsel for the parties and any unrepresented parties are to be present at the case management conference in person, unless allowed by the court to attend by telephone or video conference, if available. That subsection calls for parties to be prepared to "discuss the proposed order, issues requiring resolution and any special circumstances of the case." Experienced judges who have previously used in-person case management conferences suggest that there are a number of matters that can be discussed and clarified to create case preparation procedures that are in fact just, speedy, and inexpensive.[28]

Rule 16(d)(3) provides the one exception for personal case management conferences. Where all parties are represented by counsel and counsel agree, they may submit a request to the court to dispense with a case management conference. This does not, however, dispense with the need to prepare and file a proposed order. The court can grant the request if (1) there appear to be no unusual issues that might be better dealt with by the court early in the case; (2) counsel appear to be working together collegially; and (3) the proposed order appears to be consistent with the best interests of the parties and is proportional to the needs of the case. It is expected that it will be the smaller cases and those with fewer factual and legal issues for which courts will more likely dispense with the case management conferences. Counsel can clearly aid their request if they can demonstrate by a clear, concise, and limited proposed order that they are—and are likely to continue to be—working together in the spirit of obtaining a just, speedy, and inexpensive resolution.

Rule 16(e)—Amendment of Case Management Orders

All amendments to case management orders, whether for extension of deadlines or otherwise, must be supported by specific showings of good cause for the timing of the request and for its necessity. If applicable, the showing of good cause needs to address the provisions of Rule 26(b)(2)(F), describing factors for determining good cause, discussed below. Although this amended rule is essentially the same as the prior version of this rule, because the details of the new case management orders are more extensive, there may be more need to request amendments. If counsel agree to changes that do not affect the court (for example, they agree to take depositions two weeks before trial), the parties must assume that if the agreement is breached by one of the parties, the court will refuse to enforce the agreement and will look askance at counsel willing to act inconsistently with the case management order.

Rule 16.1—Simplified Procedure

Rule 16.1(f) and (h)—Case Management Orders and Certification of Compliance. The amendments to Rule 16.1 regarding simplified procedure are minimal, but provide another incentive to use that method of dealing with lawsuits under $100,000.[29] Sections 16.1(f) and (h) incorporate by reference some provisions from Rule 16. Because some of the incorporated provisions of Rule 16 have been renumbered, the corresponding provisions in Rule 16.1 have been renumbered to remain consistent. The significant change in Rule 16.1 is that the parties under Simplified Procedure do not have to prepare or file a proposed order or attend a case management conference unless they wish to. This exception was designed to maintain the simplified procedure with minimal paperwork for these smaller, less complicated cases.

Rule 26—General Provisions Governing Discovery and Duty of Disclosure

The amendments to Rule 26 relating to discovery and disclosures are the most significant of all the new amendments. As described in "Part I: A New Paradigm," these amendments are central to a nationwide effort to change the litigation culture from "discover all you want" to "discover only what you need." They are intended to enforce the urgent need to make cases just, speedy, and inexpensive; to reopen genuine access to the judicial system for many parties that have been priced or delayed out of their ability to use or interest in using the courts to resolve disputes; and to reinvigorate confidence and trust in the courts and judges. As stated in the 2015 Comment to Rule 26, these amendments "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"—the amendments "emphasize the application of the concept of proportionality to disclosure and discovery, with robust disclosure followed by limited discovery." (Emphasis in original.)

These changes should persuade parties and counsel to sharpen their focus; to relinquish the idea that they must discover every conceivable fact that may have some remote relevance to their general dispute; to recognize that justice delayed is justice denied; and to acknowledge that unchecked expense is more frequently used as an unjust sword than a shield against injustice. The cultural change is not expected to be immediately popular with some trial lawyers, or clients with unlimited litigation budgets, but the change may help lawyers to become better trial lawyers when they learn they must focus their cases and use thoughtful cross-examination in place of discovery paper blizzards.

As detailed below, the amendments call for more precise early disclosures—of both the favorable and the harmful information. They redefine discoverable information to limit it to that which relates to the claims and defenses of the specific case and, more significant, require that discovery be proportional to the needs of the case at issue. At this initial disclosure stage, the information to be disclosed is that which is "then known and reasonably available to the party." In complex cases with many possible witnesses and multitudes of documents, the limitation to those things "then known and readily available" should be reasonably applied, while recalling that this initial disclosure does not terminate the continuing requirement of disclosure. Disclosures must be supplemented under Rule 26(e) "when a party learns that the information is incomplete or incorrect," unless complete and correct information has already been provided in discovery responses. However, nothing permits information subject to mandatory disclosure to be withheld while waiting to see whether the opposing party will request it in discovery.

Although subject to change by the court, considering proportionality, the amendments limit the numbers of expert witnesses, call for more comprehensive written expert disclosures, limit discovery of communications between counsel and their experts, and limit expert testimony to that which has been previously disclosed.

The amendments reduce the normal deposition times from seven hours to six hours.

Rule 26(a)(1)—Disclosures

The Good, the Bad and the Ugly

The first visible change in this subsection is to make clear what should have been the standard for years. The opening sentence requires parties to make initial disclosures, without awaiting a discovery request, of four categories of information: identification of possible witnesses; production of certain documents; description of categories of damages, in addition to computations of economic damages; and production of potential insurance agreements. The clarification in this initial amendment is that the information is to be disclosed "whether or not supportive of the disclosing party's claims or defenses."

In 2000, the Federal Rules were amended to limit disclosure to information "a disclosing party may use to support its claims or defenses."[30] Colorado declined to adopt that limitation, thus requiring disclosure of all of the information listed in Rule 26(a)(1). One of the reasons for declining to adopt the federal limitation was the belief of the Civil Rules Committee that failure to produce adverse information would only cause delay while waiting for the opposing party to request such adverse information in its initial set of interrogatories and document requests. Thus, for example, in an employment discharge case, the employer must produce not only memos, notes, and e-mails criticizing the plaintiff–employee's behavior, but also the memos, notes, and e-mails praising the employee's performance.

Some lawyers complain that this clarification is contrary to their ethical obligation to represent their clients. However, lawyers must also recall that they act as "an officer of the legal system,"[31] and in that light, among other things, have professional responsibilities to bring or maintain meritorious claims,[32] to expedite litigation,[33] to be candid with the tribunal,[34] to be fair to opposing parties and counsel,[35] and to be truthful in statements to others.[36] The fact that any of these obligations may impinge on a client's interests or desires does not weaken their application to the lawyer.

Subsections 26(a)(1)(A) (identity of individuals) and (B) (documents) have both been revised to require disclosures not just of names and documents concerning "disputed facts alleged with particularity in the pleadings," but to disclose names and documents relevant to the "claims and defenses of any party." Therefore, in an automobile collision negligence case with a statute of limitations defense, both the plaintiff and defendant must provide names of individuals "likely to have discoverable information" about both the collision and the statute of limitations.

Subsection (A) (list of individuals) has also been amended to require more than the name, address, and "subjects of information." Too often parties may provide a list (frequently as many names as the party can think of) with a description of the subject of their knowledge such as "these individuals may have information about the claims in this case." This, of course, is useless and often is intentionally designed to make it difficult for the opposing party to have any real idea of who it might want to depose or interview. The revised subsection (A) now requires, in addition to the names, addresses, and phone numbers of disclosed individuals, a "*brief* description of the *specific* information" the individual in "known *or believed* to possess." (Emphasis added.) The wording of this provision is not designed to require binding disclosures used to limit the scope of possible trial testimony, such as is required from testifying experts. Rather, it is designed, for example, to reveal who was responsible for deciding to discharge the plaintiff/employee; who directly participated in negotiating the key contractual provision; and who hired the allegedly negligent company truck driver. For essentially the same reasons, subsection (B) (list of documents) now requires that a listing of the subject matter of documents be provided in addition to the category of documents.

Challenging Inadequate Disclosures

An important change is found in the last sentence of the second paragraph of Rule 26(a)(1), which was imported from the experience gained from CAPP. Motions challenging the adequacy of another party's disclosures may no longer be filed prior to the initial case management conference. There are several reasons for this limitation. First, the parties are to note concerns relating to the other party's disclosures in the proposed order (Rule 16(b)(9)) so that these issues can be addressed at the case management conference. The process of listing the asserted shortcomings will, itself, create the need for counsel to confer about these issues and perhaps resolve some of them. The identification of asserted failures to disclose should be much shorter than a motion to compel. Further, one of the court's significant tasks at the case management conference is to determine the appropriate level of proportionality for disclosure and discovery purposes. The court's ruling on this issue may indicate that some of the alleged shortcomings in disclosures are not proportional to the case and need not be disclosed for that reason alone. Additionally, the court can probably resolve the issues and concerns while conducting the case management conference without any need for briefing of a motion to compel.

Rule 26(a)(2)—Disclosure of Expert Testimony

The disclosure rules for witnesses providing opinion testimony continue to provide different requirements for disclosures of two classes of persons allowed to render opinion testimony. Persons retained or specially employed to provide expert testimony are referred to in Rule 26(a)(2)(B)(I) as "retained experts." Persons who are not specially retained or employed to give expert testimony in the case but who are expected to present testimony concerning their personal knowledge of relevant facts, along with their opinion testimony relating to those facts, are referred to in Rule 26(a)(2)(B)(II) as "other experts."

The major differences in the amended rule are that summaries of expert testimony are no longer allowed, and experts will be allowed to testify on direct examination only about matters "disclosed in detail," in conformity with the rule. This limitation was included in CAPP and judges enforced it rather strictly. These witnesses are not required to anticipate issues or areas of inquiry that may be brought up in cross-examination, and may testify about such areas without prior disclosure. Indeed, the knowledge that witnesses may testify only as to opinions disclosed in their reports should allow opposing parties to plan much more focused, precise, and concise cross-examinations.

Experience with summaries of expert testimony has revealed that there can be so much background that is omitted that either the opposing party is blind to what testimony to expect or, as is usually the case, needs to take an extensive deposition to try to flesh

out the expert's testimony. These more extensive depositions add significant cost to the party taking the deposition, both in the hours preparing for and the time actually spent deposing the expert. Furthermore, once a deposition is taken, many courts will not limit testimony to the summary if the subject was or could have been covered in the deposition itself. The fundamental objectives here are to require parties using retained experts to fully disclose their opinions and bases for those opinions so that the parties can more accurately evaluate the strength of their cases and to reduce or eliminate the need to take the expert's depositions in the first place.

Rule 26(a)(2)(B)(I)—Retained Experts

The revised rule now requires full written reports of the expert's expected testimony. There is no requirement that the expert must personally prepare the report because frequently lawyers work closely with the experts to tailor and limit the testimony to what is most necessary for the case. Determining who is responsible for selecting each word of the report is not deemed significant. What is significant is that the expert witness must sign the report and thereby accept responsibility for both what the report says and includes and what it omits.

Much of the remainder of the changes in this portion of the rule is a clarification of certain required portions of expert reports that have been in existence for years. The most critical part of the report will be the complete statement of all opinions and the basis and reasons for those opinions. The word "complete" here supports the requirement that experts be limited in their direct testimony to what is disclosed in the report. This does not require a proposed transcript of the witness's direct examination. However, before the report is complete, lawyers should plan that direct examination in detail to make sure nothing crucial is omitted. Lawyers should not rely on the assumption that the opposing party will depose the expert and open the door for further "supplementation" of the witness's opinions.

Other amendments clarify that the data and other information considered by the witness in forming opinions is listed but need not be included. The information considered, however, should be both that which is relied on and that which was rejected in forming the opinions. Likewise, literature to be used during the expert's testimony needs to be identified and referenced in the report, but need not be provided. On the other hand, copies of exhibits to be used must be provided with the report, along with the expert's qualifications, a list of publications authored by the witness within the prior ten years, and a list of deposition or trial testimony given by the expert within the preceding four years.

The amended rule now mandates more information about the compensation to be paid the retained expert. Experts have been known to testify that they are to be paid $___ per hour, but they are not sure how many hours have been spent yet, or they have only been paid a small portion of their fee because most of their billings have not been rendered or paid yet. Now, reports must include the expert's fee agreement or schedule for the study, preparation, and testimony, and an itemization of the fees incurred, whether or not actually billed or paid. The time spent must be included in the report and must be supplemented fourteen days before trial. In short, jurors are entitled to know what the expert's true, total compensation is, not just what may have been paid to the expert as of the day of the expert's initial report.

Rule 26(a)(2)(B)(II)—Other Experts

These witnesses are frequently investigating police officers at accident or crime scenes; treating physicians; and employees such as business owners, accounting personnel, supervisors, mechanics, and construction personnel with specialized, relevant background and experience, as well as personal knowledge of the events in suit. Especially for those who are not employees of a party, it is often difficult to arrange for the necessary time for them to prepare extensive reports of their planned testimony. Testimony from non-specially retained or employed witnesses who will give opinions must be disclosed either by written reports signed by the witness, or by statements prepared and signed by counsel or by any unrepresented party. The allowance of statements prepared and signed by counsel recognizes that frequently, witnesses such as police officers or treating doctors cannot or will not make time available to review or sign a written disclosure statement. In either event, the witness will be limited to testifying on direct about matters disclosed in detail in the report or statement. Again, the report or statement must include all opinions to be expressed, together with the bases and reasons therefor. Thus, a statement that the treating physician "will testify about the patient's medical records and their impact on the physician's treatment of the patient" will not meet this test. Additionally, the report or statement must list any qualifications of the witness needed to support allowing the witness to have and express admissible opinions, and must include copies of any exhibits to be used to support the opinions.

A feature of "other [non-retained] experts" is that they are not called to testify in the case because they have been specially retained as independent experts to offer opinions. They are called as fact witnesses with personal information relating to the case, and through training or experience are qualified to offer opinions useful to the jury based on facts they observed. In short, as noted in the Supreme Court's 2015 Comments, non-retained experts are people whose opinions are formed or reasonably derived from or based on their occupational duties with respect to the matter at issue in the case. Even though their opinions and supporting factual bases and reasons must be disclosed in detail in their report or statement, they are not required or expected to prepare and sign a full report containing the other information only required from retained experts. For example, in addition to the opinions and diagnoses reflected in the plaintiff's medical records, a treating physician may have reached an opinion as to the cause of those injuries gained while treating the patient. Those opinions may not have been noted in the medical records but, if appropriately disclosed, may be offered at trial without the witness having first prepared a full, retained expert report.

Rule 26(a)(2)(B)—Limitations of Trial Testimony

Both of the revised subsections of Rule 26(a)(2)(B) relating to retained experts and other experts contain the same last sentence: "The witness's direct testimony shall be limited to matters disclosed in detail in the report [or statement]." This is a new provision based in part on the experience from CAPP and on the desire to continue holding down the cost of trial preparation. One of the justifications for the perceived necessity to take expert depositions is that trial courts frequently do not limit experts to their reports at trial so that the deposition is necessary to uncover unreported opinions (or belatedly conceived opinions), which the trial judges might allow in evidence.

With the revised rule, trial courts are instructed to limit direct testimony. This does not preclude opinions for which the opposing party opens the door by cross-examining on opinions held by the witness beyond those disclosed in the report or statement. Not only does this provide a rule-based requirement that the trial courts limit testimony, but it also enforces the requirements that reports or statements in fact be complete. This limitation is also bolstered by the supplementation requirements of Rule 26(e) in those situations where depositions are taken.[37]

Rule 26(b)—Discovery Scope and Limits

Before discussing the significant change in subsection 26(b)(1), it is important not to overlook the opening phrase of section 26(b): "Unless otherwise modified by order of the court . . ."; In other words, the court is not bound to treat discovery in all cases the same. Some cases may actually have more stringent limitations placed on their discovery than the presumptive limitations in subsection 26(b)(2). Conversely, larger and complex cases may need and can be given significantly more discovery than that which is set out as the presumptive discovery limitations, as appropriate.

Rule 26(b)(1)—In General

The amended portion of Rule 26(b)(1) is taken verbatim from the new Federal Rule. It makes one fundamental change and two significant but lesser revisions to the prior Colorado Rule 26(b)(1).

Proportionality. Previously, there were four factors in Rule 26(b)(2)(F) for courts to consider when determining whether good cause existed to justify modifying the presumptive limits on discovery. The third of those factors was whether the expense of discovery outweighed its likely benefit, "taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues in the litigation, and the importance of the proposed discovery in resolving the issues."[38] Very few reported cases ever discussed this obscurely located provision.

In 2009, the ACTL/IAALS Final Report lit the wildfire. It stated "Proportionality should be the most important principle applied to all discovery."[39] Thereafter, proportionality of discovery became a key issue at the Duke Conference.[40] Then, the Federal Rules Advisory Committee joined in, concluding that "What is needed can be described in two words—cooperation and proportionality—and one phrase."[41] CAPP, along with many other pilot projects, also incorporated the concept of proportionality.[42] When the Federal Rules Advisory Committee proposed its revisions to Rule 26(b)(1), it lifted the list of factors to establish good cause from Federal Rule 26(b)(2).[43] It then specifically referred to this language as involving proportionality, and placed it directly into the very definition of what is discoverable. Thus, it is not enough any longer to contend that information is discoverable simply because it is relevant to a claim or defense. Such information must also be "proportional to the needs of the case."

In evaluating the "needs of the case," the Advisory Committee also adjusted the order of some of the factors to be considered when determining proportionality. It switched the order of "the amount in controversy" and "the importance of the issues at stake in the action" so that the amount of money was listed after the importance of the issues. This change was made to place less emphasis on the amount of money at stake as the leading factor (even though all of the factors must be considered if significant). The Advisory Committee also moved the issue of whether the burden or expense outweighed the likely benefit of the additional discovery from being a main issue in considering good cause (as phrased in Federal Rule 26(b)(2)(C)(iii) and Colorado Rule 26(b)(2)(F)(iii)) to being simply another factor to be considered. Thus, as revised, the federal and Colorado provisions regarding the scope of discovery are virtually identical and state:

> 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.* (Emphasis added)

This new rule is patently designed to limit "full discovery" in all but the larger, more important and more complex cases. This is an important brick in the new paradigm of giving parties only what they need rather than whatever they want.

The Supreme Court's 2015 Comments to Rule 26 emphasize the case-by-case considerations that may impact proportionality. All the listed factors should be thought about, but individual factors may carry very different weights depending on the case and claims. The amount in controversy may not be as much of a factor as the desired enforcement of fundamental civil or constitutional rights. The public interest may demand resolution of issues in the case. In employment and professional liability cases and for the amount of damages, for example, the parties' relative access to key information may prove to justify more discovery for one party than to the other on selected issues.

Other limitations on the scope of discovery. In addition to the requirement that discovery be proportional to the needs of the case, a second change in both the Federal and Colorado Rules was to delete the authority of a court to "order discovery of any matter relevant to the subject matter involved in the action," as allowed in the previous version of Rule 26(b)(1). This, too, strikes a blow at potentially vast discovery of material even less directly relevant to the specific claims and defenses of the lawsuit. Discovery as the fishing expedition to find out whether a party can uncover new causes of action should no longer be available.

The third change in Rule 26(b)(1) is a clarification relating to information that is not admissible at trial. The last sentence of this section still allows discovery of information that may not be admissible, but only if the information sought is "within the scope of discovery." Thus, such inadmissible information must still be relevant to the parties' claims and defenses, not just to the "subject matter involved in the action," and must still be proportional to the needs of the case.

Rule 26(b)(2)—Limitations [on Discovery]

This Rule retains Colorado's previous basic limitations on the use of the various discovery devices. It retains the ability to expand or contract the uses of those devices "for good cause shown," but also imports the proportionality factors of subsection (b)(1).

The only change is in subsection (b)(2)(F)(iii)—the subsection describing the factors to be considered in determining "good cause," and the subsection from which the proportionality factors were removed for relocation into subsection (b)(1). This new con-

sideration in reworded (b)(2)(F)(iii), taken verbatim from the proposed Federal Rule amendment, is whether the proposed additional discovery is "outside the scope permitted by C.R.C.P. 26(b)(1)." However, subsection (b)(2) specifically allows exceptions to its limits on use of discovery methods for good cause. Thus, this factor in (b)(2)(F)(iii) does not mean that good cause cannot be shown in situations if discovery is sought beyond subsection (b)(1)'s scope of discovery. If the broader discovery is sought, however, the other considerations in (b)(2)(F)(i), (ii), and (iv) will need to be quite persuasive.

Rule 26(b)(4)—Trial Preparation: Experts

Depositions of Experts. The subject of expert depositions has, from the beginning of CAPP, been a hotly debated topic. Opponents of expert depositions have argued that with requirements for disclosures of full expert reports and limiting their testimony to what is disclosed in detail, depositions of experts are unnecessary, expensive, and counterproductive. They argue that the main result of deposing experts is to "educate and make them smarter" and better able to prepare for and to withstand cross-examination at trial. Proponents of expert depositions counter that depositions allow lawyers to get a feel for the quality of the expert as a person, prospective witness, and expert in the designated field. They contend that the added cost of the deposition is not great in the overall expense of expert study and preparation, and that expert depositions enhance settlement once the lawyers have seen how well the expert can withstand intense examination. Finally, as noted above, a number of lawyers claimed that depositions were necessary because they could not rely on the judges to limit the expert's testimony to the report or summary.

Although the Civil Rules Committee ultimately recommended that depositions for retained experts should be limited to three hours, the Supreme Court decided to apply the standard of six hours to all experts, as well as to all other deponents. Because of the varying importance of expert testimony in cases, this rule specifically authorizes trial courts to expand or limit deposition time in accordance with proportionality.

Disclosures and Discovery About the Preparation of Expert Opinions and Reports. In 2010, Federal Rules 26(b)(4)(B) and (C) were added to preclude discovery of drafts of expert reports or disclosures made pursuant to Rule 26(a)(2) and to provide work-product protection to communications between a party's attorneys and the party's retained experts and the expert's assistants. The discovery bar does not extend to other information gathered by the expert or to questions about alternative analyses or approaches to the issue on which the expert is testifying.[44] Discovery may extend to communications relating to the expert's compensation for study or testimony; facts and data provided by the attorney that the expert considered in forming the opinions expressed; or assumptions that the attorney provided and the expert relied on.[45] Among other things, these rules were adopted to prevent game playing with experts, such as counsel telling them to never make notes of what they discuss, to not prepare and send drafts, and to always make revisions to the original version of the report while deleting all portions that had been changed.

After this amendment was adopted in the Federal Rules in 2010, the Colorado Civil Rules Committee was prepared to recommend a similar change. However, it decided that such a change might adversely impact the information that was to be gained from the study of how CAPP worked and, therefore, the amendment was not further considered until the study of CAPP was concluded. Although there are slight variances in language between new subsection 26(b)(4)(D) of the Colorado Rules and subsections 26(b)(4)(B) and (C) of the Federal Rules, the substance of the changes is identical.

Rule 26(c)—Protective Orders

This Rule allows courts to issue a variety of protective orders to protect against annoyance, embarrassment, oppression, or undue burden or expense. The new amendment to Colorado Rule 26(c)(2), taken verbatim from the amendment to Federal Rule 26(c)(1)(B), now also gives courts the authority to allocate the expenses of discovery among the requesting and delivering parties (or non-parties) where appropriate. This amendment does not mandate any allocation, but simply adds this tool to the court's tool box of alternatives. Indeed, the Committee Note relating to the Federal Rule change provides that "recognizing the authority to shift the costs of discovery does not mean that cost-shifting should become a common practice," and that "[c]ourts and parties should continue to assume that a responding party ordinarily bears the costs of responding."[46]

Rule 26(e)—Supplementation of Disclosures, Responses, and Expert Reports and Statements

A provision has been added to the requirement to supplement expert reports or statements where a party intends to have the expert testify on direct examination about matters disclosed for the first time during the expert's deposition, but that are not in the expert's report or statement. The supplementation must be a specific description of the deposition testimony to be offered and relied on. This additional supplementation is intended to allow the court to determine from the expert's Rule 26(a)(2) report and its supplementation whether the direct testimony offered at trial has or has not been properly disclosed. These provisions are designed to avoid the court's need to read scattered portions of the deposition before ruling on admissibility of the new testimony. It also avoids the opponent arguing surprise because it did not understand what deposition testimony was going to be offered as additional and admissible expert testimony.

When the expert report is properly supplemented with this subsequent deposition opinion testimony, Rule 26(e) instructs the trial courts that those supplemented opinions must be permitted, unless the court finds that the opposing party has been unfairly prejudiced by the failure to have made disclosure in the original expert report.

Rule 30—Depositions Upon Oral Examination

The only changes of note in Rule 30 are contained in subsection 30(d)(2). They shorten the standard deposition for all witnesses from one day of seven hours to one day of six hours (unless otherwise ordered by the court). With the usual practice now being to clock deposition times to the minute (not counting breaks for consultation or bathroom breaks), seven hours has frequently devolved into about ten hours of actual time spent at the deposition. Furthermore, many felt that six hours of solid time, leaving out boilerplate questions, was still normally sufficient to get the genuinely necessary evidence. If more is likely to be needed, the

parties should determine that before the deposition and request the court's permission for more time.

Rule 33—Interrogatories

After the Civil Rules Committee agreed on the changes to Rule 34 for the reasons described below, those changes seemed to be equally applicable to responses to interrogatories. Thus, Rule 33(b) was amended to add the requirements that objections to interrogatories specify the grounds for objection and to state whether responsive information is being withheld on the basis of the objection. Such objection also stays the need to answer those objectionable portions pending a ruling by the trial court and without filing a motion for a protective order.

Rule 34—Production of Documents

Over time, litigants have developed the habit of making a string of boilerplate objections to requests for production of documents. The objections are then incorporated verbatim, or by reference, at the beginning of the response to each document request. (To be fair, these responses are often invited by equally boilerplate definitions and instructions in the opposition's request.) Thus, the requesting party has no real information about which of the objections are intended to apply or why they are being made. This confusion can then be aggravated by the boilerplate comment to the effect that "notwithstanding these objections, and without waiving them, [defendant] is producing the following documents." With this response, the requesting party has no idea whether the responder is providing all the documents it has or whether it really is withholding some of them and, if so, how many are being withheld and the basis on which the responder is refusing to produce them.

Colorado Rule 34(b) and Federal Rule 34(b)(2) are being amended with virtually identical language. First, the amended rules provide that the response to each request must "state with specificity the grounds for objecting to the request." The objections must then be specific, not generic, and relevant to the precise request to which objection is being made. Second, the amended rules require that an objection state whether any responsive materials are actually being withheld on the basis of that objection.

Separately, the rules are also being amended to allow production of materials instead of offering inspection of the materials. Essentially, this simply recognizes what has for many years been the practice in most cases, at least where the produced documents are not especially numerous or burdensome.

Finally, Colorado Rule 34(b) adds a new provision to clarify the effect of a fairly common practice. When a party objects to production of certain documents, it has been unclear whether the objecting party also must request a protective order under Rule 26(c) or whether the requesting party must file a motion to compel production. The newly amended Colorado Rule now specifies that an objection to production stays the obligation to produce these documents until the court resolves the objection and that no motion for protective order is necessary. Frequently, when the requesting party receives an objection, especially if some responsive documents are produced, the requesting party will decide that it is unnecessary to fight for more documents or the parties can reach an acceptable compromise as to what documents will be produced. Thus, it seems appropriate to await the requesting party's determination that it really is worth the effort to obtain the withheld documents rather than requiring the objecting party to move for protection and involve the court on matters that the requesting party may no longer need.

Rule 37—Failure to Make Disclosure or Cooperate in Discovery: Sanctions

Rule 37(a)(4)(A) and (B) have allowed courts to award reasonable expenses, including awarding attorney fees in favor of prevailing parties and against opposing parties and their attorneys, unless the court finds certain factors that ameliorate against such an award, including "other circumstances that make an award of expenses unjust." Experience has shown that courts, which historically have been unwilling to award monetary sanctions, have used this latter escape valve to justify the lack of monetary sanctions.

The CAPP rules, however, required that courts grant sanctions "unless the court makes a specific determination that failure to disclose in a timely and complete manner was justified under the circumstances or [was] harmless."[47] Judges handling CAPP cases found this extra pressure to impose sanctions helpful in some instances, although they still felt that encouraging compliance and emphasizing that attorneys cooperate with each other was ultimately more desirable.

After struggling with this dichotomy at some length, the subcommittee of the Civil Rules Committee, the full Committee, and ultimately the Supreme Court chose the path of encouraging courts to be more aggressive with the imposition of sanctions, but not to go as far as CAPP went. Thus, rather than making the mere determination that other circumstances made monetary sanctions unjust—a low standard for avoiding monetary sanctions—Rule 37(a)(4)(A) and (B) were amended to allow that reprieve from imposing sanctions only where it would be manifestly unjust to award monetary sanctions to the prevailing party.

Under these rules, however, courts may still decline to impose sanctions where the movant did not make a good-faith effort to obtain compliance before seeking court action or where the accused party was substantially justified for the nondisclosure, response, or objection. Indeed, those findings might trigger a sanction against the complaining party or its counsel. This counter-provision significantly increases the pressure on parties seeking these sanctions to meet, confer in person, and diligently endeavor to reach a reasonable resolution.

Conversely, Rule 37(c)(1) has authorized preclusion at trial or for summary judgment of nondisclosed information required to be disclosed by Rules 26(a) or (e), unless such failure is harmless. Because it is so easy to articulate some kind of harm, this rule has caused preclusion of evidence that failed to cause significant harm or where the harm caused by the nondisclosure would be substantially outweighed by the harm resulting from preclusion. The amended subsection 37(c)(1) prohibits preclusion as a sanction simply upon allegations of some harm. Thus, preclusion for nondisclosure may not be imposed where the failure has not and will not cause significant harm or where the preclusion is disproportionate to the alleged harm.

Rules 54 and 121 § 1-22—Costs

Although only tangentially related to the issue of amending pretrial procedures to increase access to the judicial system by advanc-

ing the concept that cases should be just, speedy, and inexpensive, the Civil Rules Committee also submitted two amendments relating to controlling costs awarded to prevailing parties. First, in Rule 54(d), as approved by the Supreme Court, awarded costs must be reasonable considering any relevant factors that may include the needs and complexity of the case and the amount in controversy. Second, Rule 121 § 1-22 is amended to allow hearings on bills of costs where the requesting party has identified the issues to be heard and where the court has concluded that a hearing would be of material benefit to the court in ruling on the bill of costs.

Conclusion

With the revisions and amendments to the foregoing Rules, Colorado has moved to address the increasingly severe problem of a litigation culture that appears to be driven by and has thrived on frequently excessive demands for information. These demands can add substantial unnecessary expense and foreclose the societal benefits of efficient judicial systems for the peaceful resolution of disputes and wrongdoing. By encouraging and expediting a new culture focused on the genuine and limited needs of clients and not their (or their lawyers') desires—a culture trained in and dedicated to the prompt and efficient handling of disputes—it is hoped that civil litigation can indeed incorporate a new paradigm.

Notes

1. *See* CRCP 1(b).

2. The Subcommittee members included Rules Committee members: Court of Appeals Judge Michael H. Berger (Committee Chair); Richard P. Holme (Subcommittee Chair); David R. DeMuro; Judge Lisa Hamilton-Fieldman; Judge Ann B. Frick; Thomas K. Kane; Richard W. Laugesen; David C. Little; Professor Christopher B. Mueller; Teresa T. Tate; Judge John R. Webb; and Judge Christopher C. Zenisek. Outside members of the subcommittee were Judge Herbert L. Stern, III; Judge E. Eric Elliff; Gordon (Skip) W. Netzorg; and John R. Rodman.

3. *See* Holme, "Proposed New Pretrial Rules for Civil Cases—Part I: A New Paradigm," 43 *The Colorado Lawyer* 43 (April 2015), www.cobar.org/tcl/tcl_articles.cfm?articleid=8860.

4. *See id.* at 46-47. Following publication of Part I: A New Paradigm, on April 29, 2015, the U.S. Supreme Court approved the amendments and submitted them to Congress, which could change them, but has only done so on one prior occasion. *See* online.iaals.du.edu/2015/05/04/supreme-court-adopts-amendments-to-the-federal-rules-of-civil-procedure.

5. *See* Holme *supra* note 3 at 47-48 (description of CAPP).

6. The Denver Superior Court was a civil court with a jurisdictional limit of $5,000. It was abolished in 1986.

7. Memorandum from Judge David Campbell to Judge Jeffrey Sutton re Proposed Amendments to the Federal Rules of Civil Procedure B-2 (June 14, 2014), available from the author.

8. *Id.* at B-2 to B-3.

9. Holme, *supra* note 3 at 48.

10. American College of Trial Lawyers/Institute for the Advancement of the American Legal System (ACTL/IAALS), "Working Smarter Not Harder: How Excellent Judges Manage Cases" (2014) ("Working Smarter"), iaals.du.edu/images/wygwam/documents/publications/Working_Smarter_Not_Harder.pdf.

11. *See, e.g.*, *id.* at Appendix D.

12. Rule 16(b) and 16(d)(1).

13. *See* ACTL/IAALS, *supra* note 10 at 7.

14. Pilot Project Rule (PPR) 7.1.

15. PPR 7.1 to 7.2.

16. PPR 8.1 to 8.4.

17. PPR 8.5.

18. *See* Gerety and Cornett, "IAALS, Momentum for Change: The Impact of the Colorado Civil Access Pilot Project" (Oct. 2014) (CAPP Final Report), iaals.du.edu/images/wygwam/documents/publications/Momentum_for_Change_CAPP_Final_Report.pdf. The CAPP Final Report was preceded by a preliminary report: Gerety and Cornett, "IAALS, Preliminary Findings on the Colorado Civil Access Pilot Project" (April 2014), iaals.du.edu/images/wygwam/documents/publications/Preliminary_Findings_on_CAPP.pdf.

19. CAPP Final Report, *supra* note 18 at 23.

20. *Id.* at 24.

21. PPR 7.1 to 7.2; and PPR Appendix B.

22. *See* Holme, "'No Written Discovery Motions' Technique Reduces Delays, Costs, and Judges' Workloads," 42 *The Colorado Lawyer* 65 (March 2013), www.cobar.org/tcl/tcl_articles.cfm?articleid=7995. *See also* ACTL/IAALS, *supra* note 10 at 21-22.

23. *See, e.g.*, FRCP 26(f)(3)(C); *Zubulake v. UBS Warburg LLC*, 217 FRD 309 (S.D.N.Y. 2003); U.S. District Court for the District of Kansas, "Guidelines for Cases Involving Electronically Stored Information," www.ksd.uscourts.gov/guidelines-for-esi.

24. ACTL/IAALS, "Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System" 2 (rev. ed., 2009), iaals.du.edu/images/wygwam/documents/publications/ACTL-IAALS_Final_Report_rev_8-4-10.pdf.

25. *See* ACTL/IAALS *supra* note 10 at 10-20.

26. 2014 Rules Report at 19 (May 2014), available from the author.

27. *Id.*

28. *See, e.g.*, 2015 Comment to CRCP 16(d). *See also* ACTL/IAALS, *supra* note 10 at 10-20 and Appendix D; Prince, "A New Model for Civil Case Management: Efficiency Through Intrinsic Engagement," 5 *Court Review* 174, 189-92 (2014).

29. *See* 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), www.cobar.org/tcl/tcl_articles.cfm?articleid=3427.

30. FRCP 26(a)(1)(A)(i) and (ii). *See* Advisory Committee Notes re 2000 Amendment.

31. Colo. RPC, Preamble and Scope at [1].

32. Colo. RPC 3.1.

33. Colo. RPC 3.2.

34. Colo. RPC 3.3.

35. Colo. RPC 3.4.

36. Colo. RPC 4.1.

37. *See* discussion of Rule 26(e), *infra*.

38. CRCP 26(b)(2)(F)(iii).

39. ACTL/IAALS, *supra* note 24 at 7. *See* "Part I: A New Paradigm," *supra* note 2 at 46.

40. *See* Holme, *supra* note 3 at 46 and notes 35 to 37 and accompanying text.

41. Advisory Comm. Memo at B2 to B3. S*ee* Holme, *supra* note 3 at 46.

42. PPR 9.1. *See* Holme, *supra* note 3 at 47.

43. FRCP 26(b)(2)(C)(iii).

44. *See* Advisory Comm. Notes re: 2010 Amendments to FRCP 26(b)(4).

45. *Id.*; FRCP 26(b)(4)(C)(i) to (iii).

46. *See* 2014 Rules Report, *supra* note 26 at 26.

47. PPR 3.7. ■